

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1958

*Volume II*

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

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UNITED NATIONS





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# INTERNATIONAL LAW COMMISSION

## DOCUMENTS OF THE TENTH SESSION, INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

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### ARBITRAL PROCEDURE

[Agenda item 2]

#### DOCUMENT A/CN.4/113

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

**Report by Georges Scelle, Special Rapporteur**

(with a model draft on arbitral procedure annexed)

[Original text: French]  
[6 March 1958]

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#### 1. General observations

1. The International Law Commission will recall that the subject of arbitral procedure has been on its agenda for a long time, and that much time and effort have already been devoted to it. The topic was selected and accorded priority at the very first session of the Commission (1949). A draft containing thirty-two articles (A/2163, para. 24) was adopted in 1952 and submitted to Governments. A new text (A/2456, para. 57), taking into consideration the comments of Governments, was prepared in 1953 and submitted in 1955 to the General Assembly at its tenth session, in order that a draft con-

vention might be prepared from it in accordance with article 23 (c) of the Commission's statute.

2. After examination by the Sixth Committee and the General Assembly, the draft was referred back to the International Law Commission for further study in the light of further observations by Governments and the observations of the Assembly. The Assembly on 14 December 1955 adopted on the subject resolution 989 (X), which postponed until the thirteenth session, i.e. the forthcoming session of 1958, consideration of the question whether it would be desirable to convene a conference

of plenipotentiaries to conclude a convention or whether some other solution should be adopted.<sup>1</sup>

The reception given to the Commission's draft by the majority in the Sixth Committee and in the Assembly was, in fact, decidedly unfavourable to the adoption of a convention incorporating the draft's principles and articles. The majority considered that the draft would distort the traditional institution of arbitration; that it would turn that institution into a jurisdictional procedure, whereas according to custom it was diplomatic in character, and would link it with the institutional jurisdiction of the International Court of Justice by making it, as it were, a court of first instance; that the draft would face Governments with unacceptable demands for the surrender of sovereignty; and lastly, that it would cause the Commission to abandon its primary task—the codification of the law on the subject—and thus, on the pretext of developing the institution of arbitral procedure, damage it by considerably reducing its field of application.

3. We shall not attempt to analyse the various bodies of government opinion, some of which approved the draft or raised only minor objections to it, while others, in contrast, raised serious objections or even rejected the draft; nor shall we attempt to classify Governments according to their willingness to sacrifice more or less of their sovereignty in order to foster the organization of the universal community. Suffice it to say that, as the number of States Members of the United Nations increases, so the majority hostile to the Commission's draft seems bound to increase, for the more recently the new Members have required their sovereignty the greater will be their desire to maintain it whole and entire.

4. It is true that the Commission's draft drew its inspiration directly from the doctrine of the jurists—such as Moore, Lammasch, Politis, Lapradelle, van Vollenhoven and Renault—all of whom consider that the real future of arbitration lies in making it jurisdictional. It is not less true that such a prospect, and in particular the prospect of frequent recourse to The Hague Court, has proved unacceptable to the representatives of most of the

Governments which compose the United Nations General Assembly. The Special Rapporteur accordingly felt that no good purpose would be served either by laying before the Assembly a draft convention which had but little chance of receiving consideration or by asking the Assembly to convene a conference of plenipotentiaries which could only resume, probably to no avail, the discussions already held in the General Assembly and in the Commission.

General Assembly resolution 989 (X) itself suggested a solution in its preambular paragraphs, which refer to "a set of rules on arbitral procedure [which] will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements" and recall "that this draft includes certain important elements with respect to the progressive development of international law on arbitral procedure". It was to be expected, therefore, that in this attenuated form the draft might prove acceptable to the Assembly.

It is open to the Commission, under article 23 of its statute, to act on these suggestions by recommending the General Assembly either "to take no action, the report having already been published", or "to take note of or adopt the report by resolution". This would remove the risk of the Commission's work being wasted. The Commission has not yet had an opportunity to opt for either of these alternatives.

Furthermore, it may be thought that the result thus achieved would differ little from that aimed at in previous conventions on the subject, since the ratifications obtained have not been very numerous and the sponsors of a *compromis* are always free to depart from it and to adopt provisions which they consider more appropriate to the nature of the dispute. (*Lex posterior derogat priori*.)

This, indeed, was the sense of the decision which the Commission adopted by 10 votes to 4, with 5 abstentions, at its 419th meeting. It decided to turn the draft convention into "a set of rules which might inspire States", as recorded in the Commission's report covering the work of its ninth session. (A/3623, para. 19).<sup>2</sup>

5. The Convention for the Pacific Settlement of International Disputes (1907)<sup>3</sup> defined arbitration in general but unimpeachable language in its article 37,<sup>4</sup> which opened a way that the Powers showed themselves willing to follow over half a century ago. In its draft the Commission followed this lead, while at the same time drawing upon doctrine.

It may be thought that there is, in the strict, no *general custom* with regard to arbitral procedure, for the simple reason that practice has shown it to be desirable

<sup>1</sup> The text of this resolution reads as follows:

"The General Assembly,

"Having considered the draft A/2456, para. 57) on arbitral procedure prepared by the International Law Commission at its fifth session and the comments (A/2899 and Add.1 and 2) thereon submitted by Governments,

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

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

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

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

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

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

<sup>2</sup> The Commission had previously rejected a proposal by Mr. Matine-Daftary that the Commission should consider the key articles of the draft before deciding on its recommendation to the Assembly.

<sup>3</sup> *The Hague Court Reports*, James Brown Scott (ed.), Carnegie Endowment for International Peace (New York, Oxford University Press, 1916), pp. xxxi ff.

<sup>4</sup> Article 37 of the 1907 Convention reads as follows:

"International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

"Recourse to arbitration implies an engagement to submit in good faith to the award."

and article 38, in its first paragraph, continues:

"In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle."

that the *compromis* of arbitration should be the direct outcome of the will of the parties and that consequently they should vary according to the circumstances surrounding the dispute and the importance of the interests at stake. It might prove a difficult matter even to discern the local customs peculiar to any given group of States. This gives us another reason to doubt whether it would be useful, or even feasible, to draft a convention.

There are, however, some general principles which are admitted by all civilized nations: those embodied in the essential articles of the 1907 Convention, the General Act of 1928<sup>5</sup> or the Pact of Bogotá.<sup>6</sup> For this reason we maintain that it is not permissible to draft a text which would fall short of those instruments, and that it is better not to draft one at all than to disavow them.

## II. The undertaking to arbitrate and the "compromis"

6. First and most vital among these essential principles of arbitration is, in our view, the *inviolability of the promise given to have recourse to it*, or of the *undertaking to arbitrate*, regarded as an obligation in itself, or, if it is desired to emphasize this, a partial surrender of sovereignty. The same applies to any international treaty or agreements, provided only that it has an individuality which can be identified and proved.<sup>7</sup>

The "undertaking to arbitrate" may, of course, be embodied in the *compromis* itself, as its first provision, especially in the case of an *ad hoc compromis* or a *concrete* case of arbitration. The idea cannot, however, be entertained that if there is no *compromis*, or if the *compromis* has not yet been drawn up, a "bare undertaking" to arbitrate is not binding because it is only an *abstract* promise relating to hypothetical or future disputes. *That would be tantamount to declaring null and void arbitration treaties or arbitration clauses* such as our Commission has itself included, on several occasions, in the various bodies of rules it has drafted.

Unfortunately, Governments accustomed to the diplomatic technique of arbitration frequently incline to the view that, until a *compromis* relating specifically to a particular dispute has been reached or made final, no legal obligation exists. The truth is that, even then, Governments are bound by an implicit obligation, namely, the obligation to conclude the *compromis* and thereafter to comply with the decision delivered under it. This—the fundamental obligation, the obligation of good faith—is certainly the one presenting most difficulty. Hence the purpose of the draft as a whole is to assist them in this respect by providing them with appropriate methods and objective forms of co-operation.

The essential difference between the draft which your Special Rapporteur laid before you last year (A/CN.4/109, annex), and which he lays before you again, and the one you approved in 1953 (A/2456, para. 57) is that *every trace of obligation has been eliminated*. This has been done for the good reason that—we repeat—there is

no hope of the majority, either in the Sixth Committee or in the General Assembly, changing its view and accepting compulsory recourse to these procedures and forms of co-operation, above all if there is any question of co-operation with The Hague Court.

7. It was for this reason that your Special Rapporteur proposed last year that we should shift the relative emphasis on the different articles by changing their order, placing the former article 9, concerning the *compromis*, immediately after the article dealing with principles, in other words by making it article 2.

It will be noted that article 1 is the only article not concerned with procedure; but it is based directly on article 39 of the Convention of 1907,<sup>8</sup> and all the proposed procedural articles are the logical outcome of this article and its legal content. It is followed directly by the article concerning the *compromis*, in order to make it clear that even after Governments have *undertaken to compromise* they are still *completely free* to include in the *compromis* necessary to settle a dispute all such provisions as they may agree upon, without binding themselves, from the moment of their agreement, to have recourse or to submit to any form of intervention. The draft articles are made available to them as a means of arriving at a *compromis* if they should fail to conclude one, either completely or partly. If they do not accept the articles, whatever may be the reasons which prevent them from doing so, they will no doubt have failed to carry out their obligation, yet no person can compel them to comply with it. Indeed, they would have been in the same situation if, after concluding a convention of any kind, they had refused to comply with one of its provisions. When arbitration fails, the breach of law will probably be less noticeable, because in many cases both parties will be to blame. Doubtless, here too, it will be hedged about with extenuating circumstances which can always be blamed on the other side; but it will exist none the less.<sup>9</sup> At all events your Special Rapporteur has no objection to specifying in article 1 that the procedures open to disputing States shall not be applicable unless they have agreed to have recourse thereto.<sup>10</sup>

8. With all traces of obligation eliminated, your Special Rapporteur also felt justified in hoping that the 1955 draft might be left more or less as it was and that it might be re-submitted to the Assembly with only its scope and its title changed. The objections raised by Governments before the General Assembly's tenth session and by their representatives during that session were reviewed in our previous report (A/CN.4/109). It might have seemed sufficient, therefore, to follow article 23 of the Statute of the Commission and to leave the Commission free to recommend the General Assembly either "to take no

<sup>8</sup> Article 39 of the 1907 Convention reads as follows:

"The arbitration convention is concluded for questions already existing or for questions which may arise eventually.

"It may embrace any dispute or only disputes of a certain category."

<sup>9</sup> Mr. García Amador pointed out at the 422nd meeting of the Commission that the obligation to arbitrate was an "imperfect" obligation. That is very true; but what obligation under international law is not imperfect, especially since the adoption in the Charter at San Francisco of Article 2, paragraphs 2, 3 and 4, and of Chapter VII which has a paralysing effect? Failure to comply with an obligation embodied in an agreement, or with an existing international rule, is nevertheless an international offence, even if it goes unpunished and cannot be tried in a court of law.

<sup>10</sup> See the proposal to this effect made by Mr. García Amador at the 420th meeting of the Commission (para. 11).

<sup>5</sup> General Act for the Pacific Settlement of International Disputes, adopted at Geneva on 26 September 1928. See League of Nations, *Treaty Series*, vol. XCIII, 1929, No. 2123.

<sup>6</sup> American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series*, vol. 30, 1949, No. 449.

<sup>7</sup> Note the entire agreement expressed on this point by Sir Gerald Fitzmaurice, for example in his statements at the 419th and 420th meetings of the Commission.

action, the report having already been published", or "to take note of or adopt the report by resolution".<sup>11</sup>

At the ninth session, however, between the meetings of the drafting committee set up to study the key articles of the draft and the plenary meetings, it emerged that some members of the Commission, and particularly the newcomers who had been unable to attend its earlier deliberations, wanted to give the draft further study, or at any rate to reconsider its "key articles", in the light of the comments made by Governments or by their representatives in the General Assembly. It appeared that, despite the optional nature of the draft, a few members of the Commission wanted even to make amendments of substance rather than merely to remove any vagueness and ambiguity.

Prominent among the misunderstandings created by these articles, especially article 1, was the fear that it would lead to *compulsory arbitration*; it was to dispel this fear that your Special Rapporteur decided to propose some minor drafting changes.

Although the question of the non-retroactivity of the undertaking had received due discussion in the General Assembly, the decision was also taken to delete article 1, paragraph 2, of the draft,<sup>12</sup> relative to non-retroactivity, in order to preclude any inference that non-retroactivity was the only permissible stipulation and to leave the parties the fullest latitude on that point in drawing up their *compromis*. The Commission, in fact, took the view at its 420th meeting that all disputes without exception, including political disputes and even those relating to matters of exclusive competence, could be submitted to arbitration *if the parties so agreed*.

9. It even appeared to be the wish of some members of the Commission that, at the most, the draft should merely reiterate the solution envisaged in the conventions already concluded on the subject—such, *inter alia*, as those referred to in paragraph 5 of this report. Should the Commission accept this view, the Special Rapporteur would of course have to defer to it; *but in that case the draft would be of no further use*. Furthermore such an act of preterition would seem to conflict with General Assembly resolution 989 (X), the burden of which seems to be that the Assembly expects the International Law Commission to produce a new draft. The Special Rapporteur would be reluctant to include any of these previous *procedural agreements in the present draft even as an alternative to its provisions*. To do so would destroy its economy and its progressive character if it is admitted that it possesses this latter quality. The texts of previous conventions are very varied and are still in force for some States. They are available to the Governments concerned, which are always free to choose them in preference to the solutions envisaged in the proposed draft. There seems to be no reason why the draft should bring them to the notice of Governments which are familiar with them and may have recourse to them at any time.

<sup>11</sup> At the 417th meeting of the Commission Sir Gerald Fitzmaurice, Mr. Gilberto Amado and Mr. Padilla Nervo advocated leaving the draft as it stood. At the 418th meeting, however, the Commission decided by 13 votes to 2, with 4 abstentions, to reconsider the draft in the light of the comments of Governments.

<sup>12</sup> Article 40 of the 1907 Convention was less cautiously worded. It provided that the contracting Powers "reserve to themselves the right of concluding new Agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it".

The Special Rapporteur would, however, have no objection to inserting at the end of article 2 a stipulation that the disputing Governments remain free, in drawing up a *compromis*, to refer to procedures provided for in previous agreements, and particularly in agreements to which they themselves are parties. That goes without saying, but such a clause would further emphasize the essentially optional nature of the draft.

Thus articles 1 and 2 would read as follows:

#### Article 1

1. Any undertaking to have recourse to arbitration in order to settle a dispute between States constitutes a legal obligation which must be carried out in good faith.

2. Such an undertaking results from agreement between the parties and may apply to existing disputes (arbitration *ad hoc*) or to disputes arising in the future (arbitration treaties—arbitration clauses).

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

4. The procedures offered to States parties to a dispute by this draft shall not be compulsory unless the States concerned have agreed, either in the *compromis* or in some other undertaking, to have recourse thereto.

#### Article 2

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

(a) The undertaking to arbitrate under which the dispute shall be submitted to the arbitrators;

(b) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;

(c) The method of constituting the tribunal and the number of arbitrators.

The *compromis* shall likewise include any other provisions deemed desirable by the parties, such as:

(1) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter;

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

(3) Such power as may be conferred on the tribunal to make its own rules of procedure;

(4) The procedure to be followed by the tribunal, on condition that, once constituted, the tribunal shall remain free to override any provisions of the *compromis* which may prevent it from rendering its award;

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

(6) The majority required for the award;

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

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

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

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

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

This enumeration is not intended to be exhaustive.

The amendments to article 2 of the draft (former article 9) were adopted by the Commission at its ninth session (422nd meeting) by a majority of 19 votes.

### III. The question of arbitrability

10. The purpose of article 3 is to decide the question of arbitrability. It is perhaps one of the most important articles in the draft. Its object is to ensure that the obligation to arbitrate is complied with where one of the

parties contests either the existence of a dispute or the allegation that the dispute is covered by the undertaking to arbitrate. In such a case there is a possibility that no *compromis* may be arrived at and that the provision for arbitration, if any, may be stillborn. It is accordingly necessary to settle this preliminary question, and the way to do this is to refer the case to an existing court.

There are two of these: the Permanent Court of Arbitration (duly constituted) and the International Court of Justice. The article leaves the parties free to choose, but indicates a preference for the International Court of Justice, which is an institution continuously in being and whose procedure may be more rapid than that of the Permanent Court of Arbitration. The choice of the latter would entail a double process of arbitration, firstly on the question of arbitrability and secondly on the substance. The parties may prefer double arbitration of this kind. They remain free, however, to choose another method of settling the difficulty provided that they do so within a fairly short time.

The former article 3, which would have been embodied ultimately in any draft convention, implied an *obligation* and empowered each of the parties to call upon either of the Courts at The Hague, albeit a preference was indicated for the International Court of Justice. On the one hand, however, it was open to question whether the article was compatible with the Statute of the International Court of Justice; and on the other hand, since the draft now under examination no longer entailed any obligation it cannot bestow upon one of the litigants the right to initiate proceedings unilaterally before either Court. All it can do is place such Governments as may agree to have recourse to this article under a duty to agree to lay their preliminary dispute before one or other of the two Courts, preferably the International Court of Justice.

If the arbitral tribunal had already been constituted—which implies that the dispute as to arbitrability did not arise until after a *compromis* had been drawn up—it would be for that tribunal to settle this dispute.

Article 3 would accordingly read as follows:

#### Article 3

1. If, before the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to arbitrate, such preliminary question shall, failing agreement between the parties upon the adoption of another procedure, be brought by them within three months either before the Permanent Court of Arbitration for summary judgement, or, preferably, before the International Court of Justice, likewise for summary judgement or for an advisory opinion.

2. In its decision on the question, either Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties. The decision shall be final.

3. If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.

#### IV. The arbitral tribunal

11. The Special Rapporteur's original view that the first step to be taken by Governments bound by an undertaking to arbitrate was to set up the tribunal that was to settle their dispute, in order to equip their juridical community with a pseudo-institutional organ; and that they should, if necessary, do this before even drawing up the *compromis*. He arrived at this view in the light of articles

21 and 22 of the General Act.<sup>13</sup> Later on, after the Commission and the General Assembly had discussed the subject, he came to feel that it was preferable to avoid departing from generally established practice, to give priority to the *compromis*, and to include in it, so far as feasible, provisions concerning the constitution of the arbitral tribunal. As we know, these are generally considered the most difficult provisions to draw up.

Since there is here a second reference to possible recourse to the International Court of Justice or one of its judges as a means of solving these difficulties, we cannot refrain from mentioning some texts which indicate that until quite recently the progressive development of arbitral procedure aroused far fewer misgivings than it does today.

First of all, the General Assembly in part C of resolution 171 (II) dated 14 November 1947:

*"Draws the attention of States Members to the advantage of inserting in conventions and treaties arbitration clauses providing, without prejudice to Article 95 of the Charter, for the submission of disputes which may arise from the interpretation or application of such conventions or treaties, preferably and as far as possible to the International Court of Justice [italics added];"*<sup>14</sup>

The Commission is also asked to note that the recognized precedents for article 4 of the draft include, first of all, article 45 of the 1907 Convention—a pioneer effort, albeit in an inadequate and complicated form, to induce States ultimately to constitute an arbitral tribunal, especially if they have acceded to the Permanent Court of Arbitration.

A much clearer precedent is set in article 23 of the General Act, as revised and adopted by the General Assembly,<sup>15</sup> which reads as follows:

"1. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments.

"2. If no agreement is reached on this point, each party shall designate a different Power, and the appointments shall be made in concert by the Powers thus chosen.

<sup>13</sup> These articles read as follows:

*Article 21:* "Any dispute . . . which does not, within the month following the termination of the work of the Conciliation Commission . . . form the object of an agreement between the parties, shall . . . be brought before an arbitral tribunal which, unless the parties otherwise agree, shall be constituted in the manner set out below."

*Article 22:* "The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third Powers . . ." It should be noted that, according to article 17 of the General Act, legal disputes should in principle be referred to the International Court of Justice, unless the parties agree to have resort to an arbitral tribunal.

<sup>14</sup> Part A of the same resolution contained these words: "Considering that it is . . . of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law, [italics added], both in regard to legal issues between States . . ."

<sup>15</sup> Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949. See United Nations, *Treaty Series*, vol. 71, 1950, No. 912.

"3. If, within a period of three months, the two Powers so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a subject of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a subject of one of the parties, the appointments shall be made by the oldest member of the Court who is not a subject of either party."

Lastly, a third precedent is set by article XLIII of the Pact of Bogotá, which reads as follows:

"The parties shall in each case draw up a special agreement clearly defining the specific matter that is the subject of the controversy, the seat of the Tribunal, the rules of procedure to be observed, the period within which the award is to be handed down, and such other conditions as they may agree upon among themselves.

"If the special agreement cannot be drawn up within three months after the date of the installation of the Tribunal, it shall be drawn up by the *International Court of Justice* through summary procedure, and shall be binding upon the parties." [*Italics added.*]

Our draft is less categorical than the Pact of Bogotá. It arranges the questions at issue in order and ultimately, but only *in extremis*, gives the arbitral tribunal itself the task of drawing up the *compromis* on behalf of the parties. It is none the less faithful to the precedents.

In view of this fidelity, and of the ultimate resort to the International Court of Justice, it is difficult to see why the General Assembly or, *a fortiori*, the International Law Commission should reject this ultimate recourse, especially since article 23 of the revised General Act and article XLIII of the Pact of Bogotá were *conventional* provisions, whereas article 4 of our draft remains optional in character. We therefore propose to retain it more or less unchanged. It reads as follows:

#### Article 4

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

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

3. The appointments referred to in paragraph 2 shall be made in accordance with the provisions of the *compromis* or of any other instrument pursuant to the undertaking to arbitrate and after consultation with the parties. In so far as these texts contain no rules with regard to the composition of the tribunal, the composition of the tribunal shall be determined, after consultation with the parties, by the President of the International Court of Justice or by the judge acting in his place. It shall be understood that in this event the number of the arbitrators must be uneven and should preferably be five.

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

nated in accordance with the procedure prescribed in paragraph 2.

5. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law. They may call upon experts.

The Commission's attention is drawn to the detailed nature of this article and to the fact that it does not go quite as far as the precedents quoted, although it supplements them.

#### V. Immutability of the tribunal

12. Once the tribunal has been constituted, its composition should normally remain unchanged until the award has been rendered.

This is what is termed the "principle of immutability". Its purpose is to preclude the replacement of judges by Governments during the proceedings with a view to influencing the tribunal's ultimate decisions; the withdrawal or resignation (the French term is "*déport*") of the judges themselves under the political influence of their Governments or of public opinion; or ill-considered challenges by one of the litigants.

The principle of immutability has met with the objection that Governments should be left free to recall the judges appointed by them, or "national judges", whenever they please. The Special Rapporteur takes the contrary view that everything possible should be done to counter the all too common practice of appointing arbitrators who do not aspire to be genuine judges but remain representatives or advocates of their respective Governments. Such a step is in the interests of the very institution of arbitral justice—which, moreover, has at its command counsel and advocates appointed by the parties. Sometimes, indeed, it is regrettable enough that the latter cannot be effectively prevented from holding any communication with the judges. As a strictly juridical matter, the judges, as soon as they have taken up their functions, should be regarded as an *international organ*, as members of a genuine court. Their award is to be final and binding; it should therefore be enforceable as an indivisible whole. Had the parties been reluctant to comply with it, they could have had recourse to another institution, that of conciliation commissions. Conciliation may precede arbitration but may not replace it, for it does not produce a binding decision; the parties can only accept the decision, and often do. As a body of jurists, however, the International Law Commission will be unlikely to confuse the two different procedures.

Article 5 of the draft, concerning the immutability of the tribunal, read as follows:

#### Article 5

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

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

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

It will be noted, furthermore, that articles 6, 7 and 8 of the draft leave a Government free to replace unilaterally one or more national arbitrators until such time as proceedings before the arbitral tribunal have begun, and that it may do so even after proceedings have begun, provided,

in this case, that the other party to the dispute gives its consent. This is one of the forms of equality between the litigants before the court.

It is provided also that the post of one of the arbitrators may be vacated and that one of the litigants may challenge a judge, provided that he does so in good faith and under the tribunal's supervision. The principle of immutability is thus rendered flexible, and intervention by the International Court of Justice can be avoided by agreement between the parties.

Should the proposed articles fail to win acceptance, the only remaining way to ensure that arbitration is really effected would be to permit the remaining members of the tribunal to render their award in the absence of any arbitrators who have been withdrawn or have resigned. This was recognized in the Commission's original draft. We should have no great objection to the reintroduction of this principle. Theory and practice have varied on this point; but we have come to the conclusion that the solution provided by the draft as it stands is preferable from the standpoint of the authority of the arbitral decision.<sup>16</sup>

Articles 6 and 7 read as follows:

#### Article 6

If a vacancy should occur on account of the death or the incapacity of an arbitrator, the vacancy shall be filled by agreement between the litigants or, if they cannot agree, in accordance with the procedure prescribed for the original appointments.

#### Article 7

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

2. If the withdrawal should take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal, in accordance with the procedure prescribed in article 4, paragraph 2.

13. Article 8 fills one of the most troublesome gaps in the undertaking to arbitrate and in the *compromis*. Hackworth recognizes in his *Digest of International Law*<sup>17</sup> that this is one of the most frequent grounds on which arbitral awards are challenged after delivery.<sup>18</sup> This is the question of the disqualification of one of the arbitrators or even of the sole arbitrator or umpire. There can, however, be no disqualification if the challenging party acts out of spite or in bad faith, or fears an adverse result of the case. Article 8 contains precautions against this which foreshadow those embodied in article 39, concerning revision. The article reads as follows:

#### Article 8

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal. It may propose the disqualification of one of the arbitrators on account of a fact

<sup>16</sup> Among the precedents favourable to the immutability principle we may mention two which are of especially long standing and typical: the commission constituted under article 6 of the Jay Treaty, and the notorious incident of the *Hungarian Optants* (see A/CN.4/92, pp. 28 and 29).

With regard to methods of filling vacancies for arbitrators, see article 59 of the Convention of 1907 and article 24 of the General Act.

<sup>17</sup> G. H. Hackworth, *Digest of International Law* (Washington, U.S. Government Printing Office, 1943), vol. VI, chap. XIX.

<sup>18</sup> See document A/CN.4/92, pp. 31-33, and in particular article 20 of the Convention for the Establishment of an International Central American Tribunal, signed at Washington on 7 February 1923.

arising before the constitution of the tribunal only if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In all cases, and particularly in the case of a sole arbitrator, the decision shall be taken by the International Court of Justice.

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

## VI. Powers of the tribunal—Procedure

14. Once the tribunal has been constituted, its powers must be defined. The Commission will find that reference is made under this heading to a number of points which at first glance may seem to have been covered already under article 2 concerning the *compromis*, or which would fit in there. There is, however, no duplication. There may, and sometimes will, be a *compromis* in existence to which no recourse is necessary. If it fails to mention these matters, the tribunal will not enjoy the special powers which the draft recommends for adoption by the parties.

The first suggests the possibility of leaving to the arbitral tribunal the power to complete, or even to draw up, the *compromis*. It is possible that neither the *compromis*, the undertaking to arbitrate nor supplementary agreements contain provisions sufficient to enable the arbitrators to render an award. The tribunal is the judge of this, and, in the absence of the necessary agreement on all points which the tribunal requires to be clarified, either party may request the tribunal itself to complete or to draw up the *compromis*.

This may be regarded as a key article. Here again the course followed is that indicated by the precedents.

Article 53 of the Convention of 1907 empowered the Permanent Court of Arbitration to draw up the *compromis* if the two parties were agreed or in the case of a dispute covered by a general treaty of arbitration which had been concluded or renewed after that Convention had come into force and which did not exclude the competence of the Court. Article 54 provided for the establishment, in the latter case, of a commission of five members, selected by the slow and complex procedure already laid down for the composition of the tribunal.

Article 27 of the General Act provides, more bluntly, that:

“Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by one or other party.”

This provision is brief perhaps, and does not cover all the possible situations.

Article XLIII of the Pact of Bogotá, after referring to the need for a special agreement (*compromis*) to be drawn up by common consent between the parties, goes on to stipulate that:

“If the special agreement cannot be drawn up within three months after the date of the installation of the Tribunal, it shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the parties.”

This course has several times been adopted in practice. Since some States have proved reluctant to establish a kind of dependence between the International Court of Justice and the Permanent Court of Arbitration, the course preferred in our Commission's draft has been to confer the appropriate powers to conclude the *compromis* directly upon the arbitral tribunal, constituted as described above, in order to create complete confidence.

Article 9 accordingly reads as follows:

#### Article 9

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

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

3. If both parties consider that the elements available to the tribunal are insufficient for the purposes of a *compromis* but are themselves unable to draw up a *compromis*, the tribunal may do so in their stead, at the request of either party, within three months after they report failure to agree or after the decision, if any, on the arbitrability of the dispute.

15. Article 10 provides as follows:

#### Article 10

The arbitral tribunal, which is the judge of its own competence, possesses the widest powers to interpret the *compromis*.

This is axiomatic. Every judicial organ is the judge of its own competence, gives rulings on any objections raised to it, and may adapt its procedure to the substance. This applies whether its competence is based on law or on a *compromis*. For a court to refuse a ruling on the ground that its competence was challenged would be a denial of justice on its part. As early as 1875, article 14 of the draft rules on international arbitral procedure prepared by the Institute of International Law provided that:

"If the doubt concerning the jurisdiction depends on the interpretation of a clause in the *compromis*, the parties are presumed to have given the arbitrators power to settle the question, unless otherwise stipulated."  
[Italics added.]

Reference may also be made to article 73 of the Convention of 1907, Article 36, paragraph 6, of the Statute of the International Court of Justice, etc.<sup>19</sup>

Since the International Law Commission took a definite stand on this matter in compiling its 1953 draft on the basis of Judge Lauterpacht's report, it appears unnecessary to dwell on it here.

16. Article 11 likewise lays down a purely technical instruction, which is designed to promote the uniformity of international jurisprudence. This provision could have been included in article 2, concerning the *compromis*, and can be transferred to that article if the Commission so desires.

#### Article 11

In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

Before the International Court of Justice had been established, this provision read: "The arbitral tribunal

decides according to the principles of international law". The second paragraph of article 18 of the Revised General Act is similarly worded:

"If nothing is laid down in the special agreement as to the rules regarding the substance of the dispute to be followed by the arbitrators, the Tribunal shall apply the substantive rules enumerated in Article 38 of the Statute of the International Court of Justice."

This article presents no difficulty. The next article is another matter.

17. Article 12 reads as follows:

#### Article 12

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

This problem of *non liquet* is complex, and when the arbitral tribunal is considering its decision it may be uncertain whether, for example, it has ascertained the full facts (even if the tribunal itself has drawn up the *compromis*).

Since the purpose of the draft as a whole is to secure a decision and solve the dispute—by, among other means, inducing the parties to give the tribunal all necessary information and facilities, including the power to adjudicate *ex aequo et bono*—the International Law Commission has taken the view that *non liquet* is inadmissible. Several writers, including Witenberg, Mérignac and Lauterpacht (the 1953 Special Rapporteur) refuse to accept *non liquet* on the ground that the reference in Article 38 of the Statute of the International Court of Justice to "the general principles of law", makes it unthinkable.

Since the subject is highly controversial the Special Rapporteur appreciates that some hesitation may be felt; in his view, however, hesitation should arise only if the parties fail to grant the tribunal, in the *compromis*, the power to adjudicate *ex aequo et bono*, i.e. to act as though it had legislative functions (see article 2).

It is therefore, quite understandable that the Commission should reconsider its former wording and decide to amend paragraph 2 of the former article 12 (see A/2456, para. 57) as follows:

"2. The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of international law or of the *compromis*. It would be a different matter if the parties had expressly withheld from the tribunal the right to decide *ex aequo et bono* and if the tribunal were unable to find grounds for a decision in the facts."

The Special Rapporteur, however, does not favour this new wording, which jeopardizes the result of the case and the fulfilment of the undertaking to arbitrate.

Article 28 of the Revised General Act reads as follows:

"If nothing is laid down in the special agreement [*compromis*] or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*."

This wording is free of ambiguity and is an improvement.

18. Articles 13 to 21 are concerned only with procedural technicalities and seem unlikely to provoke any discussion.

Article 13 empowers the tribunal to establish its own rules of procedure if the parties are unable to agree on

<sup>19</sup> For judicial decisions see, *inter alia*, document A/CN.4/96, pp. 46 ff.

them. The tribunal is likewise given this power if the rules of procedure established by the parties prevent it from arriving at an award. This is a reiteration of the provision which the Commission agreed last year to include in article 2, paragraph 3. The Commission will probably wish to delete one of the two provisions, unless it prefers to make that laid down in article 2 a general rule, and to reproduce it as a special rule of procedure in the article now under consideration.

This article further stipulates that all questions shall be decided by a majority.

#### Article 13

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

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

Article 14 states a self-evident principle, that of equality in proceedings, which is no more than a consequence of equality before the courts. Some applications of the principle are considered later.

#### Article 14

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

19. Articles 15 to 19 were included in the previous report to the Commission (A/CN.4/109) in response to some observations made in the General Assembly, which appeared to regret that the draft had considered the reminder of traditional and generally accepted practices as negligible. Article 20—another addition—is an application of the principle of equality. These articles read as follows:

#### Article 15

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

#### Article 16

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

#### Article 17

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

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

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

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

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

#### Article 18

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

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

3. The time fixed by the compromis may be extended by mutual agreement between the parties, or by the

tribunal when it deems such extension necessary to enable it to reach a just decision.

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

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

#### Article 19

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

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

#### Article 20

1. After the tribunal has closed the pleadings it shall have the right to reject any new papers and documents which either party may wish to submit to it without the consent of the other party. The tribunal shall, however, remain free to take into consideration any new papers and documents which the agents or counsel of the parties may bring to its notice and to require the production of such papers or documents, provided that they have been made known to the other party.

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

20. Article 21 (formerly article 15) could be placed before article 20, for it is concerned with the general subject of the hearing of evidence before the closure of proceedings. It is based partly on theory, partly on the jurisprudence of arbitral tribunals, and partly on the jurisprudence of The Hague Court.<sup>20</sup> Its underlying principles can be traced back to the 1907 Convention (articles 74 and 75) and to Articles 48 and 49 of the Statute of the International Court of Justice.

#### Article 21

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

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

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

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

Article 22 reads as follows:

#### Article 22

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

This article should create no difficulties, since it is designed to ensure that the tribunal disposes of every aspect of the dispute referred to arbitration. We have used French procedural terminology, which seems to us clearer than the English phrase: "amending the pleadings". We need hardly say that the connexion between the principal claim and incidental claims must be established, since otherwise the award would carry the stigma of action *ultra vires*.

Article 23, concerning provisional measures, is the equivalent of article 33 of the General Act of 1928 and

<sup>20</sup> See document A/CN.4/92, pp. 56 ff.

Article 41 of the Statute of the International Court of Justice.<sup>21</sup>

#### Article 23

The tribunal, or in case of urgency its president, subject to confirmation by the tribunal, shall have the power to prescribe, at the request of one of the parties, any provisional measures necessary for the protection of the rights of the parties.

### VII. Closure of proceedings

21. Article 24 reads as follows:

#### Article 24

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

2. So long as the award has not been rendered, the tribunal shall have the power to reopen the proceedings after their closure on the ground that new evidence is forthcoming of such a nature as to have a decisive influence on its decision.<sup>22</sup>

The second paragraph of this article has been added to the former article 18. It supplements the article concerning evidence and the article concerning revision, which it makes less necessary.<sup>23</sup>

#### Article 25

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

Article 26 relates to discontinuance of proceedings by the claimant party. It is designed to ensure that the two parties receive equal treatment and that either of them may require the tribunal to dismiss the case. It reads as follows:

#### Article 26

1. Discontinuance of proceedings by the claimant party, either during the hearing or at the close thereof, shall not be accepted by the tribunal without the consent of the respondent.

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

Article 27 empowers the tribunal to take note of a settlement reached by the parties either during or at the closure of proceedings and to give it the authority of *res judicata*. This is current practice in private arbitration arrangements. The article reads as follows:

#### Article 27

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

It may, of course, refrain from doing so if it considers the settlement illegal, but must, in such a case, refrain from rendering an award.

### VIII. The award

22. Article 28 authorizes the tribunal to extend the period fixed by the *compromis* for the rendering of the award. The former article 23, adopted by the Commission in 1953, stipulated that in such a case the consent of at least one of the two parties was required. Such a provision, the effect of which would be to give one of the

parties an advantage according to the turn taken by the proceedings, would conflict with the equality rule, and probably stemmed from a misunderstanding. The tribunal must be the sole judge as to whether it has sufficient information to be able to render its award. It is of course understood that, since the new draft is in no way binding, the period fixed by the *compromis*, if any, is applicable if the parties cannot agree to extend it. It will also be realized, however, that to stipulate a definite period in the *compromis* is, as a rule, one of the most unfortunate steps that could be taken, and one of those most likely to hinder the settlement of the dispute. Article 28 might thus read as follows:

#### Article 28

The award shall normally be rendered within the period fixed by the *compromis*, but the tribunal may decide to extend the said period if it would otherwise be unable to render the award.

As worded above, article 28 appears to be compatible with article 2.

### IX. Default

23. The provision made in the draft for procedure by default refers to the award but applies to the proceedings as a whole. Some latitude in this respect is essential to the settlement of the dispute.

Here again there are many precedents both in arbitration practice and in the texts of conventions.<sup>24</sup> At all events article 29 is very circumspectly worded:

#### Article 29

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

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

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

24. Articles 30 to 34 are, once again, devoted either to technicalities of judicial procedure or to the reiteration of undisputed traditional principles. They read as follows:

#### Article 30

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

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

3. The award shall be deemed to have been rendered when it has been read in open court, the agents of the parties being present or duly summoned to appear.

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

#### Article 31

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

#### Article 32

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately,

<sup>21</sup> For bibliography and jurisprudence, see document A/CN.4/92, pp. 72 ff.

<sup>22</sup> Paragraph 2 may be regarded as duplicating paragraph 3 of article 21.

<sup>23</sup> See document A/CN.4/92, pp. 75 ff. (Santa Isabel Claims case).

<sup>24</sup> Cf. article 40 of the 1907 Convention; Article 53 of the Statute of the International Court of Justice; the Mixed Arbitral Tribunals; the case of the *Corfu Channel*. See document A/CN.4/92, pp. 78 ff., in this connexion.

unless the tribunal has fixed a time limit within which it must be carried out in its entirety or partly.

#### Article 33

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

(Article 33, which is the original work of the Commission, has been discussed at length.)

#### Article 34

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

In the previous report (A/CN.4/109) it seemed possible to propose to the Commission a further additional article similar to Article 94 of the Charter of the United Nations providing for the measures to be taken in case of failure to comply with the award. On second thoughts the Special Rapporteur considers that such an article would be undesirable, would lie outside the scope of arbitral procedure, and should be omitted.<sup>25</sup>

### X. Interpretation of the award

25. The article on this subject is based on article 82 of the 1907 Convention and Article 60 of the Statute of the International Court of Justice, and it implements article 79 of the latter's rules. It is also based on the old legal maxim: *Ejus est interpretari cujus est condere*. In its decisions the Permanent Court of International Justice at The Hague has several times had occasion to define interpretation. For instance, the Court has said:

"The interpretation adds nothing to the decision, which has acquired the force of *res judicata*, and can only have binding force within the limits of what was decided in the judgment construed."<sup>26</sup>

#### Article 35

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

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within a time limit of three months the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of either party.

The Special Rapporteur wonders whether the latter paragraph is really necessary. Since the time limit for requests for interpretation laid down in paragraph 1 is very short it seems unlikely that the tribunal which rendered the award should be unable to interpret it. The most that might be needed would be a provision that, should the arbitrators not be available, the tribunal might be constituted in the manner prescribed in article 4.

<sup>25</sup> This 8th additional article read as follows: "Should either party fail to observe its obligations under an arbitral award, the other party may inform the Security Council of the United Nations, which shall make whatever recommendations it thinks fit or shall decide on the measures to be taken to ensure the enforcement of the award, if it deems it necessary to do so."

<sup>26</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 13, *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory)*, p. 21. See also document A/CN.4/92, pp. 95 ff.

### XI. Annulment of the award

26. Neither the Special Rapporteur nor the Commission itself has accepted the categorical theory that an arbitral award should be treated as final even if found to be morally unacceptable or practically unenforceable. *Summum jus summa injuria*. Arbitration practice, moreover, has always conflicted with that principle. There is, however, abundant literature on the subject, and while the jurists agree in principle they do not agree on the cases in which the award is null and void or on the grounds for annulment.<sup>27</sup> It would be impossible for the Commission to study this literature in detail, and it has accordingly had to confine itself to enumerating, in the article 36 quoted below, three cases commonly recognized as invalidating an award.

Moreover the Commission has taken the view that the dispute should be referred to the International Court of Justice, which would act in this case as a court of cassation. Among the precedents for this we may mention a resolution adopted by the Institute of International Law at its session in 1929 held at New York;<sup>28</sup> more particularly, the discussions held in the Council and Assembly of the League of Nations under the chairmanship of Rundstein, the eminent Polish jurist, between 1928 and 1931; and lastly, article 67 of the rules of the International Court of Justice.

This solution has, however, been criticized as making for the establishment of a hierarchy among international tribunals, and as tending to limit their independence of the International Court of Justice.

The Commission will decide for itself whether an application for annulment may be made, by agreement between the parties, to the Permanent Court of Arbitration, to the International Court of Justice, or even to another arbitral tribunal which might be agreed on between the parties and which would be asked not merely to annul the award but to try the case again. At all events article 38 stipulates that if the award is declared invalid the whole case is re-opened.

#### Article 36

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

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a serious departure from a fundamental rule of procedure, including total or partial failure to state the reasons for the award.

#### Article 37

1. The International Court of Justice shall be competent, if the parties have not agreed on another court, to declare the nullity of the award on the application of either party.

2. In the cases covered by article 36, sub-paragraphs (a) and (c), the application must be made within sixty days of the rendering of the award and in the case covered by sub-paragraph (b) within six months.

3. The application shall stay execution unless otherwise decided by the court to which it is made.

<sup>27</sup> See, for example, Professor Verdross's detailed study of the connexion between excess of jurisdiction and the tribunal's recognized right to be the judge of its own competence, in *Zeitschrift für Öffentliches Recht* (Vienna and Berlin, Verlag von Julius Springer, 1928), vol. VII.

<sup>28</sup> *Annuaire de l'Institut de droit international* (1929), vol. II, pp. 303 and 304.

## Article 38

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

## XII. The problem of revision

27. On this subject the Special Rapporteur can do little more than refer to the observations in his previous report (A/CN.4/109) and in his first report (A/CN.4/18).

There is an adage which runs: "Nothing is settled until it is settled right"; in the interest of the system of arbitration itself, this must be taken to heart if the system is to be preserved as an instrument of pacification.

Furthermore the authority of *res judicata* is not in question here, for there is no case for revision unless a "new fact" has come to light since the award was rendered and makes it appear that, had the judges known it, they would have made a different award. Lastly, revision cannot be regarded either as an appeal procedure or as a cassation, for both the new fact and the second decision will be dealt with by the same tribunal as rendered the award. There is consequently no question of a judicial hierarchy being established in this case.

Hence the Special Rapporteur has been unable to alter his view, and continues to advocate this procedure as warmly as in his first report (A/CN.4/18, para. 95).

Here again the principle adopted can be traced back to the 1907 Convention of The Hague (article 83) and even to the Convention of 1899. It was embodied in the Pact of Bogotá of 30 April 1948 after having been applied in practice by mixed arbitral tribunals. We need hardly point out that it has figured in such celebrated cases as those of the *Pious Fund of the Californias*, the *North Atlantic Coast Fisheries*, and the *Orinoco Steamship Company*, either in the negotiations on the *compromis* or in the proceedings.

Article 39 seems explicit enough; it reads as follows:

## Article 39

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

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

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

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

5. The application for revision shall, whenever possible, be made to the tribunal which rendered the award.

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

## XIII. Conclusion

28. In his previous report (A/CN.4/109), the Special Rapporteur paid particular attention to the observations made on the 1953 draft (A/2456, para. 57) by

Governments and by their representatives to the General Assembly. He had already proposed that the Commission should abandon the idea of turning the draft into a draft convention, and, instead, compile merely a "model draft" or, if that seemed too pretentious a term, a "set of rules", which would be available to such Governments as might wish to use it, either in drawing up a *compromis* or at a later stage, during the actual proceedings, to assist them in bringing the arbitral proceedings to a successful conclusion and in fulfilling their undertaking to arbitrate. The Commission accepted this proposal at its ninth session (419th meeting).

In this report the Special Rapporteur has made a special effort to trace the *line of descent which links the articles of the draft with the texts of the conventions*—he might almost say, the texts of the constitutions—*which antedated them*. It may be felt that, in adopting them *in toto*, the Commission would be animated less by the *desire* to develop public international law, though this is one of its tasks, than by the *duty* of recording the traditional state of international law on the subject.<sup>29</sup>

The Commission has since recognized that it would be unwise to ask the representatives of Governments to contract actual obligations—however logical an outcome of the institution of arbitration these obligations might be—in the existing uncertain condition of the world community which, if not in its infancy, is at any rate clearly in a state of transition. It defers to the suggestion implicit in General Assembly resolution 989 (X) of 31 December 1955; yet it would doubtless be unacceptable to *scientific opinion* which has been moulded by the overwhelming majority of jurists, and to *public opinion*, which is still sustained by the Charter of San Francisco, to hold as null and void the progress gradually made by international arbitration in actual practice over the past half-century. It is this progress, not the fruit of theoretical speculation, that has gone into the making of the draft. In its ultimate liberalism, the Commission's draft may appear more shy than presumptuous.

## Annex

## Model draft on arbitral procedure

## Article 1

1. Any undertaking to have recourse to arbitration in order to settle a dispute between States constitutes a legal obligation which must be carried out in good faith.

2. Such an undertaking results from agreement between the parties and may apply to existing disputes (arbitration *ad hoc*) or to disputes arising in the future (arbitration treaties—arbitration clauses).

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

4. The procedures offered to States Parties to a dispute by this draft shall not be compulsory unless the States concerned have agreed, either in the *compromis* or in some other undertaking, to have recourse thereto.

## Article 2

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

(a) The undertaking to arbitrate under which the dispute shall be submitted to the arbitrators;

(b) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;

<sup>29</sup> See the preamble and articles 1, 15, 16 and 17 of the Statute of the International Law Commission.

(c) The method of constituting the tribunal and the number of arbitrators.

The compromis shall likewise include any other provisions deemed desirable by the Parties, such as:

(1) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter;

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

(3) Such power as may be conferred on the tribunal to make its own rules of procedure;

(4) The procedure to be followed by the tribunal, on condition that, once constituted, the tribunal shall remain free to override any provisions of the compromis which may prevent it from rendering its award;

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

(6) The majority required for the award;

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

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

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

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

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

This enumeration is not intended to be exhaustive.

#### Article 3

1. If, before the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to arbitrate, such preliminary question shall, failing agreement between the parties upon the adoption of another procedure, be brought by them within three months either before the Permanent Court of Arbitration for summary judgement, or, preferably, before the International Court of Justice, likewise for summary judgement or for an advisory opinion.

2. In its decision on the question, either Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties. The decision shall be final.

3. If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.

#### Article 4

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

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

3. The appointments referred to in paragraph 2 shall be made in accordance with the provisions of the compromis or of any other instrument pursuant to the undertaking to arbitrate and after consultation with the parties. In so far as these texts contain no rules with regard to the composition of the tribunal, the composition of the tribunal shall be determined, after consultation with the parties, by the President of the International Court of Justice or by the judge acting in his place. It shall be understood that in this event the number of the arbitrators must be uneven and should preferably be five.

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

5. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law. They may call upon experts.

#### Article 5

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

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

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

#### Article 6

If a vacancy should occur on account of the death or the incapacity of an arbitrator, the vacancy shall be filled by agreement between the litigants or, if they cannot agree, in accordance with the procedure prescribed for the original appointment.

#### Article 7

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

2. If the withdrawal should take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal, in accordance with the procedure prescribed in article 4, paragraph 2.

#### Article 8

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

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

#### Article 9

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

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

3. If both parties consider that the elements available to the tribunal are insufficient for the purposes of a compromis but are themselves unable to draw up a compromis, the tribunal may do so in their stead, at the request of either party, within three months after they

report failure to agree or after the decision, if any, on the arbitrability of the dispute.

#### Article 10

The arbitral tribunal, which is the judge of its own competence, possesses the widest powers to interpret the compromis.

#### Article 11

In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

#### Article 12

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

#### Article 13

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

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

#### Article 14

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

#### Article 15

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

#### Article 16

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

#### Article 17

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

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

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

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

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

#### Article 18

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

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

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

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

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

#### Article 19

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

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

#### Article 20

1. After the tribunal has closed the pleadings it shall have the right to reject any new papers and documents which either party may wish to submit to it without the consent of the other party. The tribunal shall, however, remain free to take into consideration any new papers and documents which the agents or counsel of the parties may bring to its notice and to require the production of such papers or documents, provided that they have been made known to the other party.

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

#### Article 21

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

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

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

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

#### Article 22

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

#### Article 23

The tribunal, or in case of urgency its president, subject to confirmation by the tribunal, shall have the power to prescribe, at the request of one of the parties, any provisional measures necessary for the protection of the rights of the parties.

#### Article 24

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

2. So long as the award has not been rendered, the tribunal shall have the power to reopen the proceedings after their closure on the ground that new evidence is forthcoming of such a nature as to have a decisive influence on its decision.

#### Article 25

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

#### Article 26

1. Discontinuance of proceedings by the claimant party, either during the hearing or at the close thereof, shall not be accepted by the tribunal without the consent of the respondent.

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

#### Article 27

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

#### Article 28

The award shall normally be rendered within the period fixed by the compromis, but the tribunal may decide to extend the said period if it would otherwise be unable to render the award.

#### Article 29

1. Whenever one of the parties has not appeared before the tribunal, or has failed to defend its case, the other

party may call upon the tribunal to decide in favour of its claim.

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

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

#### Article 30

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

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

3. The award shall be deemed to have been rendered when it has been read in open court, the agents of the parties being present or duly summoned to appear.

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

#### Article 31

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

#### Article 32

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

#### Article 33

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

#### Article 34

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

#### Article 35

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

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within a time limit of three months the parties have

not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of either party.

#### Article 36

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

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a serious departure from a fundamental rule of procedure, including total or partial failure to state the reasons for the award.

#### Article 37

1. The International Court of Justice shall be competent, if the parties have not agreed on another court, to declare the nullity of the award on the application of either party.

2. In the cases covered by article 36, sub-paragraphs (a) and (c), the application must be made within sixty days of the rendering of the award and in the case covered by sub-paragraph (b) within six months.

3. The application shall stay execution unless otherwise decided by the court to which it is made.

#### Article 38

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

#### Article 39

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

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

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

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

5. The application for revision shall, whenever possible, be made to the tribunal which rendered the award.

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

# DIPLOMATIC INTERCOURSE AND IMMUNITIES

## [Agenda item 3]

### DOCUMENTS A/CN.4/116/ADD.1 AND 2<sup>1</sup>

#### Draft articles concerning diplomatic intercourse and immunities<sup>2</sup>

#### Articles proposed by A. E. F. Sandström, Special Rapporteur

### Document A/CN.4/116/Add.1

[Original text: French]

[21 May 1958]

#### SECTION I. DEFINITIONS

##### Article 1 (new)

The text submitted by the Netherlands Government (A/3859, annex, sect. 14), subject to the addition in sub-paragraph (d) of the phrase: "including military, naval and air attachés and other specialized attachés".

##### Article 1A

Article 1 of the Commission's draft unchanged.<sup>2</sup>

##### Article 2

Article 2 of the Commission's draft, subject to the deletion of the words "the Government of" in sub-paragraphs (a), (c) and (d) (or at least in sub-paragraph (a)).

##### Article 3

No change.

##### Article 3A

With the consent of each receiving State the head of a mission may in addition be appointed head of mission in one or more other States.

##### Article 4

*Paragraph 1.* Article 4 of the Commission's draft, subject to the omission of the word "other".

*Paragraph 2.* A new paragraph reading as follows:

"2. The arrival and departure of the members of the mission, together with the members of their households, shall be notified to the Ministry of Foreign Affairs of the receiving State. Similarly, a notification shall be required for members of the mission and private servants engaged and discharged in the receiving State."

<sup>1</sup> Document A/CN.4/116 entitled "Diplomatic intercourse and immunities: summary of observations received from Governments and conclusions of the Special Rapporteur" is published in mimeographed form only.

<sup>2</sup> The text of the draft articles adopted by the International Law Commission (to which the present text refers) is contained in chapter II of the report of the Commission on its ninth session (A/3623).

##### Article 5

*A diplomatic agent* may be appointed from among the nationals of the receiving State only with the express consent of that State, *unless it has waived that condition.*

##### Article 6

*Paragraph 1.* In the English text, the words "according to circumstances" should be replaced by the words "as the case may be".

*Paragraph 2.* In the French text, the word "un" should be inserted between the words "dans" and "délai".

##### Article 7

*Paragraph 1.* In the English text, substitute the word "normal" for the word "customary".

*Paragraph 2.* In the first sentence the words "and on a non-discriminatory basis" should be deleted. The second sentence should read: "In the case of military, naval or attachés, the receiving State may require their names to be submitted beforehand for its approval".

*Paragraph 3.* A new provision, if necessary, reading as follows:

"The sending State may not, without the consent of the receiving State, establish offices in places other than the place where the mission is established."

##### Article 8

The receiving State shall decide whether the head of the mission is entitled to take up his functions in relation to that State when he has notified his arrival and a true copy of his credentials has been accepted by the Ministry of Foreign Affairs of the receiving State, *or (only) when he has presented his letters of credence.*

##### Article 9

*Paragraph 1.* Add at the end of the paragraph: "by the head of the mission before his departure or otherwise by the Government of the sending State".

*Paragraph 2.* This paragraph should be deleted.

##### Article 10

It is proposed that the article begin as follows: "For purposes of precedence and etiquette heads of missions . . .".

In sub-paragraph (b) the words "other persons" may be kept, or replaced by "internuncios".

*Article 11*

States shall mutually agree the level of their diplomatic representation at each other's capitals.

*Article 12*

*Paragraph 1.* Substitute the words "according to the rules prevailing in" for the words "according to the rules of the protocol in".

*Paragraphs 2 and 3.* No change.

*Article 12A*

See the Italian Government's observations (A/3859, annex, sect. 10).

*Article 13*

No change.

*Article 14*

No change.

*Article 14A*

The mission and its head shall have the right to use the flag or emblem of the sending State on the official premises of the mission, on the residence of the head of the mission and on the means of transport used by him.

SECTION II

*Article 15*

The receiving State shall either permit the sending State to acquire on its territory the premises necessary for its mission, or facilitate as far as possible adequate accommodation in some other way for the mission, including the staff thereof.

*Article 16*

*Paragraph 1.* Insert the word "official" before the word "premises" (whether they are owned by or leased to the sending State).

*Paragraphs 2 and 3.* No change.

*Paragraph 4.* A new provision reading as follows:

"4. Since the real property of the mission is subject to the laws of the country in which the said property is situated, it shall be the duty of the sending State, notwithstanding the inviolability of the premises of the mission, to co-operate in every way in the carrying out of public works, such as the widening of roads. The receiving State shall pay prompt and adequate compensation or, if necessary, place other appropriate premises at the disposal of the sending State."

*Article 17*

The sending State shall be exempt from all national, regional and municipal dues and taxes which would be leviable upon it as owner or tenant of the premises used for the purposes of the mission, other than dues and taxes which represent payment for services actually rendered. The same exemption shall be granted if the head or another member of the mission has acquired or leased the premises on behalf of the sending State.

*Article 18*

No change.

*Article 19*

*Paragraph 1.* The text of the Commission's draft article.

*Paragraph 2.* A new paragraph reading as follows:

"2. If the receiving State maintains different rates of exchange, the mission shall enjoy the most favourable rate."

*Article 20*

The receiving State shall ensure to all members of the mission freedom of movement and travel in its territory. Nevertheless, the receiving State may, for reasons of national security, issue laws and regulations prohibiting or regulating entry into specifically indicated places or regions, provided that these are not so extensive as to render freedom of movement and travel illusory.

*Article 21*

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government of the sending State and with its consulates in the receiving State, the mission may employ all appropriate means, including diplomatic couriers and dispatches in code or cipher.

2. The diplomatic bag, which may contain only diplomatic documents or articles of a confidential nature intended for official use, shall be furnished with the sender's seal and bear a visible indication of its character. The diplomatic bag may not be opened or detained.

3. The expression "diplomatic courier" means a person who carries a diplomatic bag and who is for this purpose furnished with a document (courier's passport) testifying to his status. If such a person is travelling exclusively as a diplomatic courier he shall enjoy personal inviolability during his journey and shall not be liable to arrest or detention, whether administrative or judicial.

4. If a mission wishes to make use of a wireless transmitter belonging to it, it must apply to the receiving State for special permission. Provided that the regulations applicable to all users of such communications are observed, such permission shall not be refused.

*Article 21A*

The sending State shall be exempt from dues and taxes on the fees and charges recovered by the mission in the course of its official duties.

*Article 22*

Delete paragraph 2.

*Article 23*

*Paragraph 1.* Insert the word "official" before the word "premises".

*Paragraph 2.* The Special Rapporteur's view concerning the observations expressed on paragraph 2 is as follows: The inviolability which the property of the diplomatic agent enjoys should, according to article 24, paragraph 3, cease in proceedings in which the agent cannot invoke immunity from jurisdiction. It has been suggested that, in the case contemplated by article 24, paragraph 1(c), it is likewise impossible to invoke inviolability

for the purpose of the protection of his papers and correspondence. To go thus far would, however, jeopardize the confidential nature which official papers and correspondence of the mission should possess. To bring out this distinction, the text proposed by the Netherlands Government for article 23, paragraph 2, might be adopted.

Paragraph 2 should read as follows:

"2. His papers, correspondence and, except as provided in article 24, paragraph 3, his property, likewise, shall enjoy inviolability."

#### Article 24

*Paragraph 1.* In sub-paragraph (a), for the words "held by the diplomatic agent in his private capacity and not on behalf of his Government for the purposes of the mission" substitute the words "unless he holds it on behalf of his Government for the purposes of the mission".

In sub-paragraph (b), after the word "succession" insert the words "arising in the receiving country".

*Paragraph 2.* Insert at the end of the sentence the words "except in cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1".

An alternative is proposed by the Italian Government (A/3859, annex, sect. 10).

*Paragraph 3.* No change.

*Paragraph 4.* In the first sentence delete the words "to which he shall remain subject in accordance with the law of the State".

#### Article 25

*Paragraphs 1 and 2.* No change.

*Paragraph 3.* For the words "In civil proceedings" read "In civil or administrative proceedings".

*Paragraph 4.* Insert the words "or administrative" after the word "civil".

#### Article 26

Provided that he is not a national of the receiving State, a diplomatic agent shall be exempt in the said State from all dues and taxes, personal or real, national, regional or municipal, save:

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

(b) Dues . . . mission; [No change.]

(c) Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of article 31 concerning estates left by members of the family of the diplomatic agent;

(d) Add at the end: "and on property situated in the receiving State other than the furniture and personal effects of the diplomatic agent and his family";

(e) Charges . . . rendered; [No change.]

(f) Registration, court or record fees, mortgage dues and stamp duty.

#### Article 26A

The diplomatic agent shall be exempt from all personal contributions in money or in kind.

#### Article 27

1. The receiving State shall, in accordance with such regulations as it shall prescribe, grant exemption from

customs duties and from all prohibitions and restrictions in respect of the import or subsequent re-export of:

(a) Articles for the official use of a diplomatic mission;

(b) Articles for the personal use of a diplomatic agent or members of his family belonging to his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are very serious grounds for presuming that it contains articles not covered by the exemptions mentioned in this article.

3. For the purposes of paragraph 1, the expression "customs duties" shall mean all dues and taxes payable on imports or re-exports.

4. The provisions of this article shall not apply to articles the traffic in which is specifically prohibited by the laws of the receiving State for reasons of public morality, safety, health or order.

#### Article 28

1. Apart from the diplomatic agent, the members of his family who form part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27. Even if they are nationals of the receiving State, they shall be entitled to the benefit of these privileges and immunities if they are also nationals of the sending State.

2. If they are not nationals of the receiving State, the members of the administrative, technical and service staff of the mission shall enjoy immunity in respect of acts performed in the course of their duties, and shall also be exempt from dues and taxes on the emoluments they receive by reason of their employment. They shall in addition enjoy such privileges and immunities as are granted to them by agreement between the parties concerned on the basis of reciprocity.

3. Private servants of the head or members of the mission shall, if they are not nationals of the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, any jurisdiction assumed by the receiving State shall be exercised in such a manner as will avoid undue interference with the conduct of the business of the mission.

#### Article 29

A person enjoying diplomatic privileges and immunities shall not, by virtue of the laws of the receiving State, acquire the nationality of that State against his will.

#### Article 30

*Paragraph 1.* The text of the Commission's draft article.

*Paragraph 2.* A new paragraph reading as follows:

"2. A member of the administrative and technical staff of the mission, a member of the service staff or a private servant of the head or of a member of the mission who is a national of the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, any jurisdiction assumed by the receiving State shall be exercised in such a manner as will avoid undue interference with the conduct of the business of the mission."

*Article 31*

*Paragraph 1.* The last sentence should be amended to read: ". . . from the moment when his appointment is notified to and accepted by the Ministry of Foreign Affairs." (In contradiction with article 4?).

See also the Italian proposal (A/3859, annex, sect. 10).

*Paragraph 2.* The paragraph should begin as follows: "2. When the functions of a person enjoying privileges and immunities have come to an end, exemption from customs dues shall cease. The other privileges and immunities . . .".

*Paragraph 3.* The following sentence should be added at the end: "Estate, succession and inheritance duties shall be levied only on immovable property situated in the receiving State".

*Article 32*

*Paragraph 1.* The paragraph should begin as follows: "1. If a diplomatic agent or some other member of a diplomatic mission or a member of their families enjoying diplomatic privileges and immunities passes through . . .".

*Paragraph 2* should read as follows:

"2. Third States shall accord to dispatches and other communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State. They shall accord to diplomatic couriers in transit the same inviolability and protection as the receiving State."

*Article 33*

No change.

*Article 34*

According to the commentary, the communication is addressed to the Government of the sending State, but it may be addressed to the head of the mission.

*Article 35*

A new sentence should be added: "The withdrawal of property shall be subject to the exemption laid down in article 31, paragraph 3".

*Article 36*

*Sub-paragraph (a).* In accordance with the Netherlands proposal (A/3859, annex, sect. 14), delete the words "even in case of armed conflict" and add a new article, as follows:

*"Article 36 A*

"In case of the outbreak of an armed conflict, the receiving State shall respect and protect the premises of the mission, together with its property and archives during a reasonable period as mentioned in article 31, paragraph 2".

Alternatively sub-paragraph (a) might be amended as proposed and the situation arising in case of armed conflict dealt with in the commentary.

Sub-paragraph (b) and (c). Substitute the words "accepted by" for the words "acceptable to".

*Additional provisions*

In keeping with the Luxembourg Government's proposals with regard to the application of social legislation (A/3859, annex, Sect. 13), the following article is submitted:

"The members of the mission and the members of their families who form part of their households shall be exempt from the social security legislation in force in the receiving State, provided that they are not nationals of that State.

"If a member of the mission or a private servant of a member of a mission is subject to such legislation, his employer shall, if the legislation so directs, pay the contributions payable in pursuance of the said legislation."

**Document A/CN.4/116/Add.2**

[Original text: French]

[27 May 1958]

ADDITIONAL ARTICLES PROPOSED BY THE  
SPECIAL RAPPORTEUR

*Article . . .*

If a State applies a rule of the draft narrowly, the other States shall not be bound, vis-à-vis that State, to apply it more liberally.

*Article . . .*

Two or more States may agree to extend the privileges and immunities referred to in the draft and the classes of persons qualifying for the benefit thereof.

# LAW OF TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/115\*

Third report by G. G. Fitzmaurice, Special Rapporteur

[Original text: English]  
[18 March 1958]

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\* Incorporating document A/CN.4/115/Corr.1.

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## INTRODUCTION

1. For the general scheme of the Special Rapporteur's work on treaties, he refers to paragraphs 1 and 2 of his second report (A/CN.4/107) prepared in 1957. In that report, the subject of termination of treaties, which was to form part III of a first chapter of a treaty code, was con-

sidered—this first chapter being devoted to the topic of the validity of treaties in its different forms. After submitting in 1956 a first report on formal validity (conclusion of treaties) (A/CN.4/101), constituting part I of the proposed chapter, the Rapporteur decided, for reasons explained fully in paragraph 2 of his second report, to

deal next with the subject of temporal validity (termination and suspension) although this would really form part III of the proposed chapter, whilst a part II on essential validity (intrinsic legality and force of treaties) would eventually come between part I (conclusion) and part III (termination). The present report contains this part II, though only in provisional form. The Rapporteur hesitated whether, for this year, he should not complete certain parts of his second report then left open—see in particular paragraphs 211 and 227 of the commentary in that report. But it seemed to him that, since the topic of essential validity is both necessary in order to complete the subject of validity as a whole, and also has distinct affinities with the topics both of the conclusion and the termination of treaties (a number of analogies and questions of cross-classification arising), it would be of use to the members of the Commission, when considering his first and second reports, to have before them a set of articles on essential validity with a commentary thereon—if only to see how this would fit into the general scheme of the work.

2. The topic of essential validity is not free from difficulty, and raises (if less acutely) a number of the same problems of classification, arrangement, differentiation between the cases of different types and classes of treaties etc. as arose on the other two reports, and particularly in connexion with the topic of termination. But the treatment of essential validity as a topic is subject to a difficulty of its own, to which the other two main aspects of validity are not—namely the extreme paucity of the material (decided cases, discussion by writers, etc.) dealing with it. There is a reason for this. The fact is that, whereas many concrete problems have arisen internationally in connexion with the process of concluding treaties, and equally in connexion with the process of termination, and many actual cases of termination, both legitimate and illegitimate, have occurred, there have been hardly any cases—or very few—raising the issue of essential validity; and, as regards some of the forms it can theoretically take, virtually none at all.

3. It is not difficult to see why this should be so, for this is essentially a sphere in which conditions in the international field differ very considerably from those in the domestic field. The point is best presented as follows. In private law, the question of flaws in the validity of contracts (for example, fraud and mistake) has reference (both actively and passively) mainly to the case of individuals. It is individuals who made mistakes, or are misled, or who misrepresent or conceal, or are subjected to coercion. Questions of capacity also, at any rate of incapacity arising from status, relate largely to individuals (minors, wards, persons of unsound mind, etc.). All these questions are of course capable of arising with reference to corporate and other juristic entities, but in fact do so relatively seldom, and even when they do, they tend to arise in a different way. For instance, it is possible to imagine physical coercion practised on the manager or director of a corporation to induce him to sign a contract on behalf of the corporation; but it is difficult to imagine coercion applied to the corporation itself, as an entity, *except* in that way. No company would be able to challenge the validity of a contract it had entered into with a rival company merely on the ground that this company had threatened to put it out of business if it did not. The parallel here with the international situation is very close, and also significant. It is something resembling this attitude of domestic law on the subject of duress that also in very large measure accounts

for the traditional doctrine of international law that a treaty is not invalid because of duress or coercion applied or threatened to the State itself, but only if it is applied or threatened to the person of the individual negotiator or plenipotentiary. The significance, however, is that this is so because a State is closer in its nature to a corporate entity than it is to an individual, and this also accounts for the fact that a large part of the private law on the essential validity of contracts—which has been evolved mainly with reference to the position and actions of individuals rather than of corporate entities—is inapplicable or inappropriate to the case of States, international organizations and other entities that may possess a certain treaty-making capacity such as insurgents recognized as having belligerent rights, *de facto* authorities in control of specific territory etc.; for all these resemble corporate entities in their nature far more than they do individuals. It follows quite naturally that, whereas in the private law textbooks on contract, extensive sections are devoted to flaws affecting the validity of contracts (fraud, mistake, etc.), and these sections are of considerable complexity, and may contain very great refinements, the corresponding sections of international law textbooks are usually extremely brief, and only deal with the matter in a broad general way; for much of what is contained in textbooks on contract does not arise in the international field. An illustration is afforded by the case of mistaken identity, which occupies much space in the books on contract law—the sort of case in which A contracts with B believing him to be C, in circumstances in which A would not otherwise have entered into the contract. In private law this type of case can give rise to many complications and refinements; but in international law it can hardly arise. States do not mistake one another's identities. The question of their treaty-making capacity may arise, but that is a different matter, and even here very few concrete cases have occurred. In the same way, questions such as those of fraud and error seldom arise, for the whole process of treaty making is too deliberate, and subjected to too many checks, to afford more than a rather remote chance of such situations occurring.

4. It is indeed significant, as pointing in the same direction, that the international law aspects of this matter to which the fullest discussion has been accorded by the authorities, are precisely those in which there exists a definite private law analogy in the field of corporate and not merely of individual rights and actions, such as the question of the authority of an organ of the State to enter into treaties on its behalf and the question of domestic consents and constitutional limitations, or the question of the legality of the object of a treaty. These questions are paralleled in the private field by those of the authority of an officer of a corporation to bind it, and of the legality of certain contracts as being contrary to specific prohibitions of law, or to public policy.

5. The conclusion to which these considerations might seem to tend is that in the international field the question of the essential validity of contractual instruments (treaties) is not of primary importance, and certainly cannot compare in importance with other aspects of treaty law. Nevertheless the subject is not wholly lacking in importance, and certainly involves much that is of juridical interest. Even if certain situations occur but seldom, international law cannot entirely neglect to provide for them. There are clearly dangers in failing to define (and therefore to circumscribe) concepts which, if left undefined and uncircumscribed, might be made the

basis of processes that could be detrimental to the stability and certainty of the treaty obligation.

6. The Rapporteur will almost certainly present a supplementary report on this subject at some later stage. For instance, he does not feel he has fully thought out all the implications of the question of treaties that are in conflict with international law or with other treaties. But he hopes to have said enough to show that this question is not a simple one and cannot satisfactorily be dealt with (as it sometimes has been) on the basis merely of a few broad generalizations. There is also more to be said about such topics as constitutional limitations and requirements respecting the exercise of the treaty-making power by a State; and about the use or threat of force in obtaining the conclusion of a treaty. But it would be of great assistance to the Rapporteur, on these and other points, to have, when possible, some indication of the Commission's views: hence this report.

## 1. TEXT OF ARTICLES OF CODE

### First Chapter. The validity of treaties

[Part II, which appears below, provisionally completes the first chapter on the validity of treaties, this first chapter consisting of three parts as follows:

*Part I. Formal validity (framing and conclusion of treaties)*, which was dealt with in the Special Rapporteur's first report on the law of treaties (A/CN.4/101);

*Part II. Essential validity (intrinsic legality and operative force)*, the text of which is given below;

*Part III. Temporal validity (duration, termination, revision and modification of treaties)*, which was dealt with in the Special Rapporteur's second report on the law of treaties (A/CN.4/107).]

### Part. II. Essential validity (intrinsic legality and operative force of treaties)<sup>1</sup>

#### SECTION A. GENERAL CHARACTER OF THE REQUIREMENT OF ESSENTIAL VALIDITY

##### *Article 1. Definitions*

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

[This is left blank for the present, for the reasons given in the commentary.]

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

(a) Lack of essential validity may attach to parts of treaties even where the treaty as a whole is not invalidated;

<sup>1</sup> This part is arranged as follows:

Section A. General character of the requirement of essential validity.

Section B. The specific conditions of essential validity.

Sub-section 1. Requirements attaching to the status of the parties. (Impediment of defective capacity).

Sub-section 2. Requirements (other than formal) attaching to the origin and method of procurement of the treaty. (Impediment of defective consent).

Sub-section 3. Requirements attaching to the object of the treaty. (Impediment of defective content).

Section C. Legal effects of lack of essential validity, and the modalities of its establishment.

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

(c) In the case of plurilateral or multilateral treaties, invalidity, considered in relation to any individual party to the treaty, is to be regarded as referring not to the invalidity of the treaty itself—as a whole—but to the possible invalidity of the participation of that individual party.

### *Article 2. The concept of essential validity*

1. Essential validity which, as indicated in article 10, paragraph 4, of part I of the present Code [A/CN.4/101], denotes validity in point of substance, having regard to the requirements of contractual jurisprudence, is a term used to describe that intrinsic or inherent validity which a treaty must possess, in addition to its formal validity (regularity of conclusion) and its temporal validity (continuing existence and non-termination), in order to have full obligatory force and give rise to international obligations. Accordingly, the question of essential validity presupposes the existence of an instrument regularly concluded as to its form, and having entered into force in the manner provided in part I of the present Code, and not having been terminated or come to an end in the manner provided in part III [A/CN.4/107].

2. It follows that, in the sense indicated in paragraph 1 above, the essential validity of a treaty consists in the presence of all those conditions which, assuming the regular conclusion of the treaty as such (formal validity), and its non-termination (temporal validity), are necessary in order to render it juridically operative and effective; and correspondingly in the absence of any circumstances vitiating it or rendering it otherwise void, inoperative or unenforceable.

3. For the purposes of the present Code, the notion of essential validity comprises the absence not only of elements causing the treaty (although existing as such) to be vitiated, but also of elements causing the instrument concerned (despite the apparent regularity of its conclusion) wholly to lack the status and character of a treaty; and of elements causing it (although in existence as a treaty and not tainted by any vice) to be inoperative and without effect, or unenforceable. Thus the notion of invalidity arising from lack of essential validity comprises inexistence, ineffectiveness, and unenforceability, as well as invalidity *stricto sensu*.

#### *[Alternative method of drafting paragraph 3 (no change of substance)*

3. As [or "In the sense in which"] the term essential validity is employed in the present Code, an instrument may be invalid as a treaty, on account of lack of essential validity, not only because of the presence of elements that vitiate it, but also because of the presence of elements rendering it in-existent as a treaty (despite the formal regularity of its conclusion), or of elements rendering it inoperative, though not tainted by any vice.]

### *Article 3. The requirement of essential validity in general*

In order to be valid, a treaty, or the participation of any party in it, must, in addition to having formal validity in the sense of part I of the present Code, and temporal validity in the sense of part III, possess es-

sentential validity in the sense specified in article 2 above and according to the rules set out in section B below.

*Article 4. The special case of plurilateral and multilateral treaties*

1. In the case of treaties to which there are more than two parties (plurilateral and multilateral treaties), the requirement of essential validity exists not only for the instrument itself as a treaty, but also for the participation of each party to it. In order that the treaty may be valid for any party, essential validity must attach both to the treaty itself and to the participation of that party.

2. However, except in those cases where, according to its correct interpretation, the operative effect of a treaty is dependent on the participation of a particular party or parties, or of all the States envisaged as parties, lack of essential validity in the participation of a party will not affect the validity of the treaty itself, unless it is a bilateral treaty, or unless the invalidity relates to the participation of all the parties.

3. It follows from paragraph 1 above that, subject to paragraph 2, the provisions of this part of the present Code are, in the case of plurilateral and multilateral treaties, to be read as applying *mutatis mutandis* in respect of the essential validity of the participation of the individual parties, as well as in respect of the essential validity of the treaty itself.

*Article 5. Procedural requisites for establishing lack of essential validity*

Lack of essential validity must be established. Hence, although such lack of validity avoids or nullifies the treaty—in some cases *ab initio*—the avoidance or nullification, whether of the treaty itself or of any particular participation in it, is not automatic, but subject to compliance with the procedures set out in article 23 below.

*Article 6. Classification of the requirements of essential validity*

1. The requirements of essential validity may be classified in several ways, of which the following are the chief:

(a) According to the positive character of the requirement involved, namely:

- (i) Requirements attaching to the status of the parties;
- (ii) Requirements attaching to the origin and method of procurement of the treaty;
- (iii) Requirements attaching to the object of the treaty.

(b) According to the nature of the defect involved, namely:

- (i) Defects of capacity;
- (ii) Defects of origin or procurement;
- (iii) Defects of content.

(c) According to the type of effect produced, namely:

- (i) Total non-existence of the treaty;
- (ii) Vitiating of the treaty;
- (iii) Ineffectiveness of the treaty.

2. Heads (a) and (b) in the foregoing paragraph relate to different facets of the same thing, and are treated together in section B below (The specific conditions of essential validity). Head (c) is treated in section C (Legal effects of lack of essential validity, and the modalities of its establishment).

SECTION B. THE SPECIFIC CONDITIONS OF ESSENTIAL VALIDITY

*Article 7. Necessity for the presence of all the conditions specified*

A treaty will lack essential validity, in the sense of this part of the present Code, if any of the conditions specified in this section are absent, or if any of the corresponding defects are present.

*Sub-section 1. Requirements attaching to the status of the parties. (Impediment of defective capacity)*

*Article 8. Treaty-making capacity*

1. Absence of treaty-making capacity may arise either from a general and inherent deficiency attaching to the nature of the entity purporting to enter into the treaty, or from a limitation of status affecting the treaty-making capacity of an entity not inherently wanting in such capacity.

2. The parties to the treaty must possess treaty-making capacity according to international law, that is to say they must be either (a) States in the international sense of the term; (b) para-Statal entities recognized as possessing a definite if limited form of international personality, for example, insurgent communities recognized as having belligerent status—*de facto* authorities in control of specific territory; (c) international organizations (as defined in article 3(b) of part I of the present Code) possessed of treaty-making capacity under their constitutions; or (d) international authorities set up by treaty to administer certain territory or areas and invested with a treaty-making power. In addition, the parties must conform to the provisions of paragraph 4 below.

3. The component states of a federal union, not possessing any international personality apart from that of the union, do not possess treaty-making capacity. In so far as they are empowered or authorized under the constitution of the union to negotiate or enter into treaties with foreign countries, even if it is in their own name, they do so as agents for the union which, as alone possessing international personality, is necessarily the entity that becomes bound by the treaty and responsible for carrying it out. The same applies *mutatis mutandis* to dependent territories not possessed of statehood as defined in article 3(a) in part I of the present Code.

4. The parties must not only possess inherent treaty-making capacity, or possess it *in posse* as entities not regarded by international law as fundamentally lacking in it, but must also possess it *in esse*, and must be contracting within any limits on their capacity arising from their status. [Thus the treaty-making capacity of a dependent or protected State, while not inherently absent, residually and *in abstracto*, is governed by the status of dependency or protection and by the arrangements or situation existing between it and the protecting State. Such an entity may, for the time being, lack all separate treaty-making capacity (i.e. except via the agency of the protecting State), or may possess it only in specified and limited classes of cases. Similarly, international organizations and authorities only have inherent treaty-making capacity within the scope of their purposes and functions, and matters ancillary thereto, and are also subject to any specific limitations arising from the terms of their constitutions.]

5. Where the limitation does not arise from *status*, the case is not one of capacity. A fully sovereign independent State which undertakes not to enter into a

particular treaty or class of treaty may be in breach of its undertaking if it in fact proceeds to do so; but it does not follow that the treaty thus entered into lacks essential validity or falls to be treated as null and void.

6. Equally, limitations imposed upon the treaty-making power of a State by its own constitution or other domestic law provisions do not, in the international sense, create incapacity; nor are they, in that sense, limitations on the State's capacity. Action in excess of any such limitations will raise an issue, not of international treaty-making capacity, but of the effect of non-compliance with constitutional or other domestic requirements.

7. The case of lack of authority on the part of the individual person or persons negotiating the treaty is equally not a case of capacity, but of authority or credentials affecting the formal, rather than the essential, validity of the treaty. This case is already covered by article 22 in part I of the present Code.

*Sub-section 2. Requirements (other than formal) attaching to the origin and method of procurement of the treaty. (Impediment of defective consent)*

*Article 9. Consent in general*

1. The mutual consent of the parties, and reality of consent on the part of each party, is an essential condition of the validity of any treaty, or, as the case may be, of the participation of any particular party.

2. There must accordingly be a *consensus ad idem* on the part of the parties; but the existence of such a consensus will be presumed unless the contrary is established.

3. A consent, apparently regularly given from the purely formal point of view, will nevertheless be deemed to be vitiated as a matter of essential validity if it is subsequently shown to be tainted by material error or lack of *consensus ad idem*, fraud or duress, according to the meaning ascribed to those terms by, and subject to the conditions specified in, articles 11 to 14 below.

*Article 10. The question of compliance with constitutional or other domestic requirements*

For the purposes of this part of the present Code, consent means consent on the international plane, and the reality of such consent is not impaired by the fact that, on the domestic plane, certain consents are lacking; or that there has otherwise been a failure by the State concerned, or its authorities, to observe the correct constitutional processes as required by the domestic law for the purpose of proceeding to signature, ratification, accession or other act of participation in the treaty; or to keep within any limitations on the treaty-making power imposed by the domestic law or constitution. These are and remain domestic matters, and the question is governed by the principle stated in Article 9, paragraph 3 of the introduction to the present Code [A/CN.4/101], that because States have no choice but to accept as internationally authentic the acts of the legitimate executive authority of another State, carried out on the international plane in an apparently regular manner, so also are they entitled to rely on the authenticity of such acts, which may not subsequently be denied by the State from whence, through its executive authority, they have emanated.

*Article 11. Error and lack of consensus ad idem (analysis and classification)*

1. Error means material error in some essential particular affecting the basis of the treaty.

2. The cases of error or mistake may, for the purposes of this Code, be classified as follows:

(a) Error on the part of both parties, which may take the form either (i) of common and identical error, about the same thing; or (ii) of mutual error, but about different things or in different senses;

(b) Error on the part of one party only.

*Article 12. Error and lack of consensus ad idem (effects)*

1. Provided the conditions set out in paragraph 2 below are satisfied, error, if of the kind specified in paragraph 1 of article 11, will:

(a) In cases coming within the scope of head (a)(i) of paragraph 2 of article 11, invalidate the treaty;

(b) In cases coming within the scope of head (a)(ii), invalidate the treaty, provided the errors are such as to lead to a lack of *consensus ad idem* sufficient to preclude any common basis of agreement;

(c) In cases coming within the scope of head (b), invalidate the treaty only if the error was induced or contributed to by the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence of the other party, but not otherwise.

2. In order to rank as such for the purposes of the present article, the error must, in addition to being a material one as specified in article 11, paragraph 1, above, have the following characteristics:

(a) It must be an error of fact not of law;

(b) It must not be simply an error of judgment, and must not affect merely the motives of the parties in concluding the treaty, unless these themselves involve a mistaken belief as to the existence or actuality of a fact or state of facts;

(c) It must be excusable and not such as could have been avoided by the exercise of reasonable care, diligence, investigation or foresight;

(d) It must relate to a circumstance, fact, or state of facts assumed to be correct or in existence, or to prevail, at the time of the conclusion of the treaty, and not to something anticipated in the future or occurring subsequently.

3. Although, as provided in paragraph 1(c) above, an error made by one party only is not a ground of invalidity unless induced by the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence of the other, yet, if the treaty is a plurilateral or multilateral one, an error made by a party which did not take part in the original conclusion of the treaty, affecting the fundamental basis of its own subsequent participation, will constitute a ground on which the invalidity of that participation may be claimed, provided the error in other respects conforms to the conditions of paragraph 2 above.

4. The invalidity of a treaty on the basis of an error, even if the error is mutual and conforms to the above conditions, cannot be claimed by a party whose own fault or negligence caused or contributed to the error.

*Article 13. Fraud or misrepresentation*

1. Subject to the provisions of paragraphs 2 to 4 below, fraud or misrepresentation by one party to a treaty, provided it relates to a material particular and has induced, or contributed to inducing, the other party to conclude or participate in the treaty, in such a way that that party would not otherwise have done so, is a circum-

stance vitiating the treaty, or the participation of the other party, as the case may be.

[*Alternative method of drafting paragraph 1 (no change of substance)*]

1. Subject to the provisions of paragraphs 2 to 4 below, if the participation of a party to a treaty has been brought about by the fraud or misrepresentation of the other, in a material particular, and in such a way as to induce or contribute to that participation, there is no true consent and the treaty or the participation, as the case may be, lacks essential validity.]

2. Fraud or misrepresentation means wilful intent to deceive, i.e. statements or representations made, whether orally or in writing (or by means of maps, plans, photographs, drawings etc.), in the knowledge that they are false (or without belief that they are true, or indifferently as to whether they are true or false), and for the purpose of deceiving and of procuring the conclusion of the treaty or the participation of the other party. Innocent misrepresentation is not fraud, though it may be a ground of mutual error avoiding the treaty or any participation in it on that basis.

3. The fraudulent statement or misrepresentation must be a statement of misrepresentation of fact, not of law.

4. Expressions of opinion, even if intended to mislead, do not constitute fraud or misrepresentation, provided they do not take the form of statements of fact, and are not made in the knowledge that they are false, or in circumstances in which the parties have not equal means of knowledge, or in which the party expressing the opinion has peculiar means of knowledge.

5. The mere concealment or non-disclosure by one party of facts or information in the possession of that party, or to which it has access, even if of a material character, does not constitute fraud, provided the facts or information were equally available or accessible to the other party, or could have become so through the ordinary processes of enquiry, investigation or research. Where, however, knowledge of the facts or of a material particular is exclusively available or accessible to, or within the means of ascertainment of one party only, upon whom the other must necessarily rely for knowledge of them, concealment or non-disclosure will constitute fraud if it relates to facts or circumstances that would clearly have affected the judgment of the other party as to the conclusion of the treaty.

#### Article 14. Duress

1. Subject to the provisions of paragraphs 2 to 5 below, the conclusion of a treaty brought about by duress or coercion, whether physical or mental, actual or threatened, employed directly and specifically against the persons, of the individual agents, plenipotentiaries, authorities or members of organs engaged in negotiating or signing, or ratifying or acceding to, or any other act of participation in a treaty, vitiates the consent apparently given, and invalidates the act concerned, and consequently the treaty.

2. Duress or coercion against the persons mentioned in paragraph 1 includes duress or coercion, actual or threatened, against their relatives or dependents, but not against their property.

3. Fear (for the physical or mental safety of the individual, his relatives or dependents) being the essential element of duress, any forms of pressure not involving that element, such as argument, entreaty, advice and per-

suasion, do not in themselves constitute duress, though they may be combined with it; nor does "undue influence", as that term is normally employed in private law, constitute duress.

4. Duress for the purposes of the present article means duress addressed to the persons concerned, as individuals, or as members of the negotiating, ratifying or acceding body or organ, and directed to securing the performance of the act of participation. Duress is not constituted by the threat of the consequences that will or may ensue for the State of which those persons are nationals, in the event of their non-compliance (or for themselves as nationals of that State), nor by their fear of such consequences, nor by the existence of any indirect threat to themselves or their relatives or dependents that may arise from the possibility of such consequences.

5. A treaty which has been signed or otherwise initially concluded under duress within the meaning of the present article, will nevertheless not be invalidated if it is subsequently ratified, or in some other way confirmed by the State concerned, with knowledge of that fact, and without any exercise of duress in respect of the persons of the ratifying or confirming agents, authorities or organs.

*Sub-section 3. Requirements attaching to the object of the treaty. (Impediment of defective content)*

#### Article 15. Possibility of the object

1. The object of the treaty must be a possible one. A treaty which, in the literal sense, is impossible of performance, and incapable of any application at all, will even though not strictly invalid *in se*, be abortive and inoperative.

2. The impossibility must exist at the time of the conclusion of the treaty and not arise subsequently, or the case will be one of supervening impossibility, and will fall under the head, not of avoidance, but of termination of treaties, as provided in article 17, case (iv), of part III of the present Code.

3. Where the impossibility arises from facts unknown to both or all of the parties at the time of the conclusion of the treaty, the case is strictly one of common and identical error, and the treaty may be regarded as invalidated, or as rendered inoperative, on that ground.

4. Where the impossibility, existing at the time of the conclusion of the treaty, was then known to one of the parties, but not to the other or others, or has been caused or contributed to by that party; or where the conclusion of the treaty might have been avoided but for that party's fault or negligence, the treaty will nonetheless be inoperative *ab initio*, but the party at fault will be liable to make reparation for any resulting loss or detriment.

#### Article 16. Legality of the object (general)

1. The object of a treaty must be lawful; but the invalidity of the treaty does not necessarily result from the fact that, in the relations between the parties, it modifies or varies a rule of international law, nor from the sole fact that its provisions are at variance with the provisions of a previous treaty.

2. It is essential to the validity of a treaty that it should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of *jus cogens*.

3. Incompatibility with the provisions of a previous treaty gives rise *prima facie* to a conflict of obligation,

rather than, necessarily, to the invalidity of the treaty. Such conflict will fall to be resolved in accordance with the provisions of article 18 below.

4. Since a treaty *prima facie* creates direct obligations and rights only for, and as between, the parties to it, and is *res inter alios acta* for and in relation to non-parties, it cannot, even if fully lawful as to its objects, and consistent with previous treaties, bind non-parties or create rights against them, or modify or affect their rights. The issue of illegality is therefore formally and primarily an issue affecting the relations between the parties to the treaty.

*Article 17. Legality of the object (conflict with international law)*

It being always open, *prima facie*, to any two or more States to agree, for application *inter se*, upon a rule or régime varying or departing from the rules of customary international law in the nature of *jus dispositivum*, a treaty embodying such an agreement cannot be invalid on that ground. Hence it is only if the treaty involves a departure from or conflict with absolute and imperative rules or prohibitions of international law in the nature of *jus cogens* that a cause of invalidity can arise. Since the treaty is in any event *res inter alios acta*, and without force as against non-parties, the invalidity as such of the treaty only affects directly the relations between the parties to it, and means that neither or none of the parties can claim compliance with it on the part of the other or others.

*Article 18. Legality of the object (conflict with previous treaties—normal cases)*

1. Where a treaty is in conflict with a previous treaty embodying or generally regarded as containing accepted rules of international law in the nature of *jus cogens*, the invalidity of the treaty will ensue on that ground in accordance with the provisions of article 17 above.

2. Subject to the generality of paragraph 1 above, the present article applies primarily to bilateral treaties, and to those pluri- or multilateral treaties which are of the reciprocating type, providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually. The special case of other kinds of pluri- or multilateral treaties forms the subject of article 19 below.

3. The question of incompatibility or conflict between treaties of the kind specified in paragraph 2 above may arise in any of the following situations:

(a) In the case both of bilateral and of pluri- or multilateral treaties:

- (i) The two treaties have no common parties: no party to the one is also a party to the other.
- (ii) The two treaties have common and identical parties: all the parties to the one are also parties to the other.

- (iii) The two treaties have partly common and partly divergent parties: some parties are parties to both, some to the earlier only, and some to the later only. In the case of two bilateral treaties this takes the form that there is one party common to both treaties, and that there are two other parties, one of whom is a party to the earlier treaty only, and the other a party to the later only.

(b) In the case of multilateral treaties only, or where at least one of the two treaties is a multilateral treaty:

(iv) Partially common parties, both or all of the parties to the earlier treaty being also parties (but not the only parties) to the later treaty (case of a later treaty to which both or all of the parties to the earlier agree).

(v) Partially common parties, but where some only of the parties to the earlier one are parties to the later, which has no other parties (case of a later treaty to which some only of the parties to the earlier agree, i.e. case of a separate and subsequent treaty on the same subject concluded between less than the full number of the parties to the earlier).

Subject to the provisions of paragraph 1 above, inconsistencies or conflicts arising in these cases are resolved in accordance with the provisions of paragraphs 4 to 8 hereunder.

4. *Case (i) in paragraph 3.* The validity of a treaty cannot be affected merely by the existence of a previous treaty to which neither or none of the parties to the later treaty are also parties.

5. *Case (ii) in paragraph 3.* In so far as there is any conflict, the later treaty prevails, and either in effect modifies or amends the earlier, or abrogates some of its provisions, or supersedes it entirely and, in substance, terminates it.

6. *Case (iii) in paragraph 3.* In so far as there is any conflict, the earlier treaty prevails in the relations between the party or parties to the later treaty who also participated in the earlier one, and the remaining party or parties to that earlier one: but the later treaty is not rendered invalid *in se*, and if, on account of the conflict, it cannot be or is not carried out by the party or parties also participating in the earlier treaty, there will arise a liability to pay damages or make other suitable reparation to the other party or parties to the later treaty not participating in the earlier, provided the other party concerned was not aware of the earlier treaty and of the conflict involved.

7. *Case (iv) in paragraph 3.* The effect is fundamentally the same as in case (ii). In so far as there is any conflict, the later treaty prevails for or in the relations between the parties to it who are also parties to the earlier, and may to that extent in whole or in part modify, abrogate, supersede, or terminate the earlier.

8. *Case (v) in paragraph 3.* The effect is fundamentally the same as in case (iii). In so far as there is any conflict, the earlier treaty prevails in the relations between the parties to the later treaty and the remaining party or parties to the earlier one. However, where the earlier treaty prohibits, as between any of the parties to it, the conclusion of an inconsistent treaty, or if the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier one, then the later treaty will be invalidated and deemed null and void.

*Article 19. Legality of the object (conflict with previous treaties—special case of certain multilateral treaties)*

In the case of multilateral treaties the rights and obligations of which are not of the mutually reciprocating type, but which are either (a) of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely

a non-performance in their relations with the defaulting party; or (b) of the integral type, where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others—any subsequent treaty concluded by any two or more of the parties, either alone or in conjunction with third countries, which conflicts directly in a material particular with the earlier treaty will, to the extent of the conflict, be null and void.

#### Article 20. Ethics of the object

The unethical character of a treaty which is not actually illegal by virtue of the provisions of articles 16 to 19 above, cannot *per se* be a ground of invalidity as between the parties which have concluded it (and has in any case no force as against non-parties). Nevertheless an international tribunal may refuse to take cognizance of or apply it (even as between the parties, and even if its invalidity has not been claimed) in those cases in which the treaty is clearly contrary to humanity, good morals, or to international good order or the recognized ethics of international behaviour.

### SECTION C. LEGAL EFFECTS OF LACK OF ESSENTIAL VALIDITY, AND THE MODALITIES OF ITS ESTABLISHMENT

#### Article 21. Legal effects (classification)

1. Lack of essential validity, as that term is used herein, may, according to the occasion of it, cause the instrument concerned:

(a) To lack all status as, and not to constitute, a treaty at all;

(b) Though constituting a treaty qua instrument, to be invalid or inoperative.

2. In cases coming under paragraph 1(b) above, lack of essential validity may cause the treaty to be: (a) void *ab initio*; (b) voidable, and actually void from the date of voidance; (c) totally inoperative; (d) unenforceable. However, although these are the effects produced in principle and *in posse*, their realization in practice and *in esse* is subject to the procedure specified in article 23 below.

#### Article 22. Effects in specific cases

1. The effects produced by lack of essential validity in the undermentioned cases, provided the existence of these is established in accordance with the provisions of section B hereof, and article 23 below, are as follows:

(a) Lack of capacity of a party to the instrument concerned: the instrument does not rank as a treaty and lacks all status as such; or, in the case of multilateral treaties, the signature, ratification or accession of the entity lacking capacity has no status as such.

(b) Error, mistake or lack of *consensus ad idem*: the treaty is void *ab initio*.

(c) Fraud, fraudulent representation or concealment: the treaty is voidable.

(d) Duress: the treaty is voidable.

(e) Impossibility of the object: the treaty is totally inoperative, though not strictly invalid as an instrument.

(f) Illegality of the object resulting from conflict with rules of international law in the nature of *jus cogens*: the treaty is unenforceable.

(g) Illegality of the object resulting from certain classes of conflicts with previous treaties: the treaty is unenforceable.

(h) Unethical character of the object of the treaty as declared by an international tribunal: the treaty is unenforceable.

#### [Alternative method of drafting paragraph 1 (no change of substance)]

1. Assuming the existence of the cause of invalidity to be established in accordance with the provisions of section B hereof and article 23 below, then:

(a) Lack of treaty status for the instrument concerned either as a whole or as respects the signature, ratification or accession of the entity concerned, results from lack of capacity of one or more parties;

(b) Nullity *ab initio* results from error, mistake or lack of *consensus ad idem*;

(c) Voidability results from fraud, fraudulent misrepresentation or concealment, and duress;

(d) Total inoperativeness *ab initio* results from the impossibility of the object;

(e) Unenforceability results from the fundamental illegality of the object of the treaty (whether by reason of certain conflicts with international law or of certain conflicts with earlier treaties), and from the unethical character of the object, if so declared by an international tribunal.]

2. The consequential results flowing from the different effects of lack of essential validity as stated in paragraph 1 above are as follows:

(a) Where there is lack of treaty status, or where the treaty is void *ab initio* or totally inoperative, the whole transaction is a nullity and void with retroactive effect: any steps taken in consequence of it are automatically nullified, and, in so far as this may arise and may be possible, there must be a complete *restitutio in integrum* or restoration of the *status quo ante*, but damages or reparation will not, as such, be recoverable except in cases involving an element of fraud.

(b) Where the treaty is merely voidable, the obligations of the parties cease as from the date of voidance, but without retroactive effect or the automatic nullification of any steps already taken under or in execution of the treaty: however, so far as material and possible, reparation by way of restoration, restitution or other cancellation or rectification, and ("or" alternatively) damages or other remedy may be claimed by the party aggrieved.

(c) Where the treaty is unenforceable, neither party (or "none of the parties") can claim its further performance from the other or others, but no claim by either or any party will lie against another for damages or other remedy or reparation.

#### Article 23. Procedure for establishing the claim of lack of essential validity

1. The question of lack of essential validity being inherently controversial, and itself liable to be in issue between the parties, neither or no party may unilaterally declare the invalidity of the treaty, or of its own participation therein, on any of the grounds set out in section B hereof. This applies even in the case where an inherent lack of international treaty-making capacity in the entity concerned is the alleged cause of invalidity.

2. Except where, as in the case of common and identical error, the parties are in agreement on the subject; or where, as in certain cases of impossibility of the object (for example, non-existence of the *res* to be dealt with) the element of doubt cannot arise—a party to any instrument

purporting to be a treaty instrument, alleging the invalidity of it, or of its own participation in it, on grounds of lack of essential validity must, within a reasonable period from the occurrence or discovery of the alleged cause of invalidity, address to the other a reasoned statement of the grounds of this claim.

3. If the claim is rejected, or not accepted within a reasonable period, the party making it may offer to submit the matter to an appropriate tribunal to be agreed upon between the parties (or, failing such agreement, to the International Court of Justice). If such an offer is made, but is not accepted within a reasonable period, the party making the claim may declare the suspension of any further performance of the treaty or instrument involved, and, if the offer still remains unaccepted after six months from that date, may declare actual invalidity—with the effects and consequential results specified in articles 21 and 22 above. If the party claiming invalidity does not offer reference to a tribunal, as herein specified, the treaty or instrument involved will be deemed to be valid and in full force and effect.

4. If reference to a tribunal is offered and accepted, it will be for the tribunal to decide what temporary measures, in regard to suspension or otherwise, may be taken by the parties pending the tribunal's decision, and as to the consequences of any finding of invalidity it may give.

5. In those cases where the instrument or treaty itself, or other applicable agreement, contains a provision for reference of any disputes concerning it to arbitration or judicial settlement, such provision shall apply and, in case of conflict, prevail over the preceding paragraphs of the present article.

## II. COMMENTARY ON THE ARTICLES

[NOTE: The texts of the articles are not repeated in the commentary. Their page numbers are given in the table of contents at the beginning of the report.<sup>2</sup>]

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

### First chapter. The validity of treaties

#### Part II. Essential validity (intrinsic legality and operative force of treaties)

##### SECTION A. GENERAL CHARACTER OF THE REQUIREMENT OF ESSENTIAL VALIDITY

###### *Article 1. Definitions*

1. *Paragraph 1.* This is left blank for the present, for the same reasons, *mutatis mutandis*, as those given in respect of the corresponding article of part III in paragraphs 1 and 2 of the commentary in the Rapporteur's second report (A/CN.4/107).

2. *Paragraph 2.* A similar reference is made, *mutatis mutandis*, to paragraphs 3 and 4 of the commentary in the second report.

###### *Article 2. The concept of essential validity*

3. This article should be read in conjunction with articles 10 to 12 of part I on the conclusion of treaties (A/CN.4/101) and article 2 of part III on termination (A/CN.4/107).

4. *Paragraph 1.* A treaty is more than the piece of paper it is written on. It must possess substantive effect, and for that purpose it does not suffice that it was regularly concluded as to the manner in which it was drawn up, signed, etc. (i.e. that it possesses formal validity), and that it is still "in force" as an instrument, and has not come to an end or been terminated (i.e. that it possesses temporal validity). These things do not suffice if the treaty is tainted with some inherent vice, or subject to some fundamental flaw, destructive of its essence. In such cases the treaty is a mere shell lacking substance. There is the semblance of outward form, but the inner reality is not there.

5. At the same time, as the final sentence of this paragraph indicates, the whole question of essential validity presupposes the existence of an instrument regularly framed as to its form and method of conclusion, and still in existence as such—i.e. not yet terminated. Otherwise no instrument exists in respect of which the question of its essential validity can arise. However, certain elements are capable of being regarded as relevant either to formal or to essential validity, or in a sense to both—for instance, the question of any irregularity or deficiency in the domestic or constitutional processes preceding or leading up to the signature or ratification of the treaty, by or on behalf of the executive organ of the State. In so far as this invalidates the treaty,<sup>3</sup> is it the *conclusion* of the treaty that is invalidated, or is it rather the case that, if the formalities internationally required were duly complied with, the treaty possesses formal validity as an instrument, but may lack essential validity on the ground of want of any true consent on the part of the State as a whole, arising from the (domestically) unauthorized act of the executive in signing or ratifying it? Either view is possible. For the reasons given in paragraphs 74 and 75 of the commentary to his first report, the Rapporteur has preferred to regard this as a matter appertaining to essential validity. There is again the question of lack of authority in the person of the individual agent who carries out the processes necessary to the conclusion of a treaty—in particular signature. This is capable of being viewed as a matter relating to the reality of the consent given by or on behalf of the State concerned. However, it seems more appropriately to belong to the sphere of form, and to be a question of credentials or full powers, and has been dealt with as such in the first report (articles 20-23). Further reference to these points is made in connexion with articles 8 and 10 (see paragraphs 29, and 33-38 below).

6. *Paragraph 2.* The requirement of essential validity has both a positive and a negative aspect, and may be viewed from either standpoint. Positively, it stipulates that a treaty, though regularly concluded as to form, cannot be valid unless there are present in relation to it a number of other conditions, such as the reality of the consent apparently regularly given. These are the conditions of essential validity. Negatively, it calls for the absence of a number of elements or circumstances which, if present, will have a vitiating effect on the treaty. These are the factors causing or giving rise to lack of essential validity.

<sup>3</sup> Though, actually, the view taken here is that it does not. See paragraphs 33 to 38 below.

<sup>2</sup> For the arrangement of the articles, see footnote 1.

These two aspects are merely different facets of the same thing, and are complementary to each other.

7. *Paragraph 3.* The elements whose presence gives rise to lack of essential validity do not all have the same basic character, nor do they all have a similar effect or *modus operandi*. The term "essential validity" itself covers, or has to be regarded as covering, more than the directly vitiating facts. In some classes of cases, for example lack of capacity of the parties, the question is rather whether the instrument concerned (which may otherwise be untainted with any actual vice)<sup>4</sup> has the status or character of a treaty at all. It can be contended that this should be regarded as a matter of form rather than of substance (see remarks made in paragraph 5 above) and in the final draft of this Code it will be for consideration whether it should not be so treated. Then there are cases where the treaty is not so much lacking in essential validity, as fundamentally inoperative because of some basic flaw; yet it may have been regularly concluded and not be tainted by any vice as to consent. This occurs, for instance, when parties enter into a treaty having an object which is in fact (though unknown to them at the time) impossible of achievement, for example, the *res* does not exist.<sup>5</sup> It is in a certain sense inappropriate to speak of lack of validity in this type of case. It is more a question of lack of operative force or effect. However, it is difficult to find a place for this type of case except under the general head of essential validity, and it must probably be regarded as coming under that head, particularly as these cases are almost always cases involving error or mistake on the part of the parties, or even misrepresentation on the part of one of them, and these are unquestionably vitiating elements in the strict sense. At the same time, this type of case (which has certain affinities with that of *supervening impossibility of performance*)<sup>6</sup> could perhaps be regarded as one of automatic termination of the treaty or treaty obligation, rather than as one of essential validity. The theoretical difficulty here is whether such a treaty has any duration in time at all, capable of termination—that is to say, whether any obligation ever arises under it. It will be for eventual consideration where to place this case (an infrequent one in any event);<sup>7</sup> for the present it may remain where it is.

*Article 3. The requirement of essential validity in general*

8. The previous article having described the concept of essential validity with reference to its nature and place in the general context of the validity of treaties, the present article posits the formal requirement of essential validity. No further discussion seems necessary, since a similar requirement of principle exists under all systems of domestic law in the case of private contracts, and is a familiar element of private contract law.<sup>8</sup>

*Article 4. The special case of plurilateral and multilateral treaties*

9. *Paragraphs 1 and 2.* As in the case of the topic of termination of treaties (see second report *passim*), the

<sup>4</sup> That is to say, not vitiated by error, fraud, duress, etc.

<sup>5</sup> *Supervening impossibility* owing to the subsequent *extinction* of the *res* is of course a distinct concept, and involves the question of *termination* (see article 17, case (iii), and commentary, para. 97, in the second report) not invalidity.

<sup>6</sup> See article 17, case (iv), and commentary, paras. 98-100, in the second report.

<sup>7</sup> Although, for the reasons given in the introduction to the present report, all these cases are rare.

<sup>8</sup> And, of course, a much more conspicuous and actual one.

subject of essential validity is complicated (though to a much lesser degree) by the fact that not all treaties have the same character, and in particular by certain ways in which plurilateral or multilateral treaties differ from bilateral ones. It will be seen later (articles 18 and 19) in connexion with the subject of conflict with other treaties, that certain kinds of multilateral treaties are in a special position. The present article deals with a different point. Certain grounds of invalidity, for example, fundamental illegality of the object, affect the treaty as a whole and as such, however many or however few the number of the parties. But others, particularly those relating to the reality of consent, affect the treaty through the party or parties concerned, though sometimes, as in certain cases of error, both or all of the parties may be involved. Even if, however, only one party's consent is vitiated, this will obviously invalidate the whole treaty where the treaty is a bilateral one. But the same result will not necessarily follow (though it may) in the case of treaties having more than two parties. Especially as regards general multilateral treaties will it normally be the case that a vitiating element relating to the participation of a particular party (for example, one acceding subsequently, after the treaty is in force) will only affect the validity and operative effect of that participation, and not of the treaty as such. On the other hand, the mere fact that there are more than two parties will not necessarily prevent the whole treaty from being invalidated by a vitiating element affecting the consent of one of them only, if the treaty was clearly intended to operate for and between *all* the (say, three or four) parties concerned, or not at all. In such cases, lack of valid participation by one of them invalidates the whole treaty. In others, *per contra*, there may be no reason why the treaty should not have force and effect and operate between the remaining parties. The question is essentially one of interpretation of the treaty.

10. *Paragraph 3.* No particular comment is called for.

*Article 5. Procedural requisites for establishing lack of essential validity*

11. Ideally, this article, in view of article 23, may not be strictly necessary or in the best place. At this stage of the work however, its insertion here seems desirable, in order that the more detailed article setting out the requirements of essential validity, and the specific grounds causing absence of it, may be considered against the background of the proposal that such grounds cannot operate automatically to invalidate the treaty.

*Article 6. Classification of the requirements of essential validity*

12. While possibly not essential as part of any final code, an article of this type, by presenting a clear picture, may at this stage of the work, and in the same way as articles 6 to 8 in the second report (in the much more complex case of termination of treaties), serve a useful purpose.

13. *Paragraph 1, sub-paragraphs (a) and (b).* These are largely self-explanatory and represent a development of paragraph 2 of article 2 (see comments in paragraph 6 above). Taken together, these sub-paragraphs<sup>9</sup> mean that in each category there is a positive requirement necessary for the essential validity of the treaty; but the presence

<sup>9</sup> This is, basically, the classification suggested by Professor Alf Ross of Copenhagen University in his *A Textbook of International Law* (London, Longmans, Green and Co., 1947), sect. 37.

of this positive element consists largely in the absence or non-presence of certain other elements: negatively, therefore, essential validity consists in the absence or non-presence in each category of certain defects, the presence of which will vitiate or invalidate the treaty, render it inapplicable or unenforceable, or prevent its operation. It will be preferable to reserve comment on these specific elements themselves for later articles in which they are dealt with in detail.

14. *Sub-paragraph (c)*. This represents in the same way a development of paragraph 3 of article 2, as to which see comments in paragraph 7 above. *Sub-head (i)* is based on the distinction drawn by some authorities between the "*acte inexistant*" and the "*acte nul*".<sup>10</sup> This distinction seems to the Rapporteur to be a valid one. To say that a treaty is a nullity, even where it is deemed to be void *ab initio* and with retroactive effect, is not to say that it did not come into existence as a *treaty instrument*: indeed if it did not, there is nothing that can be said to be null or void *ab initio*. Before these terms (or rather the juridical processes involved in them) can have any significance, there must be something, otherwise possessed of treaty status, in respect of which they can function. There are however certain kinds of acts (not necessarily confined to the case of treaties) which are of such a nature that they cannot be said to possess any juridical status at all, even initially or in embryo. It is more than invalidity or nullity *ab initio*: it is total non-existence (juridically). Examples that have been given,<sup>11</sup> or can be imagined, are such things as a "sentence" of death passed (however much in solemn form) by a band of brigands on one of their number, a purported "cession" of sovereignty over territory effected by a private person, "permission" given by one country to the aircraft of another to fly over the territory of a third,<sup>12</sup> and so on. In cases of this sort, it is, above all, the manifest and self-evident nullity and lack of all possible juridical effect of the transaction that enables it to be treated as actually non-existent. In the field of treaties, the context in which this question arises, or may arise, is that of the treaty-making capacity of the parties; and where this lack of capacity is manifest, as it might be,<sup>13</sup> the doctrine of inexistence is readily applicable and on the same grounds. It is less readily applicable where the lack of capacity is not absolutely manifest, although grounds for asserting it exist. Still less is the doctrine of juridical non-existence readily applicable where the incapacity attaches not to the entity concerned as such and as a category (for example, a municipal council or other local authority has not and never can, *as such*, have any international treaty-making capacity), but to have the performance of certain types of acts (for example, a State not fully *sui juris* may have capacity to enter into certain kinds of treaties but not others, or only with certain consents or through certain agencies etc.).<sup>14</sup> Other possible complications are involved, and further discussion is deferred until article 8 is reached; nevertheless it would seem that despite these

<sup>10</sup> See, for instance, Paul Guggenheim, *Traité de droit international public* (Geneva, Georg et Cie, S.A., 1953), vol. I, pp. 87-90.

<sup>11</sup> Guggenheim, *op. cit.*, p. 88; Hans Kelsen, *Allgemeine Staatslehre* (Berlin, J. Springer, 1925), p. 277.

<sup>12</sup> For instance, if the other party to the instrument were a private corporation.

<sup>13</sup> *Idem*.

<sup>14</sup> However, as will be seen later, because such cases may be controversial, and the question of capacity itself open to argument, invalidity cannot simply be declared unilaterally. See the commentary on article 23.

difficulties, if incapacity, howsoever arising, is actually established, the position it leads to is the inexistence of the treaty (there is an instrument but it is not a treaty), rather than a treaty which exists but must be deemed to be a nullity.

15. In the cases coming under *sub-head (ii)* in this sub-paragraph, the act is not inexistent: there is an instrument which, provided it is not shown to be vitiated in any way, will constitute and rank as a treaty, and which ranks *prima facie* as such. There is a real something, having treaty character, of which it can be said that, for cause shown, it is invalid or invalidated, or a nullity. Nullity itself may be absolute or relative (*nullité absolue* and *nullité relative*) or, in English legal terminology, void *ab initio* (with retroactive effect) or merely voidable.<sup>15</sup>

16. Finally, as regards *sub-head (iii)*, there are cases in which, although the treaty must be regarded as void, or inoperative or unenforceable, it is difficult or somewhat inappropriate, *at any rate as between the parties*, to speak of vitiation, or of invalidation in that sense. For instance, the parties have made the treaty in proper form, have observed all constitutional requirements, and have truly consented without any taint of error, fraud or duress etc., but the treaty has an object so illegal that no international tribunal would apply or enforce it. The parties have sinned, not so much against each other (as they do where there is error, fraud etc.) as against the law. It is in a certain sense difficult to speak of invalidity in this context because, assuming the parties could apply the treaty purely *inter se* and without affecting the position or rights of third States or their nationals (which is theoretically quite possible)<sup>16</sup> there is, *as between them*, no element vitiating the consent they have chosen to give, though there is an element affecting their obligation to carry out the treaty if they elect to invoke that element. The illegality resides in the object rather than, inherently, in the treaty itself considered as such. In the same way, it is difficult to regard as a normal case of invalidity in the strict sense the situation in which a treaty has been regularly concluded in every respect, but under a common and identical misapprehension on the part of both parties (for example, as to the existence of the *res*, or the possibility of dealing with it in a certain way). Here the treaty is simply sterile, abortive; inoperative rather than (properly speaking) invalid. Nevertheless, subject to what has been said in paragraph 7 above, it is convenient, and to some extent necessary, to treat of it under the head of essential validity. Hence, for all these reasons, that term is used herein in a somewhat extended sense. The essential point is, however, that different kinds of "invalidity" produce different effects.

17. *Paragraph 2*. No comment is necessary.

## SECTION B. THE SPECIFIC CONDITIONS OF ESSENTIAL VALIDITY

### *Article 7. Necessity for the presence of all the conditions specified*

18. It is clear that all the necessary conditions must be present, and the treaty must suffer from none of the

<sup>15</sup> See Guggenheim, *op. cit.*, p. 93. As will be seen in connexion with articles 21 and 22, there may be differences of opinion as to what cases produce what results.

<sup>16</sup> For instance, if they agreed, in a war purely *inter se*, to apply rules at variance with (or in disregard of) rules of the laws of war having a humanitarian object.

corresponding defects or flaws—otherwise it will, in one form or another, though with varying effect, lack essential validity as that term is used herein.

*Sub-section 1. Requirements attaching to the status of the parties. (Impediment of defective capacity)*

*Article 8. Treaty-making capacity*

19. *Paragraph 1.* This paragraph is simply a statement of the two main causes—or rather two main types—of lack of treaty-making capacity: the one arising from an inherent and necessary want of it attaching to the character of the entity concerned (a commercial corporation, a municipal council, etc.); the other from limitations placed or existing on the treaty-making capacity of an entity not inherently incapable of possessing it, for example, a State not fully *sui juris*. In all these cases however, and to whichever of the two categories they belong, the incapacity is a matter of status, and not, so to speak, of contract. Undertakings not to conclude certain kinds of treaties entered into by States which, in principle and as a matter of international status, possess treaty-making capacity, belong to a different category (see the commentary on paragraph 5 of this article).

20. *Paragraph 2.* This states the rule that treaty-making capacity in the parties is a necessary condition of the validity (or more strictly of the existence as such) of any treaty, and indicates the main types of international entity possessing it.

21. “. . . (a) States in the international sense of the term . . .”. This includes protected States, provided that, though not fully *sui juris*, they have a separate international personality and existence. The limitations on their treaty-making capacity are not inherent, but arise from the causes referred to in the last sentence of this paragraph of the article, and in paragraph 4. There may however be “States” which are not States in the international sense at all. Apart from the component states of a federal union, whose case is specifically mentioned in paragraph 3 of the article, there may be other entities, such as certain indigenous rulerships, called states but not possessing international statehood. A prominent example of states not possessing such statehood used to be afforded by the princely states of India. With them the British Government entered into engagements which took the form of treaties, and were usually called treaties,<sup>17</sup> but which were not in fact treaties in the international sense.<sup>18</sup>

22. “. . . (b) para-Statal entities . . .”. The case of *de facto* authorities in control of territory, insurgents to whom belligerent rights have been accorded, etc. is difficult to classify. But undoubtedly such entities have a measure of international personality. They are subjects of international law, and have certain international rights and obligations. Within the limits involved by the scope of their personality (as indicated in paragraph 4 of the article), they have treaty-making capacity: for instance, insurgents recognized as belligerents in a civil war would certainly possess the capacity to enter into international agreements with third Powers about the conduct of the civil war, and matters arising out of it, affecting those Powers.

<sup>17</sup> Or “Sanads”. See the volumes of the series known as “Aitchison”.

<sup>18</sup> This was made evident through the doctrine of “paramountcy”. As the “Paramount Power” the British Government possessed residually all such rights as were not expressly or by necessary implication conferred on the ruler under the treaty, and in the last resort a right of intervention.

23. “. . . (c) international organizations . . .”. This case is mentioned for the sake of completeness; but, for the reasons given in paragraph 2 of the commentary to the Rapporteur’s first report, it will not be further discussed at present.

24. “. . . (d) international authorities set up by treaty to administer certain territory or areas . . .”. This case is not the same as the last one. International organizations do not normally administer territory, or if so only incidentally. They exist mainly to carry out certain functions of an economic, social, humanitarian, scientific or utilitarian character. But there may be, and from time to time have been,<sup>19</sup> authorities set up *ad hoc* (usually for a limited period, but this is not a necessary condition) to govern or administer certain territory or a certain region. Even if not specifically invested with treaty-making power under the relevant constitutive instrument, it would seem that such an authority must be inherently possessed, as necessary to the performance of its functions, of capacity to enter into international agreements of treaty character on behalf of, or applicable to, the territory or region with the administration of which it is charged.

25. It has been thought preferable, for the present at any rate, not to bring into this article the difficulties that may arise from the conclusion of treaties with unrecognized entities which, however, may possess all the characteristics of statehood. This is fundamentally more a part of the topic of “Recognition” than of “Treaty-making capacity”. Very often the conclusion of a treaty with such an entity will constitute the method selected for recognition, and amount to recognition of it; and on the declaratory view of recognition, which the Rapporteur favours, there is nothing anomalous in this.

26. *Paragraph 3.* It has seemed desirable to make special mention of this case because, while there is no doubt that the component states of a federal union are not States in the international sense of the term, and do not possess any international personality apart from that of the federal union to which they belong, they are in certain cases (for example, it is believed, under the Swiss constitution) specifically empowered by the federal constitution to enter into treaties, and have in fact done so on occasion.<sup>20</sup> But does this amount to any more in effect than a species of appointment, authorization or accrediting of the component state or division of the union, as an agent empowered to conclude treaties on behalf of the union as a whole? It is believed not, for—however much such a treaty might relate only, or have its application confined to the territory or affairs of the component state or division alone—it would be the union as a whole that would be bound by it, and that would be the entity internationally responsible should the treaty not be carried out. In short, the matter is one of form and convenience rather than of substance.

27. *Paragraph 4.* The portion of this paragraph in brackets would probably be omitted in any final code, and be relegated to the commentary. The only case that gives rise to some difficulty is that of the State not fully *sui juris*—the protected State or State under suzerainty. Arising from this status (and it is a matter of status), there are limitations on the treaty-making capacity of the State concerned—for example it can only enter into treaties with the consent of the suzerain; or through the

<sup>19</sup> For instance, the various régimes of the Saar, Ruhr, Trieste, the régime at one time proposed for Spitzbergen, etc.

<sup>20</sup> There still exists a treaty between the Canton of Vaud and the United Kingdom regulating the status of British residents in that Canton.

agency of the protecting State; or in respect of certain classes of treaties. If these limitations or conditions are not observed, then the State concerned has exceeded its treaty-making capacity as involved by its status, and there is no treaty. The principle concerned has been clearly stated as follows:

"A State proposing to enter into treaty relations with another State which is not fully *sui juris*, . . . by reason, for instance, of its dependence in any form upon another State . . . is deemed to have notice of this deviation from normal and complete capacity and must satisfy itself that the proposed treaty falls within the limited capacity of the other contracting State. Treaties made by such States in excess of their capacity are void."<sup>21</sup>

Yet in practice, as both McNair<sup>22</sup> and Hyde have pointed out,<sup>23</sup> such treaties have often been made, and there are practically no recorded cases in which objection to them has been taken on grounds of lack of capacity. It is thought that this fact can be accounted for, both actually and juridically, in one or a combination of the following ways: (a) it is not usually in the interests of either of the actual parties to the "treaty" to take any objection; (b) the transaction is in effect validated or ratified *ex post facto* if the protecting or suzerain power acquiesces *sub silentio* or takes no formal objection—the lack of capacity is thereby so to speak cured; (c) the conclusion of the treaty may well be part of a process (or even constitute the act) whereby the State not fully *sui juris* is becoming so, and is throwing off the status of dependency.

28. *Paragraph 5.* It is noteworthy (and this also applies to the question dealt with in paragraph 6) that in the Harvard Research volume on treaties<sup>24</sup> the case where a State (fully *sui juris*) assumes a treaty obligation not to enter into a certain type of international agreement, and the case where a State's treaty-making capacity is limited by its own constitution, are both considered (together with the case of qualified *status* discussed in paragraph 27 above) as cases of lack or partial lack of (international) treaty-making capacity; but that the authors are clearly in doubt whether these two cases properly come under the head of want of capacity. In the Rapporteur's opinion, they do not. Absence of capacity, properly so called, is essentially a matter of *status*—in private law the minor, the married woman, the person of unsound mind, and so on. If a State fully *sui juris* assumes an obligation not to enter into certain treaties or classes of treaties, the ensuing limitation does not arise from status but from a specific and voluntary undertaking. If, ignoring this undertaking, the State concerned does enter into a treaty of the prohibited kind, it will certainly have committed a breach of the undertaking, and in that way an infraction

<sup>21</sup> Arnold D. McNair, "Constitutional Limitations upon the Treaty-making Power", introductory note in *Treaty-making Procedure. A Comparative Study of the Methods obtaining in Different States* compiled by Ralph Arnold (London, Humphrey Milford, 1933), p. 3. The author also cites the maxim *qui cum alio contrahit vel est, vel debet esse, non ignarus conditionis ejus*, and quotes Hyde to the following effect:

"In the negotiation of treaties with dependent States the burden rests upon the other contracting parties to ascertain the scope of the agreement-making power retained by the former, as well as the mode by which it is to be exercised".

<sup>22</sup> McNair, *op. cit.*

<sup>23</sup> Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston, Little, Brown and Company, 1947), vol. II, pp. 1377-1379.

<sup>24</sup> Harvard Law School, *Research in International Law, III. Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29 (1935), pp. 707-710.

of the rule of international law that requires the observance of international undertakings: but it does not at all follow that the resulting (the new) treaty will be null and void—and even if it were, it would not, properly speaking, be on the ground of lack of capacity to conclude it. Because no question of status is involved, such cases are better viewed as special instances of conflicts between a new and a previous treaty, and as cases in which a conflict with a previous treaty, or a breach of it, occurs because of the conclusion of a later one. This type of case is considered below in connexion with articles 18 and 19.

29. *Paragraph 6.* Even more clearly not a case of lack of international treaty-making capacity is that of domestic limitations placed by a State's own constitution on its treaty-making power. If the State chooses to limit its powers in this way, that is its affair, but it is a domestic matter. *Internationally* the State retains (*in posse* at any rate) all its treaty-making capacity. It could at any time (and at will, so far as any international consideration goes) alter its constitution and resume or take up the full exercise of powers it has always inherently possessed (internationally). Consequently, if a State under such a (domestic) limitation, nevertheless enters into a "prohibited" treaty, the nullity of the treaty cannot be predicated on grounds of lack of international treaty-making capacity. The issue will be a different one, and will fall under the head of the effect on a treaty of a failure by the State or its executive organ, in becoming a party to the treaty, to observe its own domestic constitutional requirements. This is considered below in connexion with article 10.

30. *Paragraph 7.* This seems sufficiently self-explanatory. Some discussion of the matter is contained in paragraph 5 above.

*Sub-section 2. Requirements (other than formal) attaching to the origin and method of procurement of the treaty. (Impediment of defective consent)*

#### *Article 9. Consent in general*

31. *Paragraphs 1 and 2.* These are self-explanatory and call for no special comment.

32. *Paragraph 3.* This also calls for no special comment in itself. Lack of *consensus ad idem*, although it constitutes the end result, is invariably brought about by error or mistake, and is usually dealt with as part of that subject under domestic law. It presupposes the outward semblance of agreement however. If the parties were so much at variance in their views that no agreement at all could be reached, then clearly there is no treaty. If there is an outward semblance of agreement, then, if nevertheless there was a lack of *consensus ad idem*, there must somewhere have been an error or mistake on the part of one or both parties.<sup>25</sup>

*Article 10. The question of compliance with constitutional or other domestic requirements*

33. The Rapporteur is conscious that the view to which this article gives expression, even as modified by the second paragraph, runs counter to the prevailing current of opinion. Yet he has felt it necessary, or at any

<sup>25</sup> It may of course have been induced by fraud or fraudulent misrepresentation, in which case, according to the common-law doctrine at any rate, there is a *consensus*, but one which is vitiated: the contract is voidable but not void *ab initio*. See further, para. 96 below.

rate desirable at this stage, to put it forward as constituting the view which he considers to be the internationally correct one. The contrary view is that (subject to certain safeguards, and to a liability which may exist for the State concerned in certain circumstances to pay damages or make other reparation) failure to comply with domestic requirements or limitations is a ground invalidating the State's participation in the treaty. This view has been argued with all his usual learning and persuasiveness by the present Rapporteur's predecessor, Sir Hersch Lauterpacht; and for the arguments in support of that view it is sufficient to refer to his report covering this topic (A/CN.4/63, part III, sect. I). Nor does the Rapporteur propose at present to develop fully the counter-arguments in support of the view now put forward, beyond noticing one or two salient points.

34. What may for convenience be called the "constitutional requirements" view, is in certain respects difficult to reconcile with the equally current monistic doctrine of the kind that postulates the absolute superiority and prevalence of international over domestic law, at any rate as regards everything that takes place in the international field—for here in effect is a case where domestic or internal constitutional considerations are allowed to prevail over and to determine the character of what purports to be an international act. The Rapporteur is aware that this statement of the matter is criticizable, for the fundamental principle involved, and repeatedly affirmed by international tribunals,<sup>26</sup> is that a State cannot plead or take shelter behind internal constitutional or domestic law difficulties, requirements, limitations or deficiencies in order to evade (or as a ground of non-performance of) its international obligations. But, it may be contended, the whole question here is precisely whether the State has incurred an international obligation. That may be true, although it is not conclusive; but whether or not there is an international obligation there is an international *act*—suppose it consists, for instance, of an instrument of ratification in proper form, on the face of it regular, signed by a normal authority such as the Head of the State or Foreign Minister, as the accredited executive agent of the State in the international sphere, and duly deposited or transmitted to the other party to the treaty, or to a depositary government or international organization, through the usual diplomatic channels—an act which, in itself, has complete international validity according to general international law and practice. Yet the international character and validity of this act is, according to the "constitutional requirements" view, to be governed and determined in the last resort entirely by considerations of an internal domestic character peculiar to the State concerned, and with which the other parties have and can have nothing to do. Thus, according to this view, it would, in the last resort, be domestic not international law which would prevail and govern the character and effect of this international act.

35. It may be urged in reply to this, that it is nevertheless international law which governs, because if international law provides that in certain circumstances domestic considerations shall prevail, then, if in fact they do prevail, and in consequence an international act is invalidated, it is precisely by virtue of a rule of international law that this occurs. But clearly this outcome (which might be valid if international law did in fact contain

such a rule) cannot be used as an argument for the view that it does contain one—and this of course is the whole question. If international law did contain such a rule, it would thereby in some sense be denying itself, and acting in a manner contrary to—or at any rate difficult to reconcile with—the prevailing doctrine as to the supremacy of international law over domestic law. This fact creates a strong presumption that it does not.

36. The argument usually advanced—and perhaps the only tenable argument that can be advanced—in favour of the view that in this particular matter international law allows domestic law to prevail, is the argument founded on the necessity for reality of consent. The consent given by the State must be a real consent, not vitiated by constitutional defects; and it must be given by the State as a whole and not merely by a particular organ of the State acting in defiance of another, or at any rate without its consent where, constitutionally, such consent is required; or again, it is said, the consent cannot be real, or is vitiated, or does not really represent the will of the State, if it ignores limitations placed on the treaty-making power of the State by its own constitution.

37. These are clearly weighty arguments. But could they not be used with equal force to invalidate almost any act of the executive authority on the international plane (and not merely in respect of treaties) where such act ran counter to some limitation or requirement imposed by the domestic law? For instance (a not impossible contingency in the present climate of opinion), suppose the domestic law of a country prohibited its ambassadors abroad from enjoying certain privileges and immunities, would this invalidate the act of the executive organ of the State in claiming those very privileges and immunities which, under international law, it was entitled to claim, and the receiving State bound to grant unless waived? Could the receiving State say in effect: "No, for you are prohibited by your own law from claiming these privileges and therefore we are not bound to grant them"? Suppose again that the domestic law of a State, running in advance of average opinion, prohibited the use by its armed forces of certain weapons, although the use of these weapons was perfectly legitimate under international law, and normal as a matter of current practice. Suppose that in a war the armed forces of this country nevertheless use these weapons. Could another country maintain that this was illegal because, in using these weapons, the armed forces were ignoring limitations placed upon their actions by their own domestic or constitutional law requirement?<sup>27</sup> Examples could be multiplied indefinitely, but these will suffice. Admittedly the parallelism with the case of "unconstitutional" participation in a treaty is not exact;<sup>28</sup> but it is close enough<sup>29</sup> to show the sort of possibility that opens out once the view prevails that States are bound (and therefore entitled) in their international dealings to take account of one another's domestic law requirements, constitutional limitations, etc.—once in fact the view prevails that the acts of the ac-

<sup>27</sup> Or suppose an even close analogy, that under the domestic law the armed forces, though under the control of the executive, could only make use of certain weapons (even though lawful internationally) with the express consent of the legislature.

<sup>28</sup> Because in the latter case, the other State or States concerned would be affirming a right (the treaty) not denying one.

<sup>29</sup> In the reverse case, for example, where the domestic law might deny to foreign diplomatic missions privileges and immunities recognized by international law, there would be no question but that the domestic law did not prevail. Yet in the other case it is said to prevail. There is certainly an inconsistency here.

<sup>26</sup> See, for instance, the well-known dictum of the Permanent Court of International Justice in the case of the *Treatment of Polish Nationals in Danzig*, in *Judgments, Orders and Advisory Opinions*, series A/B, No. 44, pp. 24 ff.

credited executive organ of the State, acting as its agents on the international plane, are not conclusive, whether to bind, or to acquire or assert rights on behalf of the State: for if it is the case that the façade of the accredited executive organ, acting as the agent of the State on the international plane, can be pierced for the purpose of determining whether the State is bound by its acts, then it can equally be pierced for the purpose of determining whether the State can assert rights; even ordinary international law rights; and the capacity of States to do so ceases to be governed by international law and becomes governed by their own domestic constitutions and legislation.

38. There is much more to be said on this subject, and on both sides. The Rapporteur will not carry the matter further now, though he may devote part of a supplementary report to this topic at a later stage. In conclusion, the following passage may be noted taken from Hyde, who, as a national of a federal State in which constitutional limitations loom large, cannot be suspected of naturally favouring the view here presented by the Rapporteur:

"The constitutional or fundamental law of a contracting State may in terms give sharp warning to all concerned as to objectives not to be dealt with, or agencies not to be employed in treaty-making, or modes of procedure that are to be avoided. Disregard of them may not be excusable on the part of a foreign contracting party. That law may, however, also contain inhibitions that are not apparent even to those who negotiate. The provisions of an agreement may thus contemplate the performance of acts or the use of methods which a foreign contracting party may, after diligent effort to inform itself as to the requirements of the law, have no reason to suppose to be at variance with any constitutional restriction. In such case, there may be room for the contention that the other contracting State which proposed or willingly accepted the agreement, and even formally declared it to be constitutional, is not in a position to plead invalidity in justification of non-performance, or in defense of a claim for losses sustained in consequence of a failure to perform. Thus, it may be said that where a contracting State holds out to another assurance that the terms of a proposed agreement are not violative of the fundamental laws of the former, and does so through an agent who is supposedly conversant with the requirements thereof by reason of the character of his connexion with the particular department of his government to which is confided the management of foreign affairs, and when no written constitution is involved, and no published and authoritative instrument notoriously proclaims an opposing view, there is ground for the conclusion that the contracting State holding out such assurance is not in a position to deny the validity of the agreement which has been concluded in pursuance thereof."<sup>30</sup>

*Article 11. Error and lack of consensus ad idem (analysis and classification)*

39. *General remarks.* The case of error (and the same applies in effect to that of fraud and duress) is extraordinarily difficult to deal with in the context of treaty law, for two main and connected reasons: first, the extreme paucity of arbitral or judicial decisions on the subject, the very few recorded cases of error etc. affecting treaties, and the very summary treatment given

to the subject by the great majority of writers on international law; and secondly (and of course in effect accounting for the first) the sheer inapplicability in the international field of many of the private law doctrines of contract on which these concepts are based, because of the lack of correspondence in the situations occurring in that field with those which normally occur in the domestic field and which have given rise to the evolution of these concepts, and to the extreme refinements to which they (and error in particular) have been subjected in many systems of private law. This matter has already been referred to in the general introduction to this report (paras. 2 and 3). It is thus that authorities such as, for example, Rousseau,<sup>31</sup> who go fairly deeply into many points of treaty law, prefer to dismiss the question of the "*vices du consentement*" as one which "*ne se pose pas en droit international comme en droit interne*", and the specific cases of error etc. as mere "*hypothèses d'école*". It is difficult to quarrel with this view, or to deny the fact that if in private law certain forms of consent are "*entachés de vice*", in international law the question whether they are, is "*entachée d'inraisemblance*". Nevertheless, for reasons given in the introduction (para. 5), it is necessary to deal with the matter. Rousseau, apart from drawing attention to the very few concrete cases that have arisen, does not discuss the theoretical aspects of error or fraud at all. Chiefly in connexion with duress however, he does discuss the general question of how far private law concepts on these topics can be imported into the international field, and the various theories which have been propounded in that connexion. At one extreme, there is the traditional or classical theory of the integral translation of private law contract doctrines into the field of treaties<sup>32</sup> a theory which in modern times has been taken up again by such authorities as Verdross and Weinschel, and, in a more modified form by Le Fur. Next, there are the theories based on a greater or lesser degree of adaptation of the relevant private law concepts to the peculiar conditions of the international field, advocated by such authorities as Fauchille, Westlake, Oppenheim, Anzilotti, Cavaglieri, Strupp and Fernand de Visscher. Finally, at the other extreme, there are the "objectivist" theories of Professors Scelle and Salvioli, which in effect deny the relevance of "contractual" considerations, and propose to determine the validity of the treaty, and of the consent given, solely by reference to the content and object of the treaty and of the reasons why that consent to it was sought or procured, rather than by reference to the character of that consent and of the acts or methods whereby it was obtained.

40. The discussion is an interesting one, but the result is inconclusive. The objectivist theory seems to the Rapporteur difficult to accept, for it implies the view that the end justifies the means: If the object of the treaty is sufficiently good, the vices of its origin may be overlooked. The classical theory cannot be accepted either, for it involves importing into the international field concepts and refinements for which there is simply no place there. This leaves the theories which seek to adopt these

<sup>31</sup> Charles Rousseau, *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944) vol. 1, pp. 339-354.

<sup>32</sup> Whether this view is in fact traditional has been questioned by Lapradelle and Politis in a passage (quoted on p. 1131 of the Harvard Research volume) which takes the opposite view: "Cette proposition semble, a première vue, contredite par la doctrine généralement reçue que les vices du consentement ne sont pas dans le droit du gens, des causes de nullité des traités".

<sup>30</sup> Hyde, *op. cit.*, p. 1385.

concepts to the situation in the international field: but here the difficulty is to know what kind and degree of adaptations to make, and there is very little that is definite to go upon. The present articles (11 *et seq.*) represent a provisional attempt to meet this difficulty.<sup>33</sup>

41. *Paragraph 1.* It is generally agreed that only basic errors can vitiate a treaty, and it so happens that one of the few judicial decisions in this field supports that view.<sup>34</sup>

42. *Paragraph 2, sub-paragraph (a).* It is usually stated that the error must be mutual; but there are two kinds of mutual error. There is the case where the error is common and identical—the parties are both mistaken, and about the same thing or in the same way; and there are the cases where the parties are both mistaken but about different things or in different ways. This matter is discussed further in paragraph 44 below.

43. *Sub-paragraph (b).* For discussion, see paragraph 45 below.

#### *Article 12. Error and lack of consensus ad idem (effects)*

44. *Paragraph 1, sub-paragraphs (a) and (b).* About the case of common and identical error mentioned in paragraph 42 above, there can be no doubt, if the error is material. It is upon this ground that certain boundary treaties which incorrectly predicated the existence of rivers or other geographical features afterwards found not to be there, have been rectified.<sup>35</sup> In the Harvard Research draft on the law of treaties, article 29, which is entitled "Mutual error", seems to be based on the view that the common and identical form of error is the only one that can invalidate a treaty. The authors, basing themselves on the American Law Institute's *Restatement of the Law of Contract* (sec. 502), deny that there would be grounds of nullity "if mistakes are made by both parties and they relate to different matters".<sup>36</sup> It would seem however that this must depend on whether these errors did or did not prevent the parties from reaching a *consensus ad idem*. If for instance A sells B a chair believing it to be an eighteenth century chair, and B buys it believing it to be a seventeenth century chair, whereas it is in fact a sixteenth century chair, both are mistaken: yet there is a contract, for both intended to buy and sell a chair, and, moreover that identical chair. It may well be that B buys the chair because he hopes to re-sell it to a client interested in seventeenth century furniture; and A may well have sold it because he believes the market for eighteenth century chairs is declining and he should not retain any. Both will be disappointed, but there is no ground upon which either could claim a rescission of the contract. Suppose however that A believes himself to be selling B an armchair, whereas for some reason B thinks that it is a sofa which he is buying from A, then it would not be unreasonable to hold that there is no *consensus ad idem* and therefore no contract.

45. *Sub-paragraph (c).* Into this category fall by far the most difficult cases—that is to say those in which one of the parties will wish unilaterally to avoid the con-

tract on the ground that in concluding it he was under a misapprehension, but for which he would not have done so. It seems best here to follow the doctrine of English contract law based on the necessity for ensuring the stability and certainty of contracts—an aim which also holds good in the field of treaties. This doctrine is broadly to the effect that each party must accept the responsibility for, and suffer the consequences of, its own mistakes, provided these have not been induced or contributed to by the fraud or other culpable act or omission of the other.<sup>37</sup> An example commonly given<sup>38</sup> is the case where A sells B a piece of china, which B buys believing it to be Dresden china. A knows it is not, but, even though he also knows that B thinks it is, and is buying it for that reason, the contract holds good so long as A is simply silent, sells the piece as "china" only, has not contributed to B's error, and does not hold himself out as purporting to sell a piece of Dresden china. Even if B (mistakenly) *thinks* A is purporting to sell it as Dresden, the contract still holds good if A does not know B to be under that misapprehension, although he may be aware of B's mistake about the quality of the china itself. It is only if A personally misrepresents the nature of the china, or, *knowing that B thinks he (A) is selling it as Dresden*, nevertheless allows him to buy it without disclosing that it is not, that the contract will be void.<sup>39</sup> The difference of principle is this—that up to a certain point B's error is simply an error of *judgement* as to the quality of the china, the responsibility for which is his. But beyond that point, B's error becomes (additionally) an error about the nature of A's *offer*—that the china not only is Dresden, but that A is selling it as such. If this further error has been caused by A; or if A, knowing of it, fails to rectify it, then the contract is void. It would obviously not be possible to translate all these refinements (and there are of course many others) into the field of treaties. But there does seem to be good ground for the broad principle that mere unilateral error does not invalidate a treaty unless the error is in some way attributable to the fault of the other side.

46. *Paragraph 2. Sub-paragraph (a):* This is generally admitted—*ignorantia legis neminem excusat*. *Sub-paragraph (b):* This is in effect covered by what has been said above. *Sub-paragraph (c):* See the Harvard Research volume, page 1129. *Sub-paragraph (d):* The object here is clearly to distinguish the case of factors affecting the essential validity of a treaty (which must therefore be factors existing or occurring contemporaneously with its conclusion), from factors occurring or arising *subsequently*, which cannot therefore affect the essential validity of the treaty *as made*, but can only, if at all, affect the question of its continuing existence. If factors of the latter class have any effect, it is to bring about the *termination* of the treaty but not to nullify it.

47. *Paragraph 3.* The case here contemplated seems (provided the conditions of paragraph 2 of the article are satisfied) to form a reasonable ground of exception to the general rule that unilateral error does not invalidate in the absence of fault on the part of the other party. In this type of case, the error can *ex hypothesi* not be mutual, but may none the less have fundamentally the same sort

<sup>33</sup> Not the first of course in the present context, for these matters were also covered by Sir Hersch Lauterpacht in his first report (A/CN.4/63).

<sup>34</sup> See the *Mavrommatis* case (Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 14, p. 31).

<sup>35</sup> Such cases (they are few) are cited in almost all the books.

<sup>36</sup> Harvard Law School, *op. cit.*, p. 1131.

<sup>37</sup> *Ibid.*

<sup>38</sup> See a standard textbook for students by Sir William Reynell Anson, *Law of Contracts*, 19th ed. (London, Oxford University Press, 1945, p. 161).

<sup>39</sup> See the English cases of *Smith v. Hughes*, 1871 L.R. 6 Q.B., at p. 610, and *London Holeproof Hosiery Company, Limited v. Padmore*, 1928, T.L.R. 499.

of characteristics as are often to be found in the case of mutual errors, for example, as to the existence of the *res* which is the object of the treaty, or necessary to the discharge of the treaty obligation.

48. *Paragraph 4.* This embodies the principle discussed in paragraph 45 above. See also the Harvard Research volume, page 1131.

*Article 13. Fraud or misrepresentation*

49. The general observations made in paragraphs 39 and 40 above are equally applicable to the case of fraud. This subject, as indeed that of error and also duress, is equally dealt with in Sir Hersch Lauterpacht's first report (A/CN.4/63, part III, sect. II) already referred to in paragraph 33 above.

50. *Paragraph 1.* This requires no explanation except to say that, although fraud is always fraud, it does not seem that it should invalidate a treaty, if otherwise regular, unless it relates to something material, affecting the basis of the treaty. Furthermore, the fraud must clearly have caused or contributed to causing the other party to enter into the treaty. The misrepresentation must in fact mislead. If it can be shown that it did not affect the judgement of the other party, or that such party knew the correct facts and still entered into the treaty, there is no ground of invalidity.

51. *Paragraph 2.* Various definitions of fraud are possible. This one is based on the leading English case of *Derry v. Peek*<sup>40</sup> and on the Harvard Research volume (p. 1145).

52. ". . . or without belief that they are true, or indifferently as to whether they are true or false . . .". This phrase is based on the dictum of Lord Herschell in giving the decision of the House of Lords in the leading English case of *Derry v. Peek* when he said that :

" . . . fraud is proved when it is shown that a false representation has been made, (1) knowingly,<sup>41</sup> or (2) without belief in its truth, or (3) recklessly, careless, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states."<sup>42</sup>

53. The second sentence of the paragraph represents what seems to the Rapporteur to be the best way of dealing with the case of innocent misrepresentation, which in private law gives rise to a good deal of difficulty.<sup>43</sup> If the misrepresentation is really innocent, then the party making it is himself under a misapprehension and induces a similar misapprehension in the other. The case therefore becomes one of mutual, or rather common and identical error, and the contract (treaty) will be invalidated on that ground, if the error is a material one.

54. *Paragraph 3.* As parties are presumed to know the law, and only ignorance of it would enable a mis-

representation about it to deceive, such a misrepresentation is not, as a matter of law, fraud.<sup>44</sup>

55. *Paragraph 4.* This deals with a difficult case. Generally speaking mere expressions of opinion (as opposed to affirmations of fact), even if made in the hope of misleading, do not amount to fraud, because an opinion is only an opinion, and it is for the other party to verify or confirm it or take the risk of not doing so. However, in certain cases, an expression of opinion may involve a fraudulent element—in particular when made in the *knowledge* that the opinion is false or incorrect, for in that case there is at least a misrepresentation about the opinion actually held by, and about the state of mind of, the party expressing it. The point may be carried even further: in the English case of *Smith v. The Land and House Property Corporation*, Lord Justice Bowen said :

" . . . it is often fallaciously assumed that a statement of opinion cannot involve a statement of a fact. In a case where the facts are equally well known to both parties what one of them says to the other is frequently nothing but an expression of opinion . . . But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."<sup>45</sup>

On the other hand, *simplex commendatio non obligat*, the sort of encomiums and eulogies, even if exaggerated and possibly untrue, which those who have wares to recommend normally indulge in, rank as mere expressions of opinion so long as they are not actual misdescriptions and do not amount to warranties of quality—not that any of this is very apposite to the case of treaties.

56. *Paragraph 5.* This paragraph is based, so far as the treaty field is concerned, on the Webster-Sparks-Ashburton affair referred to in the Harvard Research volume (pp. 1146-1147).<sup>46</sup> But it also embodies a rule of private contract law to the effect that "mere silence is not misrepresentation"<sup>47</sup> and that "Simple reticence does not amount to legal fraud, however it may be viewed by moralists".<sup>48</sup> This principle might be said to apply where the risk, so to speak, is equal for both parties; but not where it is clearly much greater for one than for the other. The second half of the paragraph is based on the doctrine relating to contracts *uberrimae fidei*, namely, that where the circumstances are such that the material facts are, and must be, peculiarly within the knowledge of one party only, it becomes a duty incumbent on that party to make a full disclosure of them.<sup>49</sup> This is a situation that may well arise in the international field, owing to the difficulty which one country may have in ascertaining the facts as to conditions in or relating to another.<sup>50</sup>

<sup>44</sup> That is, a misrepresentation about the general law. It may be a fraud to make misrepresentations about a particular *right*, for example, about the contents of a will or deed.

<sup>45</sup> 1884, 28 Chancery Division, 7, at p. 15.

<sup>46</sup> See also John Bassett Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. V, p. 719.

<sup>47</sup> Cheshire and Fifoot, *op. cit.* (footnote 43, above), p. 215.

<sup>48</sup> Lord Campbell in *Walters v. Morgan* (1861), 3 De G.F. and J., at p. 723.

<sup>49</sup> Contract of insurance are a prominent example of this type of case, for only the proposer knows the facts relevant to the proposal for insurance he wishes to make.

<sup>50</sup> A somewhat similar doctrine was enunciated by the International Court of Justice as regards a State's peculiar means of knowledge of what goes on in its territory and the correspond-

<sup>40</sup> 1889, 14 Appeal Cases, 337.

<sup>41</sup> That is, in the knowledge of its falsity. [Note by the Special Rapporteur.]

<sup>42</sup> 1889, 14 Appeal Cases, 374.

<sup>43</sup> If anyone doubts this, he is invited to read the relevant sections on this subject in one of the latest and clearest English books on contract law: G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract*, 4th ed. (London, Butterworth and Co. (Publishers) Ltd., 1956), pp. 220-225, 239-243, and 243-247.

Article 14. *Duress*

57. *Paragraph 1.* This states the traditional rule as it is to be found quasi-universally expressed in the authorities and text-books. The coercion and violence may take the form of a threat only, but, subject to the point contained in paragraph 2 of the article, must be directed against the person or persons concerned in their individual capacity, and not merely against either their State, or against them simply in the sense that as nationals of the State they will, so to speak, share in any misfortunes it suffers as a result of their non-compliance. This matter is further discussed below in connexion with paragraph 4 of the article.

58. “. . . duress or coercion, whether physical or mental . . .”. Many writers limit the case to physical coercion, or at any rate do not mention anything else. It is stated, however, in the Harvard Research volume (p. 1157) that the coercion may be physical or mental. In view of certain modern methods of compulsion summed up by the term “brainwashing”, there seems to be no doubt at all that this should be covered, even though, since the Harvard volume was drafted some twenty-five to thirty years ago, this type of case was not quite what it had in mind.

59. *Paragraph 2.* This corresponds with the relevant rule of private law and seems necessary.

60. *Paragraph 3.* The first part of this paragraph again corresponds to the private law position, and although the border line between entreaty or persuasion on the one hand, and threats on the other, may sometimes be difficult to draw, the distinction is valid in principle. “Undue influence” is perhaps mainly a doctrine of Anglo-American jurisprudence. It contemplates and covers a good deal more than the influence that one party to a contract can bring to bear on another by reason of some definite relationship between them such as that of parent and child, guardian and ward, doctor and patient, priest and devotee. In these cases the law virtually raises a presumption of undue influence arising from the nature of the relationship. The presumption can of course be rebutted by evidence that no undue influence was employed. But the doctrine also extends to any case in which, even though there is no special relationship between the parties, one can be shown to have acquired an influence over the other which may be open to abuse (for example, that gained by a person of strong will over one of weak intellect).<sup>51</sup> But here the law raises no presumption of undue influence and this must be affirmatively established. In any system of private law the aim of such a doctrine is to protect individuals placed in certain positions. In the international treaty field, however, there seems to be little room for such a doctrine. In considering whether duress or coercion has been used against the persons of negotiators or members of a ratifying authority, it would be inappropriate to take into account such considerations, nor in general would the occasion for doing so arise.

61. *Paragraph 4.* The object of this paragraph is to make it clear that it is for his own (or a dependant's) person that the negotiator must fear, not for his State;

ing difficulties of knowledge for other States. See the article entitled “The Law and Procedure of the International Court of Justice: International Organizations and Tribunals” by G. G. Fitzmaurice in *The British Year Book of International Law*, 1952, pp. 58 ff.

<sup>51</sup> Or the influence which an older man may exercise over a younger if unduly pressed and abused. See *Smith v. Kay* (1859), 7 H.L.C. 750 at p. 794.

and in a direct sense, i.e., not because he may subsequently suffer because his State suffers. In short, a threat that, if the negotiator does not sign, his country will be invaded, or the capital will be bombed, is not duress within the meaning of this article. It is pointed out in the Harvard Research volume (pp. 1153-1154) that some writers<sup>52</sup> have contended that “force cannot be used against a State for the purpose of compelling the acceptance of a treaty without its being necessarily directed against the persons or organs in whom or in which the treaty-making power is vested”. Consequently, a threat, for example, of bombing or occupation, is “in the last analysis . . . of necessity addressed to those persons or organs which are charged with the conclusion of treaties and which alone are competent to comply with the terms of the ultimatum . . . therefore . . . indirectly at least, they are subjected to duress”. The Harvard volume, however, goes on to state (p. 1154) that “This is not . . . the duress which is envisaged by this Convention, and it is not that which writers on international law generally have in mind when they declare treaties obtained as a result of duress to be invalid or voidable”. Clearly this raises the whole issue of the use or threat of force to coerce not the individual negotiator, but the State itself. Something about this must now be said.

62. The Rapporteur is naturally aware that, according to a very strong current of present-day opinion (and according also to the views most eloquently and forcefully expressed by his predecessor as Rapporteur, Sir Hersch Lauterpacht, in his first report (A/CN.4/63, part III, sect. II)), it is not merely in the case of force, or the threat of it, applied to the person of the negotiator or other individual involved in the treaty-making process that the treaty is invalidated, but also if force is used or threatened directly against the State itself. This view cannot be ignored; yet, leaving all theoretical considerations on one side, it is a view that encounters great practical difficulties. The case must evidently be confined to the use or threat of *physical* force, since there are all too numerous ways in which a State might allege that it had been induced to enter into a treaty by pressure of *some* kind (for example, economic). On this latter basis a dangerously wide door to the invalidation of treaties, and hence a threat to the stability of the treaty-making process, would be opened. If, however, the case is confined (as it obviously must be) to the use or threat of physical force, what follows? Either the demand for the treaty in question is acceded to, or it is not. If it is not, then *cadit quaestio*. If, *per contra*, it is, then the same compulsion or threat that procured the conclusion of the treaty will ensure its execution; and by the time, if ever, that circumstances permit of its repudiation, it will have been carried out, and many steps taken under it will be irreversible or reversible, if at all, only by further acts of violence. It is this type of consideration, and not indifference to the moral aspects of the question, which has led almost every authority thus far to take the view that it is not practicable to postulate the invalidity of this type of treaty, and that if peace is a paramount consideration, it must follow logically that peace may, in certain circumstances, have to take precedence for the time being over abstract justice—*magna est iustitia et praevalebit*, but *magna est pax: perstat si praeestat*.

<sup>52</sup> For example, Herbert Weinschel, “Willensmängel bei völkerrechtlichen Verträgen”, *Zeitschrift für Völkerrecht* (1929-1930) (Breslau, J.U. Kern's Verlag (Max Müller), 1930), vol. XV, pp. 446 ff.

63. After mature reflection the Rapporteur has come to the conclusion that the whole of this subject, of the greatest importance (as it clearly is), is yet part of a wider problem—the problem of what exactly, in the light of modern conditions and juristic ideas, should be consequences of the illegitimate use or threat of force; and that, viewed in this context, it is neither appropriate nor desirable to attempt to deal with the question of the effect of force on treaties in isolation and apart from its connected elements. With these very general observations he will, for the present, leave the subject, though evidently it will call for further comment later. (See also the point made in regard to this subject towards the middle of paragraph 3 of the introduction to the present report.)

64. *Paragraph 5.* There is general agreement on this point, the rationale of which is obvious.

*Sub-section 3. Requirements attaching to the object of the treaty. (Impediment of defective content)*

*Article 15. Impossibility of the object*

65. With this article there is reached the class of case in which the requirement, and the corresponding impediment or defect, attaches to the *content* of the treaty as contrasted with its origin or method of procurement, or the character (i.e., capacity) of the parties.

66. *Paragraph 1.* The object must in the first place be a possible one, or the treaty will have no sphere of operation and will be abortive. This is not strictly a case of an instrument invalid *in se*, but there are grounds for treating it under the head of essential validity which have already been mentioned (see para. 16 above).

67. “. . . in the literal sense . . . impossible . . .”. For an attempted definition of “literal impossibility”, see sub-head (b) of case (iv) in article 17 of part III in the rapporteur’s second report, which might perhaps also be incorporated here. See also paragraph 98 of the commentary in the same report, relative to the case of supervening or *subsequent* impossibility of performance, which has a certain relevance in the present connexion.

68. *Paragraph 2.* This distinguishes the case of initial and original impossibility from that of supervening impossibility arising from some subsequent occurrence which may bring the treaty to an end but will not render it void or inoperative *ab initio*.

69. *Paragraph 3.* Except in those cases where one party may have misled the other as to the possibility of the object of the treaty (as to which see paragraph 70 below), it seems clear that—since the parties would not have concluded the treaty if they had known it to be impossible of execution—they must have entertained a common and identical error on the subject. The case could in fact be treated as one of error. Nevertheless the defect seems to be one that attaches objectively to the substance of the matter rather than arising subjectively from the state of mind of the parties.

70. *Paragraph 4.* Impossibility being a fact, it is not affected by the circumstance that one of the parties knew of it and has actively or passively misled the other as to the true state of affairs, or has otherwise been at fault, for example, by negligence or failure to make adequate enquiries, or by causing or contributing to the impossibility. The treaty will nonetheless be inoperative. However, in so far as the fault or neglect of one party may have caused the other to take some step in connexion with the conclusion of the treaty which may be to that party’s

detriment if the treaty proves impossible of execution, or to incur expense in connexion with it, the party at fault may be liable to pay damages or make other suitable reparation. A similar point arose in connexion with article 16, paragraph 4, of part III in the second report. See also paragraph 91 of the commentary to that report.

*Article 16. Legality of the object (general)*

71. *Paragraph 1.* The implications of this paragraph are discussed below in connexion with paragraphs 2 and 3 of the article and with articles 17 and 18. It states the general principle that treaties must have a “lawful” object, and such a requirement usually figures in the authorities. But in itself it means very little until it is ascertained or determined what this involves, and more particularly what will cause the object to be illegal in such a way as to invalidate the treaty. Neither the mere fact of departure from general rules of international law, nor of conflict with a previous treaty, will of themselves necessarily have that effect. There are a number of different possibilities leading to different results.

72. *Paragraph 2.* This states the principle, to be more fully discussed in connexion with article 17, that it is inconsistency only with certain types of general international law rules that will invalidate a treaty. Within fairly wide limits, international law permits countries, if they so desire, to agree upon rules or a régime, for application *inter se*, that may be different from the normal.

73. *Paragraph 3.* The subject of the legal consequences that result when one treaty is at variance or in conflict with the provisions of another is surrounded with a good deal of confusion—partly owing to the failure to draw sufficiently clear or comprehensive distinctions between the various cases that can arise. Strictly, in the Rapporteur’s view, the subject does not belong there at all—that is to say it is not really a question of essential validity. It belongs rather to the general topic of the *effects* of treaties which will form the subject of the second chapter of this Code, the present (first) chapter being on validity. However, it is necessary to treat of it to some extent in the present chapter in deference to the views of a number of authorities who have dealt with it as a matter relating to validity. Therefore this paragraph poses the principle, which the Rapporteur believes to be the correct one, and which will be more fully discussed below in connexion with article 18, that incompatibility with a previous treaty gives rise *primarily* to a conflict of *obligation* and does not necessarily (and certainly does not usually) *invalidate* the later treaty (indeed it may “invalidate” the earlier one, for example, where the parties to the two treaties are identical and the effect of the later treaty is to supersede and therefore terminate the earlier, or at any rate to prevail over it in respect of the occasion of conflict).<sup>53</sup> What the conflict does (except in the special case just noticed), or rather what the conflict *is*, is not so much a conflict between two *treaties* but, as just stated, a conflict between two sets of *obligations* of certain of the parties; but only of certain parties be it noted, for, *ex hypothesi*, this case cannot arise where the parties to the two treaties are wholly common and identical. In all other cases, if there is conflict it will necessarily affect solely the position of those countries which are parties to both treaties. Only for them can this conflict arise. For the countries which are parties to only one of them—in

<sup>53</sup> This was considered in the Special Rapporteur’s second report. See article 13 of part III in that report and the commentary on that article.

particular, in the present context, those who are parties *only* to the later treaty—there is no conflict or possible cause of invalidity, at least if they entered into the treaty without knowledge of the previous treaty or of the inconsistency. As will be made clearer presently, this is quite likely to be the case, and if so, then, as “innocent” parties, such countries will be entitled to insist on the full performance of the treaty, or reparation in lieu thereof; and this is a primary reason why, in this type of case, and whatever else may result, the later treaty cannot be *invalid* merely because, in entering into it, one or more of the parties has created a conflict for itself with the provisions of an earlier treaty to which it (but not the other or others) is also a party. The law must evidently provide some means of resolving this conflict, but it cannot always be by pronouncing the automatic invalidity of the later treaty. This must depend on the type of treaty and that question will be considered in connexion with article 19.

74. Where on the other hand there are no parties to the later treaty who are not also parties to the earlier, the case may be different. This occurs only in the pluri- or multilateral treaties, where some of the parties to such a treaty agree upon a different régime for application amongst themselves, or so far as their relations *inter se* are concerned. Even here, for reasons which will be explained, the Rapporteur doubts the desirability of introducing the notion of the necessary invalidity of the later treaty, and believes it would often suffice, and be preferable, to let the matter rest on the simple basis of a conflict of obligation, to be resolved through the medium of the continued validity of the earlier treaty, and its priority or prevalence in the relations between the parties to it who are not also parties to the later treaty, and the parties who are. However, there are considerable complications here because not all treaties function in that way (i.e., “in the relations between the parties”), and further consideration of this matter will be called for below.

75. *Paragraph 4.* The fact that a treaty is *res inter alios acta* for non-parties to it, and therefore *ex hypothesi* cannot (whether its object is lawful or unlawful, or in conflict or not in conflict with a previous treaty) impose any obligations on third States, or affect the legal position or rights of these, is the key to the whole problem of “illegality”, and in a certain sense renders that problem otiose and unreal. If even a fully “lawful” treaty cannot impose obligations on, or take away the rights of countries that are not parties to it, it goes without saying that an “unlawful” one cannot. Therefore, much of the discussion on this subject has been beside the point, for it is evident that the only real question that can arise is what situation does an “unlawful” treaty produce for, or as between, the parties to it. This, as will be seen presently, depends on the character of the illegality or conflict, and of the treaty itself.

*Article 17. Legality of the object (conflict with international law)*

76. This article is largely self-explanatory. The rules of international law in this context fall broadly into two classes—those which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) which merely furnish a rule for application in the absence of any other agreed régime, or, more correctly, those the variation or modification of which under an agreed régime is permissible, provided the position and rights of their States are not affected. This distinction is

not always made clear in the authorities, with the result that many statements to the effect that treaties are void if “contrary” to international law become misleading. Contrary in what sense, is the question. In actual fact, a very large part of international law falls within the second of the above-mentioned categories. For instance, there would be nothing to prevent two States agreeing on a mutual discontinuance of any claim to diplomatic privileges and immunities for their missions or personnel in each other’s territories (a sort of permanent and standing waiver), but both would of course be obliged to continue granting full privileges and immunities to the representatives of other countries. Or again, if the correct limit of territorial waters under general international law is  $x$  miles, there is nothing to prevent two States from agreeing that, as between themselves, they will apply a limit of  $x + y$  miles, provided that they do not attempt to apply the latter limit in respect of the ships or nationals of third countries.<sup>54</sup> It is therefore only as regards rules of international law having a kind of absolute and non-rejectable character (which admit of no “option”) that the question of the illegality and invalidity of a treaty inconsistent with them can arise. Thus if two countries were to agree that, in any future hostilities between them, neither side would be bound to take any prisoners of war, and all captured personnel would be liable to execution, it is clear that even though this was intended only for application as between the parties, and not *vis-à-vis* any other country that might be involved in hostilities with either of them, such an arrangement would be illegal<sup>55</sup> and void.<sup>56</sup> Most of the cases in this class are cases where the position of the individual is involved, and where the rules contravened are rules instituted for the protection of the individual. A different type of case—on the basis that the planning of wars of aggression is illegal—would be if two countries were to agree to attack a third in circumstances constituting aggression. Apart from the fact that such an arrangement could confer no rights as against the third State concerned, it would be illegal *in se* and void. Oppenheim instances a third type of case, if one State “entered into a convention with another State not to interfere in case the latter should command its vessels<sup>57</sup> to commit piratical acts on the open sea, such treaty would be null and void, because it is a principle of international law that it is the duty of every State to forbid its vessels<sup>58</sup> to commit piracy on the high seas”.<sup>59</sup> It is not possible—nor for present purposes necessary—to state exhaustively what are the rules of international law

<sup>54</sup> An agreement to appropriate or assert exclusive jurisdiction *erga omnes* on or over the high seas, would *per contra* be directly contrary to international law, the freedom of the seas as *res communis* being *jus cogens*.

<sup>55</sup> It would in any case be contrary to morals and international good order (see article 20).

<sup>56</sup> That is, in this context unenforceable at law by either party against the other.

<sup>57</sup> This is slightly misconceived, for piracy *jure gentium* properly so called consists essentially in private and unauthorized acts. Acts commanded or authorized by a Government may be illegal under international law on various grounds, but they are not strictly piracy. This was the whole distinction between piracy and privateering under letters of marque. [Note by the Special Rapporteur.]

<sup>58</sup> Whether such a duty really exists may be questionable. There is probably a duty to co-operate in the suppression of actual piracy; and no State can object if piracy by its nationals is suppressed by the vessels of another country, even on the high seas. [Note by the Special Rapporteur.]

<sup>59</sup> L. Oppenheim, *International Law: A Treatise*, vol. I, Peace, 8th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1955), p. 897.

that have the character of *jus cogens*,<sup>60</sup> but a feature common to them, or to a great many of them, evidently is that they involve not only legal rules but considerations of morals and of international good order. (The case of treaties which are contrary only to morals or good order, and do not involve any conflict with an actual legal rule is considered below in connexion with article 20).<sup>61</sup>

*Article 18. Legality of the object (conflict with previous treaties—normal cases)*

77. *Paragraph 1.* This paragraph contains a general rule, the occasion for applying which, where application is called for, will be mainly in those cases where invalidity would not otherwise result under paragraphs 3 to 7 of the article. Even where a treaty is of a general and so-called law-making character, and embodies rules in the nature of *jus cogens*, it remains, as such technically *res inter alios acta* for non-parties. In so far therefore as it contains general international law rules, this will be either because the treaty declares or codifies existing rules of international law, or because the rules it contains have come to be recognized as rules valid for and *erga omnes*, and have been received into the general body of international law.<sup>62</sup> It will be the underlying conflict with the latter, rather than with the treaty, as such, which evidences them, that will be the cause of any invalidity in a later treaty.

78. *Paragraph 2.* This matter will be more fully explained in connexion with article 19. Suffice it to say that the present article is, as such, concerned mainly with bilateral treaties, and with pluri- or multilateral treaties of the "reciprocating" type. Certain other classes of treaties involve special considerations of the same type as were considered in connexion with articles 19 and 29 and the commentary thereon in the Rapporteur's second report.

79. *Paragraph 3.* The object of this paragraph is largely analytical. It endeavours to state and to distinguish between the different situations that can arise. Some of these may arise with reference to the case either of bilateral or of pluri- or multilateral treaties, others with reference only to the latter, or where at least one of the two treaties involved is of that kind.

80. *Paragraph 4. Case (i) in paragraph 3.* This case gives rise to no difficulty. It envisages the possibility that different groups of States may deal with the same matter in different, and perhaps conflicting ways. But each régime is valid for its own group, so long as no attempt is made to apply it outside. If any illegality exists, it will not be by reason of any conflict between the

<sup>60</sup> International agreements to engage in the slave trade afford another example given by Paul Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau et Cie., 1926), vol. I, part III, p. 300, and Louis-Erasmus Le Fur, "Le développement historique du droit international. De l'anarchie internationale à une communauté internationale organisée", *Recueil des cours de l'Académie de droit international*, 1932, III, p. 580.

<sup>61</sup> In pronouncing that treaties possessing an illegal object in the sense above described are "invalid" and "null and void", a certain theoretical difficulty arises, for it may well be that no international tribunal or other international organ is in a position effectively to declare the invalidity of the treaty concerned, and if the parties choose to apply it *inter se*, and can do so without affecting the rights of any third State, they may be able to carry it out. The real point therefore, as a practical matter, is that such a treaty is *unenforceable*. If either party refuses to carry it out, the other will have no legal right to require it to do so, even if thereby the defaulting party in a certain sense takes advantage of its own wrong.

<sup>62</sup> Such as The Hague Conventions of 1899 and 1907.

treaties as such, for none of the parties to either treaty have any obligations under the other treaty.

81. *Paragraph 5. Case (ii) in paragraph 3.* This case also gives rise to no difficulty of principle. The matter really falls under the head of termination of treaties, and is covered by the Rapporteur's second report, in article 13 of part III and the commentary thereon.

82. *Paragraph 6. Case (iii) in paragraph 3.* The case here envisaged (which must be carefully distinguished from case (v) despite its similarities) is that where there are parties to the later treaty who are not also parties to the earlier one; or, if it is a bilateral treaty, where one party to the later treaty is also a party to the earlier, but the other party is not. In short, this case does not, as in case (v), involve the situation in which the parties to the later treaty consist wholly of certain of the parties to the earlier one, without the addition of any others. The present case (case (iii)) has already been the subject of some general discussion in paragraphs 71 to 74 above. It is significant that in private law (in the Anglo-American system at any rate) the fact that a contract may involve one of the parties in a conflict of obligation with a previous contract, is not a ground formally invalidating the later contract, at any rate if the other party did not know of the conflict.<sup>63</sup> In general, however, if A contracts with B, B has no means of knowing what previous contracts A has entered into. He is therefore entitled to insist that A carries out the contract or makes due reparation for not doing so. If A, on account of a previous undertaking, cannot or does not carry out his contract with B, he must pay damages. C, with whom A made the previous contract, can equally insist that his contract be carried out, and that A shall pay damages if he fails to do so. In those cases where, for example, both contracts contemplate the same *res*, say a house which A contracted to sell to C, and subsequently also contracted to sell to B, C may, by obtaining a judicial order for specific performance, secure the transfer of the *res*, and thus prevent its transfer to B, to whom A will have to pay damages. No doubt moreover, a court faced simultaneously with both contracts would give effect to the earlier in date. But matters may not happen that way. Again, in some cases the principle *nemo plus juris transferre potest quam habet* might prevent the contract from being carried out or render it inoperative, but it is difficult to see why, if B is an innocent party in the matter, the contract should be regarded as invalid, or why B should not be entitled to recover damages for its non-performance.

83. In the Rapporteur's opinion, the position is broadly similar under international law in this type of case (it is not of course the only one), except that international law may more definitely than some systems of private law give an actual *priority* to the earlier obligation. But it does not on that account *invalidate* the second, or the treaty containing it, in those cases (which are those now under discussion) where new parties, not parties to the earlier treaty, are involved—at least if these are innocent in the matter. Their contrary view, i.e. that there is invalidation, has been taken by a number of writers of weight, a convenient reference to whom will be found in the Harvard Research volume (p. 1025), the authors

<sup>63</sup> Sir Hersch Lauterpacht, writing in 1936 ("The Covenant as the 'Higher Law'" in *The British Year Book of International Law*, pp. 54 ff.), thought a case might be made out under English law for invalidating the later contract on grounds of conspiracy. But this clearly assumes knowledge of the earlier contract by *both* parties to the later. That may well not be the case.

of which however do not share that view, and do not predicate more for the earlier obligation than prevalence or priority. This contrary (i.e. the invalidation) view is stated by Oppenheim as follows:

"[Treaties] are . . . binding upon the contracting parties, who must refrain from acts inconsistent with their treaty obligations. This implies the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results *beneficial to the law-breaker*.<sup>64</sup> It is incompatible with the unity of the law to recognize and enforce mutually exclusive rules of conduct laid down in a contract *in cases in which such inconsistency is known to both parties*.<sup>65</sup> In view of the relatively small number and publicity of treaties, this rule applies with special force in the international sphere". [*Italics added.*]<sup>66</sup>

The two passages italicized, in some sense beg the question (see footnotes 64 and 65), but the real point open to doubt appears in the reference to "the relatively small number and publicity of treaties". While this may have been true (or nearer being true, as regards the question of numbers at any rate) at the date when Oppenheim first wrote, it is certainly not true today. So far from the number of treaties being small, it is very large indeed, if treaties are regarded (as in the present Code) as covering all types of international agreements, exchanges of notes and letters, etc. As to publicity, information about them is often extremely hard to come by. Treaties may find their way but slowly, after periods of months or even years, into the various treaty series, national or international. One State concluding a treaty with another can never be certain of the full extent of the treaty obligations already assumed by that State, or what degree of conflict these may involve. The implication in the passage above quoted from Oppenheim that one State is so to speak "upon notice" of the existing or previous treaty obligations of another, is hardly realistic under modern conditions. Why therefore should States which have innocently and in good faith entered into a treaty, suddenly find themselves deprived of all rights under it (even, *ex hypothesi*, to damages or other reparation<sup>67</sup>) because, upon the discovery of a pre-existing obligation for the other party, of a conflicting character, the invalidity of the later treaty must be predicated? Upon what grounds also could it be maintained that, should the "guilty" State in fact carry out its obligations under the later treaty (even though it thereby puts itself in breach of the earlier), the innocent party could repudiate its own obligations under the treaty? Yet that is what its invalidity would imply. If, on the other hand, the other party was not in fact innocent and knew of the previous treaty and the possible or probable conflict, there is no reason why it should be entitled to any reparation for non-performance; and the paragraph of the draft Code now under discussion provides accordingly.

84. For these reasons, the Rapporteur prefers (for the situation envisaged by this case) the view taken in the Harvard Research volume, which is also that taken by Rousseau who writes:

<sup>64</sup> Of course this somewhat begs the question. The innocent other party to the second treaty having no knowledge of the earlier is not a law breaker. [*Note by Special Rapporteur.*]

<sup>65</sup> Again—what if it is not? [*Note by the Special Rapporteur.*]

<sup>66</sup> Oppenheim, *op. cit.*, p. 894.

<sup>67</sup> This might be the effect of total nullity *ab initio*.

" . . . il s'agit plutôt là<sup>68</sup> d'un problème de compatibilité de normes conventionnelles concurrentes que d'un problème de détermination de l'objet même des traités internationaux."<sup>69</sup>

After referring to the rule that a treaty is void if it conflicts with a positive requirement of international law, he continues:

"Mais ici encore le problème qui se pose est plutôt un problème de contrariété des normes juridiques, surtout si ladite règle a une origine conventionnelle."<sup>70</sup> [*Italics added.*]

The matter is summed up in the Harvard Research volume in paragraph (c) of article 22 of the Draft Convention on the Law of Treaties as follows:

"If a State assumes by a treaty with another State an obligation which is in conflict with an obligation which it has assumed by an earlier treaty with a third State, the obligation assumed by the earlier treaty takes priority over the obligation assumed by the later treaty."<sup>71</sup>

But it is expressly added in the comment that:

"Paragraph (c), however, does not say that a State may not enter into a subsequent treaty with a third State by which it assumes obligations vis-à-vis that State which are in conflict with obligations which it has assumed under a prior treaty with another State. It only says that the obligations assumed under the earlier treaty 'take priority' over those which it has assumed by the later treaty in case there is conflict between them";

and again, more explicitly:

"It may be repeated that the rule of paragraph (c) does not go to the length of pronouncing the treaties or particular stipulations to which it refers to be null and void, as some of the writers quoted above do."<sup>72</sup>

In this connexion, see also paragraph 83 above.

85. The principle of priority, coupled with that of the non-invalidity of the later treaty or obligation, implies that the States concerned must carry out the prior obligation and make due reparation for not carrying out the second—for it is bound by both. It means that an international tribunal, if the matter comes before it, will direct accordingly. In practice, the matter may not come before an international tribunal, and there may be no way of preventing the State concerned from electing to honour the later rather than the earlier obligation. If this occurs, the other party to the later treaty must carry out its own obligations under the treaty, while the other party to the earlier treaty will have a right to damages or other due reparation. This does not mean that international law confers a "right of election", but only that, in the existing State of international organization, it may not be possible to prevent a *power* of election from being in fact exercised. In these circumstances, international law predicates a right to reparation in favour of whichever of the other two parties concerned fails to obtain performance of the obligation, provided that party was itself acting innocently and in good faith.

<sup>68</sup> Speaking of the Covenant of the League of Nations.

<sup>69</sup> Rousseau, *op. cit.*, p. 341.

<sup>70</sup> *Ibid.* It is not quite clear, but it would seem that Professor Rousseau might take this view about a treaty directly conflicting with an imperative rule of international law.

<sup>71</sup> Harvard Law School, *op. cit.*, p. 1024.

<sup>72</sup> *Ibid.*, p. 1026.

86. *The case of conflict with the Charter of the United Nations.* The line taken above is, it is submitted, entirely in accordance with the language of Article 103 of the Charter of the United Nations, which does not pronounce the invalidity of treaties between Member States conflicting with it, but, on the contrary, only that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail*" [*italics added*]. This would seem to produce the effect that if, on the strict language of Article 103, it might oblige a Member State to break a treaty with a non-member (if that treaty should involve for the Member State obligations conflicting with its Charter obligations), yet it cannot *release* or absolve the Member State from *liability* in respect of those obligations. If no voluntary release from the obligations in question can be obtained, the Member State will by reason of Article 103 be forced to refuse to carry them out: but this will nonetheless be a breach of the earlier treaty, for which reparation in damages or otherwise will be due to the non-member.

87. *Paragraph 7. Case (iv) in paragraph 3.* Although this case is fundamentally similar in its effects to case (ii), and is indeed a sort of special instance of it, it is preferable in the interests of clarity to distinguish it. Both or all of those concerned in the earlier treaty are parties to the later one, but not the only parties. As in case (ii), no real question of validity or invalidity arises: it is a question of *effects*, and as such need not be further considered here.

88. *Paragraph 8. Case (v) in paragraph 3.* The situation envisaged in this case (which can only occur where the earlier treaty is pluri- or multilateral), is that which arises where a number of the parties to a treaty, being less than the full number, proceed to agree on another treaty, on the same subject, which may be in conflict with the first, or set up a different system or régime. The question then arises how far is it open to such parties to do this, even if it is admitted that the new treaty or régime can only govern and be applied in the relations between the actual parties to it, and cannot in law affect the rights of the remaining parties to the earlier treaty or be applied as against or in the relation with them? A number of weighty authorities<sup>73</sup> have taken the view that it is not permissible to do this in such manner as would impair the obligation of the earlier treaty, or as it has been put, "cause injury to the interests" of its signatories<sup>74</sup> or be "so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose";<sup>75</sup> while in the *Oscar Chinn* case before the Permanent Court of International Justice, two eminent judges, Van Eysinga and Schücking,<sup>76</sup> took the view that in the case of treaties, having not merely a dispositive but a quasi-statutory effect and status, providing a constitution, system or régime for an area or in respect of a given subject,<sup>77</sup> it was not open to any of the parties to act in

this manner in any circumstances without the consent of all.<sup>78</sup> Harvard Research accordingly propounded a provision (article 22 (b)) reading as follows:

"Two or more of the States parties to a treaty to which other States are parties may make a later treaty which will supersede the earlier treaty in their relations *inter se*, only if this is not forbidden by the provisions of the earlier treaty and if the later treaty is not so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose."<sup>79</sup>

It will be seen that this provision does not rule out the possibility of some of the parties agreeing on a different system for application *inter se*, and the present Rapporteur propounds in paragraph 8 of this article a substantially similar idea, except that it lays stress more on the simple prevalence or priority of the obligations of the earlier treaty in the relations between the "old" treaty parties and the "new", and also suggests a different form of words for the second exception.

89. There are in fact very strong reasons for permitting a certain amount of latitude in this matter. They may be summed up as follows:

(a) Since anything that some of the parties to a treaty do *inter se* under another treaty is clearly *res inter alios acta*, it cannot in law result in any formal diminution of the obligation of these parties under the earlier treaty, or affect juridically the rights or position of the other parties, which remain legally intact and subsisting. This being so, it follows that the parties who enter into the separate treaty are not, merely by reason of that, doing anything illegitimate or unlawful *in se*, and that this separate treaty is not in any way *prima facie* invalid or void.

(b) If therefore there is any impairment of the obligation under the earlier treaty, it will be in the factual rather than in the legal sense, and it can of course be maintained, and has been maintained with great force, that in practice such action tends to weaken, and indirectly to injure, the position of the non-participating countries.<sup>80</sup> That this may be so can hardly be denied. Considerations of space preclude the giving of concrete illustrations. But in general terms, it is easy to see that if, say, twenty-five out of thirty parties to a treaty agree to put into force amongst themselves a different régime on the same subject matter, even though they may remain bound by the old régime towards the other five, yet the position of those five can hardly fail to be affected in practice. Again, if under a treaty a number of the parties have certain rights as against another party, and some of them agree under a separate treaty with that party to forego those rights or to modify them in that party's favour, this may well affect in practice the ability of the remaining parties to assert their full rights as against that party, theoretically intact though these still are. However, there is another side to this question: for the right of some of the parties to a treaty to modify or supersede it in their relations *inter se* is one of the chief instruments, increasingly in use today, whereby a given treaty situation can be changed in a desirable and perhaps necessary manner, in circumstances in which it would not be possible or would be very difficult to obtain—initially at

<sup>73</sup> See those cited by Lauterpacht in *The British Year Book of International Law*, 1936, pp. 60-61.

<sup>74</sup> *Ibid.*, p. 60.

<sup>75</sup> Harvard Law School, *op. cit.*, p. 1016.

<sup>76</sup> Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63, at pp. 133-134 and 148.

<sup>77</sup> The question in the *Oscar Chinn* case was that of the status of the General Act of Berlin of 1885 relating to the Congo Basin as affecting that of the later Convention of Saint-Germain-en-Laye of 1919 on the same subject.

<sup>78</sup> For a contrary view, see the note on the *Oscar Chinn* case by "O" in *The British Year Book of International Law*, 1935, pp. 162-164.

<sup>79</sup> Harvard Law School, *op. cit.*, p. 1016.

<sup>80</sup> See the note on the *Oscar Chinn* case by Lauterpacht in *The British Year Book of International Law*, 1935, pp. 164-166.

any rate—the consent of all the States concerned.<sup>81</sup> To forbid this process—or render it unduly difficult—would be in practice to place a veto in the hands of what might often be a small minority of parties opposing change. In the case of many important groups of treaties involving a “chain” series, such as the postal conventions, the telecommunications conventions, the industrial property and copyright conventions, the civil aviation conventions, and many maritime and other technical conventions, it is precisely by such means that new conventions are floated. In some cases the basic instruments of the constitutions of the organizations concerned may make provision for changes by a majority rule, but in many cases not, so that any new or modifying system can only be put into force initially as between such parties as subscribe to it.

(c) The whole question of what inconsistency or conflict between two treaties means is a difficult one. Two treaties may be inconsistent in the sense that they set up mutually discordant systems, but so long as these do not have to be applied to or between the same parties, it may be quite possible to apply both. Thus, even though with some difficulty or at some inconvenience, State A may be able to apply one system in regard to State B under treaty X and another in regard to State C under treaty Y. In short, there may be a conflict between the treaties concerned, without this necessarily resulting in any conflict of *obligation* for any of the parties. Something of this kind is in fact precisely what happens under successive technical conventions concluded under the auspices of various international organizations and agencies. In such a situation, there are many possible permutations and combinations, shades and degrees. It would be very unwise to postulate the invalidity and nullity of a treaty merely because, on the face of it, it contained provisions that were in themselves incompatible with the provisions of an earlier treaty to which the parties to the later treaty were also parties.

90. For these reasons, and in respect of the kind of treaty here in question (bilateral and other “reciprocating” type treaties—see paragraph 2 of the present article, and paragraph 78 above), the Rapporteur is far from convinced that the invalidity of the later treaty, or of the relevant part of it, need even be predicated. The question of invalidity arises more properly with reference to the type of treaty which forms the subject of article 19. With regard to the question of whether in the present case (case (v)) a prohibition on any separate arrangement contained in the earlier treaty should be a ground of invalidity of the later, the Rapporteur recalls the doubts he expressed on the question of the effect of this particular type of “incapacity” in paragraph 28 of the present commentary, which certainly apply to case (iii). However case (v) differs, in that none of the parties to the later treaty are *additional* parties, and all are bound by the prohibition. The Rapporteur has therefore decided for the time being, to include this ground of invalidity for case (v), and also the other ground mentioned in paragraph 8 of this article, though in somewhat more restricted language than that used in the provision of the Harvard draft quoted in paragraph 88 above. Actually, it would probably only be rarely that a case of this kind would arise with reference to a “reciprocating” type agreement.

*Article 19. Legality of the object (conflict with previous treaties—special case of certain multilateral treaties)*

91. The Rapporteur, in his second report, drew attention, in connexion with the subject of the termination of treaties, to the existence of certain types of multilateral treaties the character and mode of operation of which differed materially from that of the ordinary treaty, whether bilateral or multilateral, involving a mutual exchange of benefits between the parties, or a reciprocal course of conduct by each towards each, of such a kind that a default by one party would be a *default in that party's relations with some other party*, and could be compensated for by a counter default by that party *towards the defaulting party*. Particularly with reference to articles 19 and 29 in the second report (see especially paragraphs 124-126 of the commentary) it was pointed out that not all multilateral treaties were of this type. There were two other types which operated very differently, because they did not involve a mutual interchange of benefits and performances on an individually reciprocating basis. These treaties involved a more absolute type of obligation so that it was not really possible to speak of the treaty being applied by each party merely in its relations with each of the others. In the case of one class of these treaties however (of which a disarmament convention might be taken as an example), the obligation of each party was dependent on a corresponding performance by *all* the parties; and therefore, in the case of a fundamental breach by one party, the obligation of the other parties would not merely cease towards that particular party, but would be liable to cease altogether and in respect of all the parties. In the other main class of case on the other hand—of which a humanitarian convention such as the Convention on the Prevention and Punishment of the Crime of Genocide might be taken as the type—the obligation of each party was altogether independent of performance by any of the others, and would continue for each party even if defaults by others occurred.

92. The Rapporteur believed that it was the failure to distinguish between these different classes or types of treaties which had been partly responsible for some of the difficulties surrounding the subject of the termination of treaties. The same may be true here. Those authorities which have predicated the invalidity and nullity of treaties in conflict with earlier treaties have, it is suggested, had chiefly in mind certain kinds of treaties in the case of which this result must probably follow—whereas in the case of other kinds it need not necessarily do so.

93. In the case of the treaties dealt with in article 18 hereof, it has been seen that a conflict between treaties did not necessarily lead to a conflict of *obligations*, because one set of provisions could be applied by a party in its relations with one country, and another (perhaps very different) set of obligations could be applied in its relations with another country. Hence the invalidity of the conflicting treaty did not follow. In the case of the two types of treaties dealt with in article 19 the position is different. The nature of the obligation is such that a directly conflicting treaty, if carried out, must it would seem necessarily invoke a breach of the earlier. Thus the complete invalidity of the treaty, to the extent of the conflict at any rate, may reasonably, and probably must, be predicated.

94. “. . . which conflicts directly in a material particular . . .”. Only material conflict should rank for present purposes, and only a direct one. If for instance a number

<sup>81</sup> In a number of cases States that do not come in initially will do so at a later stage.

of the parties to a treaty, even a treaty of this kind, agree not to insist, so far as they are concerned, on the performance of it by one another, this may weaken the force of the treaty, and may be inconsistent with the spirit of it, but it is not in direct conflict with the treaty so long as they do not agree actually not to perform the treaty obligations. Since it is in fact always open to parties to a treaty not to insist on performance by other parties, and no specific agreement is needed to give them that faculty, such an agreement can hardly be invalid—or if it is, its invalidity makes no difference and cannot affect the situation. What really occurs in such a case is a renunciation or modification by some of the parties of their rights, or of a part of their rights. This may or may not be undesirable (it does not follow that it always is), but it does not raise the issue of conflict as such.

#### Article 20. Ethics of the object

95. On the private law analogy of contracts contrary to public policy, order or morals, some international law authorities (for example, Oppenheim<sup>82</sup> and Verdross<sup>83</sup>) have taken the view that treaties not actually contrary to any mandatory rule or prohibition of international law, but having an immoral or unethical object, must be regarded as null and void. Others (such as Rousseau, who regards the matter as “*dépourvue d'intérêt pratique*” and as a “*pure hypothèse d'école*”<sup>84</sup>) have pointed to the absence of any decided case in which the invalidity of a treaty on such grounds has been pronounced. There are however dicta of judges of the former Permanent Court of International Justice which suggest that an international tribunal would be entitled to refuse to apply a treaty considered by it to be “contrary to public morality.”<sup>85</sup> On the other hand, as Oppenheim admits, it has to “be taken into consideration that the question as to what is immoral is often controversial. An obligation which is considered immoral by some States may not necessarily appear immoral to the contracting parties.”<sup>86</sup> In these circumstances the system propounded by the present article seems to the Rapporteur the best. It is difficult to predicate *a priori* the nullity of a treaty that has an immoral or unethical (but not illegal) object: but it is open to an international tribunal to refuse to apply it.

### SECTION C. LEGAL EFFECTS OF LACK OF ESSENTIAL VALIDITY, AND THE MODALITIES OF ITS ESTABLISHMENT

#### Article 21. Legal effects (classification)

96. This article requires no special comment, but the discussion in paragraphs 13 to 16 above with reference to the provisions of article 6 may be recalled. The final sentence of article 21 makes it clear that the effects of lack

<sup>82</sup> Oppenheim, *op. cit.*, p. 896.

<sup>83</sup> Alfred Verdross, “Forbidden Treaties in International Law”, *American Journal of International Law*, vol. 31 (1937), pp. 571-577. For comment on the very wide field of what should be regarded as immoral propounded by Verdross, see Rousseau, *op. cit.*, p. 342.

<sup>84</sup> Rousseau, *op. cit.*, pp. 341-342; see also Salvioi in *Recueil des cours de l'Académie de droit international*, 1933, IV, pp. 26-30.

<sup>85</sup> Schücking in the *Oscar Chinn* case (Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63, p. 150). Anzilotti is said to have expressed a similar view in the *Austro-German Customs Union* case, but the passage is difficult to trace.

<sup>86</sup> Oppenheim, *op. cit.*, pp. 896-897.

of essential validity are not automatic but subject to the procedural requirements propounded in article 23.

#### Article 22. Effects in specific cases

97. Paragraph 1. Again, earlier discussion has elucidated much of this. There is however a good deal of disagreement amongst the authorities (in so far as they consider the matter at all) about the exact effect of lack of essential validity in different cases. Thus Guggenheim, presumably following civil law doctrine, does not ascribe to either error, fraud or duress, the effect of nullifying the treaty *ab initio* with retroactive effect, but only of making it voidable.<sup>87</sup> The common law doctrine agrees as to fraud and duress but regards error as making the contract void *ab initio*.<sup>88</sup> In the Harvard Research volume on the other hand (p. 1148), the latter effect is ascribed to fraud but not to error or duress. It is doubtful whether these and other similar distinctions have the same importance in the international field as they do in the domestic. As regards error, fraud and duress, the common law doctrine is based on the view that in the case of error there is never any true meeting of minds—or if there is (common and identical error) it is in circumstances that deprive it of reality. Hence there is never any contract. In the case of fraud and duress the minds do meet, and therefore there is a contract, but since the meeting was only procured by extraneous and illegitimate factors, the contract is voidable on proof of these.

98. The reasons for predicating unenforceability in certain cases, rather than nullity *stricto sensu* have already been discussed in connexion with articles 17 and 20 (see the end of paragraph 75 above, and paragraph 95). On the whole, unenforceability seems also the correct effect to ascribe to invalidity resulting from conflict with previous treaties, in those cases in which invalidity on that ground occurs.

99. Paragraph 2. This attempts to state the actual consequences of nullity *ab initio*, voidability, unenforceability etc., and calls for no special comments, although the system propounded is probably capable of improvement or refinement.

#### Article 23. Procedure for establishing the claim of lack of essential validity

100. For detailed comment on this article, reference is made *mutatis mutandis* to that contained in the second report on the somewhat similar system propounded in articles 20 and 23 in that report (commentary, paras. 136-140 and 180). The extreme rarity, already referred to in other connexions, with which the question of the essential invalidity of a treaty has been raised on any of the grounds considered in the present report—as contrasted with the very numerous occasions on which claims to terminate treaties have been made—might be said to render it doubtful whether any safeguards of the kind proposed in the present article are really necessary. Yet in principle it should not be possible for any party to a treaty simply to declare its invalidity unilaterally, and on this subject reference may be made to articles 29, 31 and 32 in the Harvard draft, and the commentary thereon. Otherwise the plea of lack of essential validity might well be made the pretext for what would really be a disguised termination of an unwanted treaty. Indeed it is by no means certain that, in an indirect way, the plea of lack of

<sup>87</sup> Guggenheim, *op. cit.*, pp. 91-93.

<sup>88</sup> See Cheshire and Fifoot, *op. cit.* (footnote 43 above), p. 171; also Anson, *op. cit.* (footnote 38 above), p. 166.

essential validity is not, in a certain sense, quite often put forward, for it has not infrequently happened that the *reason* given for the unilateral *termination* or repudiation of a treaty is precisely some alleged flaw in its origin or manner of procurement. This is not made the formal basis of the act of termination or repudiation (i.e. there is no actual plea of lack of essential validity), but in effect an alleged flaw in validity is advanced as a ground justifying

the party concerned in bringing the treaty to an end. It therefore seems to the Rapporteur that if procedural safeguards are necessary in certain cases of unilateral termination of treaties, they should also be instituted where it is sought to avoid a treaty on grounds of lack of essential validity, since the considerations making such safeguards desirable in the one case apply equally, or easily could do so, in the other case as well.

# STATE RESPONSIBILITY

[Agenda item 5]

## DOCUMENT A/CN.4/111

### International responsibility. Third report by F. V. García Amador, Special Rapporteur

RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS.

#### PART II: THE INTERNATIONAL CLAIM

[Original text: Spanish]  
[2 January 1958]

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#### Introduction

1. At its ninth session, the International Law Commission, not having enough time at its disposal for a

thorough consideration of the second report on international responsibility submitted by the Special Rapporteur (A/CN.4/106), requested him to continue his work.

The present report covers questions which had been left pending and also contains additional articles for the draft submitted to the Commission. These questions are dealt with under the headings "Exoneration from responsibility; extenuating and aggravating circumstances" (chapter VI), "Exhaustion of local remedies" (chapter VII), "Submission of the international claim" (chapter VIII), and "Character and measure of reparation" (chapter IX). Thus, although not aspiring to exhaust the subject in all its aspects, this report deals with all the questions generally included under the heading "(International) Responsibility of the State for injuries caused in its territory to the person or property of aliens". Consequently, when it resumes its discussion of the subject, the Commission will be able to consider all the principal problems and questions involved in this branch of the topic of international responsibility as a single whole.

2. In order to avoid unnecessary repetitions in the commentaries on the various articles of the draft where particular questions have already been fully considered in the first report (A/CN.4/96), the Special Rapporteur has followed the method used in the second report and has confined himself in those cases to references.

**Acts and omissions which give rise to responsibility  
Questions raised in the Commission during the  
discussion of the second report on international  
responsibility**

[NOTE. The second report dealt with the first five chapters of the draft. The headings of these chapters were as follows:

- I. Nature and scope of responsibility
- II. Acts and omissions of organs and officials of the State
- III. Violation of fundamental human rights
- IV. Non-performance of contractual obligations and acts of expropriation
- V. Acts of individuals and internal disturbances.]

3. As already stated, the time which the Commission could devote at its ninth session to the discussion of the second report was so short that it was unable to consider in detail any of the problems encountered in any attempt to determine and to define the acts and omissions which give rise to the international responsibility of the State for injuries caused in its territory to the person or property of aliens. Nevertheless, during the discussion certain questions were raised which concern the method and technical approach to be adopted in the codification of the topic. That being so, it would perhaps be proper for the Special Rapporteur, in the light of the comments made, to explain the considerations which, in his opinion, justify the method and technical approach employed by him in the preparation of his reports. One of the points touched upon in these comments is the content or scope of this work of codification.

1. CONTENT OR SCOPE OF THIS CODIFICATION

4. Some members of the Commission considered that the scope of the codification ought to be delimited, and that the Commission ought not to deal with certain questions which they regarded as not strictly relevant to the task of codifying the "principles of international law governing State responsibility" in the terms of General Assembly resolution 799 (VIII). It was suggested that the subjects covered by the headings "Violation of fundamental human rights" and "Non-performance of con-

tractual obligations and acts of expropriation" (chapters III and IV of the draft) should be excluded, on the grounds that they raised substantive questions. The proponents of this view contended that consideration of those subjects would involve a definition of the international obligations of the State, an undertaking exceeding the Commission's terms of reference; a similar view, expressed in somewhat different words, was that the study should relate exclusively to State responsibility" in the strict sense of the word" (415th and 416th meetings).

5. The question of fundamental human rights, which is the subject of provisions included in the draft for special reasons, will be dealt with in the next section. The Special Rapporteur must first state, however, that he has genuine difficulty in understanding why some of his colleagues should have felt that the determination of the exact limits of the study and especially the exclusion of substantive questions were matters requiring a decision forthwith. In the first place, the problem of delimiting the exact scope of the subject matter to be codified is not peculiar to the topic of responsibility. As the experience of every body entrusted with codification, including this Commission, has shown, the same difficulties are also encountered, to a greater or lesser degree, in dealing with any other topic. This does not mean, of course, that the problem should be ignored, but the Commission should avoid premature action and not take hasty decisions which might perhaps have to be revoked later. A much more logical and practical course would be to continue the codification, and then, after a thorough study of every aspect of the topic (and, possibly, after the receipt of comments from Governments on the first draft to be prepared by the Commission), to think about omitting whatever is not pertinent to the principles of international law governing State responsibility. If it proceeded otherwise, the Commission would not only lose some valuable experience but would also be committing itself to an *a priori* selection which would not advance its proceedings in any way, and which would still be open to the objection mentioned.

6. The correctness of this view seems to be further confirmed by some reflection on the specific suggestion that the codification should omit the matters relating to contractual obligations in general, public debts and acts of expropriation. But surely the Commission could not decide that these should be omitted on the grounds that they involve substantive questions? In the course of the discussion, the writer stated, with all due respect to the views of his colleagues, that he had gained the impression that some speakers had introduced notions and distinctions totally absent from the texts and *travaux préparatoires* of the many draft codes, both private and official, prepared before this draft (416th meeting). Those texts, far from mentioning such notions and distinctions, contain explicit provisions on the subjects in question—and many of these provisions are reproduced in the commentaries on the relevant draft articles. The same is true of the decisions of courts and claims commissions, which contain ample precedent concerning the international responsibility of the State for the non-performance of obligations arising out of a contract concluded with an alien or out of a concession granted to him. In these circumstances, the exclusion of such matter from the draft which the Commission is to prepare seems impossible to justify.

7. Furthermore, these matters neither raise issues different in character from those covered by other provisions of the draft laid before the Commission, nor have they been treated as substantive questions in the articles.

Except for those dealing with fundamental human rights (articles 5 and 6), the provisions are not intended as precise statements or definitions of the manifold obligations which international law imposes on the State in its treatment of aliens. Their primary object is, rather, to indicate, sometimes quite specifically and sometimes less so, the conditions or circumstances which give rise to international responsibility in cases of breach or non-observance of those obligations. In brief, the aim of the draft provisions, which was essentially also the object of previous codifications, is to determine and state, in so far as is possible and advisable, the conditions and circumstances which must be present before some act or omission inconsistent with international law is imputable to the State. But surely one cannot speak of "imputability" without relating the act or omission to an international obligation of the State. None of the earlier codifications—in so far as any ever attempted to do so—succeeded in discussing "imputability" in the abstract in this way. That is why the provisions of chapter IV of the draft likewise mention the contractual obligations of the State, though with the immediate object of indicating when, in the event of non-performance or non-observance, international responsibility arises.

## 2. RESPONSIBILITY FOR VIOLATION OF FUNDAMENTAL HUMAN RIGHTS

8. Since writing his first report, the Special Rapporteur has repeatedly stressed the need for composing the traditional conflict between the "international standard of justice" and the principle of the equality of nationals and aliens. With this in mind, he suggested that a solution should be sought through a reformulation of both principles and their integration into a new legal rule, incorporating the essential elements and serving the main purposes of both. Such a rule would derive from the international recognition which has been extended to human rights and fundamental freedoms. In the writer's opinion, the conflict and the antagonism formerly existing between the "international standard" and the principle of the equality of nationals and aliens have become obsolete in consequence of the political and juridical phenomenon in the post-war world of the recognition of fundamental human rights, and hence it would be useless to ignore this phenomenon and to continue to hope that either the "international standard" or the principle of equality will prevail (see A/CN.4/96, chap. VI, and A/CN.4/106, chap. III).

9. During the discussion of the draft at the ninth session, as in the previous year, several members of the Commission stated that they were in sympathy with the idea, and that, in principle, they supported the system proposed in articles 5 and 6. Others, however, expressed objections, not always based on the same considerations, which call for some brief comment. The three essential objections can be summarized as follows: an individual, whether a national or an alien, cannot be regarded as a (direct) subject of international law; (fundamental) human rights have not yet been recognized by positive international law; any violation of these rights raises a substantive question and is therefore not germane to State responsibility but to the "legal status of aliens", which is a separate topic on the Commission's programme (413th, 415th and 416th meetings). These three objections are discussed one by one in the passages which follow.

10. The first objection, as formulated, actually raises a general problem the solution of which is hardly neces-

sary for the specific purposes of the draft. The only question is whether international law, in its present state of development, recognizes certain interests and rights of the human person regardless of his nationality. As for the second objection, if we accepted it we would also have to reject the basic premise underlying articles 4 and 5. Here there may be some confusion between legal rules which merely recognize a right (or impose an obligation) and those which by establishing procedures and guarantees of various kinds, ensure its effective exercise (or guarantee compliance with the obligation). The distinction may be of little consequence in an internal legal system which has been fully developed and refined, but it still has very great significance in the international legal order. Hence, even when speaking in terms of positive international law, nobody draws the distinction between the two categories of rules and nobody contends that only those in the second category have validity or binding force. In brief, therefore, one should not confuse in international law the *validity* or intrinsically obligatory nature of a rule with its *efficacy*.

11. Yet this confusion is still occasionally apparent in comments on the provisions of the United Nations Charter or of other more recent international instruments concerning "human rights and fundamental freedoms for all". As was indicated in the second report, the Charter, does not, of course, contain any explicit provision directly requiring Member States to respect these rights and fundamental freedoms or guaranteeing the effective exercise thereof. This, however, is rather a formal defect, since this duty owed by Member States is either implicitly or indirectly stipulated in other provisions, especially in Articles 55 and 56 of the Charter. Hence these provisions, regarded as a whole, cannot properly be described as fully effective rules. The same, however, can be said of other Charter provisions, the validity and binding force of which nobody questions. The one certain fact is that, with the exception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), there is no other international instrument or convention in which human rights and fundamental freedoms are enumerated. The question arises therefore whether, for the purposes of this codification, the existence of such an instrument or convention is in fact indispensable. Even if there were not similar—and often, indeed, identical—provisions in the instruments enumerating these rights and freedoms and in modern municipal statutes, the Commission would hardly have any difficulty in deciding which of those rights and freedoms are relevant to the purposes of this codification. To this it might be added that any such enumeration would still not be founded on positive law. If this objection were justified, it could also be raised for identical reasons, against the "international standard of justice" and against the principle of the equality of nationals and aliens, since both presuppose the existence of certain rights which have never been recognized in an international treaty. Despite this fact, however, both the "international standard" and the principle in question have been accepted and applied in diplomatic practice and by courts and claims commissions in decisions in cases of State responsibility for violation of human rights and freedoms.

12. The third objection raises an issue purely of form. It would obviously be idle to attempt to deny the close affinity and even identity between the subject matter of chapter III of the draft and the topic entitled "legal status of aliens". But the question cannot be put in this way, for, if it were, then this codification would have to be abandoned altogether. Indeed, whatever aspect of the topic

"International responsibility of the State for injuries caused in its territory to the person or property of aliens" is considered, one is driven to realize, invariably, that there is at bottom a problem related to the treatment of aliens. This does not mean, however, that the two topics cannot be codified separately, as, in fact, they have been in the past under the auspices of the League of Nations and by inter-American conferences and bodies (see A/CN.4/1/Rev.1, pp. 45-46). We only have to delimit, as far as possible, the subjects which each of the codifications should cover, and for this purpose it will be sufficient to bear in mind the objects of each.<sup>1</sup> Accordingly, in the codification of the principles governing State responsibility the sole concern is to determine under what conditions or in what circumstances the non-observance by the State of a duty owed to the alien renders the act or omission in question imputable to that State. In this connexion, it is permissible to point out that if the affinity or similarity between these two subjects had given rise to this kind of objection in earlier codifications the problem of the "international standard" and of the principle of equality, which are both principles applicable to the treatment of aliens, would have had to be regarded as outside the scope of the subject of responsibility and no solution thereof could ever have been envisaged.

### 3. THE PROBLEM OF SOURCES

13. Another problem which arose during the discussion on the method and technical approach to be adopted in this codification was that of the sources of international law. While some members of the Commission advocated the abandonment of the "unbridled positivism which had once reigned supreme", others insisted that the only rules to be taken into account were those established by treaties and custom (413th and 415th meetings). The comments made in this connexion referred mostly to the provisions of chapter III of the draft, but in view of the nature and scope of the problem it would perhaps be proper to explain briefly in what sense the expression "... from any of the sources of international law" is used in article 1, paragraph 2.

14. In the first place, it seems unnecessary to state expressly—and that is why the second report did not do so—that in employing a phrase analogous to that contained in the Preamble to the United Nations Charter ("... from treaties and other sources of international law...") the article did not mean the "sources" to be restricted exclusively to treaties and custom. In view of the developments which have taken place in the creative process that establishes new rules of international law, the term "sources" can be construed so broadly that the narrowest construction that can be envisaged is the one contained in Article 38 of the Statute of the International Court of Justice; that provision has the signal virtue of modifying the narrow positivist idea of sources which used to prevail.

15. The important point, however, is not merely the interpretation to be placed on the expression "sources of

<sup>1</sup> For examples of instruments concerning the legal status or treatment of aliens, see the Convention on the Status of Aliens signed at Havana on 20 February 1928 (League of Nations, *Treaty Series*, vol. CXXXII, 1932-1933, No. 3045); the draft convention prepared by the Economic Committee of the League of Nations for the International Conference on the Treatment of Foreigners, held at Paris in 1929 (League of Nations publication, *II. Economic and Financial, 1928.II.14* (document C.174.M.53.1928.11), p. 11); and the more recent European Convention on Establishment and the Protocol thereto signed at Paris on 13 December 1955 (Council of Europe, *European Treaty Series*, No. 19.

international law". This problem is inextricably bound up with the basic principles which should guide the Commission in its work of codification. Even before the Commission was established the authors of its statute realized that the expressions "progressive development" and "codification" did not reflect absolute and mutually exclusive notions. In particular, the Rapporteur of the Committee on the Progressive Development of International Law and its Codification stated in his final report that "For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice". He added: "It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps and amend the law in the light of new developments".<sup>2</sup> The codifying organs of the League of Nations, and the Assembly itself had previously made statements to exactly the same effect (see A/CN.4/1/Rev.1). As far as the Commission itself is concerned, there is no need to recall that all its earlier drafts were decisively influenced by the same considerations, in fact the Commission has frequently confirmed this very point in explicit terms in its reports. This approach, which has thus been recognized as the proper one to adopt in codification work in general, is especially necessary and justified now, for the reasons already explained in the introduction to the first report, in the codification of the principles governing international responsibility.

## CHAPTER VI

### Exoneration from responsibility; extenuating and aggravating circumstances

#### Article 13

1. Notwithstanding the provisions of the article last preceding, the State shall not be responsible for injuries caused to an alien if the measures taken are the consequence of force majeure or of a state of necessity due to a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke the peril and was unable to counteract it by other means.

2. Similarly, the State shall not be responsible for the injuries caused if the injurious act was provoked by some fault on the part of the alien himself.

3. Force majeure, state of necessity and the fault imputable to the alien shall, if not admissible as grounds for exoneration from responsibility, constitute extenuating circumstances in the determination of the quantum of reparation.

#### Article 14

In the cases of responsibility provided for in articles 10 and 11, the connivance or complicity of the authorities of the State in the injurious acts of private individuals shall constitute an aggravating circumstance for the purposes contemplated in article 25 of the present draft.

#### Commentary

1. The State's international responsibility for injuries caused to the person or property of aliens arises in cases where such injuries are the consequence of some act or omission on the part of its organs or officials which contravenes the State's international obligations. However, "there are cases in which an act, wrongful in itself, does not produce the effects of a wrongful act, or completely loses its wrongful character, or even constitutes the exercise of a right that takes precedence over the right which

<sup>2</sup> *Official Record of the General Assembly, Second Session, Sixth Committee, annex 1, para. 10.*

the act violates or disregards".<sup>3</sup> The intrinsic wrongfulness or illegality of an act or omission, i.e. the mere fact of its contravening the State's international obligations, does not, of itself, always suffice to make the State responsible for the injuries caused. What is required, in addition, is the absence of any grounds or circumstances, wholly unconnected with the State's volition, which imposed the act or omission on the State or which directly provoked the injurious act. Hence, what the above provisions are concerned with is not exactly an ingredient of international responsibility but rather a special situation in which the State can, if the circumstances described are present concurrently with the injurious act imputed to it, decline responsibility. In this sense, there can be no responsibility unless there are no grounds or circumstances which justify the State's conduct or which provoked the injurious act, as the case may be. In short, to give rise to responsibility, the act or omission must be both illegal and unjustified.

2. While the foregoing refers primarily to grounds of absolute exoneration from responsibility, it also explains what, by analogy with municipal law, might be termed "*extenuating circumstances*". Sometimes, the presence of such a circumstance, while not wholly justifying the illegal act, nevertheless makes it possible to consider that the responsibility is not of the same degree as that which would have been imputable to the State had that circumstance not been present.

3. On the other hand, inasmuch as this report speaks of exonerating and extenuating circumstances, it should also deal with the converse—"*aggravating circumstances*", i.e. circumstances which involve the State in a greater degree of responsibility. Here, however, there are bound to be certain difficulties, for even the expression "*aggravating circumstances*" is not current in international law with reference to civil responsibility. Still, if the codification of this topic is not to be incomplete, it will have to include, under this or some other description, not only extenuating and exonerating circumstances but also those which manifestly aggravate the State's responsibility. Besides, the compelling reason for including provisions relating to extenuating and aggravating circumstances is that the reparation of the injury must be fair, and that the State may be required to do something more than merely make reparation, as will be shown later on.

#### 4. "FORCE MAJEURE" AND STATE OF NECESSITY

4. Article 12 of the draft contemplates a typical case of *force majeure*, that of the injuries caused to an alien by measures taken by the armed forces or other authorities for the purpose of preventing or suppressing an insurrection or any other internal disturbance. Under the provisions of article 12 the international responsibility of the State is not involved unless the measures taken affect the alien directly or individually. As was explained in the earlier commentary on this article, it is necessary to make a distinction between the two different situations which occur in practice: sometimes the measures are exclusively of a general character (for example, an attack by fire-arms, or the bombardment of a locality), whereas at other times they directly or individually affect private persons (for example, the seizure of a railway, aqueduct or electric power station). In the first case there is no question of responsibility because the State is only carrying out one of its essential functions, that of maintaining public order

and the stability of the constituted Government. The second case is different, even though there, too, the measures constitute an exercise of the same function and the same right. From the internal point of view, the State will be under a duty to return the property it has requisitioned or occupied and in general to indemnify the owners for any injuries it may have caused. Although this is an internal rather than an international responsibility, it would assume the character of international responsibility if there was discrimination between nationals and aliens, and if reparation was limited to the injuries caused to the former. (See A/CN.4/106, chap. V, para. 30).

5. This is why article 13 of the draft contains a proviso excepting the second of the two situations referred to above from the case of *force majeure* covered by the article. On the other hand, the first situation is somewhat analogous to that resulting from an earthquake, flood, fire, epidemic, etc. There is, of course, no question of the State's having a duty to repair injuries of aliens caused by the elements or by the forces of nature, although one writer has suggested the possibility of such a responsibility.<sup>4</sup> The analogy with the case covered by article 12 would be applicable not to the injuries caused directly by such natural disasters but to those resulting from measures taken by the authorities of the State for the purposes of counteracting them or dealing with the situation they created. If these measures do not affect the alien's person or property directly and individually, then, for reasons similar to those already indicated, there will likewise not be any responsibility. The *force majeure* is so obvious that it is impossible to conceive of either an internal or an international duty to make reparation.

6. The international case-law contains at least three cases in which it has been recognized that the defence of *force majeure* is admissible in international law as capable of exonerating the State from responsibility or of extenuating the responsibility imputable to it. In two of these cases the respondent State pleaded the financial position in which it had been placed by war as a circumstance preventing it from discharging its pecuniary obligations. One of these is the *Russian Indemnity case* (1912), which came before the Permanent Court of Arbitration of The Hague. The arbitral tribunal stated that "*The exception of 'force majeure' . . . may be pleaded in opposition in public as well as in private international law*".<sup>5</sup> Turkey had disclaimed its responsibility by alleging financial difficulties of the utmost seriousness. The tribunal held that "It would clearly be exaggeration to admit that the payment (or obtaining of a loan for the payment) of the comparatively small sum of about six million francs due the Russian claimants would imperil the existence of the Ottoman Empire or seriously compromise its internal or external situation".<sup>6</sup> On those grounds, the tribunal declared that the exception of *force majeure* could not be admitted.

7. The second of these cases is the *Case concerning the payment of various Serbian Loans issued in France* (1929), decided by the Permanent Court of International Justice. Yugoslavia pleaded *force majeure*, as well as impossibility of performance with respect to certain obligations connected with loans and bearer bonds issued

<sup>4</sup> Clyde Eagleton, *The responsibility of States in International Law* (New York, The New York University Press, 1928, p. 125).

<sup>5</sup> *The Hague Court Reports*, James Brown Scott (ed.) (New York, Oxford University Press, 1916), p. 317.

<sup>6</sup> *Ibid.*, p. 318.

<sup>3</sup> Dionisio Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, Societa Poligrafica Editoriale, 1955), vol. I, p. 413.

by the Serbian Government before 1914. As to the question of *force majeure*, the Court declared that:

"It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations and—if resorted to—the arbitral determination for which Article II of the Special Agreement provides".<sup>7</sup>

The plea of "impossibility of performance" does not come within the purview of this study, since it was put forward on the ground that it was illegal, under the French Act of 5 August 1914, to effect payment in gold francs.

8. The third is the *Société Commerciale de Belgique* case (1939), also decided by the former Permanent Court of International Justice. In this case it was argued that the Greek Government had been obliged, on account of the general financial crisis, to abandon the gold standard and to default in the service of its debt. In its judgement, the Court stated that it could declare itself on that contention only after having itself verified that the alleged financial situation constituting *force majeure* "really existed" and after having ascertained the effect which the execution of the arbitral awards already made would have on that situation. The Court also indicated that the Parties were in agreement that the question of Greece's capacity to pay was outside the scope of the proceedings before the Court.<sup>8</sup>

9. To sum up, the foregoing supports the view that the defence of *force majeure* is recognized in principle by international law; that in this law its validity or admissibility is contingent on conditions which are no less strict, or even stricter, than those governing the defence of *force majeure* in municipal law; that the most important of these conditions, and that which dominates the notion of *force majeure*, is "uncontrollableness";<sup>9</sup> and that where *force majeure* is not valid or admissible as a ground exonerating from responsibility, it may be valid or admissible as an extenuating circumstance for the purposes of fixing the quantum of reparation of the injury sustained.

10. Article 13 also mentions "state of necessity" as one of the grounds permitting a State to disclaim the responsibility imputed to it, or as one of the circumstances which may be considered extenuating for the purposes of reparation. Some writers deny that this ground or circumstance can have any of these consequences in positive international law. Basdevant, for example, says:

<sup>7</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 20, pp. 39-40.

<sup>8</sup> *Idem*, *Judgments, Orders and Advisory Opinions*, series A/B, No. 78, pp. 21-22.

<sup>9</sup> See in this connexion Marcel Sibert, *Traité de droit international public* (Paris, Librairie Dalloz, 1951), vol. I, p. 334. Article 4, paragraph 1, of the Draft Covenant on Civil and Political Rights provides as follows:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties hereto may take measures derogating from their obligations under this Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." (*Official Records of the Economic and Social Council, Eighteenth Session, Supplement No. 7, annex I, B*).

"There does not appear to be a rule of positive international law which would justify the non-observance of a rule of that law on the alleged ground of necessity. A State may take the view that, in a particular case, the circumstances override strict adherence to the law; it may consider that it has political or moral reasons for departing from the observance of international law. Nevertheless, there would still be a violation of positive international law capable of engaging the responsibility of the State to which it is imputable."<sup>10</sup>

However, the weight of opinion among the learned writers is decidedly on the other side. According to Anzilotti, a study of diplomatic documents shows that States are very far from denying that necessity may justify acts which *per se* contravene international law. He adds:

"While interested States have challenged, very often with justice, the existence [in a particular case] of an alleged necessity to act in a certain way, they have also specifically declared, or clearly implied, that in other circumstances the defence would have been completely valid. In other words, the defence is accepted in the abstract although rejected in specific cases. On the other hand, one would look in vain for a single statement challenging the principle of necessity as a general proposition."<sup>11</sup>

Thus, state of necessity, which is sometimes similar to, and may even be indistinguishable from, *force majeure*, is a principle which is recognized in the practice of States and is not limited to so-called "international law in time of war".<sup>12</sup>

11. State of necessity has sometimes been linked to self-defence. That is the case, in particular, in one of the bases of discussion prepared by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930). In view of the vagueness and contradictions encountered in the observations submitted by Governments, the Committee drafted the following text:

#### "Basis of discussion No. 24

"A State is not responsible for damage caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons.

"Should the circumstances not fully justify the acts which caused the damage, the State may be responsible to an extent to be determined."<sup>13</sup>

12. The basis of discussion, in referring to a "danger" provoked by the very alien who is injured, is rather more concerned with a case of the kind covered by article 13, paragraph 2, of the draft. So far as "self-defence" is concerned, this is notion which, as presently defined, falls outside the limits of this codification, as will be seen later. What is of interest here is the fact that this basis of discussion foresaw that a situation might arise in which

<sup>10</sup> Jules Basdevant, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international*, 1936, IV, p. 553.

<sup>11</sup> Anzilotti, *op. cit.*, p. 416. See also his separate opinion in the *Oscar Chinn* case (1934) (Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63, pp. 107 ff.).

<sup>12</sup> Cf. L. Oppenheim, *International Law—A Treatise*, vol. II, *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1952), pp. 232 and 233.

<sup>13</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 128.

the circumstances alleged by the State could, if not fully justify its acts, extenuate the responsibility imputed to it.

13. It is undeniable that great uncertainty surrounds the subject of necessity; in other words, it is a controversial question what circumstances have to attend the imputable act or omission in order that the state of necessity can justify full exoneration from responsibility or extenuate responsibility for the purposes of reparation. Nevertheless, it is precisely and principally because of this uncertainty, and because of the contradictions encountered in diplomatic and other documents, that necessity ought to be mentioned as a defence in the draft. If state of necessity is recognized in international law, as in fact it is, it needs a definition to forestall as far as possible a recurrence of past controversies concerning the circumstances in which it is admissible as a defence. And it is the purpose of the concluding part of paragraph 1 of article 13 to provide a definition.

14. In the first place, the peril must be one which threatens some vital interest of the State. Strupp defines states of necessity as

“... a situation, objectively judged, in which a State is threatened by a grave peril, present or imminent, capable of affecting its territorial status or identity, its Government or its form of government, or of curtailing or destroying its independence or international capacity to act and from which it cannot escape except by violating foreign interests protected by the law of nations”.<sup>14</sup>

Though the enumeration is quite comprehensive, it is possible that it does not cover all the interests which come within the category of those justifying the plea of state of necessity. That is why the article uses the expression “some vital interest”. At the same time, the peril must be one which a State “did not provoke”, for any fault or culpability on its part would rob the plea of all substance. Secondly, the peril must be “grave and imminent”, and not a simple threat. In the *Neptune* case (1797) the arbitration tribunal held that “the necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and rights must be absolute and irresistible . . .”.<sup>15</sup> And the third condition is that the State must have been “unable to counteract [the peril] by other means”; in other words there must be “impossibility of proceeding by any other method than the one contrary to law”.<sup>16</sup>

15. One last problem to be considered here is that of “self-defence”, traditionally a plea admitted in international law as a ground for exoneration from responsibility. Today, there is at least one reason against its inclusion in this codification. Since the adoption of the United Nations Charter, the right of self-defence, at all times recognized as one of those exercisable by the State for its own preservation, has become subject to the conditions laid down in Article 51 of the Charter. Naturally, acts performed by a State which come within the terms of Article 51 do not engage that State’s responsibility with

regard to the injuries resulting therefrom. However, this situation is one of armed conflict, which must exist before the right of self-defence may properly be exercised, whereas this draft is concerned exclusively with cases of responsibility in peacetime. Besides, the plea of “state of necessity”, within the meaning of article 13, would cover the cases which have hitherto been classed as instances of “self-defence”.

#### 5. FAULT ON THE PART OF THE ALIEN

16. Any fault attributable to the injured alien in the occurrence of the injurious act may also operate as a ground for exoneration from international responsibility or as an extenuating circumstance, as the case may be. This has been recognized as a valid ground by international case-law, some codifications and the writers who have dealt with the subject. First, the case-law will be considered below.

17. According to the award of the arbitration tribunal in the *Delagoa Bay Railway* case (1900), all the circumstances imputable to the concessionary company and favourable to the [Portuguese] Government extenuate the responsibility of the latter and justify a reduction in the amount of reparation.<sup>17</sup> In the *García and Garza* case and the *Lillie S. Kling* case, which came before the General Claims Commission (United States and Mexico) established by the Convention of 8 September 1923, it was explicitly recognized that the fault or culpability imputable to the injured alien should influence the amount of the reparation to which he is entitled.<sup>18</sup> Other cases, in particular the *Costa Rica Packet* case (1897), in which the fault imputable to the injured alien operated as a circumstance extenuating the respondent State’s responsibility, are cited in chapter IX in connexion with the rules governing the measure of reparation.

18. In the draft approved at its session, held at Neuchâtel, the Institute of International Law recognized that “the obligation to indemnify disappears if the injured persons are those who caused the act which gave rise to the injury . . . for example, in the case of a particularly provocative attitude towards the mob”.<sup>19</sup> This draft, in referring to the responsibility of the State in cases of internal disturbance, recognizes that the fault of the injured alien, if it is the cause of the injurious act, wholly exonerates the State from the duty to repair the injury.

19. In the light of the replies received from Governments relating to the conduct of aliens injured by acts of private individuals, the Preparatory Committee of the Conference of The Hague drafted basis of discussion No. 19:

“The extent of the State’s responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude.”<sup>20</sup>

This text reflects the doubts and the differing opinions expressed by Governments on the question whether the hypothetical circumstance could operate solely as a circum-

<sup>14</sup> Karl Strupp, *Eléments du droit international public universel, européen et américain*, 2nd ed. (Paris, Les Editions internationales, 1930), vol. I, p. 343.

<sup>15</sup> Georg Schwarzenberger, *International Law*, vol. I, *International Law as applied by International Courts and Tribunals*, 2nd ed. (London, Stevens and Sons Limited, 1949), p. 244.

<sup>16</sup> See the separate opinion of Anzilotti in the *Oscar Chinn* case (Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63, pp. 107.).

<sup>17</sup> Sibert, *op. cit.*, p. 334.

<sup>18</sup> J. G. De Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico under the Convention of September 8, 1923* (The Hague, Martinus Nijhoff, 1938), pp. 311 ff.

<sup>19</sup> *Annuaire de l’Institut de droit international*, vol. 18 (1900), p. 255.

<sup>20</sup> See League of Nations publication, *V. Legal, 1929V.3* (document C.75.M.69.1929.V), pp. 99-102.

stance extenuating the State's responsibility or, in some cases, as a ground for absolute exoneration.

20. Article VI of project No. 16 of the American Institute of International Law on "Diplomatic Protection" deals with two other possible cases of fault on the part of the alien:

"The American republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the Government to which the claim is made. The republic may also decline if the claimant has committed acts of hostility toward itself." (A/CN.4/96, annex 7).

This is substantially the situation which has just been examined. If the alien has conducted himself in an improper manner or in a manner that is contrary to the laws of the State in which he resides, he must of necessity accept the consequences of his conduct. In the cases envisaged in the American Institute's draft, if the alien's conduct was the cause of the injurious act, what basis would there be for diplomatic protection?

21. The hypothetical instances mentioned above do not, of course, constitute an exhaustive catalogue of the grounds or circumstances which exonerate the State from responsibility or extenuate responsibility for the purposes of reparation. There may be others, equally admissible, either as grounds for exoneration or as extenuating circumstances. And that is why in article 13, paragraph 2, of the draft general terms are used in preference to language referring to specific situations (the latter having been the practice in past codifications). Its essence is the recognition, in principle, of this additional exonerating or extenuating circumstance, for it is inconceivable that the State should have an unqualified duty to make reparation if the injury is the result of acts provoked by the alien himself. The only thing that has to be specified is the nature of the conduct imputable to the alien, namely culpable conduct, because it is the common element in all the possibilities. A vague reference to some act on the part of the alien would not do, for the conduct of the alien may not always justify the injurious act even if it was provoked by his conduct. It must be a culpable act, i.e. an act the consequences of which could or should have been foreseen by the alien.

#### 6. AGGRAVATING CIRCUMSTANCES

22. Although this terminology may be an innovation in the international law relating to State responsibility, there is really no objection to its adoption if the word "aggravating" is used to describe those circumstances which, by analogy with municipal law, tend to involve a greater degree of responsibility on the part of the State. As article 14 of the draft shows, the specific reference here is to cases of responsibility connected with acts of private individuals or with the internal disturbances mentioned in articles 10 and 11 in which imputability depends on whether there has been "manifest negligence" on the part of the authorities in taking the measures normally taken to prevent or punish the injurious acts. On the other hand, article 14 deals with the case of connivance (or deliberate and intentional failure to prosecute or to punish) or complicity of the authorities of the State in the injurious acts of private individuals. It should be noted that this is not the same thing as the failure of the authorities to exercise "due diligence", the criterion applicable in these cases of responsibility in assessing the conduct of the State; article 14 deals, rather, with circum-

stances which denote an attitude utterly at variance with that which the competent organs and authorities would be expected to observe. In cases in which there has been such an attitude on the part of the State's organs or officials, the degree of the State's responsibility cannot be the same as in those in which all that can be imputed to the State is manifest negligence in preventing or punishing the injurious acts. On the contrary, apart from the nature of the injury to the alien, the responsibility must be greater, in keeping with the gravity of the imputable act or omission.

23. The question might also be considered from another point of view: such acts or omissions might be treated on a par with those which engage what is known as the "direct" responsibility of the State, i.e. acts or omissions of its organs or officials which directly cause the injury to the person or property of the alien. The analogy might be patent in a case where the conduct of the authorities or their participation in the injurious acts was such as to become indistinguishable from one of the acts or omissions directly engaging the State's international responsibility. In practice, however, it will not always be easy to maintain this analogy, not even in the case of complicity, since complicity depends on the degree of material or effective participation imputable to the authorities. In any event, the salient feature in these cases of responsibility is still the act of the private individual, which is the direct cause of the injury, although the presence of the other element (the connivance or complicity of the authorities) would necessarily create a special responsibility on the part of the State. This approach has the further advantage of enabling certain difficulties encountered in the past by arbitration tribunals and commissions in deciding cases of responsibility of this kind to be avoided in the future, and, as will be seen later, or facilitating a solution for the purpose of determining what reparation is proper in such cases.

24. It is of course realized that in considering this type of conduct as an "aggravating circumstance" one may be straying from the notion of civil responsibility to which the Commission has decided to confine itself for the time being. The expression "aggravating circumstance" has, it is true, a frankly penal flavour, and its use in connexion with the cases indicated would logically suggest the idea of punitive reparation. Nevertheless, the problem can be resolved without resort to penal provisions in the draft. It would suffice to class these cases of responsibility among the acts or omissions the consequences of which extend beyond the specific injury caused to the person or property of the alien to the point of affecting what in the first report is called "the general interest". In this way, the State of nationality bringing the international claim for reparation of the injury caused to the alien would be able, if there was connivance or complicity of the authorities in the injurious act, to require the respondent State to take the steps referred to in article 25. This question will be touched on again in the comments on article 25 and, before then, in the discussion of the right of the State of nationality to bring an international claim under article 20, paragraph 2.

#### 7. INADMISSIBLE GROUNDS OR CIRCUMSTANCES

25. The Special Rapporteur's first report mentioned certain grounds or circumstances which cannot be admitted as exonerating or extenuating (A/CN.4/96, sect. 25). One of these is reprisals; the questionnaire sent to Governments in connexion with The Hague Con-

ference invited observations on the subject of reprisals and the Preparatory Committee formulated basis of discussion No. 25 in the following terms:

"A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs."<sup>21</sup>

Nowadays it would be difficult to admit, as the Preparatory Committee did, that reprisals can constitute grounds for exoneration from responsibility. Reprisals, as the term is understood in theory and in practice, imply a State conduct essentially contrary to the rules of international law. The term describes, furthermore, very different measures the object or purpose of which may, in many cases, be achieved by means consistent with international law. Where action reconcilable with that law is impossible, then possibly reprisals should be admissible, if the action in question was in fact taken in circumstances so grave as to constitute the state of necessity which is provided for in article 13.

26. Nor is the non-recognition of a State or of a Government or, by analogy, the severance or the suspension of diplomatic relations admissible as an exonerating circumstance. In the first place, in all these cases, the political factor is predominant, and consequently any legal solution that might be suggested would run the risk of being ineffective in practice. In any case, from a purely objective point of view, a State can hardly be relieved of responsibility simply because it or its Government has not been recognized by the claimant State, or because diplomatic relations with the claimant State are broken or suspended. As recognition has a declaratory effect, it is not possible to plead absence of international personality as a defence to responsibility, on the theory that the State concerned lacks the capacity to be a subject of those obligations which international law imposes upon the State or the Government. For obvious reasons, the severance or interruption of diplomatic relations does not even raise this issue. Naturally, it may be difficult in practice to assert the international responsibility successfully, for recognition may be a condition that has to be fulfilled before a claim can be pursued; indeed, recognition may actually be the consequence of the exercise of diplomatic protection. These are, however, purely procedural matters; they do not affect the principle of responsibility, if the imputable act or omission itself constitutes the non-observance of an international obligation.

## CHAPTER VII

### Exhaustion of local remedies

#### Article 15

1. An international claim brought for the purpose of obtaining reparation for injuries alleged by an alien, or for the purposes contemplated in article 25, shall not be admissible until all the remedies established by municipal law have been exhausted.

2. For the purposes of the provisions of the previous paragraph, local remedies shall be deemed to have been "exhausted" when the decision of the competent body or official is final.

3. Except in the cases of "denial of justice" provided for in article 4 of the draft, the absence, delay or inefficacy of local remedies, or the inadequacy of the reparation for the injury, shall be incapable of furnishing grounds for the international claim.

#### Article 16

1. Notwithstanding the provisions of the preceding article, if two or more States restrict by agreement the right to bring an international claim, such claim shall be admissible only in the cases and circumstances specified in the said agreement.

2. Similarly, in cases where an alien claims to have suffered injury as a result of the non-performance of obligations stipulated in a contract entered into with the State, or in a concession granted to him by the State, the international claim shall not be admissible if the alien concerned has agreed not to seek the diplomatic protection of the State of his nationality; the exoneration shall operate in accordance with the terms of the waiver.

3. The waiver mentioned in the previous paragraph shall not deprive the alien's State of nationality of the right to make an international claim in the case provided for in article 20, paragraph 2, of the present draft.

#### Article 17

Article 15 shall not apply if the State has expressly agreed with the alien, or, as the case may be, with the State of his nationality, to dispense with local remedies.

#### Article 18

Disputes between the respondent State and the alien, or, as the case may be, between that State and the State of his nationality, regarding the admissibility of an international claim shall be submitted to the methods of settlement provided for in articles 19 and 20 in the form of a preliminary question and resolved by means of a summary procedure.

#### Commentary

1. The four articles in this chapter relate to various aspects and problems of the "exhaustion of local remedies". Article 15 lays down the general principle that the admissibility of an international claim depends on the exhaustion of these remedies and indicates the point at which and the circumstances in which local remedies are deemed to have been "exhausted". Article 16 deals with the waiver of diplomatic protection and also with the case in which such a waiver, if made by the alien, does not deprive the State of nationality of the right to make an international claim. Article 17 concerns a special situation which may be the consequence of an agreement between two States, or between the alien and the respondent State, and in which the general principle does not apply. Lastly, article 18 provides for a mode of settling disputes which concern the interpretation or application of the provisions contained in the previous three articles.

### 8. FUNCTION OF THE PRINCIPLE

2. For more than one reason, practice has established the principle that an international claim to obtain reparation for injuries alleged by an alien is not admissible until all the remedies offered by municipal law have been exhausted. The reason is that so long as the private claimant has not brought and exhausted all the actions and proceedings provided for in the legislation of the State of residence, it is impossible to say whether an injury in fact exists and what is its extent, or whether the injury is the consequence of an act or omission truly imputable to the State, or whether the alien has or has not obtained appropriate reparation by resorting to these remedies. Borchard has explained the operation of the principle in a paragraph which is worth reproducing textually:

"The principle of international law by virtue of which the alien is deemed to tacitly submit and to be subject to the local law of the State of residence implies as its corollary that the remedies for a violation of his rights

<sup>21</sup> *Ibid*, p. 130.

must be sought in the local courts. Almost daily the Department of State of the United States of America has occasion to reiterate the rule that a claimant against a foreign Government is not usually regarded as entitled to the diplomatic interposition of his own Government until he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes claim. There are several reasons for this limitation upon diplomatic protection: first, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local State in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home Government of the complaining citizen must give the offending Government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussions; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the State; and fifthly, if it is a deliberate act of the State, that the State is willing to leave the wrong unrighted. It is a logical principle that where there is a judicial remedy, it must be sought. Only if sought in vain and a denial of justice established, does diplomatic interposition become proper."<sup>22</sup>

It is by reason of this multiple function that the principle of the exhaustion of local remedies is regarded as one of the fundamental principles in the matter of international responsibility. And the reason is undoubtedly that, otherwise, any internal claim would be capable of being converted into an international claim by the mere fact that the claimant is an alien, independently of any participation by the State in the acts which caused the injury or of its attitude at the time of reparation.

3. In connexion with the foregoing, as was stated in the Special Rapporteur's first report, the question has often been asked whether the rule concerning the exhaustion of local remedies constitutes a mere procedural requirement or whether it is, rather, a substantive condition upon which the very existence of the State's international responsibility hinges.<sup>23</sup> While one aspect of the question is quite academic, and with that the Commission is naturally not concerned, it has one practical aspect and

<sup>22</sup> Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York, The Banks Law Publishing Co., 1915), pp. 817-818.

<sup>23</sup> For a discussion of and precedents concerning the question, see the Special Rapporteur's first report (A/CN.4/96, paras. 170-173).

Since the publication of this report the Institute of International Law has considered the question at its session at Granada in 1956 and adopted the following text:

"When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a judicial body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the internal means of redress available to the injured person which appear to be effective and sufficient so long as the normal use of these means of redress has not been exhausted.

"This rule does not apply:

"(a) If the injurious act affected a person enjoying special international protection;

"(b) If the application of the rule has been set on one side by agreement between the States concerned." (*Annuaire de l'Institut de droit international*, vol. 46 (1956), p. 364.)

it is this which is really relevant to the purpose of the codification. So far as this practical aspect is concerned, neither theory nor practice leaves room for the slightest doubt: the responsibility or duty to make reparation for an injury caused to an alien is not exigible by means of an international claim so long as the local remedies have not been exhausted. In this sense, the rule implies a suspensive condition, which may be procedural or substantive, but to which the right to bring international claims is subordinated. Responsibility as such may or may not exist, but unless and until the condition is fulfilled, the State of the nationality of the alien has only a potential right.

4. These considerations are reflected in the wording of article 15, paragraph 1, of the draft. In other words, the admissibility of the international claim for any of the purposes contemplated by the draft is contingent on the exhaustion of local remedies. Now, it is not enough, for the purpose of solving the problems arising out of its application, simply to set down the bare principle. Of all these problems the one which has caused major difficulties, both in the text-books and in practice, is this: at what point or in what circumstances should the local remedies be deemed to have been exhausted for the purposes mentioned?

#### 9. WHEN ARE LOCAL REMEDIES DEEMED TO BE "EXHAUSTED"?

5. From the sources cited in the first report (A/CN.4/196), which include both writings of learned jurists and diplomatic and judicial practice, it appears that there are three main schools of thought, three ways of answering this question. According to one view, "There can be no need . . . again to resort to those [the municipal] courts if the result must be a repetition of a decision already given." (*Ibid.*, para. 165). A different view has been expressed in these words: "The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights." (*Ibid.*, para. 166).

6. Clearly, the first of these pronouncements tends frankly to limit the principle of the exhaustion of local remedies, while the second reflects an excessively liberal conception of the principle. The third view is in a way an intermediate one; it is the one which finds expression in article 15, paragraphs 2 and 3, of the draft. For purposes of illustration, there are quoted immediately below some of the provisions adopted in first reading by the Third Committee of The Hague Conference (1930):

#### "Article 4

"1. The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.

"2. This rule does not apply in the cases mentioned in paragraph 2 of Article 9."

#### "Article 9

"International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact:

. . .

"(2) That, in a manner incompatible with the said obligations, [i.e. the international obligations of the State], the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice."<sup>24</sup>

7. Though expressed in different words, this is substantially the position taken by the Seventh International Conference of American States (Montevideo, 1933) in its resolution on "International responsibility of the State":

(3) [The Conference] reaffirms equally that diplomatic protection cannot be initiated in favour of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the difference may have arisen. Should no agreement on said difference be reached through diplomatic channels, within a reasonable period of time, the matter shall then be referred to arbitration.<sup>25</sup>

8. In view of these different conceptions of the rule of the exhaustion of local remedies, the adoption of any extreme position would obviously be incompatible with its true function and purposes. In the first place, to accept the view that the condition to which the rule subordinates the bringing of an international claim may be deemed to be fulfilled if the exhaustion of local remedies is considered of no avail would be tantamount to allowing the State of nationality to prejudge the efficacy of these remedies and to authorizing that State to exercise diplomatic protection before it knows the attitude of the respondent State. On the other hand, the idea of excluding diplomatic protection if the aliens have had free access to the municipal courts for the purpose of defending their rights—irrespective of the comportment of the courts and of the outcome of the judicial proceedings—seems equally inadmissible.

9. It follows that the third of the views mentioned is the one most consistent with the purposes of the rule. The alien has a duty to exhaust all the remedies open to him under municipal law, and the State of his nationality (or the alien himself in the case provided for in article 19 of the draft) has a duty to refrain from bringing the international claim until that condition has been fulfilled. Its fulfilment is an event which can be verified objectively, for it will be sufficient to know whether the decision of the competent body or official is "final" within the meaning of draft article 15, paragraph 2. So long as a "final" decision has not been given, it cannot be argued, either in fact or in law, that the remedies open to the alien alleging the injury have been exhausted, nor can it be said with certainty what is the form or scope of the act or omission of the State on which the international claim is founded.

10. The last question to be considered in this context is what would happen if it is alleged that the local remedies are ineffective, non-existent or dilatory, so that they may be deemed to have been "exhausted" for the

purposes of the right to bring an international claim, or if, these remedies having in fact been exhausted, the reparation is regarded as insufficient or inadequate. How are these (in practice not uncommon) situations to be dealt with? Here, again, the difficulties are not insuperable if one looks for a solution to the idea underlying the codifications cited above. For if the proceedings instituted for the purpose of seeking local remedies suffered an unjustified delay or any other interruption which patently demonstrates the inefficacy of these remedies, then the case would be one of "denial of justice" within the meaning of draft article 4, paragraph 2. Similarly, if the reparation of the injury is insufficient or inadequate, then either the decision is "manifestly unjust" within the meaning of paragraph 3 of the same article, or else the case is one of those, relatively frequent in litigation under municipal law, in which the plaintiff is not satisfied with the form or amount of the reparation. In this latter case, since there is actually no unlawful act or omission imputable to the State, there cannot be any international responsibility either.

#### 10. WAIVER OF THE RIGHT TO BRING AN INTERNATIONAL CLAIM

11. In his first report, the Special Rapporteur considered with some care, though in more general terms, the two cases of waiver of the exercise of diplomatic protection: waiver by the State of nationality itself, and waiver by the private individual of the right to request that State to bring a claim on his behalf, in both cases the waiver being stipulated in an agreement with the State to which responsibility is imputed (A/CN.4/96, sect. 24). These two cases, which obviously are closely related to the rule of the exhaustion of local remedies, are the subject of the first two paragraphs of article 16 of the draft.

12. It will be recalled that the first case refers to the practice, which originated in the nineteenth century, of concluding bilateral treaties limiting the right of diplomatic protection to a few expressly specified situations. As a rule, a saving clause was inserted concerning cases of denial of justice, though different treaties interpret "denial of justice" very differently. As is known, the propriety and even the validity of these stipulations have at times been questioned.<sup>26</sup> Nevertheless, apart from the doubtful character of the alleged "duty" of the State to protect its nationals abroad, there are really no serious grounds, whether legal or otherwise, for denying the propriety of waiving a right which is intrinsically capable of being waived, particularly if the waiver does not affect the principle upon which the diplomatic protection is based. An examination of the terms and scope of the treaties to which reference has been made will show that the principle in question is not affected by them. Their purpose is simply to limit the exercise of the right of diplomatic protection, not to abolish that right; this is also true, as will be seen later, in the case of a waiver by the alien. As to the duty of the State to protect aliens in its territory, the State of residence is not relieved of this duty by these stipulations which limit its international responsibility; the latter are meant, rather, to define that

<sup>24</sup> League of Nations publication, *V. Legal, 1930 V.17* (document C.351(c)M.145(c).1930.V), pp. 236 and 237. Cf. the similar language of basis of discussion No. 27 prepared by the Preparatory Committee of The Hague Conference (*idem, V. Legal.1929.V.3* (document C.75.M.69.1929.V), p. 139).

<sup>25</sup> *The International Conferences of American States, First Supplement, 1933-1940* (Washington, D.C., Carnegie Endowment for International Peace, 1940), p. 92.

<sup>26</sup> At its session at Neuchâtel in 1900, the Institute of International Law expressed the opinion that "... these clauses err inasmuch as they exonerate States from their duty to protect their nationals abroad and from their duty to protect aliens in their territory." (*Annuaire de l'Institut de droit international*, vol. 18 (1900), pp. 253-254). See also Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (New York, Longmans, Green and Co., 1938), pp. 40 ff.

duty in clear and precise terms, not only for the benefit of that State but also for the benefit of the aliens. These are the considerations on which paragraph 1 of article 16 is based.

13. Paragraph 2 of the same article deals with the waiver of diplomatic protection commonly known as the Calvo Clause. For reasons which are easy to understand, a provision relating to this clause is even more necessary than that contained in paragraph 1. In the first place, there is still a difference of opinion on the true scope of the waiver by the alien in the contract entered into with the State or in the concession granted to him by the State. Secondly, doubts are still voiced concerning its actual validity or, at least, the validity of certain forms of the waiver. And, lastly, if the draft remained silent on this point, the only provisions applicable would be those of article 15, and the consequence would be a conflict between a general principle and a particular rule, the presence and intrinsic validity of which it would be unrealistic to disregard.

14. The Calvo Clause may and, in fact, does take in practice several forms. Sometimes, it merely consists of a stipulation that the foreign individual concerned will be satisfied with the action of the local courts. In other cases, both the alien and the local Government concerned mutually undertake to submit any disputes which may arise between them to arbitrators appointed by both parties. On occasion, the Calvo Clause embodies a more direct and broader waiver of diplomatic protection, as when it provides that disputes which may arise shall in no circumstances lead to an international claim, or else that the foreign individuals or corporate bodies are to be deemed to be nationals of the country for the purposes of the contract or concession.<sup>27</sup> In several countries, there exist constitutional or legislative provisions whereby contracts entered into by the State with aliens are only valid if they include a clause of this type, i.e., it is deemed to be an implicit term of all these contracts.<sup>28</sup> One further point should be added: whatever form it may take, the Calvo Clause invariably relates to a contractual relationship, and only operates with regard to disputes concerning the interpretation, application or performance of the contract or concession.

15. What, then, is the true purpose or object of the Calvo Clause? In other words, what is in fact the scope

<sup>27</sup> An example of such a provision may be found in article 18 of the contract which was in issue in the well-known *North American Dredging Company* case (1926); the article read:

"The contractor and all other persons who, as employees or in any other capacity, may be engaged in the execution of work under this contract, either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of any foreign diplomatic agents be permitted in any matter related to this contract." See A. H. Feller, *The Mexican Claims Commissions, 1923-1934* (New York, The Macmillan Company, 1935), p. 187.

<sup>28</sup> For examples of these various forms of the Calvo Clause see Eagleton, *op. cit.*, pp. 168-169, and the comment to article 17 of the draft by Harvard Law School in Supplement to the *American Journal of International Law*, vol. 23 (1929), pp. 203 ff.

of the alien's waiver of diplomatic protection? It will be recalled that, according to some learned authors, it is merely a reaffirmation of the rule requiring local remedies to be exhausted before the right of diplomatic protection can be exercised, because, in so far as it may purport to prevent the State [of nationality] from exercising that right in accordance with international law, the Calvo Clause will be ineffective in law; in other words it will be void *ab initio* in so far as it is framed so as to involve a complete waiver of that protection. Nevertheless, it would be wrong to consider the Clause, even conceived in this way, as useless or superfluous, for in practice it has, within this limited scope, enabled States to resist successfully international claims which, but for the presence of the Clause, would have been admissible.<sup>29</sup> But this is not really the question at issue here, for the object or purpose of the Clause is much broader in the majority of cases where it generally operates, in effect, as a complete and absolute waiver of diplomatic protection. In these cases the Calvo Clause would not limit the right of the State of nationality but would bar an international claim to obtain reparation for an injury, whatever may have been accomplished by the exhaustion of local remedies.

#### 11. THE PROBLEM OF THE VALIDITY OF THE CALVO CLAUSE

16. International case-law has not yet recognized the validity of the Calvo Clause to the same extent. In its decision in the *North American Dredging Company* case (1926)—which was the first to construe the true juridical effect of the Clause and which examined its various aspects most thoroughly—the United States-Mexican General Claims Commission held that this validity was not absolute. Under article V of the Convention of 8 September 1923, the United States and Mexico agreed that "no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim".<sup>30</sup> When the claim was submitted, the Commission held it to be inadmissible on the grounds that there had been a valid contractual stipulation to resort to local remedies (article 18 of the contract, quoted in footnote 27). In its opinion:

"... where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies and authorities, and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim."<sup>31</sup> At the same time, however, the Commission stated:

"Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of

<sup>29</sup> See, in this connexion, a recent work which is both thorough and objective: Donald R. Shea, *The Calvo Clause, A Problem of Inter-American and International Law and Diplomacy* (Minneapolis, University of Minnesota Press, 1955) p. 31.

<sup>30</sup> Feller, *op. cit.* (footnote 27 above), p. 326.

<sup>31</sup> *Opinions of Commissioners under the Convention concluded 8 September 1923 between the United States and Mexico—4 February 1926 to 23 July 1927* (Washington, U.S. Government Printing Office, 1927), pp. 31-32.

such a clause in a contract subscribed by such claimant."<sup>32</sup>

In its summing up, the Commission referred specifically to a claim for "denial of justice".<sup>33</sup> Some of the writers who have commented on the decision in the *North American Dredging Company* case have described the Commission's reasoning as inconsistent and even contradictory,<sup>34</sup> and it would certainly seem that, at least in so far as the above distinction is concerned, the Commission's line of thought is not entirely clear.

17. By contrast, the wording of article 16, paragraph 2, of the draft removes all doubt on this point and thus disposes of the crucial issue raised by the Calvo Clause. Under article 7, paragraph 3, of the draft, none of the provisions governing the international responsibility of the State for injuries caused by the non-performance of obligations stipulated in a contract "shall apply if the contract or concession contains a clause of the nature described in article 16, paragraph 2". It is thus explicitly admitted that if the waiver of diplomatic protection is absolute, no international claim can be entertained even in the case of denial of justice. This provision of course applies only to a specific case of denial of justice, that connected with the interpretation, application or execution of a contract, and not in cases where some other rights of the alien of interests of another kind were affected. At first sight, this exception to the principle which governs international responsibility for acts and omissions of this nature might appear unjustified. In reality, however, it is not unjustified. Contractual interests and rights are not, so to speak, in the same class as the other rights enjoyed by the alien in international law. Not only are they of an exclusively monetary character, but the alien acquires them by virtue of a contract or concession the acceptance of which depends solely on his own volition.

18. The writer is not seeking to minimize the importance of this category of rights and interests, but to stress that, by their very nature, they can form the subject of an infinite variety of operations and transactions which can be effected merely by the consent of the contracting parties. In brief, these are rights and interests in respect of which the alien may waive diplomatic protection in whatever terms he considers most conducive to the acquisition of the benefits which he expects to derive from the contract or concession. Nor can it be admitted that, in such cases, the alien agreed to the waiver with a knowledge of the rights vested in the State of his nationality, for this would imply that he entered into an undertaking in bad faith.<sup>35</sup> It should be noted, moreover, that from the strictly juridical standpoint, the Calvo Clause does not even constitute an exception to the principle establishing international responsibility in cases of denial of justice. An alien who agrees not to seek the diplomatic protection of the State of his nationality and to rely on local remedies in seeking satisfaction of any claim he may have against the host State places himself, in fact and in law, on exactly the same footing as a national. Thus the Clause creates a juridical situation in which, technically, there can be no problem of denial of justice of interest to international law.

<sup>32</sup> *Ibid.*, p. 31.

<sup>33</sup> *Ibid.*, pp. 32 and 33.

<sup>34</sup> See Shea, *op. cit.* (footnote 29 above), pp. 211 ff.

<sup>35</sup> See in this connexion Antonio Sánchez de Bustamante y Sirvén, *Derecho internacional público* (Havana, Carasa y Cia, 1936), vol. III, pp. 505-506.

19. Furthermore, even international case-law has on occasion gone so far as to attribute to the Calvo Clause a binding force very similar to that envisaged in the draft. An example can be found in the *Interoceanic Railway* case (1931), in which the British-Mexican Claims Commission held that vain efforts to secure redress over a period of almost eight years did not constitute a denial or undue delay of justice. Similarly, the Commission's decision in the *North American Dredging Company* case and the *International Fisheries* case (1931) established that, by reason of the Calvo Clause, there could be no question of a denial of "immediate" justice relieving the claimant of his duty to seek local remedies. It has rightly been said regarding these rulings that the Commission, undoubtedly influenced by the Calvo Clause commitment, required a "more patent or flagrant denial of justice".<sup>36</sup>

20. There is no need to dwell again on the alien's capacity to waive a right which, like the right of diplomatic protection, belongs not to him but to the State of his nationality. Apart from the points developed in the first report, there is another aspect of the question which requires clarification. An analysis of the stipulation contained in the Calvo Clause and of the judicial decisions cited above, as well as of other precedent, shows quite clearly that what the alien is waiving is not, strictly speaking, the right of diplomatic protection by the State of his nationality but his power to request the exercise of that right in his favour.<sup>37</sup> That being so, can it still be contended that the said State may exercise diplomatic protection without a request from the alien and even against his will? Normally, diplomatic protection is exercised only when invoked by the alien who claims that he has sustained an injury; but if the State wishes to intervene on its own initiative, what reasons, rights or interests can it cite as the basis of its claim? In this connexion, it has been said: "It is patent that to recognize the right of the State to require the alien not to invoke the aid of his Government is effectively to extinguish the right of that Government to intervene in his behalf."<sup>38</sup> This, however, is in fact what happens when the alien, without being compelled to do so, voluntarily and freely enters into a contractual commitment of that nature, subject to an exception in cases where the imputable act or omission has consequences extending beyond the injury sustained.

21. Article 16, paragraph 3, of the draft is expressly designed to provide for those cases where the consequences of the act or omission extend beyond the specific injury caused to the alien. The alien's waiver cannot cover anything but the injuries caused to him by the act or omission, and cannot therefore apply to the consequential damage which might be caused by the unlawful act to interests superior to his own. In such cases, the alien's waiver, regardless of the terms in which it is expressed, cannot deprive the State of his nationality of the right to protect those interests. We shall revert to this question, however, in the commentary on article 20, paragraph 2 of the draft.

## 12. CASES IN WHICH THERE IS AN AGREEMENT TO DISPENSE WITH LOCAL REMEDIES

22. Article 17 of the draft provides for a special situation which sometimes arises in practice and affects

<sup>36</sup> See Shea, *op. cit.* (footnote 29 above), p. 265.

<sup>37</sup> *Ibid.*, pp. 261-264.

<sup>38</sup> John P. Bullington, "The Land and Petroleum Laws of Mexico," *American Journal of International Law*, vol. 22 (1928), p. 67.

the principle of the exhaustion of local remedies. This occurs when the State to which unlawful acts or omissions are imputed agrees that the claim for reparation of the injuries allegedly sustained by the alien should be brought at the international level before local remedies have been exhausted. At first sight this article may appear unnecessary, and hence superfluous, for it is an implication of the local remedies rule that the respondent State has a right, and that it can freely waive this right. In practice, however, doubts and difficulties have arisen in connexion with the question whether such a waiver can ever be presumed. Some arbitral tribunals have, in fact, dispensed with the requirement of exhausting local remedies on the basis of the presumption that, by the submission of the claim to arbitration, the States must have intended to supersede such remedies.<sup>39</sup>

23. The prevailing opinion, however, as the award in the *Salem Claim* (1932) seems to show, is that the mere existence of a treaty providing for the arbitral settlement of disputes does not in itself justify a presumption that the parties have agreed to dispense with the local remedies rule.<sup>40</sup> Naturally, there can be no hard and fast rule applicable to every case, for it will always have to be ascertained whether the true purpose of the treaty was to exclude the application of the principle in the claim under consideration. In order to avoid the difficulties inherent in any interpretation, States have adopted the practice of including in the *compromis* express provisions to the effect that the respondent State consents to the arbitral tribunal's (or commission's) adjudicating on the claim although local remedies have not been exhausted. An example of such a clause can be found in article V of the Convention of 8 September 1923 between the United States and Mexico, to which reference has already been made (sect. II, para. 16). The full text of that article reads as follows:

"The High Contracting Parties, being desirous of effecting an equitable settlement of the claims of their respective citizens thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim."

24. Article 17 of the draft specifically envisages this express form of consent by a State to dispense with local remedies. Inasmuch as the local remedies rule is a fundamental principle governing international claims, constituting a condition *sine qua non* which must be satisfied before any such claim is admissible, no exceptions to the application of the principle can be presumed. The article also provides for the possibility of such a waiver of the application of the principle being included in an agreement with the private foreign national who claims to have sustained the injury; such a clause could well appear in agreements of the type referred to in article 19 of the draft.

### 13. SETTLEMENT OF DISPUTES ON PRELIMINARY POINTS

25. Among the various problems encountered in the application of the local remedies rule are the disputes

which often arise in practice regarding the admissibility of an international claim. For example, the State to which the wrongful act is imputed may oppose the submission of the claim on the grounds that all local remedies have not yet been exhausted, while the claimant may base his case on the "denial of justice" referred to in article 15, paragraph 3, of the draft. The respondent State, for its part, may resist an international claim brought under article 17, contending that the specific case by reason of which the claim is brought does not come within the terms of the agreement to dispense with local remedies. Difficulties may also arise in connexion with article 16 concerning the scope of the alien's undertaking not to seek the protection of the State of his nationality. And naturally, as between States parties to an agreement of the type referred to in article 16, paragraph 1, there may be disputes concerning the question whether the claim arises out of any of the "cases and circumstances" envisaged in that agreement:

26. All these problems, it will be realized, raise a question which may be either procedural or substantive but which is in any case a preliminary question: is the international claim admissible or not in accordance with the various forms in which the local remedies rule can be applied? In like circumstances, article 18 of the draft would perform an analogous function in the determination of the admissibility of a claim under article 20, paragraph 2, in cases where there is controversy regarding the nature or consequences of the act or omission imputed to the respondent State. And, similarly, article 18 makes provision for any other case in which a prior ruling is required on the controversy that has arisen. For obvious reasons, as these are problems which touch on the actual substance of the claim, any such preliminary question should be resolved by means of a summary procedure.

27. This article of the draft is not entirely novel. Article XI of project No. 16 of the American Institute of International Law on "Diplomatic Protection" contains the following provision:

"All controversies arising between American Republics regarding the admissibility of a diplomatic claim under the present convention shall be determined by arbitration or by the decision of an international court when not settled by direct negotiation." (A/CN.4/96, annex 7).

Though the text does not indicate with sufficient clarity what exactly the scope of the provision was intended to be, there can hardly be any doubt as to its essential import or purpose; it means that any dispute concerning the admissibility of an international claim is to be referred to an international body if not settled by direct negotiation between the parties.

28. In a recent article, Professor Briggs has developed a similar idea for the solution of a certain type of dispute. The relevant passage of the text he proposes reads as follows:

"3. Should a dispute arise as to whether available local remedies have been exhausted or as to whether available local remedies are effective, sufficient and timely, an international claim may be brought in order to permit the determination of this preliminary question; and the exhaustion of local remedies as a condition of the receivability of such an international claim may be waived by any international tribunal having

<sup>39</sup> Borchard, *op. cit.*, p. 819.

<sup>40</sup> Herbert W. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed. (New York, Appleton-Century-Crofts, Inc., 1952), p. 636.

jurisdiction over the parties and before which the claim is brought."<sup>41</sup>

In the author's opinion, the text would allow a State, as an exception, to bring an international claim before the local remedies are exhausted, in cases where the existence, effectiveness, efficacy or timeliness of these remedies is in dispute.

29. The differences between the procedure suggested by Professor Briggs and that proposed in the Special Rapporteur's draft are not hard to perceive. According to Professor Briggs' draft provision, the application or observance of the local remedies rule depends on the attitude which the alien's State of nationality chooses to adopt, inasmuch as it allows that State to interrupt the local process if it alleges the non-existence or insufficiency of the local remedies. While this may be justified in some cases, surely it would be most dangerous to empower the State to prejudice the issue? At any rate, the disadvantages of Professor Briggs' suggested procedure outweigh the advantages offered by the method of the Special Rapporteur's draft, which is based on the idea that one of the purposes of the exhaustion of the local remedies is precisely to test the efficacy of those remedies. Besides, one might add, it should be possible not only for the State of nationality but also for the State to which responsibility is imputed to resort to the procedure proposed in the draft, for any of the purposes referred to above.

30. One possible objection to the procedure proposed in article 18 is that the problems it is meant to resolve may equally be disposed of in the course of the proceedings relating to the international claim itself (that is, the claim dealt with in the next chapter). There is some substance to this objection, and it is quite true that, in practice, such problems are normally dealt with at that stage; unquestionably, however, it is very desirable that, if possible, at this preliminary stage the question of substance of a claim (which involves delays and other technical and political difficulties) should not be touched upon. If the controversy relates solely to the eminently preliminary question of the admissibility of the claim, then the procedure should likewise be preliminary. In that way it will certainly be possible to prevent the bringing of groundless international claims, so frequent in the past.

## CHAPTER VIII

### Submission of the international claim

#### Article 19

1. The alien may submit an international claim to obtain reparation for the injury suffered by him to the body in which competence for this purpose has been vested by an agreement between the respondent State and the alien's State of nationality or between the respondent State and the alien himself.

2. If the body mentioned in the previous paragraph was established by an agreement between the respondent State and the alien, the authorization of the State of nationality shall not be necessary for the purpose of submitting the international claim.

3. In the event of the death of the alien, the right to bring a claim may be exercised by his heirs or successors in interest, provided that they did not possess and have not acquired the nationality of the respondent State.

4. The right to bring claims to which this article refers shall not be exercised by foreign juristic persons in which

nationals of the respondent State hold the controlling interest.

5. For the purposes of this article, the term "alien" (or "foreign") shall be construed as applying to any person who did not possess and has not acquired the nationality of the respondent State.

#### Article 20

1. The State of nationality may bring the international claim to obtain reparation for the injury sustained by the alien:

(a) If there does not exist an agreement of the type referred to in article 19, paragraph 1;

(b) If the respondent State has expressly agreed to the subrogation of the State of nationality in the place and title of the alien for the purposes of the claim.

2. The State of nationality may, in addition, bring an international claim, for the purposes contemplated in article 25 of the present draft, in the case of acts or omissions the consequences of which extend beyond the specific injury caused to the alien, and it may bring a claim in these circumstances irrespective of any agreement entered into by the alien with the respondent State.

#### Article 21

1. A State may exercise the right to bring a claim referred to in the previous article on condition that the alien possessed its nationality at the time of suffering the injury and conserves that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the right of the State to bring a claim on behalf of the heirs or successors in interest shall be subject to the same conditions.

3. A State shall not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interests.

4. In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other ties.

#### Article 22

1. The right of the State of nationality to bring a claim shall not be affected by an agreement between the respondent State and the alien if the latter's consent is vitiated by duress or any other form of pressure exerted upon him by the authorities of the respondent State.

2. The said right shall likewise not be affected if the respondent State, subsequently to the act or omission imputed to it, imposed upon the alien its own nationality with the object of resisting the international claim.

#### Article 23

1. Except where the parties concerned have agreed upon a different time limit, the right to bring an international claim shall lapse after the expiry of two years from the date when local remedies were exhausted.

2. Notwithstanding the provisions of the preceding paragraph, the international claim shall be admissible if it is proved that the delay in its submission is due to reasons not connected with the will of the claimant.

#### Commentary

1. As was pointed out in the Special Rapporteur's first report, according to the traditional view an international claim, even though it may have its origin in another, earlier claim under municipal law, and hence is in reality no more than a continuation of that claim, is regarded as an "entirely new and distinct claim". An international claim, whatever its initial cause or its object, has a "public character", i.e. it involves a legal relationship between sovereign political entities. It is immaterial that the original claimant was a foreign private person and that the reparation of the injury caused to him continues to be the sole object of the international claim; this is precisely what generally happens in case of responsi-

<sup>41</sup> Herbert W. Briggs, "The local remedies rule: a drafting suggestion", *American Journal of International Law*, vol. 50 (1950), p. 926.

bility for injuries caused to the person or property of aliens. As the Permanent Court of International Justice said in a well-known judgement: "Once a State has taken up a case on behalf of one of its subjects . . . the dispute then entered upon a new phase; it entered the domain of international law and became a dispute between two States." (A/CN.4/96, paras. 219-221).

#### 14. THE LEGAL CHARACTER OF INTERNATIONAL CLAIMS

2. Viewed in this light, international claims certainly have a peculiar legal character. An international claim, even though it may have its origin in a local claim, and even though its sole purpose is to obtain reparation of the local injury, must invariably be regarded as an "entirely new and distinct claim". As the State is deemed not to be acting, in fact, on behalf of or as agent for the alien who suffered the injury, but rather to be acting in subrogation in the place and title of the alien for the purposes of the claim, logically that State appears as the sole true claimant. Nevertheless, this is such an obvious fiction and the technical and political difficulties to which it has given rise in practice are so patent, that the Commission should, as far as is feasible, circumvent it in its draft.

3. In this connexion, it is of fundamental importance to appreciate fully the function of the local remedies rule, and also its implications regarding the admissibility of the international claim. Under this rule, the claim is not admissible until the remedies available under the laws of the State to which the unlawful act or omission is imputed have been exhausted. After what was said in the preceding chapter concerning the multiple function of the rule, how is it possible to divorce the international action so sharply from the proceedings which had to be instituted and exhausted internally that the former can be thought of as an entirely new and distinct claim? Does the mere fact that the claimant changes, because the State of nationality has espoused the case, really affect in its essentials the action brought against the respondent State? Besides, if it were true that the claim is really always new and distinct, why should the alien concerned, who is not or is deemed not to be a party to the claim, be required to exhaust local remedies? In other words, to admit that international claims, whatever their origin or purpose, always constitute entirely new and distinct claims, would make it technically possible to dispense with local remedies.

4. What lends additional force to the foregoing considerations is the reflection that the traditional view in this matter is based on another fiction which is no less transparent, particularly in the light of international law at its present stage of development. This is the idea—which has the backing of the case-law and of the opinion of learned authors—that in all cases of international responsibility it is the State of nationality which is the sole true owner of the injured interest or right, even in the case of acts or omissions the consequences of which do not extend beyond the specific injury caused to the person or property of the alien. In various judgements the Permanent Court of International Justice has upheld the doctrine that "By taking up the case of one of its subjects . . . a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law". (A/CN.4/96, para. 98). This theory was evolved at a time when the conception of the subject capable of possessing or acquiring international rights was identified with that of the sovereign State, or, in any case, where this conception did not cover individuals as such, independently of their status as nationals or aliens.

5. The Special Rapporteur's first report, too, pointed out the serious drawbacks, in practice, of this likewise traditional notion, not only from the point of view of the respondent State, but also from the point of view of the genuine interests of the aliens themselves and the general interests of the State of their nationality, not to mention the position of stateless persons and the issues raised in cases of double or multiple nationality (A/CN.4/96, sect. 15). This, then, is a legal fiction the implications of which have produced many difficulties and very few advantages. At the present time, as it has been admitted that the individual as such has capacity to possess and acquire international rights, there would be no valid reason for continuing to uphold the traditional view. Besides, a revision of the old theory would not rule out the possibility, even in these cases of responsibility by reason of injury to the person or property of aliens, of the State's pleading the "general interest" (referred to already in the first report) and bringing an entirely new and distinct international claim. For if the consequences of the act or omission extend beyond the specific injury caused to the alien, the purpose of the claim would of course not be solely to obtain reparation of the injury, but also to secure that right or interest which is not vested in the individual. In any case, as will be explained below, nothing that has been said reflects any intention of excluding altogether the exercise of diplomatic protection, even in the case of claims the only object of which is to obtain reparation of the injury caused to the person or property of the alien.

#### 15. SUBMISSION OF THE CLAIM BY THE ALIEN

6. Article 19 of the draft sets forth the basis of a procedure which would enable the alien himself, once local remedies have been exhausted, to submit an international claim to obtain reparation for the injury suffered by him. As will be seen below, this procedure is not a completely new departure from current practice. In the Special Rapporteur's first report, reference was made to the Central American Court of Justice, the Arbitral Tribunals set up pursuant to articles 297 and 304 of the Treaty of Versailles (1919-1920), the Arbitral Tribunal of Upper Silesia set up by the German-Polish Convention regarding Upper Silesia of 15 May 1922 and to other more recent instruments which confer *locus standi* upon private persons (independently of the State of their nationality) before these international bodies (A/CN.4/96, para. 124). The advantages of this system have been so widely recognized by legal experts that the Institute of International Law at its New York session (1929) expressed the view that ". . . there are certain cases in which it may be desirable to grant to private persons the right of direct recourse to an international tribunal, under conditions to be determined, in respect of their disputes with States".<sup>42</sup>

7. The procedure outlined in the draft neither precludes the application of the traditional practice, under which the right to bring an international claim was reserved to the State of nationality, nor automatically confers international *locus standi* on individuals. Before the individual can have *locus standi* there has to be a body with jurisdiction; and even then the right of the State of nationality to bring an international claim would not, in view of the terms of article 20, paragraph 2, be barred altogether. In conformity with past practice, moreover, the body in question would normally come into being by virtue of an agreement between that State and the respondent

<sup>42</sup> *Annuaire de l'Institut de droit international* (1929), vol. II, p. 311.

State, and this agreement would specify the conditions governing the exercise of the right of aliens to bring claims. The only element that might, at first glance, appear to be an innovation is the second possibility envisaged in article 19, paragraph 1, namely, the possibility that the international body is established by an agreement between the respondent State and the alien himself. Actually, however, so far as contractual obligations are concerned, past practice again offers examples of agreement of this kind. Some of these will be examined below for purposes of illustration.

8. Two agreements of this type figured in cases dealt with by the former Permanent Court of International Justice. The first was the agreement or contract concluded on 2 March 1929 between the Government of Yugoslavia and the Orientconstruct Company, a United States corporation, whose rights were assigned to the Société anonyme Losinger et Cie. of Berne by agreements signed in 1930-1931. Article XVI of the contract contained an arbitration clause which stated that any differences of opinion or disputes which arose between the Contracting Parties in connexion with the carrying out or interpretation of the clauses and conditions of the contract would be settled by "compulsory arbitration, if a friendly settlement cannot be reached by the Contracting Parties".<sup>43</sup> The second agreement of this type was the Convention concluded between the Government of Greece and the Société commerciale de Belgique on 27 August 1925, under which the two parties undertook to submit to an arbitral commission any differences of opinion regarding the execution of the Convention. The decisions of that commission were to be "sovereign and final".<sup>44</sup> Of more recent date is the Iran-Consortium Agreement (19-20 September 1954), the parties to which are: The Government of Iran; a corporation organized under the laws of Iran; and a number of foreign companies of different nationalities. The Agreement provides conciliation and compulsory arbitration machinery for the determination of any differences and disputes arising between the parties and relating to the performance of the obligations stipulated in the agreement, its interpretation or execution.<sup>45</sup>

9. The advantages which would result if this practice became general are obvious. In particular, the agreements envisaged in article 19 of the draft could have an important effect on the application of the Calvo Clause. In the first place, this new stipulation between a State and an alien would have the same legal validity as contracts which these two parties commonly conclude concerning certain matters or rights and obligations and which would formerly have been regarded as inconceivable between any but sovereign bodies. Under a Calvo Clause, if embodied in an agreement, the right and duty provided for would be in essence the right and the duty to continue internationally a claim which was submitted under municipal law and in respect of which all local remedies have been exhausted. This is one and the same claim, and therefore, if the consequences of the act or omission do not extend beyond the specific injury caused to the alien, for what reasons or on what grounds could the State of nationality honestly ob-

ject to the direct exercise of this right by the private person concerned? It should be borne in mind that the entire traditional theory of diplomatic protection rests on the premise that no international action whatsoever could be taken by the individual and that, after the exhaustion of local remedies, the individual was completely without recourse if the State from which he has claimed reparation denied him justice. In those circumstances the protection of the individual by the State of nationality was, for better or for worse, the only possible solution. But at present, now that States themselves have agreed voluntarily to the appearance of their nationals as direct claimants before international bodies, surely there can be no objection to a provision authorizing such persons to agree with the respondent State, as regards matters and objects of interest to these nationals exclusively, that disputes should be submitted to an international body for settlement?

10. The argument that this would involve negotiations concerning a right vested not in the individual but in the State of nationality would in this case have no more (and perhaps less) weight than when it was used to contest the validity of the Calvo Clause. From a purely legal point of view it cannot be proved that this right—the right to bring an international claim—belongs to the State except by reference to the simple historical fact that this right has invariably been exercised by the State, and that whenever it was exercised directly by an individual, it was so exercised because the State itself had authorized its nationals to do so. Furthermore, the only party affected would be the State against which the claim is brought, and if the State agrees voluntarily with the private person to confer competence on an international body to deal with disputes between the two parties, no objection can be raised so long as the interests or rights of third parties are not affected. This is actually a form of the Calvo Clause, but in this case there is not the slightest possibility that the waiver made by the alien will be abused. Clearly, therefore, this new stipulation might complement the waiver of diplomatic protection in so far as it provides for a method of international settlement in cases where local remedies have failed to settle the dispute concerning the interpretation, application or performance of the contract. In that way it would certainly be possible to overcome many technical and political difficulties inherent in the traditional procedure. In cases not involving responsibility for non-performance of a contractual obligation, agreements between the respondent State and the alien who alleges injury would certainly solve many of the difficulties which generally arise as soon as the State of nationality intervenes and begins to exercise diplomatic protection.

11. The other paragraphs of article 19 should not present any difficulty. Paragraph 2 deals with a case concerning which little need be added to what has already been said. For once the validity of the agreements provided for in this article of the draft is admitted, the authorization of the State of nationality should not be required as a condition of the alien's capacity to bring the international claim. This is so obvious that paragraph 2 might almost be thought superfluous. Yet it is not superfluous, for allowance should be made for cases in which the State's authorization ought to be obtained. These are the cases (referred to several times above) in which, in addition to the specific injury alleged by the alien, the State of nationality may plead to the "general interest". In these circumstances, it would be desirable perhaps, in order to forestall the difficulties which might arise if both claims—that of the alien and that of the State of his nationality—were submitted simultaneously, to

<sup>43</sup> See Publications of the Permanent Court of International Justice, *Pleadings, Oral Statements and Documents*, series C, No. 78, p. 7.

<sup>44</sup> *Ibid.*, No. 87, p. 13.

<sup>45</sup> See articles 42-44. The complete text of the Iran-Consortium Agreement is reproduced in J. C. Hurewitz, *Diplomacy in the Near and Middle East, A Documentary Record*, vol. II, 1914-1956 (Princeton, N. J., D. Van Nostrand Company, Inc., 1956), pp. 348 ff.

allow the State of nationality to prevent its national from bringing the claim. Of these two interests, the "general interest" claimed by the national State should have precedence as it is a superior interest, and that is the purport of the final passage of article 20, paragraph 2, of the draft. Apart from this specific case, however, it would be quite unjustified to make the exercise of the individual's right conditional on the authorization of the State of nationality.

12. Article 19, paragraph 3, deals with a case to which international case-law from the point of view of the right of the State of nationality to bring a claim, has applied, by analogy, the rule of the "continuity of nationality", as defined particularly in the *Stevenson Claim* (1903).<sup>46</sup> The problem does not, of course, take this form if the claim is brought directly by the individual. In the case under consideration there is no reason to invoke this rule since the claim with which article 19 of the draft is concerned is neither based nor depends on the nationality of the individual, as is the case when the State makes the claim on behalf of its nationals (the injured party being either the victim himself or his heirs or successors in interest). The only condition that should be stipulated—and that is in fact the condition laid down in paragraph 3—is that the persons bringing the claim did not possess and have not acquired the nationality of the respondent State. Moreover, the right, recognized in the agreement with the said State, to bring a claim would be exercisable by the heirs or successors in interest even in the absence of an express stipulation.

13. Article 19, paragraph 4, is based on the same considerations. In some cases, juristic persons, and in particular joint-stock companies organized under the laws of a State other than that in which they operate, are not "foreign" except in name only, because the controlling interest is held by nationals of the respondent State. In these circumstances it would certainly be wrong to allow such persons to exercise the right to bring a claim which, under the agreements referred to in this article, is recognized in cases where the juristic person is foreign both in name and in fact. Paragraph 4 does not, of course, affect whatever right may, under the agreement, be vested individually in members, partners or stockholders who are not nationals of the respondent State. Nor does it affect, for obvious reasons, the right of the State of their nationality to bring claims under the relevant provisions of the draft.

14. Lastly, a few words may be said about article 19, paragraph 5. It will be remembered that in the first report attention was drawn to the precarious position of stateless persons in the matter of international claims, owing to the strict application of certain traditional principles. In fact, in consequence of the rule of the "nationality of the claim", persons having no nationality have been deprived of the benefit of the "treatment recognized by the generally accepted principles of international law" concerning aliens—to use the well-known language employed by the former Permanent Court of International Justice—although the position of such persons in municipal law is, for all practical purposes of the law of responsibility, that of aliens (AC/N.4/96, para. 103). This state of affairs, which is absurd and unjust, can and should be remedied, particularly in view of the fact that the difficulties resulting from the traditional doctrine of diplomatic protection do not even arise with respect to persons having no nationality. The legal relationship is one in which the interest of the "State of nationality"

cannot be involved, either directly or indirectly. The only parties are the State to which certain unlawful acts or omissions are imputed and a stateless person, wholly bereft of the benefits of the protection of a nationality. If that State agrees with the stateless person that an international jurisdiction should be established to settle disputes between them, then no other interest is affected. Such an agreement, on the other hand offers the only means of guaranteeing the interests of persons who do not enjoy the diplomatic protection of any State.

#### 16. SUBMISSION BY THE STATE OF NATIONALITY

15. Article 20 of the draft deals with the right of the State of nationality to bring an international claim to obtain reparation for the injury sustained and, as is explained below, provides for the two possible ways in which this right may be exercised, namely, the representation, pure and simple, of the interests of the national, and the assertion of the State's own rights or interests. Article 20, paragraph 1, does not establish any specific mode of settlement, the only [implied] condition being that the claim is to be brought before a competent body. As in certain other cases, the Special Rapporteur does not know what are the limits which the Commission wishes to set to the codification of this topic. That being so, it suffices for the time being to refer simply to the mode of settlement which exists, or on which the States concerned agree, after the dispute has arisen, without prejudice to a subsequent examination of a more suitable system and procedure for the settlement of disputes of the kind referred to in the draft.

16. Before further comments are made on this article, a word should be said about the meaning of the term "international claim" as used here. The term "diplomatic protection", at least in its broad sense, covers any action taken by the State to obtain reparation for injuries suffered by its nationals abroad. In this sense, diplomatic protection covers informal or semi-official representations made by one State to another to help in the settlement of the question, so that its national can obtain reparation for the injury. In certain cases the State does not take this kind of action but makes formal representations to the respondent State, and demands, as of right, reparation due in respect of the non-performance of an international obligation. Once this stage of diplomatic protection has been reached, one of two things may happen if the representations made by the State have not produced any result: (a) one of the States may invite the other to submit the dispute to any one of various methods of peaceful settlement, in accordance with the general obligation that modern international law imposes on all States when direct negotiations have been exhausted, or, (b) the State of nationality may refer the dispute to a competent international body with compulsory jurisdiction over both States.

17. Informal or semi-official representations are not, of course, covered by the term used in article 20, paragraph 1, and elsewhere in the draft. The term "international claim" can be used only in a more advanced stage of diplomatic protection. While it is, of course, open to the Commission to decide, in the course of its deliberations, that this codification should contain provisions concerning methods and procedures of peaceful settlement, which would make it possible to restrict the use of the term to claims brought before such bodies, in the present state of international law action taken by the State of nationality after the formal representations made to the

<sup>46</sup> Briggs, *op. cit.*, p. 735.

other State can hardly be excluded from the scope of this term, whatever the results that may be achieved in the absence of a body competent to deal with the controversy and having compulsory jurisdiction over the parties.

18. Article 20, paragraph 1 (a), is a consequence of the procedure provided for in article 19. If the alien or the State of his nationality has agreed with the respondent State to set up a body before which the alien can bring the international claim directly, it would not be logical to assume that the alien retains his right to diplomatic protection. The very purpose of this procedure is to prevent the State from exercising that right in connexion with claims which, it was felt, could be settled or adjusted more suitably by continuing the legal relationship established between the alien and the respondent State. The question of the validity of an agreement concluded between the alien and the respondent State was so fully discussed in the comments on article 19, paragraph 1, that no further observation is called for. At most it should be noted that in this case, unlike the two other cases referred to in article 20, the State brings the claim in the name or on behalf of its national; in other words, the State is not a claimant "asserting its own rights". As was pointed out at the beginning of this chapter, this kind of claim is not "entirely new and distinct" but rather a continuation, at the international level, of the claim which the injured alien brought initially under municipal law. This distinction is extremely important, particularly from the point of view of the character and measure of reparation, inasmuch as, in the traditional theory, the reparation was regarded as due to the State. This question will be discussed again in the comments on the provisions of the draft concerning the measure of reparation.

19. Article 20, paragraph 1 (b), provides for one of the cases in which the national State brings a claim neither in the name or on behalf of the alien, nor in defence of his rights and interest, but in its *own* name and behalf and asserts interests or rights which it has acquired from its national. The so-called "guaranty agreements", which the United States has in recent years concluded with various countries under the Economic Cooperation Act of 1948, may be used to illustrate this point. These instruments contain the following provisions:

"That if the Government of the United States of America makes payment in United States dollars to any person under any such guaranty, the Government of the Philippines will recognize the transfer to the United States of America of any right, title or interest of such persons in assets, currency, credits, or other property on account of which such payment was made and the subrogation of the United States of America to any claim or cause of action of such person arising in connection therewith. The Government of the Philippines shall also recognize any transfer to the Government of the United States of America pursuant to such guaranty of any compensation for loss covered by such guaranties received from any source other than the Government of the United States of America."<sup>47</sup>

This text is quite explicit: it provides for an assignment or transfer, in favour of the State of nationality, of the rights, titles or interests etc., as well as of the claims or causes of action of the alien, and for the consequent subrogation of the said State for the purposes of the agreement. In practice, it is also conceivable that the

subrogation might be agreed to *ex post facto*, that is, after the occurrence of the event giving rise to the claim or after the exhaustion of local remedies. It may even happen that the alien transfers, and that the respondent State consents to the transfer of, the right to bring a direct claim recognized under an agreement of the type referred to in article 19 of the draft. All that matters is the express consent of the State against which the claim is brought, for only on that condition can there be a valid subrogation in the rights or interests of which the alien is the titular owner.

20. Article 20, paragraph 2, provides for another case where the national State may bring an international claim to assert its rights and interests. This is the case involving what, since the first report, has been called the "general interest" for want of a better term. In any of the cases in which responsibility arises by reason of an injury caused to the person or property of the alien, the consequences of the acts or omissions may, owing to their gravity or to their frequency or because they indicate a manifestly hostile attitude towards the foreigner, extend beyond this specific or personal injury. Article 14 of the draft states that the connivance or complicity of the authorities of the State in the injurious acts of private individuals constitute an aggravating circumstance for the purposes contemplated in article 25; in other words, these are circumstances involving acts or omissions the consequences of which extend beyond the specific injury caused to the alien. In more precise language it might be said that, for the reasons indicated, there are acts or omissions which are evidence of a danger or potential threat to the safety of the person or property of nationals of the foreign State.

21. In this context, it should be recalled that Professor Brierly, interpreting the traditional doctrine regarding the passive subjects of responsibility, states that it merely expresses the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the individual sufferer or his family, ". . . but include such consequences as the 'mistrust and lack of safety' felt by other foreigners similarly situated". Summing up, he says that, in an international claim, "a State has a larger interest than the mere recovery of damages".<sup>48</sup> Furthermore, one Claims Commission has held that the national State ". . . frequently has a larger interest in maintaining the principles of international law than in recovering damages for one of its citizens".<sup>49</sup> Clearly, therefore, from a purely legal point of view, a distinction can and should be drawn between two categories of interests—the private interest of the injured alien and the "general interest"—and, consequently, between two categories of acts or omissions, according to whether they affect only the former or have consequences affecting the general interest as well. In the latter case, the national State, as the titular claimant of this "general interest", may bring the international claim for the purpose of requiring the State to which the act or omission is imputed to take the action described in article 25 of the draft. Moreover, as the interest involved is superior to that of the individual alien, the State's right to submit a claim transcends any agreement between the alien and the

<sup>48</sup> J. L. Brierly, "The Theory of Implied State Complicity in International Claims", *The British Year Book of International Law*, 1928, p. 48.

<sup>49</sup> Schwarzenberger, *op. cit.*, p. 74. See also document A/CN.4/96, para. 112, with reference to the award of Judge Huber concerning the British claims in the Spanish Zone of Morocco (1924).

<sup>47</sup> United Nations, Treaty Series, vol. 177, 1953, No. 2330, pp. 308 and 310.

respondent State; this is the principle laid down in the final passage of article 20, paragraph 2.

#### 17. NATIONALITY OF THE CLAIM

22. Article 21 states a principle established by international practice: that a State may not bring a claim in the name of a person who does not possess its nationality. Although, as the International Court of Justice has admitted explicitly, "... there are cases in which protection may be exercised by a State on behalf of persons not having its nationality",<sup>50</sup> such exceptions are so rare and the circumstances surrounding them so special that it would be undesirable, and certainly of no advantage, to make provision for them in the draft. The important point here is to determine how far the general principle should be interpreted or applied. In Project No. 16 concerning "Diplomatic protection" the American Institute of International Law stated in article 8:

"In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented." (A/CN.4/96, annex 7).

While it cannot be denied that this is the position adopted by a number of arbitral tribunals, the predominant opinion both in diplomatic practice and in international case-law is unquestionably the one expressed by the Preparatory Committee of The Hague Conference (1930) in its basis of discussion No. 28, the first paragraph of which reads as follows:

"A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided."<sup>51</sup>

As the Preparatory Committee indicated in its observations, the wording of this principle was drafted in the light of the replies received from Governments and of international case-law.<sup>52</sup> This is, moreover, the more logical interpretation or application of the principle, since the more liberal criterion mentioned above is inconsistent with the fundamental idea which forms the basis of and justifies the entire doctrine of the diplomatic protection of nationals abroad. Indeed, how could it be explained or admitted that, the nationality of the injured person having changed after the claim was submitted, a State can continue the action it had begun to obtain reparation for injury on behalf of a person who is no longer one of its nationals? Alternatively, would this situation be compatible with the right of a third State whose nationality the person concerned has acquired? Article 21, paragraph 1, was drafted in the light of these considerations.

23. Article 21, paragraph 2, describes the procedure to be followed in the event of the death of the alien and stipulates that the right of the State of nationality to bring a claim on behalf of the heirs or successors in interest is subject to the same conditions. The purpose of the paragraph is to set forth what may be considered to be

the consensus of opinion on the subject, as expressed particularly in the *Stevenson Case* referred to in the commentary on article 19, paragraph 3 (see para. 12 above), and in the last paragraph of basis of discussion No. 28 of the Preparatory Committee of The Hague Conference, which states that:

"In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested."<sup>53</sup>

As was stated in the commentary on article 19, paragraph 3, on the subject of the right of the State to bring claims on behalf of its nationals, it is a fundamental condition that the heirs or successors in interest must possess the same nationality. If they should possess a different nationality, then only the State or States of which they are nationals would be able to bring a claim. Naturally, article 19, paragraph 3, by requiring "continuity of nationality", *ipso facto* bars claims on behalf of persons who were or have become nationals of the respondent State, a situation that has arisen frequently in practice.<sup>54</sup>

24. Article 21, paragraph 3, deals with the case of a juristic person whose nationality is more fictitious or nominal than real. As was pointed out in the comments on the relevant paragraph of article 19, neither the conditions nor the basis for any international claim are present in this case, for to hold otherwise would be to recognize a right to bring such a claim on the part of bodies the controlling interest in which is held by nationals of the State against which the claim is brought. In the case of the claims provided for in article 20, this would make a mockery of the principle of the "nationality of the claim" on which the doctrine of diplomatic protection is based, and produce a situation absurd in law from the point of view both of the respondent State and of the claimant State. Even in this case, however, the paragraph does not affect whatever right the claimant State may have to bring a claim on behalf of shareholders or other stockholders having its nationality, in respect of injuries which they suffered individually in their interests in the company or juristic person in question.

25. Article 21, paragraph 4, dealing with cases of dual or multiple nationality, specifies what State really has the right to bring an international claim in keeping with the principle on which the doctrine of diplomatic protection is based. On this point the reasoning of the International Court of Justice in the *Nottebohm Case* (1955) indicates what is the rule in such situations. In this case the Court, ruling that the claim submitted by the Principality of Liechtenstein was not admissible, said:

"According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."

In the opinion of the Court:

"... a State cannot claim that the rules it has thus laid down [with regard to nationality] are entitled to

<sup>50</sup> *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 181.

<sup>51</sup> League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 145.

<sup>52</sup> *Ibid.*, pp. 140-145.

<sup>53</sup> *Ibid.*, p. 145.

<sup>54</sup> See Fred K. Nielsen, "Some Vexatious Questions relating to Nationality", *Columbia Law Review*, vol. XX (1920), No. 8, p. 840, and Edwin M. Borchard, "The Protection of Citizens Abroad and Change of Original Nationality", *Yale Law Journal*, vol. 43 (1934), No. 4, pp. 359-392.

recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."<sup>55</sup>

This is the idea which finds expression in paragraph 4; this clause provides that the right to bring a claim is exercisable only by the State with which the alien has the stronger and more genuine ties of nationality.

26. Article 22 of the draft provides guarantees to ensure the exercise of the right of the State of nationality in the face of action or measures taken by the respondent State to prevent the submission of the international claim. Paragraph 1 deals with the case of an agreement entered into by the alien for the purposes of article 19, but under duress or some other form of pressure exerted upon him by the authorities of the respondent State. A case of this kind is not very likely to occur in practice but it is not entirely inconceivable. The purpose of the article is to prevent the respondent State from pleading article 20, paragraph 1 (a), for the purpose of contesting the admissibility of the claim brought by the State of nationality. Article 22, paragraph 2, deals with a case which is more likely to occur than the previous one. The practical application of the Calvo Clause has produced a somewhat similar situation, but with the difference that, though the contracting aliens are deemed to be nationals for the purposes of diplomatic protection, no form of pressure is exerted upon them, the Calvo Clause being one of the terms of the contract stipulated by the State which the aliens are free either to accept or to reject. The paragraph in question deals with the case of the unilateral imposition of nationality, after the occurrence of the unlawful act, where the purpose of the imposition of the nationality is precisely to prevent the bringing of the international claim.

#### 18. LAPSE OF THE RIGHT TO BRING A CLAIM

27. Verykios, and many other writers on international law have stated that the principle of the [extinctive] prescription of claims is recognized by international law and has been applied by arbitral tribunals in a number of cases.<sup>56</sup> In the *Sarropoulos v. Bulgaria* case (1927), the Bulgarian-Greek Mixed Arbitral Tribunal held that "prescription, being an essential and necessary part of every legal system, deserves to be admitted in international law."<sup>57</sup> The Institute of International Law itself has recognized that practical considerations of order, of stability and of peace, long accepted in the case-law of arbitral tribunals, favoured the acceptance of the principle of limitation of actions in international law.<sup>58</sup> Indeed, if prescription in general is to be admitted as part of international law, there can be no doubt that extinctive prescription, for its part, can perform in international relations a function as important as that which it fulfils in municipal law. Just as private individuals cannot remain subject to obligations indefinitely and under the permanent threat of legal action without any limitation of time, so the State

likewise cannot be held responsible for an indefinite duration of time, or remain under the threat of an international claim which is subject to no limitation.

28. The problem here is not, therefore, the admissibility of the principle but rather the length of the time after the expiry of which the claim lapses. On this point no rule has in fact been established by international practice. In connexion with this question, in article 9 of the text adopted in first reading by the Third Committee of The Hague Conference (1930) it is stated:

"The claim against the State must be lodged not later than two years after the judicial decision has been given, unless it is proved that special reasons exist which justify extension of this period."<sup>59</sup>

This text contains the essential elements on which article 23 of the draft is based. First, the time limit is short, in keeping with modern procedure and with the changed conditions of international life; the parties are free, of course, to agree on a different time limit. The second element is the date from which the two-year period is reckoned. Since the exhaustion of local remedies (if not dispensed with by agreement) is the condition *sine qua non* of the admissibility of the international claim, it is logical that the period should begin to run as from the date on which the right to bring the claim arises. Lastly, this period, precisely because it is short, should not be absolute. If the alien or the claimant State, as the case may be, can prove that there are grounds justifying the delay in its submission, the claim will be admissible.

## CHAPTER IX

### Character and measure of reparation

#### Article 24

1. The reparation of the injury caused to an alien may take the form of restitution in kind (*restitutio in integrum*) or, if restitution is not possible or does not constitute adequate reparation for the injury, of pecuniary damages.

2. The measure or quantum of the pecuniary damages shall be determined in accordance with the nature of the injury caused to the person of property of the alien, or, in the event of his death, of his heirs or successors in interest.

3. In the determination of the measure or quantum of the reparation the extenuating circumstances referred to in article 13 of the present draft shall be taken into account.

#### Article 25

In the case of acts or omissions the consequences of which extend beyond the specific injury caused to the alien, the State of nationality may demand, without prejudice to the reparation due in respect of the said injury, that the respondent State take all necessary steps to prevent a repetition of acts of the kind imputed to it.

#### Commentary

1. In the Special Rapporteur's first report the question of "reparation" was discussed in its broadest sense; in other words the question was treated not only as covering the various issues to which the character and extent of the reparation would give rise but also from the point of view of the punitive function of damages, particularly when they take the form of "satisfaction". In deference to the general opinion expressed in the Commission when the report was examined, the draft contains no mention of criminal liability for the failure to comply with certain

<sup>55</sup> *Nottebohm Case (second phrase), Judgment of April 6th, 1955: I.C.J. Reports 1955, p. 23.*

<sup>56</sup> P. A. Verykios, *La prescription en droit international public* (Paris, Editions A. Pedone, 1934), pp. 192-193. See also De Beus, *op. cit.*, pp. 304 ff.

<sup>57</sup> Schwarzenberger, *op. cit.*, pp. 246-247.

<sup>58</sup> See *Annuaire de l'Institut de droit international*, vol. 32 (1925), pp. 559-560.

<sup>59</sup> League of Nations publication, *V. Legal, 1930.V.17* (document C.351(c).M.145(c).1930.V), p. 237.

international obligations, even in those cases where the criminal aspect may have some effect on the strictly civil responsibility. Hence the articles dealt with in this chapter are concerned solely with reparation *stricto sensu*, to the exclusion of "satisfaction" and of other forms of reparation which may, to a lesser or greater extent, have punitive aspects or elements. The Special Rapporteur would repeat that he still holds the view he maintained in the Commission (See A/CN.4/96, chap. III; A/CN.4/106, Introduction and sect. 1).

### 19. THE FORM OF REPARATION

2. Reparation *stricto sensu* (or, in the terms of article 1 of the draft, the "duty to make reparation" for the injury) may, as indicated in article 24, take the form of restitution in kind (*restitutio in integrum*) or, if restitution is not possible or would not constitute adequate reparation for the injury, of pecuniary damages (*daños y perjuicios* in Spanish; *dommages-intérêts* in French). These two forms or methods of reparation have been formally recognized in international case-law, and particularly by the Permanent Court of International Justice in its judgement on the *Case concerning the Factory at Chorzów*:

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."<sup>60</sup>

This distinction between the two forms of reparation and the purpose it is intended to serve is to be found sometimes in the agreements setting up claims commissions and tribunals, as in the Convention concluded on 8 September 1923 which set up the General Claims Commission (United States and Mexico).<sup>61</sup>

3. These two forms or methods, as is the case under municipal law, have a common purpose: the reparation should "... as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". In some cases this is achieved by the simple restitution of the article or right of which the alien has been deprived, by making an exception to or amending a legislative provision at variance with international law, by failing to enforce a manifestly unjust judgement, and so forth. If by taking any of these steps the *status quo ante* can be restored so that all the

<sup>60</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 47.

<sup>61</sup> Article IX of the Convention states in the second paragraph:

"In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution."

See Feller, *op. cit.* (footnote 27 above), pp. 328-329.

harmful consequences of the act or omission which gave rise to the international responsibility of the State will be removed, the damage suffered by the alien will have been made good by means of restitution.

4. In other cases, however, sufficient or adequate reparation for the injury cannot be made by the simple restitution of the article or right. This happens when the act or omission has had other consequences as, for example, when the expropriation of property, the cancellation of a contract or a concession or deprivation of liberty is the cause of specific damage to the alien. In such cases restitution pure and simple would not constitute adequate or sufficient reparation, and the payment of additional compensation in accordance with the character and measure of the injury really suffered by the alien becomes necessary. In this case pecuniary damages are complementary to restitution in kind and ensure that reparation is sufficient or adequate. There is yet a third case, which is the most common in practice, where pecuniary damages constitute the only feasible form of reparation, since restitution in kind, for one reason or another, is impossible or cannot be demanded from the State.

5. How, then, can reparation be determined in cases other than those relatively rare cases in which the simple restitution of the article or right is sufficient to make good the injury? In other words, how should the amount of pecuniary damages be determined? In this respect international case-law has, in general, been guided by the principles and standards of municipal law, and by certain principles which it has introduced to correct certain inconsistencies in traditional international law. This question forms the subject of article 24 of the draft, which is commented on below.

### 20. CRITERION FOR DETERMINING THE MEASURE OF REPARATION

6. Above all, the Commission ought to dismiss from its mind, once and for all, the idea which has governed traditional thought on this matter, the idea that, even if all that is in issue is an injury to the person or property of an alien, the obligation to make reparation must be conceived in terms of a "reparation due to the State". In the judgement of the former Permanent Court of International Justice cited above, it is stated that:

"The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."<sup>62</sup>

The artificiality of this system or criterion for calculating and determining the reparation is obvious. To assume that when a State brings a claim against another it is always

<sup>62</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 28.

“asserting its own rights” is to regard all reparation, regardless of the real titular subject of the injured right or interest, as a “reparation due to the State.” And on that basis, the reparation will logically tend to correspond, not to the injury suffered by the individual but to that which, by virtue of that fiction, the State of his nationality is deemed to have suffered. The injury suffered by the private foreign individual which, in the majority of these cases of responsibility is the only injury alleged, merely affords a convenient scale for the calculation of the reparation due to the State, for it “is never . . . identical in kind with that which will be suffered by a State”.

7. In addition to being artificial, the system leads to injustices, both from the point of view of the State against which the claim is being brought as well as from that of the private foreign individual himself who has suffered the injury in his person or property. As the Special Rapporteur stated in his first report, in international relations, political and moral considerations are of special importance, generally carrying more weight than economic or other considerations or interests. Economic considerations often play a secondary part, being in a way subordinate to such political and moral considerations as the “honour and dignity of the State”, which has been wronged either directly or in the person of one of its nationals. On occasions, these latter considerations are so weighty that a claim for reparation is held justified even though no material wrong has occurred (A/CN.4/96, para. 211). And all this may be the result of insisting that the national State is the entity which has suffered the injury. This situation can also adversely affect the interests of the individual whose person or property has in fact been injured by the illegal act or omission. It is the State of nationality which decides what reparation is to be asked, and it is to it, too, that reparation is paid. The amount received by the alien depends on the discretionary will of the State itself, for “the individual does not acquire any title to the sum which is awarded, except under the assignment made in his favour”.<sup>63</sup>

8. The foregoing and also other considerations, which will be given at the end of this chapter, concerning the unnecessary difficulties and complications which the system entails, lead the Special Rapporteur to believe that it should be abandoned in favour of another which conforms more closely to reality and meets the real needs of international life. Article 24 of the draft contains a criterion which is very simple but is designed at the same time to protect the interests that are really affected. According to this criterion, the extent or quantum of reparation (pecuniary damages) is to be determined by reference to the nature of the injury caused to the person or property of the alien, or, in the event of his death, of his heirs or successors in interest. It is true, and it has been repeatedly admitted in the Special Rapporteur's earlier reports, that sometimes the specific injury suffered by the alien is not the sole consequence of the act or omission imputable to the State, and that there are also situations where the gravity of this injury is relatively slight in comparison with the consequences which affect the “general interest” that may be pleaded by the State of nationality. But this is another matter which will be

<sup>63</sup> See Anzilotti, *op. cit.*, pp. 428-429. According to basis of discussion No. 29 of the Preparatory Committee of The Hague Conference, “In principle, any indemnity to be accorded is to be put at the disposal of the injured State.” (League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69. 1929.V), p. 151.)

gone into at the end of the chapter. Here the only point of interest is the injury actually suffered by the alien in his person or property, and the fairest and most appropriate way of making reparation when it is necessary to have recourse to pecuniary damages because restitution is not impossible or would not constitute adequate reparation. For the purpose of determining the measure or extent of such reparation there is no other criterion than that of the nature of the damage, that is to say the sum total of the injuries in fact suffered by the alien in his person or in his property.

9. Admittedly, the rule laid down in article 24 is too general or too vague in that it does not make it possible to foretell the quantum of compensation corresponding to the different categories of damage, whether reparation must include the costs and expenses incurred by the alien in exhausting local remedies, or whether interest should be charged on the amount of the compensation in the event of a delay in payment of the compensation. Nevertheless, in conformity with the method of codification followed in the preparation of the draft, the rule was deliberately formulated in terms of a general principle. There is, further, a particular reason why one should not depart from this method—the lack of uniformity, indeed, the marked uncertainty in diplomatic practice and international case law in this respect. In this connexion, Eagleton expressly recognizes that “international law provides no precise methods of measurement for the award of pecuniary damages”.<sup>64</sup> The same view has been expressed by many others, among them Feller, who points out how fragmentary and confused is this part of the law of international claims owing to the fact that arbitral awards are very often the result of compromise behind closed doors in which no attempt was made to work out any consistent theory.<sup>65</sup>

10. Nevertheless, if the Commission would prefer detailed provisions, rules could be made laying down criteria for determining the quantum of compensation to be paid for the different categories of injury. These criteria would serve, for instance, to determine the amount of any damage to the property or possessions of the alien, as well as any loss in income or profits resulting from such damage. Similarly, as regard these property rights it would be necessary to know how to fix the quantum when “indirect” injuries are alleged and in what cases or conditions such injuries have been recognized in practice. In the case of personal injury, either physical or moral, the factors would be different. This is also applicable when the injury was the consequence, not of an action imputable to the State but of the acts of an individual, with respect to whom, however, the authorities have conducted themselves in a manner contrary to international law.

11. It seems essential to mention, in this part of the draft, the extenuating circumstances discussed in chapter VI. As was stated there, even if the act or omission is the same or the injury is of the same kind, the degree of responsibility imputable to the State may vary, according to circumstances. Of course, where there are causes entirely exonerating the State from responsibility, there will be no difficulty under article 24 of the draft, but that does not apply if there are circumstances extenuating the responsibility imputed to the State. Paragraph 3 of this article is intended to provide for such cases, for it states that such circumstances (enumerated in article 13

<sup>64</sup> Eagleton, *op. cit.*, p. 191.

<sup>65</sup> See Feller, *op. cit.* (footnote 27 above), p. 290.

of the draft) are to be taken into account in the determination of the measure or quantum of the reparation. The general problem having been examined in chapter VI, it only remains to explain the intended scope of article 24, paragraph 3.

12. With regard to the extenuating circumstances, Professor Salvioi has indicated cases where in international case-law, by the application of certain principles, it has been deemed justifiable to reduce the amount of reparation sought from the State responsible for an injury. He quotes a number of arbitral awards in which the fault imputable to the party which alleged the injury resulted in a diminution of the reparation. One of them is that given in the *Fabiani* case in which it was considered that the existence of an illicit act ought not to constitute a source of unjustifiable gain for the injured party; in other words, a source of "undue enrichment". In the *Costa Rica Packet* case the arbitrator drew a distinction, in determining the amount of reparation, between the losses suffered through the unjustified detention of the master of the vessel and those resulting from the fact that neither the owners nor the master himself had authorized the vessel's departure to resume its whaling operations.<sup>66</sup> As was stated in chapter VI, the same circumstance (a fault on the part of the alien) was taken into account by the arbitral tribunal when it considered a reduction in the amount of reparation in the cases of the *Delagoa Bay Railway*, *García and Garza* and *Lillie S. Kling*. Any other extenuating circumstances recognized in international case-law and in codifications must be considered to have similar consequences, *mutatis mutandis*, with regard to the measure of the reparation claimed.

#### 21. CASES IN WHICH THE "GENERAL INTEREST" IS AFFECTED

reference has been made repeatedly to the case where the consequences of the act or omission imputed to the State

13. In this report and in the two previous reports transcend the loss suffered by the alien, where, that is, beyond such loss, the "general interest" is affected. In fact, in article 20 of the draft, the situations in which the national State may bring an international claim in this case have been included in these terms. In the commentary on that article a definition was attempted which, although not entirely satisfactory, at least gives an idea of this legal verity which has at various times been recognized both by publicists and by international case-law. It only remains, then, to consider this circumstance from the point of view of this chapter of the draft, from the point of view, that is, of the "reparation" which ought to be made in such a case.

14. It is not difficult to see that this problem is much more complex although, naturally, it is not impossible to find a solution. The fact is, simply, that if the form of reparation for the injuries which the State of nationality alleges is to be appropriate, one will undoubtedly have to

<sup>66</sup> See Gabriele Salvioi, "La Responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des cours de l'Académie de droit international*, 1929, III, pp. 265-267.

depart from the type of reparation envisaged in the draft. For reparation for these "injuries" (that is, the danger or threat to the safety of the person or property of aliens which is involved in the act or omission imputed to a State) cannot be made in the same manner as in the case of a specific injury suffered by an alien in his person or property. In short, the "general interest" alleged by the national State is not susceptible, unlike the injured interests of the alien, of reparation *stricto sensu*; that is to say, with regard to this category of interests there can be no question of reparation in the sense of restitution in kind or pecuniary damages. There can be no doubt that this interest calls for legal protection equal to that afforded to the interests of the alien, but of a character so different that the question of analogy cannot be entertained for one moment when thinking of "reparation". It would in fact be illogical and unrealistic—although this view has been held in the past—to think of making reparation for this interest through the award of a pecuniary compensation to the State of nationality, and this would still be inadmissible even if it were thought of as compensation granted in favour of the alien in addition to that awarded in reparation for the injury he has really suffered. The latter would permit the alien to gain undue profit from his own injury, while the former would enable the State concerned to benefit as a result of an injury which it had not really suffered. As other aspects of this question were examined at the beginning of this chapter it is unnecessary to go into it any further.

15. The only point which should be brought out is that, for the reasons which have just been indicated in a case in which the "general interest" is affected, there is no alternative but to consider measures which could really help to provide an effective legal protection for this interest. In accordance with the traditional notion it was possible to think only in terms of that form of reparation known as "satisfaction" with the "idea of punishment" inherent in it, to use Anzilotti's phrase. But the matter must be considered in accordance with more modern notions and we must think, not in terms of "punishing" the State but rather in terms of providing effective guarantees for the safety of the person and property of aliens. The only possible way of ensuring such guarantees would be to demand that the respondent State should take all necessary steps to avoid the repetition of acts of the kind imputed to it, as, for instance, the suspension or removal from their duties of the officials at fault when dealing with the acts or omissions of any body of authority of the State or the reinforcement of its security authorities when dealing with the acts of ordinary private individuals or internal disturbances.

16. These considerations have led to the drafting of article 25 of the draft. It cannot be denied that this provision departs from the idea of the "duty to make reparation" *stricto sensu* for it contains characteristic elements of "satisfaction" from which the imputation of criminal responsibility might be presumed, as explained in the first report (A/CN.4/96, sect. 8 and chap. VIII). But if the Commission were to persist in isolating this aspect of the matter from the codification, it would still fail to succeed, even if it were to adjust itself to the traditional notion and draw up a rule in accordance therewith.

*Annex***Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens**

## CHAPTER I

## NATURE AND SCOPE OF RESPONSIBILITY

## Article 1

1. For the purposes of this draft, the "international responsibility of the State for injuries caused in its territory to the person or property of aliens" involves the duty to make reparation for such injuries, if these are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State.

2. The expression "international obligations of the State" shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law.

3. The State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.

## CHAPTER II

## ACTS AND OMISSIONS OF ORGANS AND OFFICIALS OF THE STATE

## Article 2

## Act and omissions of the legislature

1. The State is responsible for the injuries caused to an alien by the enactment of any legislative (or, as the case may be, constitutional) provisions which are incompatible with its international obligations, or by the failure to enact the legislative provisions which are necessary for the performance of the said obligations.

2. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if, without amending its legislation (or its constitution), it can in some other way avoid the injury or make reparation therefor.

## Article 3

## Acts and omissions of officials

1. The State is responsible for the injuries caused to an alien by some act or omission on the part of its officials which contravenes the international obligations of the State, if the officials concerned acted within the limits of their competence.

2. The international responsibility of the State is likewise involved if the official concerned exceeded his competence but purported to be acting by virtue of his official capacity.

3. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if the lack of competence was so apparent that the alien should have been aware of it and could, in consequence, have avoided the injury.

## Article 4

## Denial of justice

1. The State is responsible for the injuries caused to an alien by some act or omission which constitutes a denial of justice.

2. For the purpose of the provisions of the foregoing paragraph, a "denial of justice" shall be deemed to have occurred if the court, or competent organ of the State, did not allow the alien concerned to exercise any one of the rights specified in article 6, paragraph 1 (f), (g) and (h) of this draft.

3. For the same purposes, a "denial of justice" shall also be deemed to have occurred if a judicial decision has

been rendered, or an order of the court made, which is manifestly unjust and which was rendered or made by reason of the foreign nationality of the individual affected.

4. Cases of judicial error, whatever may be the nature of the decision or order in question, do not give rise to responsibility within the meaning of this article.

## CHAPTER III

## VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS

## Article 5

1. The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees, as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the "fundamental human rights" recognized and defined in contemporary international instruments.

2. In consequence, in cases of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility will be involved only if internationally recognized "fundamental human rights" are affected.

## Article 6

1. For the purposes of the foregoing article, the expression "fundamental human rights" includes, among others, the rights enumerated below:

- (a) The right to life, liberty and security of person;
- (b) The right of the person to the inviolability of his privacy, home and correspondence, and to respect for his honour and reputation;
- (c) The right to freedom of thought, conscience and religion;
- (d) The right to own property;
- (e) The right of the person to recognition everywhere as a person before the law;
- (f) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;
- (g) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of any criminal charge or in the determination of rights and obligations under civil law;
- (h) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed, the right to be tried without delay or to be released.

2. The enjoyment and exercise of the rights and freedoms specified in paragraph 1 (a), (b), (c) and (d) may be subjected to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others.

## CHAPTER IV

## NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS AND ACTS OF EXPROPRIATION

## Article 7

## Contractual obligations in general

1. The State is responsible for the injuries caused to an alien by the non-performance of obligations stipulated in a contract entered into with that alien or in a concession granted to him, if the said non-performance constitutes an act or omission which contravenes the international obligations of the State.

2. For the purposes of the provisions of the foregoing paragraph, the repudiation or breach of the terms of a contract or concession shall be deemed to constitute an "act or omission which contravenes the international obligations of the State" in the following cases, that is to say, if the repudiation or breach:

(a) Is not justified on grounds of public interest or of the economic necessity of the State;

(b) Involves discrimination between nationals and aliens to the detriment of the latter; or

(c) Involves a "denial of justice" within the meaning of article 4 of this draft.

3. None of the foregoing provisions shall apply if the contract or concession contains a clause of the nature described in article 16, paragraph 2.

#### Article 8

##### Public debts

The State is responsible for the injuries caused to an alien by the repudiation, or the cancellation, of its public debts, save in so far as the measure in question is justified on grounds of public interest and does not discriminate between nationals and aliens to the detriment of the latter.

#### Article 9

##### Acts of expropriation

The State is responsible for the injuries caused to an alien by the expropriation of his property, save in so far as the measure in question is justified on grounds of public interest and the alien receives adequate compensation.

### CHAPTER V

#### ACTS OF INDIVIDUALS AND INTERNAL DISTURBANCES

#### Article 10

##### Acts of ordinary private individuals

The State is responsible for injuries caused to an alien by acts of ordinary private individuals, if the organs or officials of the State were manifestly negligent in taking the measures which are normally taken to prevent or punish such acts.

#### Article 11

##### Internal disturbance in general

The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances, if the constituted authority was manifestly negligent in taking the measures which in such circumstances, are normally taken to prevent or punish the acts in question.

#### Article 12

##### Acts of the constituted authority and of successful insurgents

1. The State is responsible for injuries caused to an alien by measures taken by its armed forces or other authorities for the purpose of preventing or suppressing an insurrection or any other internal disturbance, if the measures taken affected private persons directly and individually.

2. In the case of a successful insurrection, the international responsibility of the State is involved in respect of injuries caused to an alien if the injuries were the consequence of measures which were taken by the revolutionaries and which were analogues to the measures referred to in the foregoing paragraph.

### CHAPTER VI

#### EXONERATION FROM RESPONSIBILITY; EXTENUATING AND AGGRAVATING CIRCUMSTANCES

#### Article 13

1. Notwithstanding the provisions of the article last preceding, the State shall not be responsible for injuries

caused to an alien if the measures taken are the consequence of "force majeure" or of a state of necessity due to a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke the peril and was unable to counteract it by other means.

2. Similarly, the State shall not be responsible for the injuries caused if the injurious act was provoked by some fault on the part of the alien himself.

3. "Force majeure", state of necessity and the fault imputable to the alien shall, if not admissible as grounds for exoneration from responsibility, constitute extenuating circumstances in the determination of the quantum of reparation.

#### Article 14

In the cases of responsibility provided for in articles 10 and 11, the connivance or complicity of the authorities of the State in the injurious acts of private individuals shall constitute an aggravating circumstance for the purposes contemplated in article 25 of the present draft.

### CHAPTER VII

#### EXHAUSTION OF LOCAL REMEDIES

#### Article 15

1. An international claim brought for the purpose of obtaining reparation for injuries alleged by an alien, or for the purposes contemplated in article 25, shall not be admissible until all the remedies established by municipal law have been exhausted.

2. For the purposes of the provisions of the previous paragraph, local remedies shall be deemed to have been "exhausted" when the decision of the competent body or official is final.

3. Except in the cases of "denial of justice" provided for in article 4 of the draft, the absence, delay or inefficacy of local remedies, or the inadequacy of the reparation for the injury, shall be incapable of furnishing grounds for the international claim.

#### Article 16

1. Notwithstanding the provisions of the preceding article, if two or more States restrict by agreement the right to bring an international claim, such claim shall be admissible only in the cases and circumstances specified in the said agreement.

2. Similarly, in cases where an alien claims to have suffered injury as a result of the non-performance of obligations stipulated in a contract entered into with the State, or in a concession granted to him by the State, the international claim shall not be admissible if the alien concerned has agreed not to seek the diplomatic protection of the State of his nationality; the exoneration shall operate in accordance with the terms of the waiver.

3. The waiver mentioned in the previous paragraph shall not deprive the alien's State of nationality of the right to bring an international claim in the case provided for in article 20, paragraph 2, of the present draft.

#### Article 17

Article 15 shall not apply if the State has expressly agreed with the alien, or, as the case may be, with the State of his nationality, to dispense with local remedies.

#### Article 18

Disputes between the respondent State and the alien, or, as the case may be, between that State and the State of his nationality, regarding the admissibility of the international claim shall be submitted to the methods of settlement provided for in articles 19 and 20 in the form of a preliminary question and resolved by means of a summary procedure.

### CHAPTER VIII

#### SUBMISSION OF THE INTERNATIONAL CLAIM

#### Article 19

1. The alien may submit an international claim to obtain reparation for the injury suffered by him to the body

in which competence for this purpose has been vested by an agreement between the respondent State and the alien's State of nationality or between the respondent State and the alien himself.

2. If the body mentioned in the previous paragraph was established by an agreement between the respondent State and the alien, the authorization of the State of nationality shall not be necessary for the purpose of submitting the international claim.

3. In the event of the death of the alien, the right to bring a claim may be exercised by his heirs or successors in interest, provided that they did not possess and have not acquired the nationality of the respondent State.

4. The right to bring claims to which this article refers shall not be exercised by foreign juristic persons in which nationals of the respondent State hold the controlling interest.

5. For the purposes of this article, the term "alien" (or "foreign") shall be construed as applying to any person who did not possess and has not acquired the nationality of the respondent State.

#### Article 20

1. The State of nationality may bring the international claim to obtain reparation for the injury sustained by the alien:

(a) If there does not exist an agreement of the type referred to in article 19, paragraph 1;

(b) If the respondent State has expressly agreed to the subrogation of the State of nationality in the place and title of the alien for the purposes of the claim.

2. The State of nationality may, in addition, bring an international claim, for the purposes contemplated in article 25 of the present draft, in the case of acts or omissions the consequences of which extend beyond the specific injury caused to the alien, and it may bring a claim in these circumstances irrespective of any agreement entered into by the alien with the respondent State.

#### Article 21

1. A State may exercise the right to bring a claim referred to in the previous article on condition that the alien possessed its nationality at the time of suffering the injury and conserved that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the right of the State to bring a claim on behalf of the heirs or successors in interest shall be subject to the same conditions.

3. A State shall not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interest.

4. In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other ties.

#### Article 22

1. The right of the State of nationality to bring a claim shall not be affected by an agreement between the respondent State and the alien if the latter's consent is vitiated by duress or any other form of pressure exerted upon him by the authorities of the respondent State.

2. The said right shall likewise not be affected if the respondent State, subsequently to the act or omission imputed to it, imposed upon the alien its own nationality with the object of resisting the international claim.

#### Article 23

1. Except where the parties concerned have agreed upon a different time limit, the right to bring an international claim shall lapse after the expiry of two years from the date when local remedies were exhausted.

2. Notwithstanding the provisions of the preceding paragraph, the international claim shall be admissible if it is proved that the delay in its submission is due to reasons not connected with the will of the claimant.

### CHAPTER IX

#### CHARACTER AND MEASURE OF REPARATION

##### Article 24

1. The reparation of the injury caused to an alien may take the form of restitution in kind ("restitutio in integrum") or, if restitution is not possible or does not constitute adequate reparation for the injury, of pecuniary damages.

2. The measure or quantum of the pecuniary damages shall be determined in accordance with the nature of the injury caused to the person or property of the alien, or, in the event of his death, of his heirs or successors in interest.

3. In the determination of the measure or quantum of the reparation the extenuating circumstances referred to in article 13 of the present draft shall be taken into account.

##### Article 25

In the case of acts or omissions the consequences of which extend beyond the specific injury caused to the alien, the State of nationality may demand, without prejudice to the reparation due in respect of the said injury, that the respondent State take all necessary steps to prevent a repetition of acts of the kind imputed to it.

## PLANNING OF FUTURE WORK OF THE COMMISSION

### [Agenda item 8]

#### DOCUMENT A/CN.4/L.76

##### Comments and proposals submitted by Mr. Jaroslav Zourek

[Original text: French]  
21 May 1958

#### I

1. The question of the means of speeding up the work of the International Law Commission was first raised in 1950, when the General Assembly of the United Nations, considering that it was of the greatest importance that the work of the International Law Commission should be carried on in the conditions most likely to enable the Commission to achieve rapid and positive results, requested the Commission to review its statute with the object of making recommendations concerning revisions which might appear desirable, in the light of experience, for the promotion of the Commission's work (resolution 484 (V) of 12 December 1950). After discussing this matter at its third session, the International Law Commission recommended that the members of the Commission should devote the whole of their time to its work. The General Assembly did not accept that recommendation, however, and decided, for the time being, not to take any action in the matter until it had acquired further experience of the functioning of the Commission (resolution 600 (VI) of 31 January 1952).

2. At the eleventh session of the General Assembly in 1956, Mr. Holmbäck, the representative of Sweden, stressed the necessity of speeding up the work of the International Law Commission. He pointed out that at its first session, in 1949, the Commission had selected fourteen topics for codification (A/925, para. 16), and that since then it had prepared drafts on only four of those topics: arbitral procedure (A/2456, chap. II), nationality, including statelessness (A/2693, chap. II), the régime of the high seas and the régime of the territorial sea (A/3159, chap. II). He observed that at that rate it would take several decades for the Commission to prepare drafts on all the fourteen topics it had selected, and added that it would be even longer before all those drafts had been accepted by Governments in the form of conventions by due constitutional process.<sup>1</sup>

3. The representative of Sweden expressed the view that an increase in the membership of the International Law Commission offered new prospects for organizing the Commission's work. Being of the opinion that all the main forms of civilization and all the principal legal systems could be represented in a body consisting of ten members, he suggested to the Sixth Committee of the General Assembly that in future the International Law Commission should divide itself into two or even more sub-commissions working independently or along parallel lines on different topics. He stressed that ex-

perience in the United Nations had shown that a body composed of more than ten members was too large for the drafting work required of the International Law Commission.<sup>2</sup>

4. The representative of Sweden also mentioned the possibility of placing some, at least, of the International Law Commission's members on a full-time basis; but he did not think it necessary to enter into that question, as it was not directly relevant to the question of an increase in the Commission's membership.<sup>3</sup>

5. The Swedish representative's suggestion for speeding up the work of the International Law Commission was supported by a number of delegations including those of the United Kingdom,<sup>4</sup> Afghanistan,<sup>5</sup> Ecuador,<sup>6</sup> the United States of America,<sup>7</sup> Denmark,<sup>8</sup> and Haiti.<sup>9</sup>

6. The representative of the United Kingdom suggested that each subject might be dealt with by one of the sections of the Commission at one session and by the full Commission at the following session, and that the sections should be so organized as to reflect the representation of the different legal systems on the full Commission. He expressed the opinion that the International Law Commission might be asked to report on the suggestion.<sup>10</sup> The representative of Austria took the same view.<sup>11</sup> However, the Sixth Committee of the General Assembly took no decision on the matter.

7. Other delegations, without referring expressly to the Swedish delegation's suggestion, also thought that an increase in membership would make it possible to speed up the Commission's work. For example, the representative of Egypt expressed the hope that a larger membership would enable the Commission to proceed at an accelerated pace.<sup>12</sup>

8. The report of the Sixth Committee<sup>13</sup> summarizes the opinions expressed on this subject. It also contains the suggestion that if its membership were increased the

<sup>2</sup> *Ibid.*, para. 4.

<sup>3</sup> *Ibid.*, para. 5.

<sup>4</sup> *Ibid.*, para. 18.

<sup>5</sup> *Ibid.*, para. 26.

<sup>6</sup> *Ibid.*, 484th meeting, para. 13.

<sup>7</sup> *Ibid.*, para. 17.

<sup>8</sup> *Ibid.*, para. 30.

<sup>9</sup> *Ibid.*, 485th meeting, para. 14.

<sup>10</sup> *Ibid.*, 483rd meeting, para. 19.

<sup>11</sup> *Ibid.*, para. 31.

<sup>12</sup> *Ibid.*, para. 33.

<sup>13</sup> *Ibid.*, *Eleventh Session Annexes*, agenda item 59, document A/3427.

<sup>1</sup> *Official Records of the General Assembly, Eleventh Session, Sixth Committee*, 483rd meeting, para. 3.

Commission might divide itself into two or even more sub-commissions working independently or along parallel lines on different topics.<sup>14</sup>

## II

9. The International Law Commission began to discuss this important question at its ninth session but, not yet having the necessary experience, did not feel able to settle it. Paragraph 29 of its report on the work of its ninth session (A/3623) reads as follows:

"Nevertheless, the Commission is fully conscious of the need for doing everything possible, consistent with the maintenance of quality, to increase the pace and volume of the work, and is ready to adopt any appropriate measures conducive to that end. It proposes to keep the matter under constant review, and to give it renewed consideration at its next session in the light of the experience gained of the working of the Commission with its present membership of twenty-one."

## III

10. At the twelfth session of the General Assembly, several delegations again expressed their concern at the progress of the Commission's work, which they thought should be quicker. The delegation of El Salvador, for instance, suggested that preliminary reports of the International Law Commission should be prepared by a sub-commission, and only final reports by the full Commission.<sup>15</sup>

11. Mr. Holmbäck, the representative of Sweden, urged that the only remedy for the slowness of the International Law Commission's work was to adopt the suggestion he had made in the Sixth Committee at the eleventh session of the General Assembly (see paras. 2 and 3 above), which had been supported by several delegations.<sup>16</sup> He expressed his disappointment that the Commission's report said nothing about possible ways of correcting the situation.<sup>17</sup>

12. Several delegations again supported the suggestion that the International Law Commission should work in sub-commissions. This view was expressed in the Sixth Committee by the delegations of the United Kingdom,<sup>18</sup> India,<sup>19</sup> Afghanistan,<sup>20</sup> and the Federation of Malaya.<sup>21</sup>

13. Other delegations, while approving the above-mentioned suggestion in principle, feared that the method might lead to a loss of unity of views (Romania),<sup>22</sup> or have other disadvantages (Bulgaria).<sup>23</sup>

14. Some delegations also gave expression, in one form or another, to their desire that the methods of work of the International Law Commission should be im-

proved. These included the delegations of Finland,<sup>24</sup> Yugoslavia,<sup>25</sup> Israel,<sup>26</sup> and Czechoslovakia.<sup>27</sup>

15. The delegation of Israel expressed the view that the International Law Commission was spending too much time on line-by-line discussions of the various drafts. It also suggested that the Commission could be asked to include in the report to be submitted to the thirteenth session of the General Assembly a section dealing with the question of its method of work.

16. Several representatives, on the other hand, opposed the idea of splitting up the International Law Commission into a number of sub-commissions. In their opinion, the Commission should not press on too fast with the work of codification, which by its very nature required a considerable amount of time. That was the view of the Belgian delegation<sup>28</sup> and the delegation of the Soviet Union.<sup>29</sup>

17. The great majority of delegations seemed to agree that the International Law Commission should be left to organize its work according to its needs and experience.

18. In his reply to the Sixth Committee, the Chairman of the International Law Commission urged that the question of organization of the work should be left to the Commission itself; he thought that the Commission would discuss the matter and take any necessary measures at its next session.<sup>30</sup>

## IV

### *Means of speeding up the work of the International Law Commission*

19. As has been shown above, suggestions that the work of the International Law Commission should be speeded up are becoming increasingly frequent in the General Assembly. Moreover, it is in the interests of the Commission's work that the pace should be quickened, for it does not make a good impression if several important questions are postponed from one session to another without being considered, or after being barely touched on in a general discussion.

20. Now the 40 per cent increase in the Commission's membership, made by the General Assembly at its eleventh session, would be bound to lead to a considerable slowing-down of the work if the Commission adhered to its previous methods. For it is clear that the bigger a body is, the more speeches will be made and the longer the work will take.

21. The International Law Commission's work is of a kind that requires a considerable period of preparation, in which to clarify all the aspects of every question, to explain and evaluate the precedents and to give mature consideration to the opinions for and against. Consequently, a time-limit cannot be imposed on speakers, save in exceptional cases. All the members must have an opportunity to explain their points of view. Experience has shown that the Commission cannot achieve satisfactory results unless all the aspects of a question have been sufficiently clarified by discussion.

<sup>14</sup> *Ibid.*, para. 15.

<sup>15</sup> *Ibid.*, *Twelfth Session, Sixth Committee*, 510th meeting, para. 8.

<sup>16</sup> *Ibid.*, paras. 14-16.

<sup>17</sup> *Ibid.*, 513th meeting, para. 43.

<sup>18</sup> *Ibid.*, 511th meeting, para. 13.

<sup>19</sup> *Ibid.*, 510th meeting, para. 29.

<sup>20</sup> *Ibid.*, 511th meeting, para. 41.

<sup>21</sup> *Ibid.*, 512th meeting, para. 29.

<sup>22</sup> *Ibid.*, 511th meeting, para. 5.

<sup>23</sup> *Ibid.*, 512th meeting, para. 35.

<sup>24</sup> *Ibid.*, 509th meeting, para. 32.

<sup>25</sup> *Ibid.*, 511th meeting, para. 53.

<sup>26</sup> *Ibid.*, 512th meeting, para. 11.

<sup>27</sup> *Ibid.*, para. 20.

<sup>28</sup> *Ibid.*, 510th meeting, para. 19.

<sup>29</sup> *Ibid.*, 511th meeting, para. 29.

<sup>30</sup> *Ibid.*, 513th meeting, para. 38.

22. Since the Commission has in the past—at its fifth and seventh sessions—rejected the proposal that its members should have the right to attach dissenting opinions to any decision by the Commission on draft rules of international law (A/2456, para. 163; A/2934, paras. 37 and 38), there are only three ways of avoiding the disadvantages referred to in the foregoing paragraphs:

(a) To hold two meetings a day. Save in exceptional cases, this solution should be avoided, as the work on which the International Law Commission is engaged requires time for study and reflexion. Furthermore, the members of the Commission have to devote a considerable amount of time to studying new documents; the special rapporteurs, and the Commission's general rapporteur, have to do a large amount of work outside normal working hours; and lastly, the drafting committee is at work during the greater part of the session and must meet in the afternoon when the full Commission is not sitting.

(b) To increase the length of the sessions. Since the membership of the Commission has been increased by 40 per cent, the duration of the sessions would have to be increased in roughly the same proportion in order to do the same amount of work. This solution would be unacceptable to most of the members, for whom a prolonged absence from home means making a sacrifice. It would be still less acceptable to the General Assembly, which, if it were proposed, would probably recommend the Commission to sit twice a year or to change its methods of work.

(c) To find another way of organizing the work, which would enable the Commission to make quicker progress without its being necessary to increase the length of the sessions or the number of meetings.

23. The suggestion that the International Law Commission should be split up into two or more sub-commissions working on different subjects along parallel lines does not provide an adequate solution. If that suggestion were accepted, the Commission would cease to exist as a single organ and would be replaced by two or more sub-commissions working independently. Unity of views would not be assured and the sub-commissions might reach conflicting results. Moreover, such a reform would be contrary to the Commission's present statute.

24. Nevertheless, the idea of referring details to smaller, but sufficiently representative, working parties for discussion should be adopted. Since it first began its work, the International Law Commission has made use of a drafting committee. In recent years, that body has often been given tasks beyond the competence of a mere drafting committee. After a discussion in plenary meeting, it has been asked to seek solutions and prepare texts for the full Commission. This procedure has proved extremely useful and has greatly helped to speed up the work. Consideration should be given to

the possibility of generalizing and extending it, with a view to making it one of the International Law Commission's normal methods of work.

25. It has sometimes been objected that nothing can be gained by such a procedure, because the whole discussion would start again when the sub-commission's draft came before the full Commission. But if the sub-commission is elected on a sufficiently representative basis and includes representatives of the world's principal legal systems—which is quite possible with the Commission's present membership—it is unlikely that this fear will be realized. Moreover, the objection has been largely belied by the facts. At its ninth session, the Commission referred a number of articles to the drafting committee after discussion in plenary meeting, without voting on them, and the drafting committee's proposals were approved by the full Commission without difficulty.

26. With a view to speeding up the work of the International Law Commission, while keeping it on a high scientific level, the following changes in the Commission's organization and methods of work might be considered in the light of past experience:

(a) In the absence of a contrary decision by the Commission, any draft prepared by the special rapporteurs would be the subject of a general discussion in plenary meeting.

(b) When the general discussion was concluded, the Commission would review the articles of the draft and the amendments submitted by members, so that they could have an opportunity of presenting their views. Votes would not be taken at that stage of the work unless the circumstances made it necessary to take a vote on a question of principle in order to simplify and facilitate the work.

(c) After this preliminary discussion, the draft would be referred to a sub-commission so constituted as to include representatives of all the world's principal legal systems. The sub-commission, of which the special rapporteur would automatically be a member, should not consist of more than ten members.

(d) The sub-commission would fully discuss the special rapporteur's proposals and the amendments thereto, and would prepare draft articles for the full Commission. In view of the importance of this work for the Commission itself, for the governments of States Members of the United Nations and for academic circles, the meetings of the sub-commissions would be conducted in the same way as plenary meetings, i.e., with simultaneous interpretation and summary records.

(e) The drafts prepared by the sub-commissions would be submitted to the full Commission for possible discussion and adoption.

(f) The Commission would always be entitled to reserve a particularly important or urgent draft for discussion in plenary meeting only.

## COMMUNICATION FROM THE SECRETARY-GENERAL

### DOCUMENT A/CN.4/L.74

#### Communication dated 2 May 1958 from the Secretary-General of the United Nations to the Chairman of the International Law Commission

[Original text: English]  
2 May 1958

The Secretary-General of the United Nations presents his compliments to the Chairman of the International Law Commission and has the honour to inform him of the following, with the request that this information be made available to the members of the Commission.

At the request of the Government of the United Arab Republic, a note from the Government dated 24 February 1958 regarding the formation of the United Arab Republic and the election of President Gamal Abdel Nasser as President of the new Republic, together with a note dated 1 March 1958, are hereby communicated to all the States Members of the United Nations, to principal organs of the United Nations and to subsidiary organs of the United Nations.

The Secretary-General has now received credentials for Mr. Omar Loutfi as Permanent Representative of the United Arab Republic to the United Nations, signed by the Minister for Foreign Affairs of the Republic. In accepting this letter of credentials the Secretary-General has noted that this is an action within the limits of his authority, undertaken without prejudice to and pending such action as other organs of the United Nations may take on the basis of the notification of the constitution of the United Arab Republic and the note of 1 March 1958.

#### *Annexes*

##### A

#### NOTE DATED 24 FEBRUARY 1958 FROM THE PERMANENT MISSION OF EGYPT TO THE UNITED NATIONS

The plebiscite held in Egypt and Syria on 21 February 1958 having made clear the will of the Egyptian and the Syrian

people to unite their two countries in a single State, the Minister for Foreign Affairs of the United Arab Republic has the honour to notify the Secretary-General of the United Nations of the establishment of the United Arab Republic, having Cairo as its capital, and of the election, in the same plebiscite, of President Gamal Abdel Nasser as President of the new Republic.

The Minister for Foreign Affairs of the United Arab Republic has the honour to be, etc.

##### B

#### NOTE DATED 1 MARCH 1958 FROM THE PERMANENT MISSION OF THE UNITED ARAB REPUBLIC TO THE UNITED NATIONS

The Ministry of Foreign Affairs presents its compliments to His Excellency the Secretary-General of the United Nations and, in pursuance of its note dated 24 February 1958, regarding the formation of the United Arab Republic and the election of President Gamal Abdel Nasser, has the honour to request the Secretary-General to communicate the content of the above-mentioned note to the following:

1. All the States Members of the United Nations.
2. Other principal organs of the United Nations.
3. Subsidiary organs of the United Nations, particularly those on which Egypt or Syria, or both, are represented.

It is to be noted that the Government of the United Arab Republic declares that the Union henceforth is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.

# REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/3859\*

Report of the International Law Commission covering the work of its tenth session, 28 April-4 July 1958

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

## Chapter I

### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the statute of the Commission annexed thereto, as subsequently amended, held its tenth session at the European Office of the United Nations, Geneva, from 28 April to 4 July 1958. The work of the Commission during the session is described in the present report. Chapter II of the report contains the model rules on arbitral procedure, which are submitted to the General Assembly for its consideration. Chapter III contains the final draft on diplomatic intercourse and immunities which is also submitted to the General Assembly. Chapter IV gives an account of the progress so far made in the Commission's work on the subjects of State responsibility, the law of treaties and consular intercourse and immunities. Chapter V deals with certain administrative and other matters.

#### I. Membership and attendance

2. The Commission consists of the following members:

| <i>Name</i>              | <i>Nationality</i>                                   |
|--------------------------|--|
| Mr. Roberto Ago          | Italy  |
| Mr. Ricardo J. Alfaro    | Panama   |
| Mr. Gilberto Amado       | Brazil   |
| Mr. Milan Bartoš         | Yugoslavia   |
| Mr. Douglas L. Edmonds   | United States of America                             |
| Sir Gerald Fitzmaurice   | United Kingdom of Great Britain and Northern Ireland |
| Mr. J. P. A. François    | Netherlands  |
| Mr. F. V. García Amador  | Cuba   |
| Mr. Shuhsi Hsu           | China  |
| Mr. Thanat Khoman        | Thailand   |
| Faris Bey El-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 30 April 1958 the Commission elected Mr. Ricardo J. Alfaro of Panama to fill the casual vacancy caused by the resignation of Mr. Jean Spiropoulos consequent upon the latter's election to the International

Court of Justice. Mr. Alfaro assisted in the work of the Commission from 28 May onwards.

4. At the 454th meeting on 2 June 1958, the Commission received a letter from Mr. Abdullah El-Erian, United Arab Republic, in which he stated that, having regard to the provision in article 2, paragraph 2, of the Commission's statute that no two members of the Commission shall be nationals of the same State, he wished to tender his resignation. The Commission accepted the resignation and, as from 2 June 1958, Mr. El-Erian took no further part in the work of the Commission. At a private meeting on 6 June 1958 the Commission decided to postpone until the beginning of the next session the election to fill the casual vacancy caused by the resignation of Mr. El-Erian.

5. Mr. Thanat Khoman was not able to be present during the session.

#### II. Officers

6. At its 431st meeting on 28 April 1958, the Commission elected the following officers:

*Chairman:* Mr. Radhabinod Pal;

*First Vice-Chairman:* Mr. Gilberto Amado;

*Second Vice-Chairman:* Mr. Grigory I. Tunkin;

*Rapporteur:* Sir Gerald Fitzmaurice.

7. 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

8. The Commission adopted an agenda for the tenth session consisting of the following items:

1. Filling of casual vacancy in the Commission (article 11 of the statute).
2. Arbitral procedure: General Assembly resolution 989 (X).
3. Diplomatic intercourse and immunities.
4. Law of treaties.
5. State responsibility.
6. Consular intercourse and immunities.
7. Date and place of the eleventh session.
8. Planning of future work of the Commission.
9. Limitation of documentation: General Assembly resolution 1203 (XII).
10. Other business.

9. In the course of the session the Commission held forty-eight meetings. It considered all the items on the agenda with the exception of the law of treaties (item 4) and State responsibility (item 5). As regards the latter two items, and consular intercourse and immunities (item 6) which was considered only briefly, see chapter IV.

## Chapter II

### ARBITRAL PROCEDURE

#### I. General observations

##### A. HISTORICAL

10. In presenting its final report on arbitral procedure, the International Law Commission recalls the following passages from the opening paragraphs of the report on this subject which it drew up at its fifth session in 1953:<sup>1</sup>

"9. At its first session in 1949, the International Law Commission selected arbitral procedure as one of the topics of codification of international law and appointed Mr. Georges Scelle as special rapporteur. The successive stages of the preparation and discussion of that topic are set forth in paragraphs 11-14 of the report of the Commission on its fourth session.<sup>2</sup>

"10. At its fourth session in 1952, the Commission adopted a 'draft on arbitral procedure' with accompanying comments.<sup>3</sup> In accordance with article 21, paragraph 2, of its statute, the Commission decided to transmit the draft, through the Secretary-General, to Governments with the request that they should submit their comments. The Commission also decided to draw up, during its fifth session in 1953, a final draft for submission to the General Assembly in accordance with article 22 of its statute.

"11. . . .

"12. During its fifth session in 1953, the Commission, at its 185th to 194th meetings, considered the draft in the light of the comments of Governments and of the study of the provisional draft by its members in the intervening period between the fourth and fifth sessions. As the result, the Commission adopted a number of substantial changes which are commented upon in the present report. No reference is made to verbal changes and alterations in drafting."

11. In submitting its 1953 draft on arbitral procedure, which was at that time intended as a final draft, the Commission, in paragraph 55 of its report for that year,<sup>4</sup> expressed the view that this final draft, as adopted, called for action on the part of the General Assembly of the kind contemplated in article 23, paragraph 1 (c), of the statute of the Commission, namely, that the draft should be recommended to Member States with a view to the conclusion of a convention; the Commission recommended accordingly. The reasons why the Commission considered the conclusion of a general convention on the subject to be important and highly desirable were set out in full in paragraph 56 of that report.

12. The draft was not, however, finally considered by the Assembly until the tenth session in 1955, when

it was subjected to considerable criticism, particularly in view of the Commission's recommendation for the conclusion of a convention on the subject. These criticisms were summarized as follows by the special rapporteur, Mr. Georges Scelle, in the report he prepared for the Commission at its ninth session in 1957:

"The Commission's draft would distort traditional arbitration practice, making it into a quasi-compulsory jurisdictional procedure, instead of preserving its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and even the outcome of the procedure, both wholly dependent on the form of the *compromis*. The General Assembly took the view that the International Law Commission had exceeded its terms of reference by giving *preponderance* to its desire to promote the development of international law instead of concentrating on its *primary* task, [*i.e.*] the codification of custom."<sup>5</sup>

Accordingly, the Assembly eventually adopted resolution 989 (X) of 14 December 1955 which reads as follows:

"The General Assembly,

"*Having considered* the draft<sup>6</sup> on arbitral procedure prepared by the International Law Commission at its fifth session and the comments<sup>7</sup> thereon submitted by Governments,

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

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

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

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

"2. *Invites* the International Law Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral

<sup>1</sup>Official Records of the General Assembly, Eighth Session, Supplement No. 9, (A/2456), chapter II.

<sup>2</sup>Ibid., Seventh Session, Supplement No. 9, (A/2163), paras. 11-14.

<sup>3</sup>Ibid., para. 24.

<sup>4</sup>Ibid., Eighth Session, Supplement No. 9, (A/2456).

<sup>5</sup>See Yearbook of the International Law Commission, 1957, vol. II (A/CN.4/SER.A/1957/Add.1), document A/CN.4/109, para. 7.

<sup>6</sup>Official Records of the General Assembly, Eighth Session, Supplement No. 9, (A/2456), para. 57.

<sup>7</sup>Ibid., Tenth Session, Annexes, agenda item 52, documents A/2899 and Add.1 and 2.

procedure, and to report to the General Assembly at its thirteenth session;

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

13. The International Law Commission was not able to take the matter up at its eighth session in 1956, because of the necessity of completing at that session its final draft on the law of the sea; but it devoted some time to the subject at its ninth session in 1957, with a view to completing the work during its present (tenth) session, for presentation to the General Assembly at its forthcoming thirteenth session, as requested in resolution 989 (X) quoted above. As stated in paragraph 19 (chapter III) of its 1957 report,<sup>8</sup> the Commission, at the ninth session, considered the matter principally from the point of view of what, in the light of the Assembly's resolution, ought to be "the ultimate object to be attained in reviewing the draft on arbitral procedure and, in particular, whether this object should be a convention or simply a set of rules which might inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements". As stated in the same paragraph, the Commission, at its 419th meeting decided in favour of the second alternative. It may be noted, without unduly stressing the point, that the Assembly resolution, while leaving fully open the possibility of convening an eventual international conference to conclude a convention on the subject, appeared rather to incline to the alternative solution.

14. In coming to this conclusion, a majority of the members of the Commission<sup>9</sup> were motivated by the feeling that the draft as it stood constituted a homogeneous and self-consistent whole, based on the view that the process of arbitration flowed logically from the agreement of the parties to submit to arbitration and that, the agreement to arbitrate having once been entered into, certain necessary consequences followed which affected the whole of the ensuing arbitral procedure, and which the parties must, in order to honour their agreement, be prepared to accept. It was however clear from the reactions of Governments that this concept of arbitration, while not necessarily going beyond what two States might be prepared to accept for the purposes of submitting a particular dispute to arbitration *ad hoc*, or even beyond what two individual States might be willing to embody in a bilateral treaty of arbitration intended to govern generally the settlement of disputes arising between them *inter se*, did definitely go beyond what the majority of Governments would be prepared to accept in advance as a general multilateral treaty of arbitration to be signed and ratified by them, in such a way as to apply automatically to the settlement of all future disputes between them. To re-cast the draft in such a way that it might attract the signature and ratification of a majority of Governments it would be necessary to embark on a complete revision, involving in all probability an alteration in the whole concept on which it was based. In these circumstances the Commission took the view that it would be preferable to leave the existing general form and structure of the draft as it stood, but to present it to the General Assembly not as the basis of a general multilateral convention on arbitral

procedure, but as a set of model draft articles which States could draw upon, to such extent as they might see fit in concluding bilateral or plurilateral arbitral agreements *inter se*, or in submitting particular disputes to arbitration *ad hoc*.

15. The special rapporteur, Mr. Georges Scelle, accordingly drew up a further report<sup>10</sup> in the light of this conclusion, for consideration by the Commission at its present session. On the basis of this report the Commission discussed the matter at its 433rd to 448th, 450th and 471st to 473rd meetings and adopted the articles set out in part II below. These articles are followed by a general commentary, but no article-by-article commentary is furnished, for the following reasons. For the purposes of its original draft of thirty-two articles prepared at its fourth session in 1952<sup>11</sup> for comment by Governments, the Commission had furnished an article-by-article commentary prepared by the special rapporteur, Mr. Georges Scelle. Although, as stated in paragraph 12 of its report for 1953,<sup>12</sup> a number of substantial changes were, in the light of the comments of Governments, introduced into the final draft submitted to the Assembly in that report, these changes were not considered to be of such a character as to require a further or new article-by-article commentary, and the matter was dealt with by means of a general commentary contained in paragraphs 15-52 of the report prepared by the general rapporteur for that year, Mr. H. Lauterpacht (now Sir Hersch Lauterpacht, Judge of the International Court of Justice). The present text, now presented, while also containing a number of changes of substance and, as explained in paragraph 13 above, entailing a change of objective so to speak, equally involves no fundamental alterations of structure or concept, for the reasons set out in paragraph 14. The increase in the original number of articles from thirty to thirty-eight is due almost wholly to the fact that the Commission decided, on the recommendation of the special rapporteur, and in the light of certain comments made in the General Assembly in 1955, to include a number of provisions relating to the routine conduct of arbitral proceedings, such as are normally inserted in the *compromis d'arbitrage*.<sup>13</sup> These provisions are for the most part of a type which do not involve important points of principle and call for no special comment. Having regard to these considerations, to the detailed commentary contained in the 1952 report, to the further detailed commentary on the 1952 articles contained in the documents referred to in footnote 13 below, to the very full general commentary contained in the 1953 report, and also to the existence of further commentaries contained in the special rapporteur's reports for 1957<sup>14</sup> and 1958,<sup>15</sup> the Commission feels that any further general or detailed restatement of the principles governing the text would be otiose, and that the comparatively brief commentary on certain of the articles which is contained in part III below will suffice to explain any points of special importance or any changes to which particular attention should be drawn.

<sup>10</sup> A/CN.4/113 of 6 March 1958.

<sup>11</sup> *Official Records of the General Assembly, Seventh Session, Supplement No. 9 (A/2163)*, chapter II.

<sup>12</sup> *Ibid.*, *Eighth Session, Supplement No. 9 (A/2456)*.

<sup>13</sup> This decision was taken despite the fact that the valuable printed *Commentary on the Draft Convention on Arbitral Procedure (A/CN.4/92)* to the original mimeographed version of which the Commission referred in paragraph 13 of its 1953 report, contained an annex of about 130 pages devoted to this type of provision.

<sup>14</sup> A/CN.4/109, para. 7. See *Yearbook of the International Law Commission, 1957*, vol. II (A/CN.4/SER.A/1957/Add.1).

<sup>15</sup> A/CN.4/113 of 6 March 1958.

<sup>8</sup> *Ibid.*, *Twelfth Session, Supplement No. 9 (A/3623)*.

<sup>9</sup> See, *passim*, the summary record of the 419th meeting of the Commission in vol. I of the *Yearbook of the International Law Commission, 1957 (A/CN.4/SER.A/1957)*, pp. 181-185.

B. SCOPE AND PURPOSE OF THE DRAFT<sup>16</sup>

16. The commentary to the 1953 text states fully the fundamental principles governing the law of arbitration on which the text is based.<sup>17</sup> There is no need to re-state all these principles. Special reference will however be made presently to two of them (namely the character and consequences of the obligation to arbitrate, and the autonomy of the parties), on account of their great overriding importance.

17. The structural and other affinities between the present text and that of 1953 are clearly apparent from the comparative table of articles which, for convenience of reference, is given in a footnote below.<sup>18</sup> But these affinities must not be allowed to obscure the fact that the text is not now presented as a prospective convention the adoption of which by the General Assembly would involve for Member States the question of deciding whether to sign and ratify it or not. This question, considered as such, no longer arises. If, as the Commission, in accordance with article 23, paragraph 1 (b), of its statute, now recommends, the Assembly adopts the present report by resolution, the draft articles would become binding on any Member State only in the following circumstances, which indicate the three or four purposes they are now specifically intended to serve:

(i) If they were embodied in a convention between two or more States for signature and ratification *inter se*, intended to govern the settlement of all, or of any specified category of future disputes arising between them;

(ii) If they were similarly embodied in a particular arbitral agreement for the settlement *ad hoc* of an already existing dispute;

(iii) If—which is a variant of (ii)—parties to a dispute which they propose to refer to arbitration, wished to embody the articles, in whole or in part, in their arbitral agreement or in the *compromis d'arbitrage*, or to

include clauses based upon them, or for which the articles would serve as a model;

(iv) If, in the same circumstances as (iii), the parties did not wish, or found it difficult, to draw up a detailed arbitral agreement or *compromis*, and preferred simply to declare that the settlement of the dispute and the process of arbitration would be governed by the present articles with or without such exceptions, variations or additions as the parties might indicate.

18. It is thus clear that the draft articles are not intended as, and do not constitute a general treaty of arbitration. They are intended as a guide, not as a strait-jacket; in this way the fundamental principle of the autonomy of the parties to a dispute, to which further reference will be made presently, is fully preserved. Nevertheless, this principle itself is not unfettered. It is absolute only in the sense that nothing can compel two States to engage in arbitration except their own agreement to do so, given either generally and in advance, or *ad hoc* in relation to the particular dispute. But this consent, once given, binds the parties and obliges them to carry out the undertaking to arbitrate. From this, certain consequences follow, which are legal consequences. These cannot be escaped by the parties, whether they make use of the present articles to govern their arbitration or not—for these consequences are inherent in, and spring from, the simple undertaking to arbitrate, once this has been given in binding form.

19. The present text therefore, like that of 1953, is based on the fundamental concept that an agreement to arbitrate involves in substance an international obligation equivalent to a treaty obligation.<sup>19</sup> Having once entered into it (which they were free not to do) the parties are legally bound to carry it out and, in consequence, to take all the steps necessary to enable the arbitration to take place and the dispute to be finally liquidated; and, similarly, to refrain from any action, positive or negative, which would impede or frustrate that consummation. This may be styled the principle of non-frustration. Experience having shown that there are a number of ways in which a party to a dispute, despite its undertaking to arbitrate, can in fact frustrate the process of arbitration—e.g., by failing to appoint its arbitrator, or otherwise to co-operate in setting up the arbitral tribunal; by withdrawing its arbitrator during the course of the proceedings and failing to appoint another; by failing to appear and present or defend its case before the tribunal, etc.—the present text, like that of 1953, provides automatic procedures for filling in any gaps thus created by the action or inaction of the parties, and thereby for preventing the frustration of the agreement and enabling the arbitration to take place and result in a final settlement binding on the parties.<sup>20</sup>

20. Within these limits which, it should be emphasized, do not spring from these articles as such, but from the inherent legal position on which they are based, and by which they themselves are governed, the parties, by virtue of the principle of their autonomy,<sup>21</sup> remain free to conduct their arbitration as they please. Subject to the overriding principle of non-frustration, they can adopt what procedural or other rules they like. In so far as they adopt or proceed on the basis of the present articles, they can (subject always to the same limitation) introduce

<sup>16</sup> The present draft is of course intended to apply to arbitrations between States. The Commission discussed the question how far it might also be applicable to other types of arbitration, such as arbitrations between international organizations, or between States and international organizations, or between States and foreign private corporations or other juridical entities. The Commission decided not to proceed with these aspects of the matter. Nevertheless, now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, its provisions would, with the necessary adaptations, also be capable of utilization for the purposes of arbitrations between States and international organizations or between international organizations.

In the case of arbitrations between States and foreign private corporations or other juridical entities, different legal considerations arise. However, some of the articles of the draft, if adapted, might be capable of use for this purpose also.

<sup>17</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*, chapter II, paras. 18-29 and 48-52.

<sup>18</sup> The present numbers of the articles are followed by numbers in brackets which indicate the article in the 1953 draft (A/2456, para. 57) on which the present article is broadly based. Where the present article had no equivalent in 1953, this fact is indicated by the word "new" in brackets after the number of the article.

Preamble (1 and 14), article 1 (2), article 2 (9), article 3 (3 and 4), article 4 (5), article 5 (6), article 6 (8), article 7 (new), article 8 (10), article 9 (11), article 10 (12, para.1), article 11 (12, para.2), article 12 (13), article 13 (new), article 14 (new), article 15 (new), article 16 (new), article 17 (new), article 18 (15), article 19 (16), article 20 (17), article 21 (18), article 22 (21), article 23 (22), article 24 (23), article 25 (20), article 26 (19), article 27 (19, 7 and part new), article 28 (24, 25), article 29 (24, para.2), article 30 (26), article 31 (27), article 32 (new), article 33 (28), article 34 (new), article 35 (30), article 36 (31), article 37 (32), article 38 (29 and part new).

<sup>19</sup> The forms taken by arbitral agreements may of course be of very diverse characters.

<sup>20</sup> See *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*, paras. 18-25.

<sup>21</sup> *Ibid.*, paras. 48-52.

what exceptions, variations or additions seem good to them. In this respect, it is desirable to make it quite clear that, within the limits stated, the application of the present articles, in so far as adopted by the parties to a dispute, will always be subject to any special provisions in the arbitral agreement or *compromis d'arbitrage*. Consequently, although for reasons of convenience or emphasis certain of the articles contain phrases such as "Unless otherwise provided in the *compromis* . . .", this should not be taken to mean that the application of other articles is not equally subordinated to the will of the parties and to variation or even exclusion under the terms of the *compromis*.

21. Naturally, where in the preceding paragraph reference is made to the limitations implied by the principle of non-frustration, it is not intended to suggest that States can in practice be prevented from drawing up their arbitral agreement or *compromis* in such a way that it will be possible for one or other of them to frustrate the purpose of the arbitration. But (at any rate with the exception of those cases where the agreement or *compromis* expressly permits it) the party taking the frustrating action will be acting in a manner which, even if not actually contrary to the arbitral agreement as such, will be contrary to the basic principles of general international law governing the process of arbitration. The present articles are designed (and this is now one of their chief objects) to ensure that, if the parties draw up their arbitral agreement or *compromis* in such a way that its object can be frustrated, they will at least do so with open eyes. If two States, aware of what they are doing, choose to draft their agreement or *compromis* in this way, they are entitled—or at any rate they have the faculty—to do so. But if they wish to close the door to the possibility of frustration, the present articles indicate by what means this can be done.

## II. Text of the draft

22. The final text on arbitral procedure in the form of a set of model draft articles, as adopted by the Commission at its 473rd meeting, reads as follows:

### MODEL RULES ON ARBITRAL PROCEDURE

#### *Preamble*

The undertaking to arbitrate is based on the following fundamental rules:

1. Any undertaking to have recourse to arbitration in order to settle a dispute between States constitutes a legal obligation which must be carried out in good faith.
2. Such an undertaking results from agreement between the parties and may relate to existing disputes or to disputes arising subsequently.
3. The undertaking must be embodied in a written instrument, whatever the form of the instrument may be.
4. The procedures suggested to States parties to a dispute by these model rules shall not be compulsory unless the States concerned have agreed, either in the *compromis* or in some other undertaking, to have recourse thereto.
5. The parties shall be equal in all proceedings before the arbitral tribunal.

### THE EXISTENCE OF A DISPUTE AND THE SCOPE OF THE UNDERTAKING TO ARBITRATE

#### *Article 1*

1. If, before the constitution of the arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to go to arbitration, such preliminary question shall, at the request of

any of the parties and failing agreement between them upon the adoption of another procedure, be brought before the International Court of Justice for decision by means of its summary procedure.

2. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

3. If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.

### THE COMPROMIS

#### *Article 2*

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

- (a) The undertaking to arbitrate according to which the dispute is to be submitted to the arbitrators;
- (b) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;
- (c) The method of constituting the tribunal and the number of arbitrators.

2. In addition, the *compromis* shall include any other provisions deemed desirable by the parties, in particular:

- (i) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter;
- (ii) The power, if any, of the tribunal to make recommendations to the parties;
- (iii) Such power as may be conferred on the tribunal to make its own rules of procedure;
- (iv) The procedure to be followed by the tribunal; provided that, once constituted, the tribunal shall be free to override any provisions of the *compromis* which may prevent it from rendering its award;
- (v) The number of members required for the constitution of a *quorum* for the conduct of the hearings;
- (vi) The majority required for the award;
- (vii) The time limit within which the award shall be rendered;
- (viii) The right of the members of the tribunal to attach dissenting or individual opinions to the award, or any prohibition of such opinions;
- (ix) The languages to be employed in the course of the proceedings;
- (x) The manner in which the costs and disbursements shall be apportioned;
- (xi) The services which the International Court of Justice may be asked to render.

This enumeration is not intended to be exhaustive.

### CONSTITUTION OF THE TRIBUNAL

#### *Article 3*

1. Immediately after the request made by one of the States parties to the dispute for the submission of the dispute to arbitration, or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps, either by means of the *compromis* or by special agreement, in order to arrive at the constitution of the arbitral tribunal.

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

the appointments shall be made by the oldest member of the Court who is not a national of either party.

3. The appointments referred to in paragraph 2 shall, after consultation with the parties, be made in accordance with the provisions of the *compromis* or of any other instrument consequent upon the undertaking to arbitrate. In the absence of such provisions, the composition of the tribunal shall, after consultation with the parties, be determined by the President of the International Court of Justice or by the judge acting in his place. It shall be understood that in this event the number of the arbitrators must be uneven and should preferably be five.

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

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

#### Article 4

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

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

3. Arbitrators appointed by mutual agreement between the parties, or by agreement between arbitrators already appointed, may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in article 3, paragraph 2, may not be changed even by agreement between the parties.

4. The proceedings are deemed to have begun when the president of the tribunal or the sole arbitrator has made the first procedural order.

#### Article 5

If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of an arbitrator, it shall be filled in accordance with the procedure prescribed for the original appointment.

#### Article 6

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

2. In the case of a sole arbitrator or of the president of the tribunal, the question of disqualification shall, in the absence of agreement between the parties, be decided by the International Court of Justice on the application of one of them.

3. Any resulting vacancy or vacancies shall be filled in accordance with the procedure prescribed for the original appointments.

#### Article 7

Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral proceedings shall be recommenced from the beginning, if these have already been started.

#### POWERS OF THE TRIBUNAL AND THE PROCESS OF ARBITRATION

#### Article 8

1. When the undertaking to arbitrate or any supplementary agreement contains provisions which seem sufficient for the

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

2. If the parties fail to agree or to complete the *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal, within three months after the parties report failure to agree—or after the decision, if any, on the arbitrability of the dispute—shall proceed to hear and decide the case on the application of either party.

#### Article 9

The arbitral tribunal, which is the judge of its own competence, has the power to interpret the *compromis* and the other instruments on which that competence is based.

#### Article 10

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall apply:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. If the agreement between the parties so provides, the tribunal may also decide *ex aequo et bono*.

#### Article 11

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

#### Article 12

1. In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, the tribunal shall be competent to formulate or complete the rules of procedure.

2. All decisions shall be taken by a majority vote of the members of the tribunal.

#### Article 13

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

#### Article 14

1. The parties shall appoint agents before the tribunal to act as intermediaries between them and the tribunal.

2. They may retain counsel and advocates for the prosecution of their rights and interests before the tribunal.

3. The parties shall be entitled through their agents, counsel or advocates to submit in writing and orally to the tribunal any arguments they may deem expedient for the prosecution of their case. They shall have the right to raise objections and incidental points. The decisions of the tribunal on such matters shall be final.

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

#### Article 15

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

2. The pleadings shall consist in the communication by the respective agents to the members of the tribunal and to the opposite party of memorials, counter-memorials and, if necessary, of replies and rejoinders. Each party must attach all papers and documents cited by it in the case.

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

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

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

#### Article 16

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

2. Records of the hearing shall be kept and signed by the president, registrar or secretary; only those so signed shall be authentic.

#### Article 17

1. After the tribunal has closed the written pleadings, it shall have the right to reject any papers and documents not yet produced which either party may wish to submit to it without the consent of the other party. The tribunal shall, however, remain free to take into consideration any such papers and documents which the agents, advocates or counsel of one or other of the parties may bring to its notice, provided that they have been made known to the other party. The latter shall have the right to require a further extension of the written pleadings so as to be able to give a reply in writing.

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

#### Article 18

1. The tribunal shall decide as to the admissibility of the evidence that may be adduced, and shall be the judge of its probative value. It shall have the power, at any stage of the proceedings, to call upon experts and to require the appearance of witnesses. It may also, if necessary, decide to visit the scene connected with the case before it.

2. The parties shall co-operate with the tribunal in dealing with the evidence and in the other measures contemplated by paragraph 1. The tribunal shall take note of the failure of any party to comply with the obligations of this paragraph.

#### Article 19

In the absence of any agreement to the contrary implied by the undertaking to arbitrate or contained in the *compromis*, the tribunal shall decide on any ancillary claims which it considers to be inseparable from the subject-matter of the dispute and necessary for its final settlement.

#### Article 20

The tribunal, or in case of urgency its president subject to confirmation by the tribunal, shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

#### Article 21

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

2. The tribunal shall, however, have the power, so long as the award has not been rendered, to re-open the proceedings after their closure, on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or if it considers, after careful consideration, that there is a need for clarification on certain points.

#### Article 22

1. Except where the claimant admits the soundness of the defendant's case, discontinuance of the proceedings by the claimant party shall not be accepted by the tribunal without the consent of the defendant.

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

#### Article 23

If the parties reach a settlement, it shall be taken note of by the tribunal. At the request of either party, the tribunal may, if it thinks fit, embody the settlement in an award.

#### Article 24

The award shall normally be rendered within the period fixed by the *compromis*, but the tribunal may decide to extend this period if it would otherwise be unable to render the award.

#### Article 25

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

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

3. On the expiry of this period of grace, the tribunal shall render an award after it has satisfied itself that it has jurisdiction. It may only decide in favour of the submissions of the party appearing, if satisfied that they are well-founded in fact and in law.

### DELIBERATIONS OF THE TRIBUNAL

#### Article 26

The deliberations of the tribunal shall remain secret.

#### Article 27

1. All the arbitrators shall participate in the decisions.

2. Except in cases where the *compromis* provides for a quorum, or in cases where the absence of an arbitrator occurs without the permission of the president of the tribunal, the arbitrator who is absent shall be replaced by an arbitrator nominated by the President of the International Court of Justice. In the case of such replacement the provisions of article 7 shall apply.

### THE AWARD

#### Article 28

1. The award shall be rendered by a majority vote of the members of the tribunal. It shall be drawn up in writing and shall bear the date on which it was rendered. It shall contain the names of the arbitrators and shall be signed by the president and by the members of the tribunal who have voted for it. The arbitrators may not abstain from voting.

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

3. The award shall be deemed to have been rendered when it has been read in open court, the agents of the parties being present or having been duly summoned to appear.

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

#### Article 29

The award shall, in respect of every point on which it rules, state the reasons on which it is based.

#### Article 30

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately, unless the tribunal has allowed a time limit for the carrying out of the award or of any part of it.

#### Article 31

During a period of one month after the award has been rendered and communicated to the parties, the tribunal may,

either of its own accord or at the request of either party, rectify any clerical, typographical or arithmetical error in the award, or any obvious error of a similar nature.

*Article 32*

The arbitral award shall constitute a definitive settlement of the dispute.

INTERPRETATION OF THE AWARD

*Article 33*

1. Any dispute between the parties as to the meaning and scope of the award shall, at the request of either party and within three months of the rendering of the award, be referred to the tribunal which rendered the award.

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within the above-mentioned time limit the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of either party.

3. In the event of a request for interpretation, it shall be for the tribunal or for the International Court of Justice, as the case may be, to decide whether and to what extent execution of the award shall be stayed pending a decision on the request.

*Article 34*

Failing a request for interpretation, or after a decision on such a request has been made, all pleadings and documents in the case shall be deposited by the president of the tribunal with the International Bureau of the Permanent Court of Arbitration or with another depositary selected by agreement between the parties.

VALIDITY AND ANNULMENT OF THE AWARD

*Article 35*

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

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
- (d) That the undertaking to arbitrate or the *compromis* is a nullity.

*Article 36*

1. If, within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the International Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party.

2. In the cases covered by article 35, sub-paragraphs (a) and (c), validity must be contested within six months of the rendering of the award, and in the cases covered by sub-paragraphs (b) and (d) within six months of the discovery of the corruption or of the facts giving rise to the claim of nullity, and in any case within ten years of the rendering of the award.

3. The Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for annulment.

*Article 37*

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal constituted by agreement between the parties, or, failing such agreement, in the manner provided by article 3.

REVISION OF THE AWARD

*Article 38*

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to constitute a decisive factor, pro-

vided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision, and that such ignorance was not due to the negligence of the party requesting revision.

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

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

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

5. The application for revision shall, whenever possible, be made to the tribunal which rendered the award.

6. If, for any reason, it is not possible to make the application to the tribunal which rendered the award, it may, unless the parties otherwise agree, be made by either of them to the International Court of Justice.

7. The tribunal or the Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for revision.

III. Comments on particular articles

*Notes:*

(i) The following comments are not intended as an article-by-article commentary. Only those articles are commented upon which are either new or involve substantial changes not otherwise self-explanatory. Many of the changes made, as compared with the 1953 text, are only changes of a technical or drafting character or in the nature of re-arrangement.

(ii) No attempt is made to indicate the reason why in a number of cases no changes have been made in order to meet criticisms made in the General Assembly or elsewhere by Governments. In the first place, the reasons for and against the proposed changes are fully set out in the 1957<sup>22</sup> and 1958<sup>23</sup> reports of the special rapporteur, Mr. Georges Scelle. In the second place, the fact that the articles are now presented as a model draft rather than as a potential general convention of arbitration which would be binding upon States has the effect of placing these criticisms against a different background thus causing them to lose a good deal of their point.

23. *Preamble.* Subject to language changes, the first three paragraphs of this preamble correspond to article 1 of the 1953 text. Paragraph 4 is new, but merely states the position already set out earlier in the present commentary, according to which the articles have no binding effect unless specifically embodied by the parties in a *compromis* or other agreement. Paragraph 5 corresponds to article 14 of the 1953 text.

24. In view of the fact that all the provisions of the preamble relate to the substantive law of arbitration rather than to arbitral procedure as such, the Commission felt that in the present context of the draft it would be preferable to state them in preambular form and not keep them as substantive articles. In effect they govern any arbitration, but they govern it as principles of general international law rather than as deriving from the agreement of the parties.

25. *Article 1.* This article, like a number of others in the text, e.g. articles 3, 6, 27, 33, 36, 37 etc., involves the exercise of functions by the President of the Inter-

<sup>22</sup> See *Yearbook of the International Law Commission, 1957*, vol. II (A/CN.4/SER.A/1957/Add.1), document A/CN.4/109.  
<sup>23</sup> A/CN.4/113 of 6 March 1958.

national Court of Justice, or by the Court itself. Criticisms of similar provisions in the 1953 text were made on the ground that this set up the International Court of Justice as a sort of super-tribunal not subordinate to the agreement of the parties. Despite doubts expressed by certain of its members, the Commission did not consider these criticisms to be well-founded, particularly in the present context of the draft, according to which the articles in question will be binding upon the parties only in so far as they accept those articles and make them part of the arbitral agreement. On the other hand, the articles are necessary if the process of arbitration is not to be liable to possible frustration as described in paragraphs 18, 19, 20 and 21 above. The practice of conferring functions upon the President of the International Court, or even upon the Court itself, is a fairly common one and has never given rise to any difficulty. Further comments on this matter are contained in paragraphs 45 and 46 of the commentary to the 1953 text.

26. *Article 2.* There is now included, amongst the matters which a *compromis* must deal with, the specification of the undertaking to arbitrate in virtue of which the dispute is to be submitted to arbitration. The list of matters which ought if possible to be regulated by the *compromis* remains substantially unchanged.

27. *Article 4.* This article, as compared with the 1953 text, has been amplified so as to include possible cases not previously covered.

28. *Article 5.* This article covers the previous articles 6 and 7 of the 1953 text. The changes effected are based in particular on the feeling that it is not in practice possible to prevent an arbitrator from withdrawing or resigning if he wishes to do so, and that in such event it is not necessary to do more than provide for the filling of the vacancy by the same means as were employed for the original appointment.

29. *Article 7.* This article is new. It is obviously undesirable that the proceedings should have to start again from the beginning merely because a vacancy has occurred and has been filled. There is, moreover, no difficulty over the written proceedings, which the new arbitrator is able to read. On the other hand, if the oral proceedings have begun, the new arbitrator ought to have the right to require that these be started again.

30. *Article 8.* The first paragraph of this article does not differ substantially from the corresponding article 10 of the 1953 text, but embodies technical improvements and simplifications in what was a somewhat complicated provision. As regards paragraphs 2 and 3 of the previous article 10, various objections were felt to the idea of the tribunal itself drawing up the *compromis*; nor was this felt to be necessary. Whether or not there is a *compromis* in the technical sense of that term, there is always an undertaking to arbitrate, whether this has been completed by the drawing up of a *compromis* or not. Even if the parties are unable to draw up or complete the *compromis*, it is always possible for the tribunal to proceed with the case, so long as one of the parties requests it to do so. Either the nature of the dispute will have been defined in the original agreement to arbitrate or, alternatively, it will be defined in the application made to the tribunal to proceed with the case and in the subsequent written pleadings the deposit of which the tribunal will order.

31. *Article 9.* Despite the considerations set out in paragraph 42 of the commentary to the 1953 text, in favour of retaining the term "widest", which appeared in the corresponding article 11 of that text, the Commission

decided that the use of this term was unnecessary and might give rise to difficulties.

32. *Article 10.* The substance of this article, as compared with the corresponding article 12 of the 1953 text, remains the same; but as the phrase "shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice" was considered to be unsatisfactory, and no other general phrase referring to that provision seemed free from drafting difficulties, it was decided to set out the actual terms of Article 38, paragraph 1. Paragraph 2 of old article 12 (the question of *non liquet*) now appears, somewhat amended, as article 11.

33. *Articles 13 to 17.* These articles, as explained in paragraph 15 above, have been newly introduced, in order to meet certain wishes expressed in the course of the General Assembly's discussions. They are articles relating to the routine procedure of arbitration and call for no special comment, except with reference to article 17, which is based on the consideration that it is undesirable, once the written proceedings have been closed, for further documentary material to be presented or adduced in evidence by the parties. Nevertheless, it is equally not desirable to exclude all possibility of presenting such new material. The essential consideration is that, if new material presented by one of the parties is admitted, the other should have an opportunity of dealing with it in writing and should be able to require a prolongation of the written proceedings for that purpose. In this way the possibility of new written material being presented on the eve of the oral hearing, so that the other party has inadequate time to consider or reply to it in writing before the oral hearing takes place, can be eliminated.

34. *Article 19.* This article has been a good deal simplified in comparison with the corresponding article 16 of the 1953 text. In particular, the general reference to ancillary claims, in place of the phraseology used in the previous article 16, should get over a number of difficulties of definition which that phraseology might have entailed. The basic object is that the grounds of dispute between the parties arising out of the same subject-matter should be completely disposed of.

35. *Article 21.* Paragraph 2 of this article, which otherwise corresponds to article 18 of the 1953 text, is new. It seemed to the Commission desirable to give the tribunal this faculty in order to insure that no element material to its decision should be excluded.

36. *Article 22.* The corresponding article 21 of the 1953 text provided that in no case could discontinuance of the proceedings by the claimant party be accepted by the tribunal without the consent of the defendant party. It seemed to the Commission that this principle ought only to apply in those cases where the claimant party proposed to discontinue the proceedings without any recognition of the validity of the defendant's case, since in that event the defendant State may still have an interest in endeavouring to secure from the tribunal a positive pronouncement in its favour. Where, however, such recognition is given, it would obviously be unnecessary to require the consent of the defendant party before the proceedings could be discontinued.

37. *Article 25.* The drafting of the corresponding article 20 of the 1953 text was defective inasmuch as it seemed to imply that it would always be the defendant party which would fail to appear and defend the claim, and the claimant party whose case would accordingly be adjudged valid. It is, however, equally possible that the claimant party may fail to pursue its case, but that the

defendant party will not be content with anything short of an actual decision in favour of its own arguments in case the claimant should attempt to re-open the matter at a later date. The article has, therefore, been amended to take account of both possibilities. The second paragraph is new, but self-explanatory.

38. *Articles 26 and 27.* These articles include the matters previously dealt with by the single article 19 of the 1953 text. The second paragraph of article 27 is new. The Commission felt it undesirable to adhere to the somewhat rigid system of the previous article 19, which could be interpreted as involving the unremitting attendance on all occasions of all the members of the tribunal. It is, on the other hand, necessary to ensure that an arbitrator shall not, through his deliberate absence, be able to frustrate the rendering of the award.

39. *Article 28.* Paragraphs 1, 3 and 4 of this article correspond to the same paragraphs of article 24 of the 1953 text, and paragraph 2 corresponds to article 25 of that text. The first sentence of paragraph 1 is, however, new. Despite the general provision on the subject of majority decisions contained in article 12, it was felt desirable to repeat this requirement specifically in respect of the rendering of the award. Paragraph 2 of the previous article 24 concerning the statement of the reasons for the award now appears as article 29 of the present text.

40. *Article 32.* This article is new. It no doubt goes without saying that the award constitutes a final settlement of the dispute, but it seemed desirable to the Commission to emphasize this fact in view of the provisions concerning the possible interpretation, revision or annulment of the award. These possibilities do not alter the fact

that, subject to any necessity for interpreting, or to any eventual revision or annulment of the award, it constitutes, in principle, a definitive and final settlement.

41. The provisions concerning interpretation in article 33, which previously figured in article 28 of the 1953 text, remain substantially unchanged apart from re-wording and re-arrangement.

42. *Article 34.* This article is new. Its object is to ensure that the documents and written records of arbitral proceedings, which may be of great value for the study of international law and in other ways, should not become lost or forgotten. It goes without saying that the Secretary-General of the Permanent Court of Arbitration, or other depositary, would not permit any inspection of the records by a third party without obtaining the consent of the parties to the dispute.

43. *Article 35.* Sub-paragraph (*d*) is new as compared with the corresponding article 30 of the 1953 text. Despite the cogent considerations contained in paragraph 39 of the commentary to that text, the Commission decided to add the nullity of the undertaking to arbitrate or of the *compromis* as a ground of the nullity of the eventual award. It is difficult, in principle, to deny that the nullity of the original undertaking or *compromis*, if established, must automatically entail the nullity of the award. Such cases should, however, prove exceedingly rare. The principle at issue is the same as that which governs the essential validity of treaties, and it is noticeable that there are very few precedents involving the nullity of a treaty or other international agreement, when drawn up in proper form, and apparently regularly concluded between duly authorized plenipotentiaries or governmental organs empowered to act on behalf of the State.

## Chapter III

### DIPLOMATIC INTERCOURSE<sup>24</sup> AND IMMUNITIES

#### I. Introduction

44. In the course of its first session, in 1949, the International Law Commission selected "diplomatic intercourse and immunities" as one of the topics the codification of which it considered desirable and feasible. It did not, however, include this subject among those to which priority was accorded.<sup>25</sup>

45. At its fifth session in 1953, the Commission was apprised of General Assembly resolution 685 (VII) of 5 December 1952, by which the Assembly requested the Commission to undertake, as soon as it considered it possible, the codification of "diplomatic intercourse and immunities" and to treat it as a priority topic.<sup>26</sup>

46. At its sixth session in 1954, the Commission decided to initiate work on the subject, and appointed Mr. A. E. F. Sandström special rapporteur.<sup>27</sup>

47. Owing to lack of time, the Commission was unable to take up the subject until its ninth session in 1957. At that session, the Commission considered the topic on the basis of the report prepared by the special rapporteur (A/CN.4/91). It adopted a provisional set of draft articles with a commentary.<sup>28</sup>

48. In accordance with articles 16 and 21 of its statute, the Commission decided to transmit this draft, through the Secretary-General, to Governments for their observations. By 16 May 1958, the Governments of the following countries had communicated their observations: Argentina, Australia, Belgium, Cambodia, Chile, China, Czechoslovakia, Denmark, Finland, Italy, Japan, Jordan, Luxembourg, Netherlands, Pakistan, Sweden, Switzerland, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia (A/CN.4/114 and Add.1-6). The text of these observations is reproduced in an annex to the present report. The Commission also had before it a summary (A/CN.4/L.72), prepared by the Secretariat, of opinions expressed in the Sixth Committee of the General Assembly relative to the 1957 draft.

49. During the present session, at its 448th, 449th, 451st to 468th and 474th to 478th meetings, the Commission examined the text of the provisional draft in the light of the observations of Governments and of the conclusions drawn from them by the special rapporteur

<sup>24</sup> The term "intercourse" (in the English text) has traditionally been employed by the Commission in relation to this subject. The term used in the French text is "Relations (diplomatiques etc.)". There is no reason why in English the title "Diplomatic relations and immunities" should not also be employed.

<sup>25</sup> See *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, paras. 16 and 20.

<sup>26</sup> *Ibid.*, *Eighth Session, Supplement No. 9 (A/2456)*, para. 170.

<sup>27</sup> *Ibid.*, *Ninth Session, Supplement No. 9 (A/2693)*, para. 73.

<sup>28</sup> *Ibid.*, *Twelfth Session, Supplement No. 9 (A/3623)*, para. 16.

(A/CN.4/116 and Add.1 and 2). In consequence of that examination, the Commission made a number of changes in the provisional draft.

50. At its 468th meeting, the Commission decided (under article 23, paragraph 1 (c) of its statute) to recommend to the General Assembly that the draft articles on diplomatic intercourse and immunities should be recommended to Member States with a view to the conclusion of a convention.

51. The draft deals only with permanent diplomatic missions. Diplomatic relations between States also assume other forms that might be placed under the heading of "ad hoc diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the special rapporteur to make a study of the question and to submit his report at a future session.

52. Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. However, these matters are, as regards most of the organizations, governed by special conventions.

#### II. Text of the draft articles and commentary

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

#### DRAFT ARTICLES ON DIPLOMATIC INTERCOURSE AND IMMUNITIES

##### DEFINITIONS

##### Article 1

For the purpose of the present draft articles, the following expressions shall have the meanings hereunder assigned to them:

(a) The "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) The "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) The "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) The "diplomatic staff" consists of the members of the staff of the mission having diplomatic rank;

(e) A "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;

(f) The "administrative and technical staff" consists of the members of the staff of the mission employed in the administrative and technical service of the mission;

(g) The "service staff" consists of the members of the staff of the mission in the domestic service of the mission;

(h) A "private servant" is a person in the domestic service of the head or of a member of the mission.

#### SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

### *Establishment of diplomatic relations and missions*

#### Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

#### *Commentary*

(1) There is frequent reference in doctrine to a "right of legation" said to be enjoyed by every sovereign State. The interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, necessitate the establishment of diplomatic relations between them. However, since no right of legation can be exercised without agreement between the parties, the Commission did not consider that it should mention it in the text of the draft.

(2) Article 2, which corresponds to article 1 of the 1957 draft, remains unchanged. It merely states that the establishment of diplomatic relations between two States, and in particular of permanent diplomatic missions, takes place by mutual agreement.

(3) The most efficient way of maintaining diplomatic relations between two States is for each to establish a permanent diplomatic mission (i.e., an embassy or a legation) in the territory of the other; but there is nothing to prevent two States from agreeing on other methods of conducting their diplomatic relations, for example, through their missions in a third State.

(4) All independent States may establish diplomatic relations. In the case of a State which is a member of a federation, the question whether it is qualified to do so depends on the federal constitution.

### *Functions of a diplomatic mission*

#### Article 3

The functions of a diplomatic mission consist *inter alia* in:

(a) Representing the sending State in the receiving State;

(b) Protecting in the receiving State the interests of the sending State and of its nationals;

(c) Negotiating with the Government of the receiving State;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

#### *Commentary*

(1) A detailed enumeration of all the functions of a diplomatic mission would be very lengthy. The Commission has merely mentioned the main categories under very broad headings.

(2) First of all, under sub-paragraph (a), comes the task which characterizes the whole activity of the mission. The mission represents the sending State in the receiving State. The mission, and in particular the head of the mission, is the spokesman for its Government in communications with the receiving Government, or in any discussions with that Government to which relations between the two States may give rise.

(3) Sub-paragraphs (b), (c) and (d) state the classic functions of the mission, viz. protecting in the receiving State the interests of the sending State and of its nationals; negotiating with the Government of the receiving State and ascertaining conditions and developments in the receiving State and reporting thereon to the Government of the sending State.

(4) The functions mentioned in sub-paragraph (b) must be carried on in conformity with the rules of international law. The validity of the rule laid down in article 40, paragraph 1, which prohibits interference in the internal affairs of the receiving State, and of the rule concerning the exhaustion of remedies in the local courts (in cases in which this rule is applicable) is not affected in any way.

(5) The phrase "conditions and developments" in sub-paragraph (d) covers the political, cultural, social and economic activities of the country, and in general all aspects of life which may be of interest to the sending State. Only lawful means may be used by the mission in ascertaining these conditions and developments.

(6) The enumeration of functions as given in the draft prepared at the ninth session (1957) has been supplemented by a reference to certain functions which, in consequence of the establishment of the United Nations and of modern developments, have acquired steadily increasing importance, viz. (e) promoting friendly relations between the sending State and the receiving State and developing economic, cultural and scientific relations between the two States.

(7) With regard to trade missions, it should be noted that the question of commercial representation as such—i.e., apart from the commercial attachés of a diplomatic mission—is not dealt with in the draft because it is usually governed by bilateral agreement.

### *Appointment of the head of the mission: agrément*

#### Article 4

The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

### *Appointment to more than one State*

#### Article 5

Unless objection is offered by any of the receiving States concerned, a head of mission to one State may be accredited as head of mission to one or more other States.

### *Appointment of the staff of the mission*

#### Article 6

Subject to the provisions of articles 7, 8 and 10, the sending State may freely appoint the members

of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

#### *Appointment of nationals of the receiving State*

##### *Article 7*

Members of the diplomatic staff of the mission may be appointed from amongst the nationals of the receiving State only with the express consent of that State.

#### *Persons declared persona non grata*

##### *Article 8*

1. The receiving State may at any time notify the sending State that the head of the mission, or any member of the staff of the mission is *persona non grata* or not acceptable. In such case, the sending State shall, as the case may be, recall the person concerned or terminate his functions with the mission.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1, the receiving State may refuse to recognize the person concerned as a member of the mission.

##### *Commentary*

(1) Article 5 is new, but the text of articles 4, 6, 7 and 8 as adopted at the ninth session was left unchanged, with the exception of some purely drafting alterations.

(2) Articles 4 to 8 deal with the appointment of the persons who compose the mission. The mission comprises a head, and assistants subordinate to him, who are normally divided into several categories: diplomatic staff, who are engaged in diplomatic activities, administrative and technical staff, and service staff. While it is the sending State which appoints the persons who compose the mission, the choice of these persons and, in particular, of the head of the mission, may considerably affect relations between the States, and it is clearly in the interests of both States that the mission should not contain members whom the receiving State finds unacceptable.

(3) The procedure for achieving this result differs according as the person concerned is the head of mission or another member of the mission. As regards the former, the sending State ascertains in advance whether a person whom it proposes to accredit as head of its mission to another State is *persona grata* with that State. If the *agrément* is not given, then the person in question cannot be accredited. The fact that a head of mission has been approved does not, however, prevent a receiving State which has meanwhile found reasons for objecting to him from subsequently notifying the sending State that he is no longer *persona grata*, in which case he must be recalled and, if the sending State fails to recall him, the receiving State may declare his functions terminated.

(4) As regards other members of the mission, they are in principle freely chosen by the sending State, that is to say, their names are not submitted in advance; but if at any time—if need be, before the person concerned arrives in the country to take up his duties—the receiving State finds that it has objections to him, that State may, as in the case of a head of mission who has been approved, inform the sending State that he is *persona non grata*, with the same effect as in the case of the head of the mission.

(5) This procedure is sanctioned by articles 4, 6 and 8. So far as details are concerned, it should be noted first that the use of the term “not acceptable” as an alternative for the term *persona non grata* in article 8, paragraph 1, is intended to cover non-diplomatic staff, with respect to whom the term *persona non grata* is not usually employed. At the end of the same paragraph, the words “or terminate his functions with the mission” are intended principally to cover cases where the person concerned is a national of the receiving State.

(6) The fact that the draft does not say whether or not the receiving State is obliged to give reasons for its decision to declare *persona non grata* a person proposed or appointed, should be interpreted as meaning that this question is left to the discretion of the receiving State.

(7) When a person who has already taken up his duties is declared *persona non grata*, the normal consequence is (as indicated above) that the sending State recalls him or declares his functions terminated (see article 41, sub-paragraph (b)). But, if the sending State fails to do this within a reasonable time, the receiving State is authorized to take action of its own accord. It may declare that the functions of the person concerned are terminated, that he is no longer recognized as a member of the mission, and that he has ceased to enjoy diplomatic privileges.

(8) As is clear from the reservation stated in article 6, the free choice of the staff of the mission is a principle to which there are exceptions. One of these exceptions is mentioned in paragraph (4) of this commentary. Another, for which article 6 expressly provides, is that in the case of military, naval and air attachés, the receiving State may, in accordance with what is already a fairly common practice, require their names to be submitted beforehand for its approval.

(9) A further exception is that arising out of article 7 of the draft, concerning cases where the sending State wishes to choose as diplomatic agent a national of the receiving State or a person who is a national of both the sending and receiving States. The Commission takes the view that such an appointment is subject to the express consent of the receiving State, even though some States do not insist on this condition. The Commission did not, on the other hand, think it necessary to provide that the consent of the receiving State is a condition necessary for the appointment as a diplomatic agent of a national of a *third* State, or for the appointment of a national of the receiving State to the administrative, technical or service staff of a foreign mission. In these cases, the considerations underlying article 7 do not apply; and in the case of administrative and technical staff and service staff, the Commission was influenced by the further factor that it is undeniably necessary to recruit for these categories of the staff persons with a good knowledge of the local language and of local conditions. Serious difficulties might be created for the sending State if the receiving State refused to authorize local recruitment of staff in these categories, whereas the difficulties created would probably be inconsiderable so far as diplomatic staff was concerned. The only objection which might be raised to these considerations is that, in some States, nationals have to seek the consent of their own Government before entering the service of a foreign Government. Such a requirement, however, is merely an obligation governing the relationship between a national and his own Government, and does not affect relations between States, and is not therefore a rule of international law. While the practice of appointing nationals of the receiving State as

members of the diplomatic staff has now become fairly rare, and there are grounds for believing that it will disappear altogether with the development of States which have recently obtained their independence, the majority of the members of the Commission thought that the case should be mentioned. Certain members of the Commission, however, stated that they were in principle opposed entirely to the appointment of nationals of the receiving State as members of the diplomatic staff, and to the grant of diplomatic privileges and immunities to such persons.

(10) The free choice of staff mentioned in article 6 does not imply exemption from visa formalities, where these are required by the receiving State.

(11) Article 5, which is new, is concerned with the fairly frequent case in which a sending State wishes to accredit a head of mission to one or more other States. This is permissible, provided that none of the receiving States concerned objects.

### *Notification of arrival and departure*

#### *Article 9*

The arrival and departure of the members of the staff of the mission, and also of members of their families, and of their private servants, shall be notified to the Ministry for Foreign Affairs of the receiving State. A similar notification shall be given whenever members of the mission and private servants are locally engaged or discharged.

#### *Commentary*

It is desirable for the receiving State to know the names of the persons who may claim privileges and immunities. Accordingly, it is *inter alia* provided in article 9, which is new, that the names of persons recently appointed to a mission and of those who are finally leaving their posts must be notified.

### *Size of staff*

#### *Article 10*

1. In the absence of specific agreement as to the size of the mission, the receiving State may refuse to accept a size exceeding what is reasonable and normal, having regard to circumstances and conditions in the receiving State, and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

#### *Commentary*

(1) The English text of paragraph 1, as drafted at the ninth session (article 10 corresponds to article 7 of the 1957 draft), has been amended by the substitution of the word "normal" for the word "customary", for the sake of concordance with the French text. The last sentence of paragraph 2 of the 1957 text has been moved to article 6, with certain drafting changes based on paragraph (3) *in fine* of the 1957 commentary, which it was felt more accurately expressed the Commission's intentions.

(2) There are questions connected with the mission's composition which may cause difficulty besides that of the choice of the persons comprising the mission. In the Commission's view, these matters require regulation, and article 10 is intended to deal with them.

(3) Paragraph 1 of the article refers to cases where the staff of the mission is inordinately increased; experience in recent years having shown that such cases may present a problem. Such an increase may cause the receiving State real difficulties. Should the receiving State consider the staff of a mission unduly large, it should first endeavour to reach an agreement with the sending State. Failing such agreement, the receiving State should, in the view of the majority of the Commission, be given the right within certain limits to refuse to accept a size exceeding what is reasonable and normal. In such cases there are two sets of conflicting interests, and the solution must be a compromise between them. Account must be taken both of the mission's needs, and of prevailing conditions in the receiving State. Any claim for the limitation of the staff must remain within the bounds stated by the article.

(4) Paragraph 2 gives the receiving State the right to refuse to accept officials of a particular category. But its right to do so is circumscribed in the same manner as its right to claim a limitation of the size of the staff, and must, furthermore, be exercised without discrimination between one State and another.

(5) The provisions of this article have been criticized on the grounds that the criteria by reference to which a dispute is to be settled are too vague and would not solve the problems arising. Furthermore, it has been argued that the provisions of paragraph 2 go beyond the principles of international law as now recognized, and that, once the establishment of a mission has been agreed, the sending State has the right to equip the mission with all the categories of staff needed for the discharge of the mission's functions, because only the two States concerned are in a position to decide what circumstances and conditions had a bearing on the size and composition of their respective missions. The Commission does not deny that the parties concerned are best qualified to settle disputes of the kind to which this article relates. That is why the Commission has referred to the desirability of such disputes being settled, if possible, by agreement between the parties. At the same time, criteria must be laid down which are to guide the parties, or which, in the absence of agreement between the parties, are to be observed in the arbitral or judicial decision to which it would be necessary to have recourse. As so often happens when conflicting interests are the subject of a compromise, these criteria are necessarily vague. The reason why these provisions do not form part of existing international law is that the problem is new. It can hardly be said that the mission's needs are in any way jeopardized, seeing that it is precisely one of the safeguards offered by these provisions that the mission's needs constitute one of the decisive considerations, and since, in addition, special account is to be taken of "what is reasonable and normal."

### *Offices away from the seat of the mission*

#### *Article 11*

The sending State may not, without the consent of the receiving State, establish offices in towns other than those in which the mission itself is established.

#### *Commentary*

The provisions of this article have been included to forestall the awkward situation which would result for the receiving Government if mission premises were established in towns other than that which is the seat of the Government.

*Commencement of the functions of the head  
of the mission*

*Article 12*

The head of the mission is considered as having taken up his functions in the receiving State either when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or when he has presented his letters of credence, according to the practice prevailing in the receiving State, which shall be applied in a uniform manner.

*Commentary*

(1) The text of the corresponding provision (article 8) prepared at the Commission's ninth session gave as the principal alternative the first part of the present article (i.e., the passage preceding the phrase: "or when he has presented his letters of credence"). The latter phrase was at that time given as a "variant". The article was accompanied by the following commentary: "So far as concerns the time at which the head of the mission may take up his functions, the only time of interest from the standpoint of international law is the moment at which he can do so in relation to the receiving State—which must be the time when his status is established. On practical grounds, the Commission proposes that it be deemed sufficient that he has arrived and that a true copy of his credentials has been remitted to the Ministry for Foreign Affairs of the receiving State, there being no need to await the presentation of the letters of credence to the head of State. The Commission, however, decided also to mention the alternative stated in the text of the article."

(2) Of the Governments which submitted observations on the draft, six were in favour of the principal alternative and nine in favour of the variant. Hence the Commission, although considering the establishment of a uniform regulation desirable, decided to leave the choice of the system to be applied to the discretion of the receiving State subject, however, to the condition that a separate decision is not taken *ad hoc* as each case occurs, but that a uniform system is applied to all missions. This stipulation now forms part of the article. In addition, some slight drafting changes have been made to the text. The significance of the matter lies in the fact that the precedence and seniority of heads of mission depends upon the date on which their functions are deemed to have been taken up (see article 15 below).

*Classes of heads of mission*

*Article 13*

1. Heads of mission are divided into three classes, namely:

(a) That of ambassadors or nuncios accredited to Heads of State;

(b) That of envoys, ministers and internuncios accredited to Heads of State;

(c) That of *chargés d'affaires* accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

*Article 14*

The class to which the heads of their missions are to be assigned shall be agreed between States.

*Precedence*

*Article 15*

1. Heads of mission shall take precedence in their respective classes in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the practice prevailing in the receiving State, which must be applied without discrimination.

2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.

3. The present article is without prejudice to any existing practice in the receiving State regarding the precedence of the representative of the Pope.

*Mode of reception*

*Article 16*

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

*Commentary*

(1) These articles correspond to articles 10 to 14 of the previous session's draft, which have been amended in the following respects:

(a) In article 10 (a) of the old text, the word "legates" has been deleted, as legates are never heads of mission;

(b) In article 10 (b) the words "other persons" have been replaced by "internuncios", since these representatives of the Pope can be the only persons referred to;

(c) Article 10 of the old text, amended as described above, has become paragraph 1, and the former article 14 is now paragraph 2 of the new article 13;

(d) In article 15, paragraphs 1 and 3, there are certain changes of terminology. Paragraph 2 has been amended to clarify the rule stated therein.

(2) In the report covering the work of the ninth session, articles 10 to 13 (new articles 13 to 16) were accompanied by the following passages (*inter alia*) by way of commentary:

"(1) Articles 10—13 are intended to incorporate in the draft the gist of the Vienna Regulation concerning the rank of diplomats.<sup>29</sup> Article 10 lists the dif-

<sup>29</sup> The text of the Regulation of Vienna on the classification of diplomatic agents is as follows:

"In order to avoid the difficulties which have often arisen and which might occur again by reason of claims to precedence between various diplomatic agents, the Plenipotentiaries of the Powers which have signed the Treaty of Paris have agreed to the following articles and feel it their duty to invite the representatives of other crowned heads to adopt the same regulations.

"Article 1. Diplomatic officials shall be divided into three classes: that of ambassadors, legates or nuncios; that of envoys, whether styled ministers or otherwise, accredited to sovereigns; that of *chargés d'affaires* accredited to Ministers for Foreign Affairs.

"Article 2. Only ambassadors, legates or nuncios shall possess the representative character.

"Article 3. Diplomatic officials on extraordinary missions shall not by this fact be entitled to any superiority of rank.

"Article 4. Diplomatic officials shall rank in each class according to the date on which their arrival was officially notified.

"The present regulation shall not in any way modify the position of the Papal representatives.

ferent classes of heads of mission, the classes conferring rank according to the order in which they are mentioned.

"(2) In view of the recent growing tendency—intensified since the Second World War—on the part of States to appoint ambassadors rather than ministers to represent them, the Commission considered the possibility of abolishing the title of minister or of abolishing the difference in rank between these two classes.

" . . .

"(10) Some of the provisions of the Vienna Regulation have not been included in the draft: articles 2 and 6 because the questions dealt with therein are no longer of current interest, article 3 because the draft has exclusive reference to permanent missions, and article 7 because it deals with a matter which falls rather within the province of the law of treaties."

This commentary should now be supplemented by the following:

(3) The rule in article 14 that "The class to which the heads of their missions are to be assigned shall be agreed between States" does not imply that the heads of mission by which States are represented in each other's territory must necessarily belong to the same class. There are instances in which that has not been the case.

(4) As a consequence of article 12, the precedence of heads of missions is determined under article 15, paragraph 1, as being in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the practice of the receiving State.

(5) The Commission's object in incorporating the text of article 14 of the 1957 draft as paragraph 2 of the new article 13 was to stress the equality in law of heads of mission. Differences in class between heads of mission are not material except for purposes of precedence and etiquette. "Etiquette" refers only to ceremonial (article 16) and matters of conduct (protocol).

(6) The new text of article 15, paragraph 2, emphasizes in unambiguous terms that the rule set forth in that provision does not apply to a change of class. If the head of mission is promoted to a higher class, he ranks in the new class according to the decisive date applicable for that class.

(7) The Commission did not feel called upon to deal in the draft with the rank of the members of the mission's diplomatic staff. This staff comprises the following classes:

Ministers or Ministers-Counsellors;  
Counsellors;  
First Secretaries;

Second Secretaries;  
Third Secretaries;  
Attachés.

(8) There are also specialized officials such as military, naval, air, commercial, cultural or other attachés, who may be placed in one of the above-mentioned.

### Chargé d'affaires ad interim

#### Article 17

If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, the affairs of the mission shall be conducted by a *chargé d'affaires ad interim*, whose name shall be notified to the Ministry for Foreign Affairs of the receiving State.

#### Commentary

(1) This article, which apart from certain drafting changes reproduces the text of article 9, paragraph 1, of the draft prepared at the Commission's ninth session (1957), provides for situations where the post of head of the mission falls vacant, or the head of the mission is unable to perform his functions. The *chargé d'affaires ad interim* here referred to is not to be confused with the *chargé d'affaires* mentioned in article 13, sub-paragraph (c), who is called *chargé d'affaires en pied* and is appointed on a more or less permanent footing.

(2) The question when a head of a mission is to be regarded as unable to perform his functions must be answered according to the practice of the receiving State. Usage differs from country to country; in some, the head of the mission is not regarded as requiring to be replaced so long as he is in the country; in others his actual ability to perform his functions is taken into consideration. It is not possible to lay down a hard-and-fast rule.

(3) The text of this article as drafted at the ninth session contained a paragraph 2 which stipulated that, in the absence of notification, the member of the mission placed immediately after the head of the mission on the mission's diplomatic list would be presumed to be in charge. This provision was criticized, and the Commission considered that the (undoubtedly rather rare) case of "absence of notification" did not justify a special provision. It can be left to the States concerned to find methods of communication if needed.

### Use of flag and emblem

#### Article 18

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, and on the residence and the means of transport of the head of the mission.

#### Commentary

This article is new. The rule laid down in the article was considered desirable in view of the existence in certain countries of restrictions concerning the use of flags and emblems of foreign States.

## SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES

### General comments

(1) Among the theories that have exercised an influence on the development of diplomatic privileges and

"Article 5. A uniform method shall be established in each State for the reception of diplomatic officials of each class.

"Article 6. Ties of relationship or family alliances between Courts shall not confer any rank on their diplomatic officials. The same shall be the case with political alliances.

"Article 7. In acts or treaties between several Powers which admit the *alternat*, the order in which the ministers shall sign shall be decided by lot.

"The present Regulation was inserted in the Protocol concluded by the Plenipotentiaries of the eight Powers which have signed the Treaty of Paris at their meeting on 19 March 1815."

(The Regulation was signed by the following countries: Austria, Spain, France, Great Britain, Portugal, Prussia, Russia and Sweden. Translation taken from the report of a sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, C.203. M.77. 1927.V, p.2.)

immunities, the Commission will mention the "exterritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State.

(2) There is now a third theory which appears to be gaining ground in modern times, namely, the "functional necessity" theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions.

(3) The Commission was guided by this third theory in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself.

(4) Privileges and immunities may be divided into the following three groups, although the division is not completely exclusive:

- (a) Those relating to the premises of the mission and to its archives;
- (b) Those relating to the work of the mission;
- (c) Personal privileges and immunities.

#### SUB-SECTION A. MISSION PREMISES AND ARCHIVES

##### *Accommodation*

##### *Article 19*

The receiving State must either permit the sending State to acquire on its territory the premises necessary for its mission, or ensure adequate accommodation in some other way.

##### *Commentary*

(1) The laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary to it. For that reason the Commission has inserted in the draft an article which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it.

(2) This obligation, because it would impose too heavy a burden on the receiving State, does not apply to the residences of the members of the staff of the mission.

##### *Inviolability of the mission premises*

##### *Article 20*

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, save with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission and their furnishings shall be immune from any search, requisition, attachment or execution.

##### *Commentary*

(1) This article (which reproduces unchanged the text of article 16 of the 1957 draft), deals firstly with the inviolability of the premises of the mission.

(2) The expression "premises of the mission" includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented. The premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park.

(3) From the point of view of the receiving State, this inviolability has two aspects. In the first place, the receiving State is obliged to prevent its agents from entering the premises for any official purpose whatsoever (paragraph 1). Secondly, it is under a special duty to take all appropriate steps to protect the premises from any invasion or damage, and to prevent any disturbance of the peace of the mission or impairment of its dignity (paragraph 2). The receiving State must, in order to fulfil this obligation, take special measures—over and above those it takes to discharge its general duty of ensuring order.

(4) The inviolability of the mission premises is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending State by reason of the fact that the premises are used as the headquarters of the mission.

(5) A special application of this principle is the rule that no writ may be served within the premises of the mission, and that no summons to appear before a court may be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. The service of such documents should be effected in some other way. In some countries, the persons concerned may apply to the Ministry for Foreign Affairs of the receiving State. There is nothing to prevent service through the post if it can be effected in that way.

(6) The inviolability concerned confers on the premises, their furnishings and fixtures, immunity from any search, requisition, attachment or execution. The opinion had been expressed that the rule laid down in paragraph 3 of this article was unnecessary, because the acts referred to could not be performed without a contravention of the provisions of paragraph 1. Nevertheless, the rule has a value of its own in that it provides that the premises must not be entered even in pursuance of a judicial order. If the premises are leased or rented, measures of execution may of course be taken against the private owner, provided that it is not necessary to enter the premises of the mission.

(7) While the inviolability of the premises may enable the sending State to prevent the receiving State from using the land on which the premises of the mission are situated, in order to carry out public works (widening of a road, for example), it should on the other hand be remembered that real property is subject to the laws of the country in which it is situated. In these circumstances, therefore, the sending State should co-operate in every way in the implementation of the plan which the receiving State is contemplating; and the receiving State, for its part, is obliged to provide adequate compensation or, if necessary, to place other appropriate premises at the disposal of the sending State. The Commission did not consider it advisable to insert in the article itself a provision on these lines, which had formed paragraph (4) of the commentary on article 16 of the draft adopted by the Commission at its ninth session. To do so would convey the erroneous impression that the commentary was concerned with an exception to the principle of inviol-

ability. The text of the commentary refers solely to the moral duty of the sending State to co-operate.

### *Exemption of mission premises from tax*

#### *Article 21*

The sending State and the head of the mission shall be exempt from all national, regional or municipal dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

#### *Commentary*

(1) The text of this article reproduces that of article 17 of the 1957 draft, with slight changes which do not alter the substance. The article now mentions "national, regional or municipal dues or taxes", which is a more comprehensive description and, according to the Commission's interpretation, covers all dues and taxes levied by any local authority. The phrase at the end of the article "for services actually rendered" has been replaced by the corresponding phrase used in article 32 "for specific services rendered". The Commission thought that a reference to *specific* services rendered was preferable to the phrase "for services *actually* rendered".

(2) The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable.

### *Inviolability of the archives*

#### *Article 22*

The archives and documents of the mission shall be inviolable.

#### *Commentary*

(1) This article reproduces unchanged the text of the corresponding provision in article 18 of the 1957 draft. As the Commission pointed out in the commentary to its 1957 draft: "The inviolability applies to archives and documents, regardless of the premises in which they may be. As in the case of the premises of the mission, the receiving State is obliged to respect the inviolability itself and to prevent its infringement by other parties."

(2) It was suggested that the words "and documents" in the text of the article should be deleted, and that the statement in the commentary that the inviolability applies to archives and documents, regardless of the premises in which they may be, was too sweeping. The commission cannot share this view. The mission's documents, even though separated from the archives, and whether belonging to the archives or not, must, like the archives themselves, be inviolable, irrespective of their physical whereabouts (e.g., while carried on the person of a member of a mission). It was for that reason that this extension was provided for in the General Convention on the Privileges and Immunities of the United Nations (article II, section 4).

(3) Although the inviolability of the mission's archives and documents is at least partly covered by the inviolability of the mission's premises and property, a special provision is desirable because of the importance of this inviolability to the functions of the mission. This inviolability is connected with the protection accorded by

article 25 to the correspondence and communications of the mission.

### SUB-SECTION B. FACILITATION OF THE WORK OF THE MISSION, FREEDOM OF MOVEMENT AND COMMUNICATION

#### *Facilities*

#### *Article 23*

The receiving State shall accord full facilities for the performance of the mission's functions.

#### *Commentary*

(1) This article, which corresponds to article 19 of the 1957 draft, remains unchanged.

(2) A diplomatic mission may often need the assistance of the Government and authorities of the receiving State, in the first place during the installation of the mission, and to an even greater extent in the performance of its functions, for instance in obtaining information, an activity referred to in article 3 (*d*). The receiving State (which has an interest in the mission being able to perform its functions satisfactorily) is obliged to furnish all the assistance required, and is under a general duty to make every effort to provide the mission with all facilities for the purpose. It is assumed that requests for assistance will be kept within reasonable limits.

#### *Free movement*

#### *Article 24*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

#### *Commentary*

One of the necessary facilities for the performance of the mission's functions is that its members should enjoy freedom of movement and travel. Without such freedom, the mission would not be able to perform adequately its function of obtaining information under article 3 (*d*). This freedom of movement is subject to the laws and regulations of the receiving State concerning zones entry into which is prohibited or regulated for reasons of national security. The establishment of prohibited zones must not, on the other hand, be so extensive as to render freedom of movement and travel illusory

#### *Freedom of communication*

#### *Article 25*

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher.

2. The official correspondence of the mission shall be inviolable.

3. The diplomatic bag shall not be opened or detained.

4. The diplomatic bag, which must bear visible external marks of its character, may only contain diplomatic documents or articles intended for official use.

5. The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

*Commentary*

(1) Apart from paragraph 2, which is new, the article substantially reproduces the text of article 21 of the 1957 draft. Paragraph 2 being new, the succeeding paragraphs have been re-numbered accordingly. In the former paragraph 3 (now paragraph 4) the phrase "which must bear visible external marks of its character" has been added after the words "The diplomatic bag".

(2) This article deals with another generally recognized freedom, which is essential for the performance of the mission's functions, namely freedom of communication. Under paragraph 1, this freedom is to be accorded for all official purposes, whether for communications with the Government of the sending State, with the officials and authorities of that Government or the nationals of the sending State, with missions and consulates of other Governments or with international organizations. Paragraph 1 of this article sets out the general principle, and states specifically that, in communicating with its Government and the other missions and consulates of that Government, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. If a mission wishes to make use of its own wireless transmitter it must, in accordance with the international conventions on telecommunications, apply to the receiving State for special permission. Provided that the regulations applicable to all users of such communications are observed, such permission must not be refused.

(3) Formerly, the freedom to employ all appropriate means of communications was limited in principle to the diplomatic mission's exchanges, on the one hand with the Government of the sending State and, on the other, with the consulates under its authority within the receiving State. Nowadays, with the extension of air communications, the practice has changed. Communications with embassies and consulates in other countries no longer always pass through the Ministry for Foreign Affairs in the sending State; often use is made of certain intermediate posts from which despatches are carried to the various capitals to which they are addressed. The Commission has therefore not changed the rule laid down in paragraph 1.

(4) Paragraph 3 (former paragraph 2) states that the diplomatic bag is inviolable. Paragraph 4 (former paragraph 3) indicates what the diplomatic bag may contain. The Commission considered it desirable that the statement of the inviolability of the diplomatic bag should be preceded by the more general statement that the official correspondence of the mission, whether carried in the bag or not, is inviolable. In accordance with paragraph 4, the diplomatic bag may be defined as a bag (sack, pouch, envelope or any type of package whatsoever) containing documents and (or) articles intended for official use. According to the amended text of this paragraph, the bag must bear visible external marks of its character.

(5) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph

4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.

(6) Paragraph 5 deals with the inviolability and the protection enjoyed by the diplomatic courier in the receiving State. The diplomatic courier is furnished with a document testifying to his status: normally, a courier's passport. When the diplomatic bag is entrusted to the captain of a commercial aircraft, he is not regarded as a diplomatic courier. This case must be distinguished from the not uncommon case in which a diplomatic courier pilots an aircraft specially intended to be used for the carriage of diplomatic bags. There is no reason for treating such a courier differently from one who carries the bag in a car driven by himself.

(7) The protection of the diplomatic bag and courier in a third State is dealt with in article 39.

*Article 26*

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

*Commentary*

This article states a rule which is universally accepted.

SUB-SECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

This sub-section deals with members of the mission who are foreign nationals (articles 27 to 36), with nationals of the receiving State (article 37), and with certain general matters (articles 38 and 39).

*Personal inviolability*

*Article 27*

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all reasonable steps to prevent any attack on his person, freedom or dignity.

*Commentary*

(1) This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.

(2) The paragraph 2 which formed part of the corresponding article 22 in the 1957 draft has been deleted in consequence of the introduction of article 1 (definitions).

*Inviolability of residence and property*

*Article 28*

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of article 29, his property, shall likewise enjoy inviolability.

#### Commentary

(1) This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression "the private residence of a diplomatic agent" necessarily includes even a temporary residence of the diplomatic agent.

(2) Paragraph 2 of the corresponding article 23 of the 1957 draft has been amended so as to make the exception to immunity from jurisdiction provided for in article 29, paragraph 3, applicable to the inviolability of property.

(3) So far as movable property is concerned (as was explained in the commentary on article 23 in the 1957 draft), the inviolability primarily refers to goods in the diplomatic agent's private residence; but it also covers other property such as his motor car, his bank account, and goods which are intended for his personal use or essential to his livelihood. In mentioning his bank account, the Commission had in mind immunity from the measures referred to in article 20, paragraph 3.

### Immunity from jurisdiction

#### Article 29

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, save in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of his Government for the purposes of the mission;

(b) An action relating to a succession in which the diplomatic agent is involved as executor, administrator, heir or legatee;

(c) An action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State, and outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

#### Commentary

(1) Certain drafting changes have been made in paragraphs 1 (a) and 3 of this article as it stood in the 1957 draft (article 24). In paragraph 4, the end of the first sentence ("to which he shall remain subject etc.") and the second sentence have been deleted.

(2) The jurisdictions mentioned comprise any special courts in the categories concerned, e.g. commercial courts, courts set up to apply social legislation, and all administrative authorities exercising judicial functions.

(3) A diplomatic agent enjoys immunity from the receiving State's criminal jurisdiction and, with the exceptions mentioned in paragraph 1 of the article, also immunity from its civil and administrative jurisdiction. At the same time, he has the duty to respect the laws and regulations of the receiving State as laid down in article 40 of the present draft.

(4) The immunity from criminal jurisdiction is complete, whereas the immunity from civil and administrative jurisdiction is subject to the exceptions stated in the text.

(5) The first exception concerns immovable property belonging to the diplomatic agent personally. All States claim exclusive jurisdiction over immovable property on their territory. This exception is subject to the conditions that the diplomatic agent holds the property in his private capacity and not on his Government's behalf for the purposes of the mission.

(6) The second exception is based on the consideration that, because it is of general importance that succession proceedings should not be hampered, the diplomatic agent cannot plead diplomatic immunity for the purpose of refusing to appear in a suit or action relating to a succession.

(7) The third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. It was urged that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata*. Nevertheless, such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.

(8) There may be said to be a fourth exception, in the case referred to in article 30, paragraph 3 (counterclaim directly connected with the diplomatic agent's principal claim).

(9) Paragraph 2 of the article derives from the diplomatic agent's inviolability. There is no obligation on a diplomatic agent to testify, i.e., to give evidence as a witness. This does not mean that a diplomatic agent ought necessarily to refuse to co-operate with the authorities of the receiving State, for example in the investigation of a crime of which he has been an eye-witness. On the contrary, it may be proper for him to give the authorities the information he possesses. Where his immunity is waived, he may give either written or oral testimony. In certain countries there are special rules concerning the manner in which a diplomatic agent's testimony is to be taken in those cases in which he consents to give evidence.

(10) In consequence of certain observations, the Commission considered whether paragraph 2 of the article should not contain an exception to cover the cases referred to in paragraph 1. The Commission concluded that these cases should not be mentioned. It is debatable whether the question of the obligation to give evidence is relevant in cases where the diplomatic agent is himself a party to the suit. At all events—and this was the decisive point in the Commission's opinion—in such cases the diplomatic agent is called upon to testify in his own interest and, if he fails to do so, he must accept the consequences.

(11) The effect of immunity from jurisdiction, and of the privileges mentioned in articles 27 and 28, is that the diplomatic agent is also immune from measures of

execution, subject to the exceptions mentioned in paragraph 3 of the present article.

(12) Paragraph 4 states the obvious truth that the immunity from jurisdiction enjoyed by the diplomatic agent in the receiving State does not exempt him from the jurisdiction of his own country. But it may happen that this jurisdiction does not apply, either because the case does not come within the general competence of the country's courts, or because its laws do not designate a local forum in which the action can be brought. In the provisional draft the Commission had meant to fill this gap by stipulating that in such a case the competent court would be that of the seat of the Government of the sending State. This proposal was, however, opposed on the ground that the *locus* of the jurisdiction is governed by municipal law. Although of the opinion that Governments should see to it that there is in their States a competent forum for hearing cases against members of their diplomatic missions abroad, the Commission did not wish to press the matter, and the provision in question was deleted. In some countries the problem is solved, at least in part, by a rule to the effect that diplomatic agents while on mission abroad have a specified domicile in their own country.

### *Waiver of immunity*

#### *Article 30*

1. The immunity of its diplomatic agents from jurisdiction may be waived by the sending State.

2. In criminal proceedings, waiver must always be express.

3. In civil or administrative proceedings, waiver may be express or implied. A waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity. The initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect of counter-claims directly connected with the principal claim.

4. Waiver of immunity of jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment for which a separate waiver must be made.

#### *Commentary*

(1) This article corresponds to article 25 of the 1957 draft. Paragraph 1 which, except for a minor drafting amendment, remains unchanged, implies that the immunity of its diplomatic agents from jurisdiction may be waived by the sending State alone. The waiver of immunity must be on the part of the sending State because the object of the immunity is that the diplomatic agent should be able to discharge his duties in full freedom and with the dignity befitting them. This is the principle underlying the provision contained in paragraph 1.

(2) In the text adopted at the ninth session in 1957, paragraph 2 read as follows: "In criminal proceedings, waiver must always be effected expressly by the Government of the sending State". The Commission decided to delete the phrase "by the Government of the sending State", because it was open to the misinterpretation that the communication of the waiver should actually emanate from the Government of the sending State. As was pointed out, however, the head of the mission is the rep-

resentative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and to the head of the mission.

(3) In view of the amended text of paragraph 2, there is no longer any doubt but that paragraphs 2 and 3 deal only with the question of the form which the waiver should take in order to be effective (see commentary of the report of the ninth session, paragraph (2)). A distinction is drawn between criminal and civil proceedings. In the former case, the waiver must be express. In civil, as in administrative proceedings, it may be express or implied, and paragraph 3 explains the circumstances in which it is presumed to be implied. Thus, if in such proceedings a valid waiver may be inferred from the diplomatic agent's behaviour, his expressly declared waiver must naturally also be regarded as valid. He is presumed to have the necessary authorization.

(4) Paragraphs 3 and 4 have been amended to include also administrative procedure.

(5) It goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance.

(6) Under paragraph 3, the initiation of proceedings by a diplomatic agent precludes him from invoking immunity in respect of counter-claims directly connected with the principal claim. In such a case the diplomatic agent is deemed to have accepted the jurisdiction of the receiving State as fully as may be required in order to settle the dispute in regard to all aspects closely linked to the basic claim.

### *Exemption from social security legislation*

#### *Article 31*

The members of the mission and the members of their families who form part of their households, shall, if they are not nationals of the receiving State, be exempt from the social security legislation in force in that State except in respect of servants and employees if themselves subject to the social security legislation of the receiving State. This shall not exclude voluntary participation in social security schemes in so far as this is permitted by the legislation of the receiving State.

#### *Commentary*

National social security legislation grants substantial benefits, often in the form of insurance, to persons living in the country, in consideration, however, of the payment of annual premiums by the beneficiary or his employer (old age pensions, industrial accident and sickness insurance, unemployment insurance, etc.). Whereas members of a mission and members of their families who are nationals of the receiving State would naturally be subject to such legislation, this is not necessarily the case when they have foreign nationality. Under the present article, which is new, such persons are exempt from the receiving State's social security legislation so far as they themselves are concerned, but not as regards the payment of any contributions due in respect of servants or employees.

*Exemption from taxation**Article 32*

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, save:

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

(b) Dues and taxes on private immovable property, situated in the territory of the receiving State, unless he holds it on behalf of his Government for the purposes of the mission;

(c) Estate, succession or inheritance duties levied by the receiving State, subject, however, to the provisions of article 38 concerning estates left by members of the family of the diplomatic agent;

(d) Dues and taxes on income having its source in the receiving State;

(e) Charges levied for specific services rendered;

(f) Subject to the provisions of article 21, registration, court or record fees, mortgage dues and stamp duty.

*Commentary*

(1) In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemptions exist, subject to certain exceptions.

(2) The introduction to the article has been slightly changed, in keeping with the terminology used in article 21. The dues and taxes covered in that article are only those levied on the premises as such.

(3) As an explanation of the term "indirect taxes" used in sub-paragraph (a), the words "incorporated in the price of goods or service" have been added.

(4) Sub-paragraph (b) has been modified to bring it into line with the redraft of article 29, paragraph 1 (a).

(5) Article 31, paragraph 3, of the 1957 draft (article 38, paragraph 3, of the present draft) has been amended in the sense that, in the event of the death of a member of the mission not a national of the receiving State, or of a member of his family, estate, succession or inheritance duties may be levied only on the immovable property situated in the receiving State. The proviso in sub-paragraph (c) of this article is intended to take that amended provision into account.

(6) Sub-paragraph (d) applies to the income of the diplomatic agent which has its source in the receiving State. Income from immovable property held by the diplomatic agent on behalf of his Government does not belong to him, and consequently he is not liable to dues and taxes on such income.

(7) In the French text of sub-paragraph (e) the word *impôt* has been added before the word "taxes." The exception provided for in this sub-paragraph calls for no explanation.

(8) Sub-paragraph (f) is new. The rule stated therein seems to be in conformity with practice.

*Exemption from personal services and contributions**Article 33*

The diplomatic agent shall be exempt from all personal services or contributions.

*Commentary*

This article is new. It deals with the case where certain categories of persons are obliged, as part of their general civic duties or in cases of emergency, to render personal services or to make personal contributions.

*Exemption from customs duties and inspection**Article 34*

1. The receiving State shall, in accordance with the regulations established by its legislation, grant exemption from customs duties on:

(a) Articles for the use of a diplomatic mission;

(b) Articles for the personal use of a diplomatic agent or members of his family belonging to his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are very serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or in the presence of his authorized representative.

*Commentary*

(1) Articles for the use of the mission are in practice exempted from customs duties, and this is generally regarded as a rule of international law.

(2) In general, customs duties are likewise not levied on articles intended for the personal use of the diplomatic agent or of members of his family belonging to his household (including articles intended for his establishment). This exemption has been regarded as based on international comity. Since, however, the practice is so generally current, the Commission considers that it should be accepted as a rule of international law.

(3) Because these exemptions are open to abuses, States have very frequently made regulations, *inter alia*, restricting the quantity of goods imported or the period during which the imported articles for the establishment of the agent must take place, or specifying a period within which goods imported duty-free must not be resold. Such regulations cannot be regarded as inconsistent with the rule that the receiving State must grant the exemption in question. To take account of this practice, the Commission amended the wording of the first sentence in paragraph 1, by referring to the regulations "established" by the legislation of the receiving State. *Ad hoc* action in each case is therefore not permissible.

(4) Goods imported by a diplomatic agent for the purpose of any business carried on by him cannot, of course, qualify for exemption.

(5) The expression "customs duties," as used in this article, means all duties and taxes chargeable by reason of import or export.

(6) While the Commission did not wish to prescribe exemption from inspection as an absolute right, it endeavoured to invest the exceptions proposed to the rule with all necessary safeguards.

(7) In framing the exception, the Commission referred not only to articles in the case of which exemption from customs duties exceptionally does not apply, but also to articles the import or export of which is pro-

hibited by the laws of the receiving State, although without wishing to suggest any interference with the customary treatment accorded with respect to articles intended for a diplomatic agent's personal use.

(8) The diplomatic agent's personal baggage is that containing his personal effects. Very commonly, although not invariably, his personal baggage travels with him; but when he travels by air, part of his personal baggage may be sent separately by boat or rail.

### *Acquisition of nationality*

#### *Article 35*

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

#### *Commentary*

This article is based on the generally received view that a person enjoying diplomatic privileges and immunities should not acquire the nationality of the receiving State solely by the operation of the law of that State, and without his consent. In the first place the article is intended to cover the case of a child born on the territory of the receiving State of parents who are members of a foreign diplomatic mission and who also are not nationals of the receiving State. The child should not automatically acquire the nationality of the receiving State solely by virtue of the fact that the law of that State would normally confer local nationality in the circumstances. Such a child may, however, opt for that nationality later if the legislation of the receiving State provides for such an option. The article covers, secondly, the acquisition of the receiving State's nationality by a woman member of the mission in consequence of her marriage to a local national. Similar considerations apply in this case also and the article accordingly operates to prevent the automatic acquisition of local nationality in such a case. On the other hand, when the daughter of a member of the mission who is not a national of the receiving State marries a national of that State, the rule contained in this article would not prevent her from acquiring the nationality of that State, because, by marrying, she would cease to be part of the household of the member of the mission.

### *Persons entitled to privileges and immunities*

#### *Article 36*

1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 27 to 34.

2. Members of the service staff of the mission who are not nationals of the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, and exemption from dues and taxes on the emoluments they receive by reason of their employment.

3. Private servants of the head or members of the mission shall, if they are not nationals of the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may

enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

#### *Commentary*

(1) This article corresponds to article 28 of the 1957 draft. Paragraph 1 is unchanged. There is no change of substance in the former paragraphs 2 to 4, but the text has been rearranged in consequence of the Commission's decision to deal with all questions relating to the privileges and immunities due to nationals of the receiving State in article 37. In this rearrangement the former paragraphs 3 and 4 have been amalgamated.

(2) It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of States in deciding which members of the staff of a mission shall enjoy privileges and immunities. Some States include members of the administrative and technical staff among the beneficiaries, and some even include members of the service staff. There are also differences in the privileges and immunities granted to the different groups. In these circumstances it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned.

(3) The solutions adopted for this problem will differ according to whether the privileges and immunities required for the exercise of the functions are considered in relation to the work of the individual official or, alternatively, in relation to the work of the mission as an organic whole.

(4) In view of the differences in State practice, the Commission had to choose between two courses: either to work on the principle of a bare minimum, and stipulate that any additional rights to be accorded should be decided by bilateral agreement; or to try to establish a general and uniform rule based on what would appear to be necessary and reasonable.

(5) A majority of the Commission favoured the latter course, believing that the rule proposed would represent a progressive step.

(6) The Commission differentiated between members of the administrative and technical staff on the one hand, and members of the service staff on the other.

(7) As regards persons belonging to the administrative and technical staff, it took the view that there were good grounds for granting them the same privileges and immunities as members of the diplomatic staff. The Commission considered several other proposals; for example, it was proposed that these categories should qualify for immunity from jurisdiction solely in respect of acts performed in the course of their duties, and that in all other respects the privileges and immunities to be accorded to them should be determined by the receiving State. By a majority, however, the Commission in 1957 decided that they should be put on the same footing as the diplomatic staff. In the light of observations received from several Governments, the Commission reviewed the question at the present session and, by almost the same majority, confirmed its earlier decision.

(8) The reasons relied on may be summarized as follows. It is the function of the mission as an organic whole which should be taken into consideration, not the

actual work done by each person. Many of the persons belonging to the services in question perform confidential tasks which, for the purposes of the mission's function, may be even more important than the tasks entrusted to some members of the diplomatic staff. An ambassador's secretary or an archivist may be as much the repository of secret or confidential knowledge as members of the diplomatic staff. Such persons equally need protection of the same order against possible pressure by the receiving State.

(9) For these reasons, and because it would be difficult to distinguish as between the various members or categories of the administrative and technical staff, the Commission recommends that the administrative and technical staff should be accorded not only immunity from jurisdiction in respect of official acts performed in the course of their duties but, in principle, all the privileges and immunities granted to the diplomatic staff.

(10) With regard to service staff, the Commission took the view that it would be sufficient for them to enjoy immunity only in respect of acts performed in the course of their duties, and exemption from dues and taxes on the emoluments they receive by reason of their employment (paragraph 2). States will, of course, remain free to accord additional privileges and immunities to persons in this category.

(11) In the case of diplomatic agents and the administrative and technical staff, who enjoy full privileges and immunities, the Commission has followed current practice by proposing that the members of their families should also enjoy such privileges and immunities, provided that they form part of their respective households and are not nationals of the receiving State. The Commission did not feel it desirable to go farther and lay down a criterion for determining who should be regarded as a member of the family, nor did it desire to fix an age limit for children. The spouse and children under age, at least, are universally recognized as members of the family, but in some cases other relatives may also be regarded as qualifying as "members of the family" if they are part of the household. In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household, the Commission intended to make it clear that close ties or special circumstances are necessary qualifications. Such special circumstances might exist where a relative kept house for an ambassador, although she was not closely related to him; or where a distant relative had lived with the family for many years, so as, in effect, to become a part of it.

(12) With regard to private servants of the head or members of the mission, a majority of the Commission took the view that they should not enjoy privileges and immunities as of right, except for exemption from dues and taxes on the emoluments they receive by reason of their employment. In the majority view, the mission's interest would be adequately safeguarded if the receiving State were under a duty to exercise its jurisdiction over their persons in such manner as to avoid undue interference with the conduct of the mission's business.

(13) In connexion with this article, the Commission considered what value as evidence could be attached to the lists of persons enjoying privileges and immunities which are normally submitted to the Ministry for Foreign Affairs. It took the view that such a list might constitute presumptive evidence that a person mentioned therein was entitled to privileges and immunities, but did not constitute final proof, just as absence from the list

did not constitute conclusive proof that the person concerned was not so entitled.

### *Diplomatic agents who are nationals of the receiving State*

#### *Article 37*

1. A diplomatic agent who is a national of the receiving State shall enjoy inviolability and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions. He shall enjoy such other privileges and immunities as may be granted to him by the receiving State.

2. Other members of the staff of the mission and private servants who are nationals of the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

#### *Commentary*

(1) Paragraph 1 of the article corresponds to article 30 of the 1957 draft. It deals with the position of a *diplomatic agent* who is a national of the receiving State, but in a different form. Paragraph 2, which is new, deals with the position of the other members of the mission and with that of private servants, and reproduces the rules concerning such persons which were formerly embodied in article 28, paragraphs 3 and 4, of the 1957 draft or referred to in the commentary to former article 30 as an implied consequence of the rule there stated.

(2) With regard to the privileges and immunities of a diplomatic agent who is a national of the receiving State, practice is not uniform, and the opinion of writers is also divided. Some writers hold the view that a diplomatic agent who is a national of the receiving State should enjoy full privileges and immunities subject to any reservations which the receiving State may have made at the time of the *agrément*. Others are of the opinion that the diplomatic agent should enjoy only such privileges and immunities as have been expressly granted him by the receiving State.

(3) This latter opinion was supported by a minority of the Commission. The majority favoured an intermediate solution. It considered it essential for a diplomatic agent who is a national of the receiving State to enjoy at least a minimum of immunity to enable him to perform his duties satisfactorily. That minimum, it was felt, was inviolability, and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions, although certain members of the Commission urged that he ought to be granted more extensive privileges considered necessary for the satisfactory performance of his duties.

(4) The privileges and immunities to be enjoyed beyond the stated minimum by a diplomatic agent who is a national of the receiving State will depend on the decision of the receiving State.

(5) Attention is drawn to the fact that the phrase "diplomatic agent" includes, not only the head of the mission, but also members of the diplomatic staff.

(6) Under paragraph 2, "other" members of the mission (i.e., other than diplomatic agents) and private servants who are nationals of the receiving State only enjoy such privileges and immunities as are granted to

them by that State. However, as stated in the same paragraph, the jurisdiction which the receiving State may exercise over their persons must be exercised in such a manner as not to interfere unduly with the conduct of the business of the mission.

(7) The fact that the draft makes no mention of the position of the members of the families of any of the persons specified in the article implies that they enjoy only such privileges and immunities as are granted to them by the receiving State.

#### *Duration of privileges and immunities*

##### *Article 38*

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

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

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

##### *Commentary*

(1) The first two paragraphs of this article deal with the times of commencement and termination of entitlement, in the case of persons entitled to privileges and immunities in their own right. In the case of persons who derive their entitlement from such persons, other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds of the entitlement.

(2) As regards paragraph 2, the question had been raised whether exemption from import duties should not cease immediately on the termination of functions. The Commission did not take that view. It was in any event clear that, as regards *export* duties, these should continue until the person concerned had had time to make arrangements for his departure. Similarly, in the case of import duties also, there are cases calling for exemption, e.g. where goods have been ordered prior to any knowledge of appointment to another post.

(3) A provision was added to paragraph 3 to the effect that, in the event of the death of a member of the mission not a national of the receiving State, or of a member of his family, the receiving State may not levy estate, succession and inheritance duties, except on immovable property situated in that country.

#### *Duties of third States*

##### *Article 39*

1. If a diplomatic agent passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in case of any members of his family enjoying diplomatic privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1, third States shall not hinder the passage of members of the administrative, technical or service staff of a mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers in transit the same inviolability and protection as the receiving State is bound to accord.

##### *Commentary*

(1) In the course of diplomatic relations it may be necessary for a diplomatic agent or a diplomatic courier to pass through the territory of a third State. Several questions were raised on this subject during discussion in the Commission.

(2) The first question is whether the third State is under a duty to grant free passage. The view was expressed that it was in the interest of all States belonging to the community of nations that diplomatic relations between the various States should proceed in a normal manner, and that in general, therefore, the third State should grant free passage to the member of a mission and to the diplomatic courier. It was pointed out, on the other hand, that a State was entitled to regulate access of foreigners to its territory. The Commission did not think it necessary to go further into this matter.

(3) Another question concerns the position of the member of the mission who is in the territory of a third State either in transit or for other reasons, and who wishes to take up or return to his post or to go back to his country. Has he the right to avail himself of the privileges and immunities to which he is entitled in the receiving State, and to what extent may he avail himself of them? Opinions differ and practice provides no clear guide. The Commission felt it should adopt an intermediate position.

(4) The Commission proposes (paragraph 1) that the diplomatic agent should be accorded inviolability and such other privileges and immunities as may be required to ensure his transit or return. The same privileges and immunities should be extended to the members of the diplomatic agent's family, and the Commission accordingly amended the text proposed at the ninth session, which did not contain any provision to that effect.

(5) With regard to the members of the administrative, technical and service staff and their families, the Commission recommends that, in circumstances similar to those specified in paragraph 1 of the article, there should be an obligation on third States not to hinder the

passage of such persons. Paragraph 2, which is new, lays down this rule.

(6) The second sentence of paragraph 3 reproduces the language of the corresponding provision (article 32, paragraph 2) in the 1957 draft, viz. a third State through whose territory a diplomatic courier passes in transit shall accord him the same inviolability and protection as the receiving State. The Commission considers, however, that the third State should accord to official diplomatic correspondence and to other communications in transit the same freedom and protection as is accorded by the receiving State. Accordingly, a provision to that effect (which precedes the provision relating to the protection of the courier) has been inserted in paragraph 3 of the article.

### SECTION III. CONDUCT OF THE MISSION AND OF ITS MEMBERS TOWARDS THE RECEIVING STATE

#### Article 40

1. Without prejudice to their diplomatic privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. Unless otherwise agreed, all official business with the receiving State entrusted to a diplomatic mission by its Government, shall be conducted with or through the Ministry for Foreign Affairs of the receiving State.

3. The premises of a diplomatic mission must not be used in any manner incompatible with the functions of the mission as laid down in the present draft articles, or by other rules of general international law, or by any special agreements in force between the sending and the receiving State.

#### Commentary

(1) Paragraph 1, which remains unchanged, states in its first sentence the rule already mentioned, that in general it is the duty of the diplomatic agent, and of all persons enjoying diplomatic privileges and immunities, to respect the laws and regulations of the receiving State. Immunity from jurisdiction implies merely that the agent may not be brought before the courts if he fails to fulfil his obligations. The duty naturally does not apply where the agent's privileges and immunities exempt him from it. Failure by a diplomatic agent to fulfil his obligations does not absolve the receiving State from its duty to respect the agent's immunity.

(2) The second sentence of paragraph 1 states the rule that persons enjoying diplomatic privileges and immunities must not interfere in the internal affairs of the receiving State; for example, they must not take part in political campaigns. The making of representations for the purpose of protecting the interests of the diplomatic agent's country or of its nationals in accordance with international law does not constitute interference in the internal affairs of the receiving State within the meaning of this provision.

(3) Paragraph 2 states that the Ministry for Foreign Affairs of the receiving State is the normal channel through which the diplomatic mission should conduct all official business entrusted to it by its Government: nevertheless, by agreement (whether express or im-

plied) between the two States, the mission may deal directly with other authorities of the receiving State, as specialist attachés, in particular, frequently do.

(4) Paragraph 3 stipulates that the premises of the mission shall be used only for the legitimate purposes for which they are intended. Failure to fulfil the duty laid down in this article does not render article 20 (inviolability of the mission premises) inoperative but, on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission. The question of asylum is not dealt with in the draft but, in order to avoid misunderstanding, it should be pointed out that among the agreements referred to in paragraph 3 there are certain treaties governing the right to grant asylum in mission premises which are valid as between the parties to them.

### SECTION IV. END OF THE FUNCTION OF A DIPLOMATIC AGENT

#### Modes of termination

#### Article 41

The function of a diplomatic agent comes to an end, *inter alia*:

(a) If it was for a limited period, then on the expiry of that period, provided there has been no extension of it;

(b) On notification by the Government of the sending State to the Government of the receiving State that the diplomatic agent's function has come to an end (recall);

(c) On notification by the receiving State, given in accordance with article 8, that it considers the diplomatic agent's function to be terminated.

#### Commentary

This article lists various examples of the ways in which a diplomatic agent's function may come to an end. The causes which may lead to termination under points (b) and (c) are extremely varied.

#### Facilitation of departure

#### Article 42

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment, and must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

#### Commentary

The Commission thought necessary to make it clear that, naturally, only in case of need is the receiving State under a duty to place means of transport at the disposal of persons leaving the country.

#### Protection of premises, archives and interests

#### Article 43

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

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

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

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

*Commentary*

With the exception of certain drafting changes (e.g. in sub-paragraph (c)), the article reproduces unchanged the terms of the corresponding article in the 1957 draft.

SECTION V. NON-DISCRIMINATION

*Article 44*

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

2. However, discrimination shall not be regarded as taking place:

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

(b) Where the action of the receiving State consists in the grant, on the basis of reciprocity, of greater privileges and immunities than are required by the present rules.

*Commentary*

(1) It is stipulated in the draft that certain of its rules are to be applied without discrimination as between States (article 10, paragraph 2; article 15, paragraph 1), or uniformly (article 16). It should not be inferred that these are the only cases in which the rule of non-discrimination is applicable. On the contrary, this is a general rule which follows from the equality of States. Article 44, which is new, lays down the rule expressly.

(2) In the article laying down the rule, the Commission was, however, at pains to refer to two cases in which, although an inequality of treatment is implied, no discrimination occurs, inasmuch as the treatment in question is justified by the rule of reciprocity which is very generally applicable in the matter of diplomatic relations.

(3) The first of these cases is that in which the receiving State applies restrictively one of the rules of the

draft because the rule is so applied to its own mission in the sending State. It is assumed that the restrictive application in the sending State concerned is in keeping with the strict terms of the rule in question, and within the limits allowed by the rule; otherwise, there is an infringement of the rule and the action of the receiving State becomes an act of reprisal.

(4) The second case is that in which the receiving State grants, subject to reciprocity, privileges and immunities more extensive than those prescribed by the rules of the draft. It is only natural that the receiving State should be free, as regards the grant of benefits greater than those which it is obliged to grant, to make such grant conditional on receiving reciprocal treatment.

SECTION VI. SETTLEMENT OF DISPUTES

*Article 45*

Any dispute between States concerning the interpretation and application of this Convention that cannot be settled through diplomatic channels shall be referred to conciliation or arbitration or, failing that, shall, at the request of either of the parties, be submitted to the International Court of Justice.

*Commentary*

The Commission discussed whether a clause should be inserted in the draft concerning the settlement of disputes arising out of its interpretation or application, and also where the clause should be placed and what form it should take. Opinion was divided. Some members considered that where, as in the present case, the Commission's task had consisted of codifying substantive rules of international law, it was unnecessary to deal with the question of their implementation. Others suggested that the clause should be included in a special protocol. A majority, however, thought that, if the present draft were submitted in the form of a convention, a provision governing the settlement of disputes would be necessary and that, for this purpose, it should stipulate that, in cases where other peaceful means of settlement proved ineffective, the dispute would be referred to the International Court of Justice. The article as drafted at the ninth session (article 37) has been clarified by the addition of words stating that this can be done at the request of either of the parties.

## Chapter IV

### PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION

#### I. State responsibility

54. The special rapporteur, Mr. F. V. García Amador, in accordance with the request of the Commission made during its ninth session that he should continue with his work on the subject, submitted his third report at the present session (A/CN.4/111). It was not possible, for want of time, to discuss the report. However, in chapter V below an account is given of the planning of the future work of the Commission which includes, *inter alia*, plans for taking up this subject at the eleventh session. The special rapporteur will continue his work.

#### II. Law of treaties

55. Sir Gerald Fitzmaurice, the special rapporteur, having continued his work on this subject at the request of the Commission, presented at the present session his third report, dealing with the essential validity of treaties

(A/CN.4/115). As in the case of State responsibility, lack of time did not permit the Commission to take up the subject, but the Commission's plans for future work are explained in chapter V, and include, *inter alia*, plans for taking up this subject at the eleventh session. The special rapporteur will continue his work.

#### III. Consular intercourse and immunities

56. Towards the end of the session, the Commission began discussion of the report on this subject (A/CN.4/108), submitted by the special rapporteur, Mr. Jaroslav Zourek, at the previous session. After an exposé by the special rapporteur, and a general exchange of views on the subject as a whole, and also on the first article, the Commission deferred further consideration of the report until the next session. The special rapporteur will continue his work.

## Chapter V

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

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

57. On account of certain hopes expressed in the General Assembly during its twelfth session in 1957, to the effect that on the completion of the draft on diplomatic intercourse and immunities it might be possible for the work on the related subject of consular intercourse and immunities to be accelerated, the Commission decided to take this subject up next, on the basis of the report of the special rapporteur, Mr. Zourek, contained in document A/CN.4/108. Accordingly, the Commission, in addition to devoting two meetings to a general discussion of the subject (see chapter IV, part III, above) decided to place it first on the agenda for its eleventh session in 1959 with a view to completing at that session, and if possible in the course of the first five weeks, a provisional draft for the comments of Governments (see also paragraphs 61, 64 and 65 below). Other subjects which the Commission decided to place on its agenda for next year were the law of treaties and State responsibility, but no final decision was taken as to the order in which these subjects would be discussed, or as to the amount of time to be devoted to them respectively.

58. In paragraphs 26-29 of its report covering its ninth session in 1957<sup>30</sup> an account was given of a discussion regarding the methods of work of the Commission which it had held at that session, arising out of certain views expressed in the Sixth Committee of the Assembly at the latter's eleventh session in 1956. Although the conclusion then reached was that there were no immediate steps which the Commission could usefully take to accelerate its work, it was stated that the Commission proposed to keep the matter under review and to give it renewed consideration at its next session, in the light of experience of the working of the Commission with a membership of twenty-one.<sup>31</sup>

59. Accordingly, and also because the matter had been the subject of further observations in the Sixth Committee of the Assembly at its twelfth session in 1957, the Commission discussed it again during its present session on the basis of a paper<sup>32</sup> prepared by Mr. Zourek who, as last year's Chairman of the Commission, had attended the relevant meetings of the Sixth Committee. After examining the various methods by which the Commission's work might be accelerated, Mr. Zourek thought it possible to rely on only one of them as constituting a method that could be followed without prejudicing the quality of the Commission's work. This consisted in a re-organization of methods of work in such a way that

<sup>30</sup> *Official Records of the General Assembly, Twelfth Session, Supplement No. 9 (A/3623).*

<sup>31</sup> At the eleventh session of the General Assembly in 1956, the membership of the Commission was increased from fifteen to twenty-one. The ninth session of the Commission in 1957 was the first to be held with this increased membership; the present session the second.

<sup>32</sup> A/CN.4/L.76 of 21 May 1958. As implied in paragraph 17 of this paper, however, the great majority of delegations in the Assembly did not seek to criticize the Commission's methods.

less would be done in the plenary meetings and more in committees or sub-commissions, of which greater use would be made; and the paper concluded by setting out a number of concrete proposals to that end.<sup>33</sup>

60. In addition to these proposals Mr. Zourek in an oral statement, suggested that Governments should be given more time to comment on first drafts produced by the Commission, also for the members to digest these comments and for the special rapporteur to make his recommendations concerning them. At present, the effective period which Governments had in order to make comments, from the time when the Commission's report reached them to the date by which replies were supposed to be sent in, was only some four or five months; this period was precisely that during which the annual session of the General Assembly took place, when a number of the officials concerned would be absent in New York. The result was that often only a small number of Governments offered any comments, and many of the comments arrived late—some too late to be pre-digested in writing either by the special rapporteur concerned or by the Secretariat before the Commission's session began. Mr. Zourek accordingly proposed that the Commission's present practice of completing a draft at one session for submission to Governments, with a view to preparing a final draft at the immediately following session in the light of the comments of Governments, and for submission to the General Assembly in the same year, should

<sup>33</sup> "With a view to speeding up the work of the International Law Commission, while keeping it on a high scientific level, the following changes in the Commission's organization and methods of work might be considered in the light of past experience:

"(a) In the absence of a contrary decision by the Commission, any draft prepared by the special rapporteurs would be the subject of a general discussion in plenary meeting.

"(b) When the general discussion was concluded, the Commission would review the articles of the draft and the amendments submitted by members, so that they could have an opportunity of presenting their views. Votes would not be taken at that stage of the work unless the circumstances made it necessary to take a vote on a question of principle in order to simplify and facilitate the work.

"(c) After this preliminary discussion, the draft would be referred to a sub-commission so constituted as to include representatives of all the world's principal legal systems. The sub-commission, of which the special rapporteur would automatically be a member, should not consist of more than ten members.

"(d) The sub-commission would fully discuss the special rapporteur's proposals and the amendments thereto, and would prepare draft articles for the full Commission. In view of the importance of this work for the Commission itself, for the Governments of States Members of the United Nations and for academic circles, the meetings of the sub-commissions would be conducted in the same way as plenary meetings, i.e., with simultaneous interpretation and summary records.

"(e) The drafts prepared by the sub-commissions would be submitted to the full Commission for possible discussion and adoption.

"(f) The Commission would always be entitled to reserve a particularly important or urgent draft for discussion in plenary meeting only."

be modified, and that the Commission should only prepare its final draft at the second session following that in which the first draft had been prepared.

61. With regard to this last proposal, the Commission, while conscious that it would prolong the period before the end of which a final draft on any given subject could be presented to the Assembly,<sup>34</sup> felt little doubt that its work tended to suffer because of defects in the process of obtaining and dealing with the comments of Governments, and accordingly decided in principle to adopt this proposal. On this basis it decided that if, at its next session in 1959, it could complete a first draft on consular intercourse and immunities to be sent to Governments for comment, it would not take that subject up again in order to prepare a final draft in the light of those comments until its thirteenth session in 1961, and would proceed with other subjects at its twelfth session in 1960.

62. As regards the other concrete proposals (see footnote 33) contained in Mr. Zourek's paper, the Commission, while considering that they ought certainly to be kept in mind and acted upon as occasion might require or render desirable, felt that this should be done on an *ad hoc* basis and that no definite decision was called for in advance to the effect that the Commission would always (or even usually) adopt this method of work. Such a method might on occasion be useful in the initial stages of drawing up a draft on a difficult or complex subject. On the other hand, the experience of the present session, during which the Commission had finalized no less than two complete drafts for presentation to the General Assembly, had shown that, during the later stages at any rate, the work could proceed quite sufficiently quickly in the full Commission, and that no real advantage would be gained by setting up sub-commissions. There was moreover always the danger that, except in cases obviously suitable for reference to a sub-commission, the discussions in the smaller body would merely be re-opened in plenary meeting and the ground be gone over again with no real saving of time.

63. It was also pointed out that in any case the suggestion made in the second sentence of sub-paragraph (d) of Mr. Zourek's proposals—apart from budgetary and other implications of a practical character—was open to objection because it would tend to deprive any committee or sub-commission of precisely that informality and conversational atmosphere which enabled difficult or controversial points to be disposed of quickly. It would tend to re-introduce much of the deliberate character of the plenary meetings of the Commission, and this would not be off-set by the smaller number of members involved.

64. However, subject to this, the Commission felt that the topic of consular intercourse and immunities (because of its similarity to that of diplomatic intercourse and immunities which had now been debated at two sessions, and with which all members were thoroughly familiar) might well lend itself to the method of work proposed by Mr. Zourek. Accordingly, in view of its desire to complete a first draft if possible by the fifth week of its next session, the Commission decided that it would organize its work on that subject at its next session on the basis of Mr. Zourek's proposals, with the exception of that contained in the second sentence of sub-paragraph (d). It was also decided to ask all the members who might

wish to propose amendments to the existing draft presented by the special rapporteur<sup>35</sup> to come to the next session prepared to put in their principal amendments in writing within a week, or at most ten days, of the opening of the session (this would not of course preclude the submission of further or consequential amendments at later stages).

65. It was also decided that, in future, the Commission's Drafting Committee should be formally constituted as what it had long been in fact, namely, a committee to which could be referred not merely pure drafting points, but also points of substance which the full Commission had been unable to resolve, or which seemed likely to give rise to unduly protracted discussion. It was to such a committee that the method of work to be adopted next year in respect of consular intercourse and immunities would relate. This decision would not entail any alteration in the present arrangements for the Drafting Committee. If, however, the Commission at any time decided to make greater use of sub-commissions on points of substance, this might necessitate recourse to simultaneous interpretation and possibly summary records, thereby involving an administrative and budgetary problem calling for study by the Secretariat and an eventual decision by the Assembly.

66. For other ideas which were considered, but which were regarded as unsatisfactory, it will be sufficient to refer to paragraphs 22 and 23 of Mr. Zourek's paper above-mentioned and the remarks there made.<sup>36</sup> As a variant of the one contained in paragraph 22 (b), it was suggested in the course of the discussion that the length of the sessions should be increased from ten to twelve weeks, although what had been envisaged as necessary to compensate for the increase in membership had been a prolongation of the session proportionate to that increase—i.e., of four weeks.<sup>37</sup> But it was felt that even an increase of two weeks would give rise to some or all of the difficulties mentioned by Mr. Zourek. However, a related suggestion which was discussed and will be kept in mind was the possibility that the special rapporteurs for the various subjects to be taken at a given session should hold a meeting with some members of the Commission a week or ten days before the opening of the session, in order to have a preliminary discussion and thereby to shorten the discussion in the Commission itself.

67. The Commission also draws attention to the fact that, while during the main part of the session it holds one plenary meeting a day, experience has shown that towards the end of the session, when the draft report to the General Assembly is being finalized, two meetings are often needed. Provision should therefore be made in the budget for the servicing of approximately ten extra meetings during, but principally towards the end of, the session.

<sup>35</sup> A/CN.4/108.

<sup>36</sup> See footnote 32 above. As regards the idea of the Commission's working in two main sections, paragraph 23 of this paper stated "The suggestion that the International Law Commission should be split up into two or more sub-commissions working on different subjects along parallel lines does not provide an adequate solution. If that suggestion were accepted, the Commission would cease to exist as a single organ and would be replaced by two or more sub-commissions working independently. Unity of views would not be assured and the sub-commissions might reach conflicting results. Moreover, such a reform would be contrary to the Commission's present Statute."

<sup>37</sup> The Commission did not however accept the view that the 40 per cent increase in the membership of the Commission effected by the Assembly's decision in 1956, had resulted in a 40 per cent increase in the time taken up by its proceedings.

<sup>34</sup> However, while retarding the presentation of any individual draft, it need not, after a certain initial delay, hold up the orderly flow of drafts to the Assembly year by year, in so far as it is otherwise possible to achieve that.

## II. Review of the Commission's work during its first ten sessions

68. At the conclusion of this, its tenth session, the Commission thought it might be useful to review briefly the work accomplished during that period, since this might have a bearing on the matters discussed in paragraphs 57 to 67 above. The chief points that seemed to emerge were as follows:

(a) In view of the great difficulty and complexity of any work of codification or progressive development,<sup>38</sup> the fact that good work could only be done by proceeding with deliberation, and also the necessity of producing in most cases a detailed commentary as well as a set of well-thought-out and well-drafted articles and a general report on the subject concerned, the Commission considered that the finalization *on the average* of one completed piece of work for presentation to the Assembly in each year constituted about as much as it would be possible or desirable to aim at consistently with maintaining the requisite standard of work. In fact the Commission had done better than this, having in its ten sessions produced no less than fifteen<sup>39</sup> or sixteen<sup>40</sup> final and completed pieces of work. The fact that some of these (e.g. the reports on defining aggression, on reservations to multilateral conventions, and on ways and means of making international law more generally known) did not consist of or include a set of articles, was due to the fact that they concerned matters specially referred to the Commission by the Assembly for opinion, report or proposals, rather than for codification as such.

(b) A considerable amount of the time of the Commission had in fact been taken up with these and other special tasks referred to it by the Assembly, with the result that its own programme of codification, as drawn up

<sup>38</sup> It was pointed out that many national codifications had taken up periods of ten years or even much longer. Yet in the domestic field a homogeneous corpus of law was being dealt with by persons who were all of the same nationality and all had the same legal background. Bodies so constituted could conveniently split up into sections, each dealing more or less independently with different parts of the subject. This was not possible for the Commission, which was quite differently constituted and had a very different kind of subject-matter to deal with.

<sup>39</sup> These were:

1. Draft Declaration on Rights and Duties of States.
2. Ways and means for making the evidence of customary international law more readily available.
3. Formulation of the Nürnberg Principles.
4. Question of international criminal jurisdiction.
5. Draft Code of Offences against the Peace and Security of Mankind.
6. Question of defining aggression.
7. Reservations to multilateral conventions.
8. Draft on arbitral procedure.
9. Draft Convention on the Elimination of Future Statelessness.
10. Draft Convention on the Reduction of Future Statelessness.
- 11-14. Articles concerning the law of the sea comprising:
  - Régime of territorial waters;
  - Régime of the high seas;
  - Fisheries: Conservation of the living resources of the high seas;
  - The continental shelf.
15. Draft on diplomatic intercourse and immunities.

The above list takes into account the fact that the Conference on the Law of the Sea adopted four distinct Conventions as comprising the law of the sea. Each is an independent subject.

<sup>40</sup> Sixteen, if account is taken of the fact that the draft on arbitral procedure presented to the Assembly in 1953 was, so far as the Commission was concerned, a final and completed text. In effect the Commission has presented two final texts on this subject.

at its first session in 1949,<sup>41</sup> had been delayed. During its last five sessions, however, i.e., since and including 1954, the Commission had finally completed nine<sup>42</sup> pieces of codification or progressive development, of which eight<sup>43</sup> were covered by its own original selection of topics to be dealt with, and four<sup>44</sup> figured amongst the five topics<sup>45</sup> originally selected for priority treatment. Of these nine completed pieces of work, four had already been taken up at an international conference<sup>46</sup> and two more would be similarly taken up in 1959.<sup>47</sup> Of the remaining three, one had in effect not so far been proceeded with by the Assembly,<sup>48</sup> while two were going to the Assembly in final form at its forthcoming session. The Commission's task was over when it presented final drafts. Any further action was for the Assembly. Such further action had sometimes been taken and sometimes not.

(c) The question arose whether, even if the Commission were to produce drafts more quickly, Governments, and the Assembly itself, would be able to keep pace with them. As it was (see paragraphs 60 and 61 above), Governments had difficulty in furnishing comments, and often it was only a small minority that did so. As regards the Assembly, it would no doubt always be possible to hold a general discussion each year in the Sixth Committee on any texts prepared by the Commission. But in many cases this did not suffice, and further action was required, such as holding an international conference which could be attended by the necessary experts on the subjects involved, who would not normally be present in the Sixth Committee. The already crowded condition of the international programme, however, would make it difficult to hold many conferences of a codificatory character. It was doubtful whether, on the average, such conferences could be held oftener than once a year, or more probably once

<sup>41</sup> The report of the Commission on its first session contains, in chapter II, paragraph 16, the following list of topics selected by the Commission for codification:

1. Recognition of States and Governments;
2. Succession of States and Governments;
3. Jurisdictional immunities of States and their property;
4. Jurisdiction with regard to crimes committed outside national territory;
5. Régime of the high seas;
6. Régime of territorial waters;
7. Nationality, including statelessness;
8. Treatment of aliens;
9. Right of asylum;
10. Law of treaties;
11. Diplomatic intercourse and immunities;
12. Consular intercourse and immunities;
13. State responsibility;
14. Arbitral procedure.

See *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)* chapter II, para. 16.

<sup>42</sup> Draft Code of Offences against the Peace and Security of Mankind (one);

Law of the sea: Régime of territorial waters, Régime of the high seas, Fisheries: Conservation of the living resources of the high seas, The continental shelf (four);

Elimination of future statelessness; Reduction of future statelessness (two); Arbitral procedure (one); Diplomatic intercourse and immunities (one).

<sup>43</sup> i.e., all but the Draft Code of Offences against the Peace and Security of Mankind.

<sup>44</sup> The régime of the high seas; fisheries; the continental shelf; and arbitral procedure.

<sup>45</sup> As in footnote 44, plus the law of treaties.

<sup>46</sup> i.e., those covering the law of the sea.

<sup>47</sup> Draft Convention on the Elimination of Future Statelessness and Draft Convention on the Reduction of Future Statelessness.

<sup>48</sup> i.e., the Draft Code of Offences against the Peace and Security of Mankind.

in two years. For administrative and technical reasons, they could not usually be held concurrently with either the meetings of the Assembly or of the Commission itself. This meant that, in practice, the only time of the year at which such conferences could be held, unless they were very short, was between January and April. In these circumstances, the Commission came to the conclusion that it should adhere to its policy of taking enough time to ensure that any final draft it produced would be good, and such as could in substance be adopted by an international conference—a policy that had been fully vindicated by the results of the recent Conference on the Law of the Sea. Added to this, there was the important consideration that the whole of international law and international relations was now going through a period of adjustment. In such a situation speed was not necessarily the most important consideration. Time spent in endeavouring to reconcile different points of view and different types of outlooks and ideas was not time wasted. In the course of the years what would matter was the quality of the work, not whether a greater or lesser period had been spent in producing it.

69. The foregoing observations in no way imply that the Commission is not fully aware of the necessity of proceeding as fast as is reasonably possible with its work—and it intends to do so. But it has thought it useful to try and place the matter in its wider perspective.

### III. Co-operation with other bodies

70. In 1956 the Commission adopted a resolution requesting the Secretary-General to authorize the Secretary of the Commission to attend the fourth meeting of the Inter-American Council of Jurists, scheduled to be held at Santiago, Chile, in 1958. At the next session in 1957, the Secretary informed the Commission of the postponement until 1959 of the meeting of the Inter-American Council.

71. During the present session the Commission had before it a joint proposal (A/CN.4/L.77) by Mr. R. J. Alfaro, Mr. G. Amado, and Mr. F. V. García Amador, which would renew the request to the Secretary-General in view of the convening of the fourth meeting of the Inter-American Council of Jurists early in 1959.

72. The Commission adopted this proposal unanimously in the following terms:

*"The International Law Commission,*

*"Recalling* article 26 of its statute and the resolutions adopted at its sixth, seventh and eighth sessions regarding co-operation with inter-American bodies and, in particular, that at its eighth session it requested the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, in the capacity of an observer, the fourth meeting of the Inter-American Council of Jurists to be held in Santiago, Chile, in 1958,

*"Noting* that this meeting has been postponed until early in 1959,

*"Considering* that, since the subject of State responsibility will be discussed at the eleventh session of the Commission and is also the principal item on the agenda for the fourth meeting of the Inter-American Council of Jurists, there exists again a real opportunity for co-operation between the International Law Commission and the Inter-American Council of Jurists,

*"Decides:*

"1. To request 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 early in 1959 at Santiago, Chile, and submit a report to the Commission at its next session regarding such matters discussed by the Council as are also on the agenda of the Commission;

"2. To communicate this decision to the Inter-American Council of Jurists and to express the hope that the Council may be able, for a similar purpose, to request its Secretary to attend the next session of the Commission."

73. The Commission also had before it a communication received from the Asian-African Legal Consultative Committee informing it of the holding of a second session at Colombo, Ceylon, from 14 to 26 July 1958, during which session the Committee proposed to consider certain items also of interest to the Commission. In view of the closeness of the date of this second session, the Commission was unable to consider the question of sending an observer. It authorized the Secretary to inform the Asian-African Legal Consultative Committee of this fact and, at the same time, to express its interest in the work of the Committee and its hope that the Committee would transmit to it such records and other documents as related to matters falling within the scope of the work of the Commission.

### IV. Control and limitation of documentation

74. Resolution 1203 (XII) of the General Assembly 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.

### V. Date and place of the next session

75. The Commission decided to hold its eleventh session in Geneva from 20 April to 26 June 1959.

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

76. The Commission decided that it should be represented at the next (thirteenth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Radhabind Pal.

## A N N E X

### Comments by Governments on the draft articles concerning diplomatic intercourse and immunities adopted by the International Law Commission at its ninth session in 1957 (A/3623, para. 16)\*

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#### 1. ARGENTINA

*Transmitted by a note verbale of 30 January 1958 from the Permanent Mission of Argentina to the United Nations*

[Original: Spanish]

The competent organs of the Argentine Government consider that the draft clauses are on the whole acceptable. They have certain comments to make, however, concerning articles 6, paragraph 1, 8, 21 and 28, paragraph 1.

The wording of article 6, paragraph 1, becomes ambiguous if it is considered that the phrase "according to circumstances" should be deleted, since once the representative of a State has been declared *persona non grata* there are no circumstances that can alter the situation and the representative must leave the country in which he has been exercising his functions.

As regards article 8, the competent organs of the Argentine Government are of opinion that the date of commencement of the functions of the head of the mission depends on the date on which he presents his letters of credence.

As regards article 21, the relevant part of the commentary should be added as paragraph 5: "If a mission wishes to make use of a wireless transmitter belonging to it, it must, in accordance with the international conventions on telecommunications, apply to the receiving State for special permission. If the regulations applicable to all users of such communications are observed, such permission should not be refused".

Finally, as regards article 28, paragraph 1, which provides that "apart from diplomatic agents" and the members of their families accompanying them, "the administrative and technical staff of a mission" and the members of their families accompanying them shall enjoy the privileges and immunities mentioned in articles 22 to 27, it is understood that, as the Commission observes, there is no uniformity in the granting of diplomatic privileges and immunities to the technical and administrative staff of diplomatic missions. In order to take into account the existing disparity in the treatment accorded to this class of officials and to try to prevent possible objections with regard to privileges, it is proposed that such equal consideration should be granted in accordance with the regulations established under local legislation, subject to reciprocity.

\* Originally distributed in documents A/CN.4/114 and Add. 1-6.

#### 2. AUSTRALIA

*Transmitted by a note verbale of 11 February 1958 from the Permanent Representative of Australia to the United Nations*

[Original: English]

The Government of Australia has perused with interest the draft articles prepared by the International Law Commission at its ninth session on the subject of diplomatic intercourse and immunities, and takes the opportunity to express its appreciation of the work of the Commission and its special rapporteur, Mr. A. E. F. Sandström, upon the work which has been done on the subject and the provisional draft, which appears to cover in a comprehensive manner all aspects of the subject.

While it must naturally reserve any final position with regard to the draft, and would desire to make it clear that the presence or absence of any comment must not be taken as necessarily involving acceptance of any part of the draft, either in principle or in detail, the Government of Australia submits the following observations for consideration by the special rapporteur when preparing his further proposals to the Commission.

##### *Article 2*

The words "the Government" should be omitted in sub-articles (1), (3) and (4), since diplomatic missions generally represent Heads of States, and it is considered inaccurate to describe such functions by reference to Governments.

##### *Article 5*

Some further consideration may be required to take account of the special position of members of the Commonwealth of Nations in their mutual diplomatic relations.

##### *Article 7*

The Australian Government reserves its position with regard to the whole of this article.

##### *Article 8*

The Australian Government would prefer the alternative version, namely, that a head of mission takes up his functions when he has presented his letters of credence.

##### *Article 9*

1. The Australian Government would omit the words "Government of the" for reasons already stated in connexion with article 2.

2. The Australian Government would omit this sub-article.

*Article 12*

1. The Australian Government would omit the words "either of the official notification of their arrival or" in this sub-article, being of the view that precedence dates from presentation of letters of credence and not from date of official notification of arrival.

2. The Australian Government does not quite understand what this sub-article is intended to cover.

*Article 16*

Some definition of the expression "premises" seems to be necessary.

*Article 20*

2. As stated, this sub-article would appear to require a receiving State to treat all members of all diplomatic missions equally. Some provision for reciprocity appears to be necessary, e.g., if the receiving State places a general restriction upon members of all missions in its territory, the sub-article as drafted would preclude the respective sending States from imposing similar restrictions on the missions of the receiving State in its territory. Such restrictions would not operate in respect of members of other missions whose States had not placed restrictions upon missions in their territory.

*Article 24*

1. (c) The expression "commercial activity" appears to require some definition.

*Article 25*

2. The Australian Government would prefer substitution of "Head" for "Government".

4. As a point of drafting detail, the words "the judgement" in this sub-article should read "any judgements".

*Article 28*

2. The expression "service staff" should be defined.

4. In the view of the Australian Government, the exemption provided for should apply only where the emoluments are paid by the Government of the sending State.

## 3. BELGIUM

*Transmitted by letters dated 29 January and 4 and 12 February 1958 from the Permanent Representative of Belgium to the United Nations*

[Original: French]

A

29 January 1958

The provisions of the draft are on the whole in accordance with Belgian usage.

The wording of several articles is nevertheless subject to certain objections.

1. *Article 8* provides that "The head of the mission is entitled to take up his functions in relation to the receiving State when he has notified his arrival and presented a true copy of his credentials to the Ministry for Foreign Affairs of the receiving State."

In Belgium, the head of the mission does not take up his functions until he has presented his credentials to the Head of the State. The latter, however, instructs the Minister for Foreign Affairs to receive credentials in the event of his own prolonged absence or illness.

The Belgian Government adopts the alternative proposed by the International Law Commission: "The head of the mission is entitled to take up his functions in relation to the receiving State when he has presented his letters of credence."

2. *Article 12, paragraph 1*, provides that "Heads of mission shall take precedence in their respective classes in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the rules of the protocol in the receiving State, which must be applied without discrimination."

In Belgium the order of precedence of heads of mission is determined solely by the date of the presentation of the letters

of credence; the date of the official notification of arrival has no relevance.

3. *Articles 16 and 23* have a common purpose but relate to different premises; they could be amalgamated or the same terminology could be used: e.g. "buildings or parts of buildings".

4. *Articles 17 and 26* grant exemption from all "national or local" dues or taxes. It would be desirable as regards Belgium to make allowance for taxes levied by the provinces and to amend this phrase to read "national, regional or local".

In order to avoid using the French word *locaux* in two different senses in article 17 it would perhaps be preferable to use here also the expression "buildings or parts of buildings used by the mission" (*immeubles ou parties d'immeubles utilisés par la mission*).

5. The commentary on *article 21, paragraph 1*, implies that the receiving State is under an obligation to permit diplomatic missions to make use of radiocommunication installations belonging to them provided that the regulations applicable to all users of such communications are observed.

The Belgian Government can accept this provision as a general rule. In view, however, of the saturation of the wavelengths suitable for medium and long-distance communication, the Belgian authorities would not be in a position to grant diplomatic missions such permission under present conditions.

6. *Article 21, paragraph 3*: The customs treatment applicable to articles intended for official use is prescribed by draft article 27, paragraph 1 (a). It does not seem desirable to extend the inviolability of the diplomatic bag to such articles. The phrase "articles intended for official use" should be replaced by "official documents".

With reference to paragraph (2) of the commentary it should be noted that the diplomatic bag may not always take the form of a bag (sack or envelope), especially in a large consignment of documents or archives which may be transported in cases, or even by motor-lorry.

7. *Article 21, paragraph 4*: Diplomatic courier is not defined in the draft. According to generally established practice and, as indicated in paragraph (4), of the commentary, the expression "courier" should be understood to mean any person who carries a diplomatic bag and is furnished for the purpose with a document (courier's passport) testifying to his status.

8. The exception prescribed in *article 24, paragraph 3*, might perhaps with advantage be included in paragraph 2.

The reference in paragraph 1 to civil and administrative jurisdiction is doubtless intended to cover all types of proceedings before civil and administrative courts. The immunity provided by paragraph 2 is of so sweeping a nature, however, that it might be taken to apply even in the cases for which exception is made in paragraph 1.

9. The Belgian Government proposes that *article 27* should read as follows:

"1. The receiving State shall, in accordance with such regulations as it shall prescribe, grant exemption from customs duties and from all prohibitions and restrictions in respect of the import or subsequent re-export of:

"(a) Articles for the official use of a diplomatic mission;

"(b) Articles for the personal use of diplomatic agents, the administrative and technical staff of a mission and members of their families belonging to their respective households, including articles necessary to their establishment.

"2. The personal baggage of diplomatic agents shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in this article. Such inspection shall be conducted only in the presence of those concerned or in the presence of their authorized representatives.

"3. For the purposes of paragraph 1, the expression 'customs duties' shall mean all dues and taxes payable on imports or re-exports.

"4. The provisions of this article shall not apply:

"(a) To articles, traffic in which is specifically prohibited by the laws of the receiving State for reasons of public morality, safety, health or order;

"(b) To persons who are nationals of the receiving State or who engage in any professional or gainful occupation in the said State."

This proposal is made for the following reasons:

(a) The existing text is insufficiently explicit regarding the exemption which the draft is apparently intended to embody. It will be seen that, unless the expression "customs duties" is defined, such taxes or dues as may be assessed on a basis wholly unconnected with the customs principle (e.g., excise duties, consumption taxes, transfer taxes and the like) will remain applicable. Furthermore, restrictions of certain kinds (e.g., economic quotas) will not be removed.

(b) It is general practice for the receiving State to lay down regulations for the grant of customs exemption. Such regulations cover, for instance, the form of applications for exemption, the services assigned to deal with them, the import routes, etc. and, where applicable, the health formalities to be complied with, the conduct of plant pathology inspections and the like.

(c) Paragraph 1 (a) should specify "for the official use of a diplomatic mission" so as to conform with the many similar texts on the subject.

(d) Exemption is out of the question for members of the diplomatic corps who are nationals of the receiving State or who engage in a profession or gainful occupation therein.

(e) Since there can be no question of granting privileges in respect of articles, traffic in which is specifically prohibited by the laws of the receiving State for reasons of public morality, safety, health or order, a proviso to that effect should be included in article 27.

10. In view of the proposed new wording of article 27, the cross-reference in *article 28, paragraph 1*, should be confined to articles 22 to 26. The reservation proposed for article 27 could be repeated here by inserting after the words "nationals of the receiving State" the words: "and do not engage in any professional or gainful occupation therein".

Article 28, which enumerates the persons entitled to diplomatic privileges and immunities, also contains the following provisions concerning the families of diplomatic agents: "Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27".

In Belgium these privileges and immunities are granted only to the wives and children of diplomatic agents and of administrative and technical staff, and to no other members of their families.

Lastly, article 28, paragraph 1, withholds privileges and immunities from members of the family who are nationals of the receiving State. There would appear to be some danger in this restriction. It would have, for example, the effect of making the wife of the head of a mission or of a diplomatic agent liable to criminal prosecution if she happened to be a national of the receiving State. This being so, it seems advisable to stipulate that, at any rate, the wife of the head of a mission shall enjoy diplomatic immunity even if she is a national of the receiving State.

11. *Article 29* provides as follows concerning the acquisition of nationality:

"As regards the acquisition of the nationality of the receiving State, no person enjoying diplomatic privileges and immunities in that State, other than the child of one of its nationals, shall be subject to the laws of the receiving State."

This provision prompts several comments:

(1) The International Law Commission's commentary appears to restrict the scope of the article, for it states that: "This article is based on the idea that a person enjoying diplomatic privileges and immunities shall not, by virtue of the laws of the receiving State, acquire the nationality of that State *against his will*"—unless he be the child of a national of the receiving State.

The Belgian Government considers it desirable that this should be specified in the actual text of article 29.

Read out of context, article 29 might be construed as prohibiting voluntary acquisition of the nationality of the receiving State by the persons in question, which is not the intention of the authors of the draft. The difficulty could be overcome by adding the words: "unless he requests that they should be applied to him".

(2) The application of this article may give rise to difficulties in determining the nationality of a child whose father is a diplomat accredited abroad and whose mother is a national of the receiving State.

It would seem preferable to delete this exception.

The article might read as follows: "Persons enjoying diplomatic privileges and immunities in the receiving State shall not be subject to the laws in force therein concerning the acquisition of nationality unless they request that the said laws should be applied to them."

12. *Article 31, paragraph 2*: The exemptions prescribed by article 27 cease to be applicable to imports so soon as the functions of the persons entitled to the exemptions as mentioned in paragraph 1 (b) of that article and, if the reference to article 27 is retained in article 28, paragraph 1, the functions also of the persons entitled to the privileges and immunities as mentioned in article 28, paragraph 1, come to an end.

Consequently, the provision should either embody a reservation to that effect or be amended.

13. *Article 32, paragraph 1*: There can be no question of establishing any privileges or immunities in customs matters for a diplomatic agent in a third State.

However, in view of the observations made in paragraph (3) of the commentary, the draft should provide for such agents to be treated with courtesy.

This could be done by wording the paragraph as follows:

"1. If a diplomatic agent passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him every facility consistent with its national laws."

14. According to paragraph 15 of the report, the draft was prepared on the provisional assumption that it would form the basis of a convention.

There is no objection to the use of the draft for this purpose.

Since, however, some of its clauses are worded in general terms, it would seem necessary, whatever the nature of the final document, expressly to limit its application to the States signatories of that document.

B

4 February 1958

1. The wording of the first paragraph of article 26 should be amended to make it clear that the text refers only to taxes levied in the receiving State.

Furthermore, the term "indirect taxes" used in article 26 is understood in Belgium to mean taxes other than those imposed periodically on specific taxpayers in respect of a continuing situation. The concepts of direct or indirect taxation are, however, difficult to define with absolute precision and it should therefore be made clear that the exemption provided in article 26 cannot apply to such taxes as registration, court or record fees and mortgage dues and stamp duty. Nor can it apply to taxes assimilated to stamp duty (taxes on transactions) although, in Belgium, these are not generally collected from diplomatic agents.

2. In order to ensure that there is no abuse of the privilege of inviolability of the mission premises (article 16), the mission

documents (article 18), the private residence of the diplomatic agent (article 23, paragraph 1) or the diplomatic agent's papers (article 23, paragraph 2), the following paragraph 4 should be added to article 33:

"4. If documents or objects relating to a commercial or industrial activity are lodged in premises housing a diplomatic mission or in the private residence of a diplomatic agent, the head of the mission shall take all appropriate steps to ensure that the inviolability as provided in articles 16, 18 and 23 does not, in any way, impede the application of the laws in force in the receiving State in respect of the said commercial or industrial activity."

## C

12 February 1958

*Article 17: Exemption of mission premises from tax*

(a) It must be pointed out first of all that, under article 11, paragraph 1, of the co-ordinated Income Tax Acts, the tax on immovable property (as likewise the related national emergency tax) is payable by the owner, occupier, lease-holder, superfiary or usufructuary of the taxable property. This provision in no way limits the freedom of agreement between lessor and lessee; however, should the sending State assume responsibility for property taxes under a lease it would not be entitled to invoke the provision of article 17 in support of an application for exemption from such taxes, which in the circumstances would amount in practice to an increase in rent.

(b) In accordance with the consistent practice of the courts, it is made a condition of exemption from the immovable property tax and the related national emergency tax in Belgium that the immovable property in question should belong to the foreign State. In extreme cases this condition may be deemed to be met where a building is purchased by the head of a diplomatic mission recognized as acting on behalf of the sending State, which thus becomes the owner of the building. The principle is that exemption may be granted only to a foreign State. It is not possible, therefore, to agree to an exemption which would extend to immovable property purchased by the head of a foreign diplomatic mission in his private capacity. In this respect article 26, sub-paragraph (b), appears to make satisfactory provision for cases in which immovable property intended for a mission's use is purchased in the name of the head of the mission but on behalf of the sending State.

*Article 26: Exemption from taxation*

(a) The Belgian Department of Direct Taxation considers that diplomatic immunities should not, as a general rule, apply to diplomatic agents who are nationals of the receiving State. This rule is accepted by most States and is due to a desire to avoid granting undue fiscal privileges.

Although such instances must be very rare, article 30 provides for the case where the diplomatic agent is a national of the receiving State. It is therefore recommended that the nationality restriction laid down in article 28 should be applied to the diplomatic agents themselves.

(b) The text could be made more clear if it were specified in the opening words that the exemptions in question shall be accorded in the receiving State, as pointed out in the first note setting out the additional observations by the Belgian Government.

In view of the foregoing it is suggested that the opening words of article 26 might be amended to read as follows:

"Provided that he is not a national of the receiving State, a diplomatic agent shall be exempt, in the said State, from all dues and taxes, personal or real, national or local, save..."

*Article 28: Persons entitled to privileges and immunities*

The persons referred to in article 28 are exempt subject only to the condition that they are not nationals of the receiving State. Persons exempt in the receiving State, however, are not necessarily liable to taxation in the sending State. This will be the case if the sending State's fiscal laws are inapplicable to such persons either in virtue of their nationality (some States tax only the emoluments paid to their nationals who are mem-

bers of their diplomatic missions abroad) or in virtue of the nature of their functions (some States do not tax persons in the private employ of their diplomatic agents abroad other than heads of missions).

It will also be the case if the right to levy tax may not be exercised in the sending State owing to the existence of agreements for the avoidance of double taxation, many of which confer on the State in which the activity is carried on (in this case, the receiving State) the sole right to tax the emoluments of paid employees (including public officials who are not nationals of the State which pays such emoluments).

This situation may arise with reference to diplomatic agents as well as to the persons referred to in article 28, and may arise with reference to other sources of income, e.g. copyright or patent royalties, taxation of which is normally made the sole right of the State in which the recipient has his fiscal domicile—in this instance, the receiving State.

It is therefore suggested that a paragraph reading as follows should be added to article 28:

"5. In the case of the persons referred to in article 26 and in the present article (paragraphs 1 to 4), however, who are not nationals of the sending State, the exemptions provided by the said articles shall be granted only in respect of income actually taxed in the sending State."

## 4. CAMBODIA

*Transmitted by a letter dated 21 February 1958 from the Minister for Foreign Affairs of Cambodia*

[Original: French]

... The Royal Cambodian Government wishes to make the following reservations to the draft articles concerning diplomatic intercourse and immunities:

1. *Article 30*

Cambodian nationals may not be appointed members of the diplomatic staff of a foreign diplomatic mission.

2. *Article 28*

Cambodian nationals employed by an accredited diplomatic mission, as members of the administrative, technical or service staff of such a mission shall not enjoy diplomatic privileges and immunities in any part of Cambodian territory.

The jurisdiction exercised by Cambodia over such Cambodian nationals shall not unduly interfere with the conduct of the business of the accredited diplomatic missions.

## 5. CHILE

*Transmitted by a letter dated 10 March 1958 from the Permanent Representative of Chile to the United Nations*

[Original: Spanish]

...

On the whole, this Government considers that the draft has been prepared according to sound juridical criteria and that it has been carefully developed from the technical point of view. It embodies fundamentally the same principles as those stated in the Convention on Diplomatic Officers signed by the American countries at the Sixth International Conference of American States held in Havana in 1928. The purpose of the main differences between the present draft and the Convention is to adapt those principles to the new conditions brought about by changes in certain aspects of diplomatic relations.

The reforms, alterations or amplifications contemplated in the draft have taken due account of the practice adopted by States in situations for which allowance had not been made in the traditional rules. Many of these rules, which had lent themselves to differing interpretations, have been clarified and defined; new regulations have also been established to supplement existing ones or repair omissions when necessary.

Nevertheless, in view of the fundamental importance of this draft, which is designed to replace the Vienna Regulation of 1815, for the governing of international diplomatic intercourse and immunities, the Chilean Government considers that certain points should be studied in greater detail.

In the view of my Government, the following articles should receive further study for the reasons given below:

*Article 2*

"The functions of a diplomatic mission consist, *inter alia*, in:

"...  
 "(b) Protecting the interests of the sending State and of its nationals in the receiving State;

"..."

Although the article does not attempt to be exhaustive, as explained in the International Law Commission's commentary, it reproduces the practice followed by States for a very long time.

Paragraph (b) of this article states that one of the functions of a diplomatic mission is to protect the interests of the nationals of the sending State. In this respect, the Government of Chile considers that diplomatic protection should be exercised only after the ordinary remedies in the courts of the receiving State have been exhausted. There can be no doubt that diplomatic missions should protect the interests of the sending State but, in so far as its nationals are concerned, protection should consist rather in obtaining for them a guarantee of access to the ordinary courts of the country. Denial of justice alone can justify diplomatic protection. The Government of Chile therefore considers the unqualified statement of this protection in the aforesaid paragraph somewhat inadequate.

*Article 3*

"The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State."

The present drafting of article 3 might lead to the mistaken assumption that the *agrément* of the receiving State is necessary for all heads of mission, when it is only required for ambassadors and ministers, since in practice it is not necessary for *chargés d'affaires*.

The wording of the article might be changed by replacing the words "head of the mission" by the words "ambassador or minister". The following sentence might also be added: "This provision shall not apply to *chargés d'affaires*."

*Article 5*

"Members of the diplomatic staff of the mission may be appointed from among the nationals of the receiving State only with the express consent of that State."

As it stands, this article appears to admit of the possibility that a national of a third State might be appointed without the consent of the receiving State, which would be contrary to the principle that a document of this kind is intended to establish. It would perhaps be better to state that members of the diplomatic staff must be nationals of the sending State and may be nationals of the receiving State only in exceptional cases.

*Article 8*

"The head of the mission is entitled to take up his functions in relation to the receiving State when he has notified his arrival and presented a true copy of his credentials to the Ministry of Foreign Affairs of the receiving State.

"(Alternative: When he has presented his letters of credence)."

The Government of Chile is in agreement with the practical considerations given in the Commission's commentary on article 8. It deems it sufficient that the head of the mission has arrived and that a true copy of his credentials has been remitted to the Ministry of Foreign Affairs of the receiving State, there being no need to await the presentation of the letters of credence to the Head of State.

Experience has shown that a recently appointed head of mission may find himself obliged to act immediately without awaiting the presentation of his letters of credence to the Head of State. Since the times of notification of arrival and presentation of the true copy of the credentials do not always coincide, account need only be taken of such presentation.

For these reasons, the Government of Chile considers that article 8 is a great improvement, but that the points mentioned

above need clarification and the proposed alternative should consequently be rejected.

*Article 9*

"1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, the affairs of the mission shall be handled by a *chargé d'affaires ad interim*, whose name shall be notified to the Government of the receiving State.

"2. In the absence of notification, the member of the mission placed immediately under the head of the mission on the mission's diplomatic list shall be presumed to be in charge."

The Government of Chile has certain observations to make concerning the drafting of paragraph 1 of this article. It considers that the scope of this provision is somewhat restricted and that it would be advisable to specify in greater detail the type of situation that might arise from the head of the mission being unable to perform his functions, although still in the country, as in the case of leave away from the capital or sickness. Clearly it is not possible to appoint a *chargé d'affaires ad interim* if the head of mission merely leaves the capital, but such an appointment would be in order if he left the country.

On the other hand, it is not specified who should notify the name of the *chargé d'affaires ad interim* nor what procedure should be followed in case of the death of the head of the mission. In that case the *chargé d'affaires ad interim* might himself notify the fact that he has assumed the charge of the mission.

For the reasons given above, it would be preferable to delete the qualifying phrase *ad interim*.

*Article 10*

"Heads of missions are divided into three classes, namely:

"(a) That of ambassadors, legates or nuncios accredited to heads of State;

"(b) That of envoys, ministers and other persons accredited to heads of State;

"(c) That of *chargés d'affaires* accredited to Ministers of Foreign Affairs."

In sub-paragraph (c), article 10 refers to *chargés d'affaires* or officers in that category accredited to Ministers of Foreign Affairs. In practice this category, however, seems to have disappeared since at present there are only embassies and legations, and existence of a *chargé d'affaires* presupposes the subsequent appointment of an ambassador. This does not imply that he is not the head of a mission and therefore the classification in the draft is acceptable.

*Article 15*

"The receiving State shall either permit the sending State to acquire on its territory the premises necessary for its mission or ensure adequate accommodation in some other way."

The text of this article is designed to cover countries whose internal legislation does not allow foreign diplomatic missions to acquire premises for the conduct of their business. The text provides that in such cases the State shall be obliged to "ensure" adequate accommodation for the mission.

In the opinion of the Government of Chile, there seems no justification for obliging a receiving State, merely because foreign missions may not acquire property in the country, to "ensure adequate accommodation in some other way". In fact, missions may obtain accommodation under lease, without having to wait for the State to take the action provided for in the article.

The text might, perhaps, be improved if the alternative suggestions were drafted in the same terms as the first; that is if, instead of reading "or ensure adequate accommodation in some other way", it were to read "or permit adequate accommodation in some other way".

*Article 17*

"The sending State and the head of the mission shall be exempt from all national or local dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for services actually rendered."

The exemption of diplomatic missions from taxes, where the premises occupied by them are leased only, does not apply in Chile since under our system of taxation the tax on leased property is paid not by the tenant but by the owner.

From a logical standpoint the inclusion of this exemption would be feasible and useful provided that its application was limited to countries in which a tenant is subject to a direct tax.

#### Article 21

“ . . .

“4. The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial.”

The Government of Chile has no observations to make concerning the drafting of this paragraph, but is of the opinion that it might be advisable to consider extending the personal inviolability of the diplomatic courier to the captain or a member of the crew of a commercial aircraft carrying the diplomatic bag; that immunity would exist only for the duration of the journey and until the bag is delivered.

A provision of this kind would extend protection to the person responsible for carrying the official documents of States which do not employ diplomatic couriers.

#### Article 22

“1. The person of a diplomatic agent shall be inviolable. He shall not be liable to arrest or detention, whether administrative or judicial. The receiving State shall treat him with due respect and take all reasonable steps to prevent any attack on his person, freedom or dignity.

“2. For the purposes of the present draft articles, the term ‘diplomatic agent’ shall denote the head of the mission and the members of the diplomatic staff of the mission.”

The Government of Chile has no observations to make in respect of paragraph 1 of this article. However, it considers that the terminology used in paragraph 2 might constitute a somewhat undesirable departure from the Regulation of Vienna in extending the term “diplomatic agent” to include the entire diplomatic staff of the mission. It would be better to devise a more precise formula that would retain the term “diplomatic agent” for heads of mission and use another term to describe the rest of the staff.

Here, consideration might be given to the wording used in the Havana Convention, mentioned earlier, which, under article 14 (a), extends inviolability “to all classes of diplomatic officers”.

#### Article 24

“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction save in the case of:

“ . . .

“(c) An action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State and outside his official functions.”

The situation contemplated in sub-paragraph (c) of this article appears very unusual and is in any case inadmissible by virtue of the very nature of diplomatic functions.

#### Article 25

“1. The immunity of diplomatic agents from jurisdiction may be waived by the sending State.

“2. In criminal proceedings, waiver must always be effected expressly by the Government of the sending State.

“3. In civil proceedings, waiver may be express or implied. An implied waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity. The initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect of counter-claims directly connected with the principal claim.

“4. Waiver of immunity of jurisdiction in respect of civil proceedings shall not be held to imply waiver of immunity

regarding measures of execution of the judgement, which must be separately made.”

The Government of Chile considers it unnecessary to make a separate waiver of immunity regarding measures of execution of the judgement, as provided in paragraph 4. Where immunity has been waived for reasons that must have been carefully weighed by those entitled to it, the waiver should be complete, in order to ensure respect for the enforcement of judgements. Refusal to waive immunity in the final instance, when judgement is about to be enforced, would render the earlier waiver meaningless.

#### Article 26:

“A diplomatic agent shall be exempt from all dues and taxes, personal or real, national or local, save:

“ . . .

“(d) Dues and taxes on income which has its source in the receiving State;

“(e) Charges levied for specific services rendered.”

The first paragraph of the proposed article 26 states that a diplomatic agent shall be exempt from “taxes, personal or real, national or local”. Sub-paragraph (e) of the same article states that diplomatic agents must pay “charges levied for specific services rendered”.

Under Chilean administrative law, dues or charges (*tasas*) are a type of tax prescribed as remuneration for special services rendered for purposes of public utility. Consequently, the term “personal dues” used in the first paragraph of article 26 of the draft, has no meaning under our system of taxation; it would thus be impossible to indicate which are the personal dues from which diplomatic agents are exempt, and in what way they differ from the charges referred to in sub-paragraph (e), from which those officials are not exempt.

Furthermore, the Government of Chile considers that sub-paragraph (e) of article 26 should be deleted for the reasons given in connexion with article 24.

The exceptions should include taxes designed to remunerate specific services and also contributions under social welfare legislation in respect of domestic staff recruited locally.

#### Article 27

“1. Customs duties shall not be levied on:

“(a) Articles for the use of a diplomatic mission;

“(b) Articles for the personal use of a diplomatic agent or members of his family belonging to his household, including articles intended for his establishment.

“2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are very serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or in the presence of his authorized representative.”

With regard to the provisions of article 27, Chilean legislation lays down certain restrictions in matters relating to customs. Consideration might be given to a formula whereby any State may establish a quota system for the exemptions enjoyed by diplomatic officials, in which case other countries might act on a basis of reciprocity.

#### Article 28

“1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective household, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27.”

In this article as drafted there is a possibility that the words “administrative and technical staff of a mission” are somewhat ambiguous and that diplomatic immunities are extended too far. The Commission might study a formula that would render those terms more precise.

*Article 35*

"The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment and, particularly, must place at their disposal the necessary means of transport for themselves and their property."

Lastly, the Government of Chile considers that the present drafting of this article might give reason to believe that the receiving State is under an obligation in all cases to arrange for the departure of diplomatic agents; in practice at present this is done only exceptionally.

In bringing the foregoing observations to your attention, I should be glad if you would kindly forward them to the International Law Commission and, at the same time, convey the congratulations of the Chilean Government for its commendable achievement in drafting the articles under consideration.

...

## 6. CHINA

*Transmitted by a letter date 29 April 1958 from the Ministry for Foreign Affairs of China*

[Original: English]

*Article 5*

It is stated in commentary (6) under article 6 that the appointment as a member of the diplomatic staff of a person who is the national of both the sending and the receiving States also requires the express consent of the receiving State. The Government of China does not share this view. It seems to be legally unsound and arbitrary that the appointment of a person having the nationality of both States be put on the same footing as that of a person who is a national of the receiving State only, and politically unwise because such a practice would lead to controversy on the conflict of their respective laws of nationality and thus disturb the harmony between the two States. The Chinese Government is of the opinion that in case of a person having dual nationality no consent of the receiving State should be required for his appointment, although his acceptance of the diplomatic post of the sending State could jeopardize his status of nationality with respect to the receiving State. It is therefore suggested that a second paragraph be added to article 5, which reads:

"The preceding paragraph may not apply in cases where the person concerned is a national of both the sending State and the receiving State. The receiving State shall not declare him as *persona non grata* by reason of his dual nationality."

*Article 8*

Concerning the time of commencement of the functions of the head of the mission, the alternative presented in the Commission's draft is preferred. However, in case of a delayed official reception by the Head of the State, the head of the mission should be permitted to request the Minister for Foreign Affairs of the receiving State to arrange for an earlier commencement of his diplomatic activities if he so wishes.

*Article 9*

The second paragraph of the article seems to serve no useful purpose. If the post of the head of the mission is vacant or if he is unable to perform his functions, there is no question that the sending State would designate a *chargé d'affaires ad interim* inasmuch as it intends to maintain an effective and orderly representation. Failure on the part of the sending State to do so may just be presumed that no one is in charge of the mission. The question of who is to notify the receiving State of the name of the *chargé d'affaires ad interim* may be left entirely to the sending State.

*Article 22*

As mentioned in the commentary under the article, the principle of personal inviolability does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences. It may be desirable to have these exceptions to the principle of personal inviolability incorporated into the body of the article.

*Article 24*

The Government of China would suggest the deletion of paragraph 4 of the article. The jurisdiction of the sending State over its diplomatic agents shall be such as is prescribed by the law of that State, and may not necessarily be a subject to be covered in the articles concerning diplomatic immunity, which, in the opinion of the Chinese Government, is to deal solely with the immunities enjoyed by the diplomatic agents in the receiving State and, in certain circumstances, in a third State. Any rigid rule concerning this subject is not only considered undesirable but might also prove to be incompatible with the very purpose of the long-established practice of diplomatic immunity.

*Article 28*

The Government of China doubts the advisability and the necessity of adopting rules that would grant the administrative and technical staff of a mission, and members of their families, the same privileges and immunities as the members of the diplomatic staff of a mission. As a general rule, it should be sufficient that they shall enjoy immunity in respect of the acts performed in their official capacity and be exempted from dues and taxes on the emoluments they receive by reason of their employment, if they are not nationals of the receiving State. States who find it fit to grant them full diplomatic privileges and immunities may of course do so at their own will or by bilateral agreements.

It is also suggested that a definition of the term "members of family" may be useful to avoid abuse and controversy.

## 7. CZECHOSLOVAKIA

*Transmitted by a letter dated 10 March 1958 from the Permanent Representative of Czechoslovakia to the United Nations*

[Original: English]

...

(1) The Czechoslovak Government considers it desirable that section I of the draft should express the principle that all States enjoy law of legation.

(2) With a view to completeness, the Czechoslovak Government would recommend that the provisions on functions of a diplomatic mission (article 2 of the draft) be supplemented by a provision on activities serving the promotion of friendly relations among States and the development of their economic, cultural and scientific relations, and by a provision on consular activities in those cases where official consular relations are non-existent between States.

(3) The Czechoslovak Government holds that section I of the draft should also stipulate in the respective articles, besides the classes of heads of mission, also the rank and precedence of the other diplomatic staff of the mission and the right of individual diplomatic members of a mission to exercise diplomatic activities in accordance with the instructions of their Governments.

(4) This part of the draft should equally provide for the right of a mission and of the head of such a mission to use the flag and emblem of his country on the official premises of the mission, on the residence of the head of a mission and on the means of transportation used by him.

(5) With respect to section II of the draft, the Czechoslovak Government would note that the range of persons enjoying diplomatic privileges, as provided under draft article 28, is broader than that generally recognized by the regulations of international law, and the Czechoslovak Government therefore believes that the question of the accordance of immunities to non-diplomatic personnel of a mission and to the service staff and private servants should be left to the agreement of the States concerned.

(6) The Czechoslovak Government considers that it would be useful if section II of the draft contained a provision to the effect that the inviolability of the premises of the mission, of the residence of the head of mission and of the other premises occupied by the personnel of the mission does not cover the right to asylum, if there is no special agreement to that effect.

## 8. DENMARK

*Transmitted by a letter received on 5 March 1958 from the Deputy Permanent Representative of Denmark to the United Nations*

[Original: English]

[Note: The letter states that the Ministry for Foreign Affairs is in agreement with the articles other than those commented on below.]

## Article 8

The Danish Government consider that for practical reasons the receiving State should enable the head of mission to take up his functions in relation to the receiving State as soon as possible after his arrival. The remittance to the Ministry for Foreign Affairs of a true copy of his credentials should therefore be sufficient.

## Article 9

The attention is drawn to the fact that in cases where no diplomatic member of a mission is present in the receiving State a non-diplomatic member of the staff might be officially in charge of the affairs of the mission in the capacity of *chargé d'affaires*. It might be considered whether the existence of such arrangements should be mentioned in the convention, for instance in a third paragraph added to this article.

## Article 15

The Danish Government suggest to insert the words "on a non-discriminatory basis" after the words "the receiving State shall".

## Article 35

It is suggested to add the following paragraph to the article:

"The receiving State shall permit the withdrawal of the movable property of such persons with the exception of any such property acquired in the country and the export of which is prohibited at the time of departure".

## 9. FINLAND

*Transmitted by a note verbale dated 18 April 1958 from the Permanent Representative of Finland to the United Nations*

[Original: English]

The draft articles prepared by the International Law Commission seem on the whole to be acceptable and to correspond to international practice.

In article 2 concerning the functions of a diplomatic mission the word "all" could be deleted from paragraph (d), since the diplomatic mission will of course make its own choice of the lawful means by which it will ascertain conditions and developments in the receiving State.

Article 3 of the draft provides that an *agrément* be obtained for all heads of mission from the receiving State prior to their nomination. This has, however, been applied in practice only in regard to ambassadors and ministers. It would appear that as far as *chargé d'affaires* are concerned a freer procedure should be maintained.

In article 8 both alternatives mentioned have their advantages. In Finland the commencement of official functions of the head of a mission is considered to occur when he has presented his letters of credence, which is a clearly defined and indisputable moment.

It ought to be considered—as has already been done by the Commission—whether the classes of heads of mission mentioned in article 10, paragraphs (a) and (b), as accredited to heads of States should be combined, as to constitute in future a uniform class of representatives of the same rank, i.e., ambassadors (and nuncios). After the Second World War there has been an increasing tendency towards the accrediting of ambassadors in place of envoys and ministers.

In article 16, paragraphs 1 and 3, of the draft similar questions are dealt with to some extent. Paragraph 3 appears somewhat superfluous, since it has been stipulated in paragraph 1 that the premises occupied by the mission shall be inviolable

and that agents of the receiving State shall not enter these premises without the consent of the head of the mission. It is difficult to understand how any search as prohibited in paragraph 3, or any measures of attachment or enforcement could be performed. The latter paragraph should in fact be interpreted as a modification of the preceding paragraph in certain individual cases, but the intention may have been to refer here to certain known events. In any event, it would be desirable to re-formulate article 16 in such a way that its paragraphs 1 and 3 were more closely connected.

In article 21, paragraphs 2 and 3 should perhaps be amalgamated, preferably in such a manner as to determine the permissible contents of the diplomatic bag and to add the remark that it (as such) is protected. Paragraph 4 of article 21 stipulates that the diplomatic courier shall enjoy personal inviolability, and that he may not be subjected to arrest or detention. It should of course be considered of the utmost importance that diplomatic mail and other official parcels may, by using a diplomatic courier, be forwarded to destination with promptness and reliability. But if such a courier makes himself guilty of a felony during his journey or becomes dangerous to those in his vicinity, it seems natural that in the former instance he might be detained for a short period for interrogation and, in the second, that persons necessary to guard him should be appointed for as long as he is within the boundaries of the State in question, without in any way interfering with the diplomatic bag in such instances. This could be mentioned at least as a suggestion in the commentary to the article under discussion, even if it bears on exceptional cases which are not as a rule discussed in drafts of codification.

Article 24, paragraph 4: Whether the diplomatic agent is, and to what extent, under the jurisdiction of the sending State, whose national he is as a rule, is above all an internal problem of this State, which is decided in accordance with the rules of international law pertaining to the individual as applied by the State in question. The criminal law of numerous States does not provide for crimes committed abroad—or does so only to a limited extent in exceptional cases, nor are the courts always competent to hear even civil disputes which are the consequence of juridical acts performed abroad. It seems difficult to force States to modify their laws, even where diplomatic agents are concerned, and it emerges from the commentary to the draft under discussion, as well as from the International Law Commission's records of discussion, that this is by no means the intention. The significance of the paragraph will therefore remain limited in any event. It would not seem desirable that the last clause goes so far as to mention what courts shall be competent to deal with the matters in question, if they are not designated under the laws of that State.

Article 28, paragraph 1, shows that members of the family of a diplomatic agent cannot demand for themselves any diplomatic privileges and immunities if they are nationals of the receiving State. To deprive them of all privileges on this basis does, however, seem unreasonable, especially when the wife of the diplomatic agent is in question. It would not seem recommendable that the administrative and technical staff of a mission lose all privileges and immunities on the same basis, while the domestic staff of the mission, in accordance with paragraph 2 of the article, are allowed certain minimum rights irrespective of their nationality. Paragraphs 3 and 4 of the same article, concerning the legal status of personal servants of diplomatic agents, and particularly their exemption from taxes, should be amalgamated, in the same way as in paragraph 2 of the article, where problems associated with the legal position of the whole domestic staff of the mission are treated.

According to article 29 of the draft, nationality laws of the receiving State should not be applied to persons enjoying diplomatic privileges and immunities, except for the children of nationals of the receiving State. This exception, at least in such categorical form, seems doubtful. The general rule is that children of diplomatic agents who are born in countries adhering to the *jus soli* principle, do not acquire the nationality of the State in question. If the spouse of a diplomatic agent—usually a woman—is a national of the receiving country, and the diplomatic agent himself belongs to a country in which

*jus sanguinis* rules are applied, an application of the *jus soli* rule would result in obvious unfairness.

In paragraph 5 of the commentary on article 30 it is stated that the article concerning immunity from jurisdiction of a diplomatic agent who is a national of the receiving State indirectly implies that members of the domestic staff of a mission, who are nationals of the receiving State, should also be allowed no privileges or immunities other than those granted to them by the receiving State. This stipulation is, however, at variance with article 28, paragraph 2, of the draft, which states that such persons should in any event be granted such immunity as is necessary in respect of acts performed in the course of their duties. Nationals of the receiving State lose exemption from taxes only in respect of emoluments received from the mission.

It emerges from the commentary to article 31 that the time confirmed by paragraph 1 of this article from which diplomatic privileges and immunities are considered to have commenced is not always applicable to persons who derive their entitlement from persons entitled to privileges and immunities in their own right. Because of this the said paragraph is in need of more precise formulation. Paragraph 3 of article 31 prohibits the withdrawal from the receiving State of movable property in the event of the death of a diplomatic agent or of a member of his family, if such property has been acquired in the receiving State and if its export was prohibited at the time of death. Such a strict provision appears unreasonable, particularly if no export prohibition had existed at the time when the property was acquired.

Article 36, paragraph (c). Since it is the general international custom to apply for the agreement of the receiving State before a third State can undertake these functions and proceed to fulfil them, it would be preferable to use in the text the clear and accurate formula *accepté par* (and not *acceptable pour*), as has been suggested by the International Law Commission. A corresponding modification should perhaps be made also in paragraph (b) of article 36.

#### 10. ITALY

*Transmitted by a letter dated 18 April 1958 from the Permanent Delegation of Italy to the United Nations*

[Original: French]

The Italian Government states that it is, in general, in agreement with the draft articles concerning diplomatic intercourse and immunities, prepared by the International Law Commission during its ninth session from 23 April to 28 June 1957, and has the honour to submit the following observations and proposals:

##### Article 4

This article should, it is proposed, be amended to read:

"Subject to the provisions of articles 5, 6 and 7, the sending State may freely appoint the other members of the staff of the mission; before sending them to the territory of the receiving State, however, it shall notify the latter of the appointment. The receiving State may take cognizance of the appointment either expressly or tacitly."

##### Article 6

It is proposed that the last part of paragraph 2 be amended to read:

". . . the receiving State may refuse to recognize the person concerned as a member of the mission and may make an expulsion order against him."

##### Article 8

The alternative given in the draft is considered preferable: "when he has presented his letters of credence".

##### Article 10

The term "internuncios" should be added under (b).

##### Article 12

It is proposed that in paragraph 1 the following phrase should be omitted: "either of the official notification of their arrival or".

It is considered desirable that an article 12A should be inserted in these terms:

"The heads of mission accredited to the same State form the diplomatic corps.

"The diplomatic corps performs the functions which it is recognized to possess by international usage, and it is represented for all purposes by its doyen.

"The doyen is the senior head of mission or, in countries in which precedence is granted to the Holy See, the Apostolic Nuncio."

##### Article 15

It is proposed that this article should be amended to read:

"The receiving State shall permit the sending State to acquire on its territory the premises necessary for its mission. In any case, if the sending State should not wish or should be unable to exercise this right, the receiving State shall ensure adequate accommodation for the mission in some other way."

##### Article 17

This article should, it is proposed, be amended to read:

"No national or local dues or taxes shall be levied in respect of the premises of the mission other than such as represent payment for services actually rendered."

##### Article 18

It is proposed that this article should be amended to read:

"The archives and documents of the mission shall be inviolable, wheresoever they may be."

##### Article 21

Paragraph 2 should contain a definition of the diplomatic bag, especially since the definition contained in the commentary is not satisfactory, for it does not make any reference to seals or to the external identification marks which the bag should always bear.

It should also be provided that the sending State is under a duty to communicate to the receiving State an advance description of its diplomatic bags, and to address the bags invariably to the head of mission in person.

##### Article 24

It is proposed that paragraph 2 be amended to read:

"A diplomatic agent is not obliged to give evidence concerning questions which are in any manner whatsoever connected with his duties. In other cases, he may not be summoned to appear before the judicial authority. If it should be necessary for the local judicial authority to take a deposition from the diplomatic agent, the said authority shall proceed to his residence in order to receive his statement orally, or the said authority shall delegate a competent official for this purpose, or else shall request the agent to make the statement in writing."

##### Article 25

It is proposed that paragraph 1 be amplified by the addition of the following:

"The head of mission may waive the immunity of members of his staff from jurisdiction on his own authority."

##### Article 26

Sub-paragraph (a) should, it is proposed, be amended to read:

"Dues and taxes levied in payment of services actually rendered."

##### Article 27

The following should be added at the end of paragraph 1:

"The receiving State may nevertheless place reasonable restrictions on the number of articles imported for the uses specified in (a) and (b)."

##### Article 28

The extension of diplomatic privileges and immunities to cover members of the administrative and technical staff of the mission or to members of a diplomatic agent's family conflicts with international usage and is entirely unacceptable to the Italian Government. The privileges and immunities in question

should be restricted to the officials whose names appear in the diplomatic lists.

#### Article 30

This article should, it is proposed, be amended to read:

"A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction and any other privilege or immunity which is strictly related to the exercise of his functions. He shall also enjoy such other privileges and immunities as may be granted to him by the receiving State."

#### Article 31

Paragraph 1 should, it is proposed, be amended to read:

"A diplomatic agent shall enjoy the privileges and immunities to which he is entitled from the moment he enters the territory of the receiving State on proceeding to take up his post, provided that the formality of *agrément* referred to in article 3 or that of notification referred to in article 4 [Italian Government's text] has been satisfied. If he is already in the territory of the receiving State, he shall enjoy the said privileges and immunities on the satisfaction of the aforesaid formalities."

#### Article 33

It is proposed that paragraph 1 be amended to read:

"Without prejudice to their diplomatic privileges or immunities it is the duty of all diplomatic agents to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

"The members of the administrative or technical staff of the mission shall be bound by the same duties."

#### Article 36

It is proposed that sub-paragraph (c) should be amended to read:

"The sending State may entrust the protection of the interests of its country to the mission of a third State acceptable to the receiving State."

## 11. JAPAN

*Transmitted by a note verbale dated 6 February 1958 from the Permanent Representative of Japan to the United Nations*  
[Original: English]

### I. General

The Government of Japan are deeply appreciative of the contribution made by the International Law Commission in drawing up the draft articles concerning diplomatic intercourse and immunities. The Japanese Government, considering that the present subject constitutes an important field of the international law to be codified, are ready to co-operate in every possible way to promote its codification now being carried on by the United Nations. It is sincerely hoped that the International Law Commission will at its tenth session examine especially the points mentioned below, and will continue to exert still further efforts with the view to concluding a multilateral treaty on the subject.

### II. Article by article comments

#### Section I. Diplomatic intercourse in general

##### 1. Articles 1-6

The classification of the members of a diplomatic mission into several distinct categories is an extremely important point of the whole system proposed by the present draft articles, in so far as different privileges and immunities are accorded according to this classification (see article 28).

Hence it would be desirable to have the "members of the diplomatic staff", the "members of the administrative and technical staff", and the "members of the service staff" and "private servants" more precisely defined in the articles themselves.

(In establishing these definitions, it would be necessary to take into consideration both the status of a member under the laws of his own country and the functions actually performed

by him in a mission. For example, under the present draft articles, it is natural to assume that, as distinguished from diplomatic agents, those who perform low-grade duties, such as janitors and chauffeurs, belong the "service staff". However, under the Japanese laws all such persons are given the uniform status of regular public service or full-time government official. Therefore the status under national laws alone cannot always provide adequately the basis for classification of the members of the diplomatic, administrative and technical staffs and the members of the service staff.)

##### 2. Article 7

It is hoped that a statement will be inserted in the commentary to this article that it would be desirable to make the size of the missions exchanged correspond in principle to each other.

##### 3. Article 8

The alternative that "when he has presented his letters of credence" is more desirable.

#### Section II. Diplomatic privileges and immunities

##### 4. Articles 15 and 16

It is desirable that the meaning and scope of "mission premises" be clarified.

(The term "premises" could be interpreted as either (a) only the official residence of an ambassador or a minister, and the chancellery; or (b) all accommodations (including housing facilities for the members of a mission) owned or leased for diplomatic purposes by a sending State; or (c) all accommodations used for diplomatic purposes (including private dwellings of diplomatic agents).)

##### 5. Article 16

The provision in the first paragraph may be too absolute. It seems desirable to include, at least, a provision in the article itself to the effect that the head of a mission is under an obligation to co-operate with the authorities of a receiving State in case of fire or an epidemic or in other extreme emergency cases.

##### 6. Article 17

Whatever the meaning of "mission premises" may be (see comment 4 above), article 17 might be interpreted to mean that the mission premises are exempt from indirect taxes from which the diplomatic agents are not exempt by virtue of article 26. (For example, it would hardly be proper to interpret this article so as to exempt diplomatic agents from taxes on electricity and gas used in their chancellery while they are not exempt from such taxes on gas and electricity used in their private dwellings.)

Under the Convention on Privileges and Immunities of the United Nations, the United Nations, its assets, income and other property enjoy exemption only from all direct taxes.

##### 7. Article 21

(a) The right of consulates to communicate by means of diplomatic bag or diplomatic courier is not yet established in international law.

(b) In view of the present situation of the frequency assignment, it is difficult to approve the use of wireless transmitter by a diplomatic mission every case.

(c) In paragraph 4 of the commentary, there is a statement concerning the captain of a commercial aircraft to whom the diplomatic bag is entrusted. Such persons should not be treated as diplomatic couriers in every case.

##### 8. Article 23

(a) In relation to article 15, it is necessary to clarify the meaning and scope of "private residence" as distinguished from mission premises. For example, it is not clear whether the term "private residence" includes housing facilities for the members of the mission furnished by a sending State.

(b) The provision of the first paragraph of this article is considered to be too absolute as in the case of article 16, paragraph 1, if not even more so. This is especially so in the case of private residences of the members of the "administrative and technical staff" of a mission.

(c) The provision of paragraph 2 should not be applied to immovable property held by a diplomatic agent in his private capacity.

#### 9. Article 24

(a) It is desirable that this article be interpreted to provide that immovable property held by a diplomatic agent in his private capacity under article 24, paragraph 1, sub-paragraph (a), does not include his own dwelling held in his private capacity. (This subject is connected with article 23.)

(b) It is desirable that the term "execution" used in this article be interpreted to include both administrative (against a delinquent taxpayer, for example), as well as judicial executions. These measures, of course, can only be taken without infringing the principle of inviolability of diplomatic agent's person and his residence.

#### 10. Article 26

(a) Clarification of the meaning of "indirect taxes" is desirable.

(b) Clarification of the meaning of "source" is desirable.

#### 11. Article 27

(a) Clarification of the meaning of "customs duties" is desirable.

(b) Clarification of the meaning of "personal baggage" is desirable.

(c) It is desirable to modify this article so that an inspection might also be conducted even though without "very serious" grounds.

(d) It is desirable to modify this article so that it may be possible to restrict or prohibit the use of the articles imported without customs duties for purposes other than those for which they were imported, such as resale of these articles to persons not entitled to diplomatic immunities.

#### 12. Article 28

As regards the "members of the service staff", it is desirable to make the necessary modification so as to grant them, regardless of their nationality, only the same privileges and immunities accorded to "private servants" under the present draft articles. (Especially in case of the "members of the service staff" who are nationals of a receiving State, the receiving State might find it most difficult to grant, as provided in the present draft articles, immunities in respect of acts performed in the course of their duties.)

#### 13. Supplementary remark

It is hoped that provisions will also be made in the course of the Commission's next session concerning the delivery of diplomatic passports and the granting of diplomatic visas. Such passports and visas provide practically the sole basis for granting privileges and immunities at the custom upon entering or leaving a country. This point concerns not only the normal diplomatic personnel treated in the present draft articles, but also the officials of a Foreign Office on an official mission and the official delegates to international conferences.

### 12. JORDAN

*Transmitted by a letter dated 24 September 1957 from the Permanent Representative of Jordan to the United Nations*  
[Original: English]

I am directed by my Government to inform you that my Government considers the provisions of the draft articles as covering the requirements.

### 13. LUXEMBOURG

*Transmitted by a note verbale of 7 February 1958 from the President of the Government and Minister for Foreign Affairs of Luxembourg*  
[Original: French]

On the whole, the Luxembourg Government can fully approve the draft articles prepared by the International Law

Commission. It considers that the Commission's work is a distinguished contribution to the unification and development of international law in a sphere which is of great practical importance to Governments.

The following remarks apply only to a few points of details and to certain choices which had been left open in the Commission's text. The Luxembourg Government would also like to raise a preliminary question of more general scope as well as a further question dealing with social legislation.

#### *Preliminary question*

In drawing up the articles of the draft, the International Law Commission dispensed with any kind of general principle in order that it might devote itself to reaching a positive solution to the main questions of a concrete nature which arise in connexion with diplomatic relations. This method is entirely commendable since to lay down principles which are unduly general could lead to considerable difficulties. Nevertheless, it would seem essential to indicate clearly (e.g. in the preamble to the convention which would give definitive form to the subject matter) that the articles do not represent a complete and exhaustive regulation of all the questions which may arise in actual practice. This would prevent the exclusion of recourse to general principles of law, to international custom and to the legal and administrative practices of States in cases where the rules finally adopted in the convention did not offer a positive solution.

For instance, the draft articles include no general rule concerning the domicile of the diplomatic agent. Is this domicile fixed at his place of actual residence or does it continue to be legally fixed in his country of origin? The question is important because domicile constitutes the criterion of permanent abode for the application of a large number of rules of law, with respect not only to jurisdictions (article 26 of the draft) or to the acquisition of nationality (article 29), but also to the application of civil law and, especially, to judgement of the validity of civil documents which the diplomatic agent may have to draw up at his place of residence. This example shows that, although the draft settles a large number of practical matters, it is still not completely exhaustive and room must be left for supplementary solutions.

#### *Article 2*

Sub-paragraph (a) of this article states that the functions of a diplomatic mission consist in "representing the Government of the sending State in the receiving State". This formula raises an important question of principle. The function of a diplomatic mission consists not only in representing the Government of the sending State, i.e., the executive branch, but also the State as a whole. It is precisely this notion which is expressed in the traditional formula that diplomatic agents represent the Heads of States, it being understood that the person of the Head of State, which is generally above the divisions between the organs of power, represents the unity of the State as a whole.

It would therefore be more correct to say that the functions of a diplomatic mission consist in "representing the sending State in the receiving State".

#### *Article 8*

As regards the commencement of the functions of the head of the mission, the International Law Commission mentions an alternative course. The Government of Luxembourg prefers the solution proposed by the Commission itself, considering it to be the most practical one. It considers that the head of the mission should be able to take up his functions when he has presented a copy of his credentials to the Ministry for Foreign Affairs.

#### *Article 12*

The Government of Luxembourg has no preference as between the two methods mentioned in paragraph 1 of this article for determining precedence of heads of missions. Either alternative would appear to be acceptable, yet it believes that the solution proposed in article 8 (commencement of the mission) should be made to coincide with the criterion selected in article 12 (precedence of heads of mission).

*Article 16*

The Luxembourg Government considers that the matter discussed in paragraph 4 of the commentary (carrying out public works) should be settled by a special clause in the actual text of article 16. Since the provisions of this article are very specific, it would not seem possible, in the event of litigation, to win acceptance for the considerations set forth in the commentary over the explicit text of the convention.

*Article 17*

The application of this article might give rise to disagreements, since the delimitation between "such (taxes) as represent payment for services actually rendered" and general taxes does not appear to be the same in all countries. Certain benefits (e.g. police protection, lighting or cleaning of public thoroughfares) are apparently considered in some countries as services which give rise to remuneration, whereas in other countries these measures are public services covered by the general tax. In such cases, therefore, it would seem that the criterion for making a distinction must be the specific nature of the services and not that of services "actually rendered", since any public service is actually rendered. This is in fact the criterion which the Commission has selected elsewhere, i.e., in article 26 (e), which is concerned with "charges levied for specific services rendered". The same formula should be adopted in article 17.

*Article 24*

Paragraph 1 of this article makes a distinction between immunity from criminal, civil and administrative jurisdiction. This enumeration not only appears to be superfluous, but also carries with it the danger of a restrictive interpretation. In some countries there are still other types of jurisdiction besides the three forms listed above, including commercial courts, labour jurisdictions and social security jurisdictions, which are neither civil nor administrative. It would therefore be more advantageous to lay down the general rule of immunity from jurisdiction at the outset, without further specification, and to let it be followed by the three exceptions listed under (a), (b) and (c). It should be specified in (b), which deals with actions relating to successions, that the succession must be one which is opened in the receiving country, in order to prevent the possibility of the diplomatic agent being sued in that country, by reason of his residence, in connexion with a succession opened in his country of origin or in another country.

Paragraph 4 states that the immunity from jurisdiction enjoyed by the diplomatic agent in the receiving State does not exempt him from the jurisdiction of his own country. In order that this provision may be applied, it is necessary, however, that a court of the country of origin should be competent under its laws. Therefore, if under the legislation of that country the court of the country of residence was competent, the parties concerned would not be able to bring any jurisdiction into operation, since in the receiving country they would be faced by the diplomatic immunity of the defendant and in the sending country there would be no jurisdiction competent to settle the dispute. In order to fill this gap, which is detrimental to the interests of third parties, it would seem desirable to include a provision assigning competence in such a case to the courts of the sending State, notwithstanding any provision to the contrary in the laws of that State.

On the other hand, it would seem advisable to point out in this article that the Government of the receiving State always has the right, in the interest of persons under its jurisdiction, to approach the mission or Government concerned when immunity from jurisdiction is applied. Such right of political action might appear to be automatic in this case; nevertheless, it would seem advisable to make express reservations covering this possibility, in order to prevent a mission or a Government from being able to invoke immunity from jurisdiction as grounds for refusing even to engage in discussions with the receiving Government concerning the possibilities of an amicable arrangement.

In view of these considerations, the Luxembourg Government proposes that the last part of this article should be reworded as follows:

"4. If, under the provisions of the internal law of the sending State, the diplomatic agent is subject to the juris-

dition of the receiving State and the sending State does not waive the immunity from jurisdiction of the agent, the latter shall be subject to the jurisdiction of the sending State, notwithstanding any provision to the contrary in the law of that State. In such case, the competent court shall be that of the seat of the Government of the sending State.

"5. Immunity from jurisdiction shall be without prejudice to the right of the Government of the receiving State to approach the mission or Government having jurisdiction over the agent concerned for the purpose of protecting its interests or those of its nationals."

*Article 25*

Application of this article could give rise to practical difficulties, since it is not very clear in each case who has the right to waive immunity and who may validly notify the waiver to the jurisdictions. The difficulty originates in the fact that the diplomatic agent is the sole qualified representative of the sending State in the receiving State and it is therefore difficult to see who, except the diplomatic agent himself, could notify a waiver on behalf of the sending State. The text proposed by the Commission carries with it the danger that immunity may be invoked in proceedings initiated or consented to by a diplomatic agent on the pretext that the waiver was his personal action and not the action of the sending State. Such an attitude would be contrary to good faith.

Accordingly, the Luxembourg Government proposes that article 25 should be drafted as follows:

First, the general principle should be laid down that immunity may be waived by the sending State. This principle should be accompanied by a statement that the diplomatic agent is presumed to be qualified to notify such waiver. Secondly, it should be required that the waiver be expressed in the case of penal proceedings, whereas it may be implicit in all other proceedings.

If the Commission felt that this presumption might lead to further difficulties, it would be well to consider a variant under which certain limitations would be placed on the retracting by the Government concerned of a waiver made by its agent.

It should also be pointed out that the distinction drawn between criminal jurisdiction (paragraph 2) and civil jurisdiction (paragraph 3) is not exhaustive, since there are still other types of jurisdiction, as mentioned above in connexion with article 24. A general residual category must therefore be opposed to the category covered by paragraph 2 (penal jurisdiction).

In accordance with these comments, the Luxembourg Government is pleased to submit the following to the Commission:

"1. The immunity of diplomatic agents from jurisdiction may be waived by the sending State. Diplomatic agents shall be presumed to be competent, in proceedings in which they are concerned, to notify the waiver on behalf of the sending State.

"(Variant: The immunity of diplomatic agents from jurisdiction may be waived by the sending State. Diplomatic agents shall be competent, in proceedings in which they are concerned, to notify the waiver on behalf of the sending State. The Government of the sending State shall not revoke the waiver unless it can show that the diplomatic agent was not free when he made the waiver or that the waiver is prejudicial to the interests of the sending State).

"2. In penal proceedings, the waiver must always be effected expressly. In all other cases, the waiver may be express or implied. An implied waiver is presumed to have occurred," etc. (the rest of the text unchanged, except that paragraph 4 becomes paragraph 3).

*Article 26*

This article, which deals with exemption from taxation, calls for a number of comments.

(a) *Indirect taxes.* The Government of Luxembourg considers that the exemption from indirect taxes, including excise duties, should be granted as a matter of principle, but subject to a limitation: it does not appear feasible to grant a reimbursement in respect of duties incorporated in the price of

goods if such goods are circulating freely at the time of purchase.

(b) *Taxes on immovable property.* The Luxembourg Government approves the solution proposed by the Commission, except that the words "and not on behalf of his Government for the purposes of the mission" seem to be superfluous.

(c) *Estate, succession or inheritance duties.* The effect of this provision would be to make the tax system of the receiving State applicable to estates, successions or inheritances left by the diplomatic agent or by the members of his family who live with him. This seems absolutely inadmissible. The Luxembourg Government believes that, as a matter of principle, tax immunity should be recognized in respect of estates, successions and inheritances, but that the immunity should be limited by an exception applying to immovable property situated in the receiving country and to movable assets, except the furniture and personal effects of the diplomatic agent and his family, situated in the same country.

(d) This paragraph should mention, in addition to income which has its source in the receiving State, property which is situated in that State, in order to cover the case of a tax on capital of funds invested by the diplomatic agent in the receiving country.

(e) This provision can be approved.

In consequence of these comments, the Government of Luxembourg proposes that the text of article 26 should be amended as follows:

"1. A diplomatic agent shall be exempt from all dues and taxes, personal or real, national or local, save:

"(a) Dues and taxes on private immovable property, situated in the territory of the receiving State, held by the diplomatic agent in his private capacity;

"(b) Dues and taxes on income which has its source in the receiving State and on property other than the furniture and personal effects of the diplomatic agent and his family which is situated in the said State;

"(c) Charges levied for specific services rendered.

"2. The exemption provided in the first paragraph does not include reimbursement of indirect taxes incorporated in the price of goods which are circulating freely at the time of purchase.

"3. Exemption shall be granted in respect of estate, succession or inheritance duties, except in the case of immovable property situated in the territory of the receiving State and movable property, other than the furniture and personal effects of the diplomatic agent and his family, which are situated in that State. This regulation shall be applicable to estates, successions or inheritances left or inherited by the diplomatic agent by the members of his family who live with him."

#### Article 28

The provisions of this article appear to be fully acceptable. Paragraph 2, however, will give rise to much difficulty in practice. The question is the extent to which violations of traffic regulations by chauffeurs of diplomatic missions can be considered as acts performed in the course of duty. The Luxembourg Government considers that such acts are not performed in the course of duty and, whatever the opinion of the Commission may be on this matter, it would like a clear decision in the commentary.

#### Article 30

The Government of Luxembourg believes that the effect of the second sentence might be to give rise to unjustified claims against Governments which did not desire to grant to their own nationals who have been appointed diplomatic agents by third States any privileges other than immunity from jurisdiction for acts performed in the exercise of their functions. The Luxembourg Government therefore believes that this sentence should simply be deleted. Deletion would in no way affect the possibility of granting further privileges by unilateral decision of a State which desired to grant them.

#### Article 33

Paragraph 4 of the commentary might give rise to erroneous interpretations. The example cited in these explanations might give the impression that the granting of the right of asylum would be a legitimate use of the mission premise only if there was a specific convention regulating such grant. The Government of Luxembourg believes that clarification of the commentary is imperative.

#### Further question: application of social legislation

The Government of Luxembourg believes that the convention should provide an answer to a question which is giving rise to an increasing number of difficulties as various countries progressively develop their social legislation and, especially, their social security legislation. In order to situate the question properly, a distinction should be made between the effect of such legislation on the diplomatic staff of missions and its effect on diplomatic missions or the agents of such missions in their relations with subordinate staff in respect of the obligations which may devolve upon them in their capacity as employers.

1. In the case of the diplomatic agents themselves and of administrative and technical staff, there would appear to be no doubt as to exemption from social legislation, without prejudice to such agents being covered by the security systems of their countries of origin.

2. On the other hand, it seems advisable that social legislation should continue to apply to service staff members and private servants who are nationals of the receiving country or who had their residence there before taking up employment; for practical purposes, this means locally recruited staff. If this solution were accepted, the employer would have to assume the obligations incumbent upon employers (declaration and payment of contributions). It would matter little whether the capacity of employer was assumed by the mission as such or by a diplomatic agent personally. In other words, this arrangement would consist of requiring diplomatic missions to observe the social welfare conditions in force at the place of their mission whenever they were recruiting staff at that place.

The provision in question could be worded as follows:

#### Additional article

"1. The persons mentioned in article 28, paragraph 1, shall be exempt from the social security legislation in force in the receiving State.

"2. Members of the service staff of the mission and private servants of the head or of members of the mission are subject to the social security legislation in force in the receiving State if they are nationals of that State or if they had their residence in the territory of the receiving State before taking up employment. In this case, the employer is bound to comply with the obligations inherent in his capacity as such."

#### 14. NETHERLANDS

Transmitted by a letter dated 26 March 1958 from the Permanent Representative of the Netherlands to the United Nations

[Original: English]

#### Introduction

The Netherlands Government has studied with interest the draft articles formulated by the International Law Commission under the title of "Draft articles concerning diplomatic intercourse and immunities". It agrees with the Commission that the subject of diplomatic intercourse and immunities constitutes a suitable topic for codification. It is of the opinion that the Commission's draft articles form an excellent basis for such codification.

The Netherlands Government subscribes to the view that all the aspects of this comprehensive subject should not be regulated in one single convention but that in particular the rules governing "ad hoc diplomacy" and consular relations should be laid down in separate conventions. The same applies

to the relations between States and international organizations and to those between the organizations themselves. Unlike the Commission, the Netherlands Government is, however, of the opinion that already now the need is felt for a regulation of the latter type of relations, partly also as a result of the development of the *jus legationis* of international organizations such as the European Coal and Steel Community, and it would appreciate it if the Commission would request its rapporteur to include this subject in his studies.

### I. General observations

#### 1. Application of the articles in time of war

The Netherlands Government is of the opinion that, in principle, the draft articles are only intended for the regulation of diplomatic intercourse in time of peace and that certain provisions, such as those of paragraph 2 of article 31 and of article 35, govern the transition from peacetime to wartime conditions. The Netherlands Government will enter more deeply into this matter in its comments on article 36. It is of the opinion that the relations between belligerents are governed by the law of war but that the draft articles continue to apply to the relations between belligerent and neutral States and between neutral States themselves. The Netherlands Government thinks that it is advisable that a paragraph dealing with this problem should be inserted in the commentaries to the articles.

#### 2. Reciprocity

The Netherlands Government is of the opinion that, although it will not be possible to adhere to the principle of reciprocity in its strictest sense when rules are laid down governing diplomatic relations, this principle is nevertheless the keynote of any regulations of this kind. The Netherlands Government therefore wonders whether it would not be appropriate to insert a general provision embodying the principle of reciprocity without, however, making the observance of a strict reciprocity a condition for diplomatic intercourse. Such a provision should in particular serve as a basis for a satisfactory application of article 7.

#### 3. Reprisals

The Netherlands Government takes the view that the articles of the Commission's draft do not interfere with the possibility of taking reprisals in virtue of the relevant rules of general international law.

#### 4. Emergency law

The Netherlands Government is of the opinion that the privileges and immunities that have been granted to the diplomatic missions and their staffs do not preclude the taking of special measures by the receiving State in emergencies. In such cases the receiving State will be able successfully to invoke *force majeure* against the sending State. Such cases may occur in particular in connexion with the application of articles 16 and 22, so that it is advisable to insert an observation to this effect in the commentaries to these articles.

#### 5. Relationship between the convention and the commentaries thereto

In spite of the great authority that may be attached to the commentaries which the Commission has submitted with its draft articles, these commentaries have no force of law. The Netherlands Government is therefore of the opinion that the principles mentioned in the commentaries which should be accorded force of law should be embodied in the articles themselves, and would therefore suggest that the Commission review its text in this respect.

#### 6. Definitions

The Netherlands Government is of the opinion that it is to be recommended to have the draft articles preceded by an article containing definitions, running as follows:

##### "Articles containing definitions"

"For the purpose of the present draft articles, the following expressions shall have the meanings herewith assigned to them:

"(a) The 'head of the mission' is a person authorized by the sending State to act in that capacity;

"(b) The 'members of the mission' include the head of the mission and the members of the staff of the mission;

"(c) The 'members of the staff of the mission' include the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

"(d) The 'diplomatic staff' consists of the members of the staff of the mission authorized by the sending State to engage in diplomatic activities proper;

"(e) A 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;

"(f) The 'administrative and technical staff' consists of the members of the staff of the mission employed in the administrative and technical service of the mission;

"(g) The 'service staff' consists of the members of the staff of the mission in the domestic service of the mission;

"(h) A 'private servant' is a person in the domestic service of the head or of a member of the mission."

If this article should be adopted, the word "other" before "members" in article 4 could be deleted, in article 5 the term "diplomatic agent" could be used and paragraph 2 of article 22 could be cancelled.

#### 7. Terminology

The Commission has not always been consistent in the terminology used. For instance, the terms "member of the mission" and "member of the staff of the mission" are sometimes interchanged. In the title and in article 32 the term "immunities" is used whereas elsewhere the expression "privileges and immunities" is used. In the articles the expressions "immunity from jurisdiction" and "exemption from taxation" are used, whereas in the commentary to article 24 reference is made to "exemption from jurisdiction". In the opinion of the Netherlands Government it would add considerably to the clarity of the draft if a uniform terminology were used both in the articles and in the commentaries.

### II. Comments on individual articles

#### Article 2

In the commentary to this article attention should be paid to the position of a foreign trade representation. In the Netherlands Government's view the question whether or not a trade representation belongs to the diplomatic mission must be answered in the light of the internal organization of the mission concerned; the receiving State should rely on the information given by the sending State in this respect, unless it is clear that the information supplied is completely fictitious and that the person concerned can in actual fact in no way be regarded as having a diplomatic function.

#### Article 4

The Netherlands Government is of the opinion that it should be made obligatory on the sending State to notify the receiving State of the arrival and departure of any member of the mission and of personnel, even in the case of local personnel. Such an obligation would be consistent with the practice existing in various countries. Therefore the Netherlands Government is of the opinion that the following should be added to article 4:

"The arrival and departure of the members of the mission, together with the members of their households, shall be notified to the Ministry for Foreign Affairs of the receiving State. Similarly, a notification shall be required for members of the mission and private servants engaged and discharged in the receiving State."

#### Article 7

The words "reasonable and customary" in paragraph 1 refer to two criteria that may come into conflict with each other. The criterion is not what is customary but what is reasonable, on the one hand in the light of the needs of the sending State, and on the other in the light of the conditions prevailing in the receiving State. Therefore the words "and customary" should be deleted.

In paragraph 2 the words "and on a non-discriminatory basis" should be deleted. In the Netherlands Government's view the principle of non-discrimination is a general principle on which the application of all the draft articles should be based. By

making it obligatory to observe the principle of non-discrimination in respect of certain individual cases, the impression might be created that this principle should apply only or in particular to these cases, which would be contrary to the general nature of this principle.

The Netherlands Government is further of the opinion that article 7 should be supplemented by adding the provision that the sending State may not—prior to the consent of the receiving State—establish offices in places other than the place where the mission is established. Such a provision would be in conformity with the practice followed in various countries.

#### Article 8

In view of the fact that practice differs from State to State and that both systems have their merits and demerits, the Netherlands Government would suggest that it should be for the receiving State to decide which of the two methods embodied in article 8 should be adopted.

#### Article 12

It is to be recommended to substitute the words “the rules prevailing” for the expression “the rules of the protocol” in paragraph 1, because these rules need not necessarily be confined to rules of protocol proper.

#### Article 14

There is a widely held view according to which an ambassador enjoys the special privilege of being allowed to apply directly to the head of the receiving State. The Netherlands Government would like to know whether this privilege is included in what is understood by “etiquette”. It would appreciate it if an answer to this question could be given in the commentary to article 14.

#### Article 20

In the Netherlands Government's view the principle of freedom of movement should be given a more prominent place in the wording of this article, whilst the power to curtail this freedom should be kept within very narrow limits. Furthermore, the final sentence of the commentary to article 20 should be incorporated in the article itself. Therefore the Netherlands Government proposes that article 20 be worded as follows:

“The receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

“Nevertheless, the receiving State may, for reasons of national security, issue laws and regulations, prohibiting or regulating the entry into specifically indicated places, provided that this indication be not so extensive as to render freedom of movement and travel illusory.”

#### Article 21

The Netherlands Government suggests that the word “messages” in paragraph 1 be replaced by the more usual term “despatches” and that the principle that the diplomatic bag may not be opened be emphasized by combining paragraphs 2 and 3 into one paragraph reading as follows:

“The diplomatic bag, which may contain only diplomatic documents or articles intended for official use, may not be opened or detained.”

In this connexion the Netherlands Government is of the opinion that it is desirable to define what is meant by “diplomatic documents” in the commentary to article 21. It takes the view that “diplomatic documents” should include all documents sent under official seal or stamp. Even when the mission attaches official seals or stamps to private documents it does not exceed its authority, because under certain circumstances it may be the mission's duty to undertake the transmission of such documents in order to protect its nationals abroad.

The Netherlands Government is of the opinion that the second sentence of paragraph 4 allows of too extensive an application, because in its present wording it also accords inviolability during the entire journey and, under the provisions of article 32 also in third countries, to persons performing the function of a diplomatic courier in an additional function. In the Netherlands Government's view this inviolability should only be accorded to persons travelling exclusively as couriers and for a particular journey only. Therefore the second sentence should read as follows:

“In case he travels exclusively as a diplomatic courier he shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial.”

#### Comments on sub-sections A and B

The Netherlands Government draws attention to the fact that these sub-sections do not contain exhaustive regulations concerning all the subjects that should be included in them. There is, for instance, no express provision governing the exemption from taxation of the mission's activities. Neither can it be inferred from the draft articles that in case the receiving State should maintain different rates of exchange the foreign mission should be accorded the most favourable rate of exchange. These observations may induce the Commission to supplement its draft articles in this respect.

#### Article 23

In connexion with the relationship between paragraph 2 and paragraph 3 of article 24, paragraph 2 should read as follows:

“His papers and correspondence and, subject to the provisions of paragraph 3 of article 24, his property likewise, shall enjoy inviolability.”

#### Article 24

In the opinion of the Netherlands Government sub-paragraph (a) of paragraph 1 is tautological, whilst it is believed that a “real action” in English law is not quite synonymous with an *action réelle* in continental law. This sub-paragraph should read as follows:

“(a) An action *in rem* relating to immovable property situated in the territory of the receiving State, unless held by the diplomatic agent on behalf of his Government for the purpose of the mission.”

To make it quite clear that paragraph 2 does not exclude the diplomatic agent's obligation to give evidence in a law suit to which he himself is a party and in which he cannot claim immunity, paragraph 2 should read as follows:

“A diplomatic agent is not obliged to give evidence except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1.”

The purpose of paragraph 4, *viz.* to guarantee that there will always be a court of the sending State competent to exercise jurisdiction over the diplomatic agent, is not realized if the exercise of this jurisdiction is made dependent on the law of the sending State. To realize this purpose the words “to which he shall remain subject in accordance with the law of that State”, at the end of the first sentence, should be deleted.

#### Article 26

With regard to sub-paragraphs (b) and (d) the question arises whether dues and taxes on income derived from private immovable property are covered by sub-paragraph (b) or by sub-paragraph (d). In the latter case all such income would be taxable, whereas in the former case dues and taxes can only be levied on income derived from property held by the diplomatic agent in his private capacity. On this point the text of the draft should be clarified.

With regard to sub-paragraph (c), the Netherlands Government wishes to point out that, according to the laws of many countries, including the Netherlands, a diplomatic agent shall be deemed to remain domiciled in the sending State for the purpose of levying estate, succession, or inheritance duties. Therefore, provision should be made that the death of a diplomatic agent shall not give rise to the levying of estate, succession or inheritance duties by the receiving State, except with regard to property situated in that State.

#### Article 27

The Netherlands Government wonders whether the Commission, in drafting sub-paragraph (b) of paragraph 1, only examined the traditional practice of States or also discussed the advisability, under present economic conditions, of exempting from customs duties all imported articles, even those destined for purely private use. It might be useful if the Commission reconsidered its draft from this point of view and inserted a relevant observation in the commentary to this article.

The Netherlands Government objects to the provision contained in paragraph 2. The exemption from inspection of a diplomatic agent's personal baggage is practically made illusory by what is further laid down in this paragraph. In its opinion this provision should be analogous to the one contained in paragraph 2 of article 21, dealing with the diplomatic bag, and should be worded as follows:

"The personal baggage of a diplomatic agent, which may contain only articles covered by the exemptions mentioned in paragraph 1, shall be exempt from inspection."

#### Article 28

Paragraph 1 only regulates the position of persons who are not nationals of the receiving State, whereas paragraph 2 regulates the position of all members of the service staff irrespective of their nationality. As a result, there is a discrepancy in treatment between, on the one hand, the members of the administrative and technical staff and, on the other hand, the members of the service staff of the nationality of the receiving State, which discrepancy cannot be justified and which, as appears from paragraph 5 of the commentary to article 30, it was not the intention to make.

The Netherlands Government is of the opinion that article 28 should only lay down rules governing the position of persons who are not nationals of the receiving State. It is therefore suggested that this article be worded as follows:

"1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27.

"2. Members of the service staff of the mission shall, if they are not nationals of the receiving State, enjoy immunity in respect of acts performed in the course of their duties, and be exempt from dues and taxes on the emoluments they receive by reason of their employment.

"3. Private servants of the head or members of the mission shall, if they are not nationals of the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. Apart from that they shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, any jurisdiction assumed by the receiving State shall be exercised in such a manner as will avoid undue interference with the conduct of the business of the mission."

#### Article 29

The purpose of the provision, *viz.* to prevent persons from being made subject to the nationality laws of the receiving State against their will, is brought out more clearly in the commentary than in the text of the article itself. Therefore, the Netherlands Government suggests that this commentary be substituted for the text of the article.

#### Article 30

This article should regulate the position of persons possessing the nationality of the receiving State.

If the wife or members of the family of a diplomatic agent possess the nationality of the receiving State, they may—in the opinion of the Netherlands Government—be granted diplomatic privileges and immunities only if they possess the nationality of the sending State as well, so that the latter can exercise jurisdiction over them. Without this restriction these persons might not be subject to any jurisdiction at all.

In connexion with what has been set forth above, the Netherlands Government suggests that article 30 be worded as follows:

"1. A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of official acts performed in the exercise of his function. He shall also enjoy such other privileges and immunities as may be granted to him by the receiving State.

"2. A member of the administrative and technical staff, a member of the service staff or a private servant of the head

or members of the mission who is a national of the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, any jurisdiction assumed by the receiving State shall be exercised in such a manner as will avoid undue interference with the conduct of the business of the mission.

"3. A member of the family of one of the persons mentioned in paragraph 1 of article 28, forming part of his household, shall enjoy the privileges and immunities mentioned in articles 22 to 27, even if he is a national of the receiving State, provided he is a national of the sending State as well."

#### Article 32

This article should be supplemented by a provision concerning the protection of the mission's communications across the territory of third States, which might read as follows:

"They shall accord despatches and other communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State."

#### Article 36

The principle that provisions of the draft articles shall apply only in time of peace and regulate at most the transition from time of peace to time of war is not adhered to in this article. The article might be interpreted as being applicable throughout the duration of an armed conflict. If the above-mentioned principle is to be enforced consistently the reference to armed conflict in article 36 will have to be deleted and a new article 36A will have to be inserted, laying down transitional measures applicable in case diplomatic relations should be broken off. On the analogy of paragraph 2 of article 31, protection would have to continue for a reasonable period. In the commentary to the article it should be clearly stated that the receiving State will continue to be obliged to grant protection, though no longer under the peacetime law codified by the Commission, but under the law of war, which will then apply.

In view of the above, the Netherlands Government suggests that the following article and commentary be inserted in the draft articles:

#### "Article 36A

"In case of the outbreak of an armed conflict the receiving State shall respect and protect the premises of the mission, together with its property and archives during a reasonable period as mentioned in paragraph 2 of article 31.

#### "Commentary

"1. As the rules proposed by the Commission are only intended to apply in time of peace, the provisions of article 36 are not applicable if diplomatic relations are broken off as the result of the outbreak of an armed conflict. In such a case, as in the cases provided for in paragraph 2 of article 31 and in article 35, it appears necessary to establish transitional rules in order to regulate the transition from the law of peace to the law of war. Article 36A constitutes such a rule.

"2. After the expiry of the period mentioned in paragraph 2 of article 31, the receiving State shall accord the premises, property and archives of the mission such respect and protection as is required by the relevant rules of the law of war."

### 15. PAKISTAN

*Transmitted by a letter dated 16 May 1958 from the Alternate Representative of Pakistan to the United Nations*

[Original: English]

#### Article 8

Pakistan follows two different practices: (i) in respect of ambassadors, ministers, etc. and (ii) in respect of high commissioners. The former category of representatives is entitled to take up his functions when he has presented his letters of credence. The latter, who normally carried a letter of introduction to the Prime Minister, is entitled to take up his functions from the date of his arrival in Pakistan. Any departure from the practice would be a matter of common concern to all the Commonwealth countries and the Government of Pakistan must

therefore for the present reserve its position in regard to this article.

*Article 9*

The Government of Pakistan considers that notification of the name of the *chargé d'affaires ad interim* who is to handle the affairs of the mission in the absence or incapacity of the head of the mission is necessary, and that paragraph 2 of this article should, therefore, be omitted.

*Article 10*

The Government of Pakistan recognizes a fourth class of heads of missions, namely, that of high commissioners, who normally carry letters of introduction to the Prime Minister. The Government of Pakistan considers that the article should be amended to include high commissioners.

*Article 12*

High commissioners take precedence in the class of ambassadors in the order of date of their arrival in Pakistan, whereas ambassadors take precedence in the order of date of the presentation of their letters of credence. Any change in this practice, as in the case of article 8, would be a matter of common concern to all Commonwealth countries and accordingly the Government of Pakistan must reserve its position on this article for the present.

*Article 21*

It is the understanding of the Government of Pakistan that the "appropriate means", mentioned in paragraph 1 of this article do not include messages by wireless transmitter.

*Article 28*

The non-diplomatic administrative and technical staff of a mission, mentioned in paragraph 1 of this article are, in Pakistan, exempt from levy of customs duties (article 27) only on their first arrival to take up appointment in Pakistan in respect of their personal effects on signing a declaration. The Government of Pakistan considers that the privileges and immunities extended to such staff by paragraph 1 of article 28 should be restricted to this extent.

16. SWEDEN

*Transmitted by a letter dated 11 January 1958 from the Minister for Foreign Affairs of Sweden*

[Original: English]

On most points, the Swedish Government can accept the draft articles proposed by the International Law Commission. They seem on the whole to correspond to internationally accepted practice.

On one principal point, however, the Swedish Government has observed with regret that the majority of the members of the International Law Commission have not followed the initial draft in the matter, prepared by the special rapporteur, Mr. A. E. F. Sandström. This point concerns the classification of heads of mission (articles 10-13). The special rapporteur had suggested that classes of heads of mission be limited to two, that of ambassadors, accredited to Heads of States and that of *chargés d'affaires*, accredited to Ministers for Foreign Affairs (article 7 of the original draft). The majority of the Commission, however, decided to retain the classification laid down in the Vienna Regulation of 1815 concerning the rank of diplomats, with the change that the now obsolete rank of resident minister should be abolished. The main classes, those of ambassadors and envoys (ministers) have been retained. The Swedish Government wishes to stress that it prefers the original draft. There seem to be no valid reasons for maintaining today two separate categories of heads of mission, accredited to heads of State. Already when this question was raised within the League of Nations in 1927 the Swedish Government made the following statement: "It does not seem fair that two States, whether large or small, should be able, by means of a bilateral agreement reciprocally conferring upon their representatives the rank of ambassador, to place the representatives of other Governments in a position of inferiority which, however formal it may be, nevertheless constitutes a real disadvantage." In its commentary to articles 10-13 the

Commission suggests (paragraph 4) that since the rate at which the tendency to give heads of mission the title of ambassador is now growing, this suggests that in time the problem will solve itself. The Swedish Government can agree with this statement, but considers it consequently most urgent that this development be taken into account when new rules concerning diplomatic intercourse between States are being created. The Swedish Government therefore suggests that paragraph (b) of article 10 be deleted.

The Swedish Government wishes to make the following additional observations.

*Article 8*

The practice in Sweden has been to consider that the functions of a head of mission commences when he has presented his letters of credence to the Head of State. The Swedish Government is willing to accept, however, the suggestion of the Commission that his functions may begin when he has presented a true copy of his credentials to the Ministry for Foreign Affairs. It would be preferable, however, that the wording of article 8 "and presented a true copy of his credentials to the Ministry for Foreign Affairs" be changed to "and a true copy of his credentials has been accepted by the Ministry for Foreign Affairs".

*Article 12, paragraph 1*

In Sweden, heads of mission take precedence in their respective classes in the order of the presentation of their letters of credence.

*Article 15*

The expression "or ensure adequate accommodation in some other way" should, in the view of the Swedish Government, preferably be replaced by "or facilitate as far as possible adequate accommodation in some other way".

*Article 16*

This article deals with the inviolability of the mission premises. In its commentary, the Commission has stated (paragraph 4) that "while the inviolability of the premises may enable the sending State to prevent the receiving State from using the land on which the premises of the mission are situated for carrying out public works (widening of a road, for example), it should on the other hand be remembered that real property is subject to the laws of the country in which it is situated. In these circumstances, therefore, the sending State should co-operate in every way in the implementation of the plan which the receiving State has in mind; and the receiving State, for its part, is obliged to provide adequate compensation or, if necessary, to place other appropriate premises at the disposal of the sending State." The matter thus dealt with in the commentary is of such great importance that the Swedish Government would prefer that it be inserted in the text proper. If possible, the obligations of the two parties, the receiving State and the sending State, should, however, be laid down in a still more precise manner than in the statement of the commentary quoted above.

*Article 24*

This article, dealing with the immunity of diplomatic agents from the jurisdiction of the receiving State, might be amended on one point. Present international practice is not quite clear on the possibility of bringing an action to court in the receiving State against a diplomatic agent who has left his diplomatic post concerning matters or acts which go back to that person's sojourn in the receiving State. A stipulation on this point would, in the view of the Swedish Government, be of practical value.

*Article 25, paragraph 2*

The Commission states that a waiver of immunity in criminal proceedings must always be effected expressly by the Government of the sending State. This stipulation seems to go beyond present international practice according to which it is generally deemed enough that the head of mission waives the immunity of the other persons belonging to the mission. It would seem that it is a matter between the head of mission and his Government whether the latter's express consent shall be necessary in such cases or not.

*Article 28, paragraph 1*

The stipulation that "the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective household, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27" goes further in some respects than certain Swedish legal provisions in the matter presently in force. The Swedish Government does not wish to suggest at this stage, however, any changes in this text.

## 17. SWITZERLAND

*Transmitted by a letter dated 7 February 1958 from the Permanent Observer of Switzerland to the United Nations*

[Original: French]

## I

*General remarks*

Switzerland has been greatly interested in the work of the United Nations International Law Commission on the codification of the rules of international law governing diplomatic intercourse and immunities. Inasmuch as it exchanges diplomatic missions with the majority of States, and in view of the many temporary delegations it sends and receives, the international conferences held in its territory and the international organizations which maintain their headquarters there, Switzerland attaches special importance to this work.

Switzerland welcomes the progress that has been made in this branch of the law but believes that the most urgent task is to arrive at a satisfactory wording of the rules existing already, thus laying the groundwork for future development.

Consequently, in the comments which follow we shall concentrate on describing the legal situation as it now exists in Switzerland, while also venturing to suggest, on the basis of practical experience, certain additions to the draft articles.

The draft articles concerning diplomatic intercourse and immunities deal only with permanent missions, leaving aside special and temporary missions and delegations, diplomatic conferences, and—a very important subject—international organizations and the permanent and temporary delegations to these organizations, as also the status of their officials. There is wisdom in proceeding step by step; nevertheless, when the rules laid down in the draft are again considered, account should be taken of the effects which this convention is bound to have on other branches of law which are yet to be codified. This is of some importance to Switzerland, since the rules governing privileges and immunities are applied to the international organizations situated in its territory, *mutatis mutandis*.

## II

*Structure of the draft*

The draft is divided into five sections, as follows:

- I. Diplomatic intercourse in general;
- II. Diplomatic privileges and immunities;
- III. Conduct of the mission and of its members towards the receiving State;
- IV. End of the function of a diplomatic agent;
- V. Settlement of disputes.

As regards the structure of section I, it would seem preferable to place articles 10 to 14, which deal with the classes of heads of mission and contain rules of outstanding importance, immediately after article 2, which defines the functions of a diplomatic mission, and before articles 3 to 8, which are concerned with the appointment and commencement of functions of diplomatic agents.

With reference to section III, which consists of a single article—article 33—on the conduct of the diplomatic mission and of its members, it would seem that paragraphs 1 and 3, which deal with abuses of privileges and immunities, ought to be placed at the head of section II, in a new article containing

a complete definition of privileges and immunities based on the general principle of "functional necessity".

Article 33, paragraph 2, which defines the role of the Ministry for Foreign Affairs in relation to diplomatic missions, might well become the second paragraph of article 2, which defines the function of the missions.

Also, it would appear more logical to eliminate section IV, and redistribute articles 34 to 36 as follows:

Article 34, dealing with the end of the function of a diplomatic agent, should be placed in section I, following articles 3 to 8 and preceding article 9, which provides for the temporary replacement of a head of mission by a *chargé d'affaires ad interim*.

Article 35, on the facilitation of departure of persons enjoying privileges and immunities, should either follow or be embodied in article 31 defining the duration of privileges and immunities.

The same applies to article 36, since it contains provisions on the partial continuation of privileges and immunities in case of an interruption of diplomatic relations.

## III

*Section I: Diplomatic intercourse in general*

It would seem advisable to insert an introductory provision at the beginning of the convention stating that the proposed articles are in part "a codification of existing international law" which does not exclude the application of customary law in cases not settled by the convention.

*Article 1*

This article corresponds to the present practice of States and calls for no special comment.

*Article 2*

The list of functions of a diplomatic mission appears to be in conformity with practice; fortunately, it is not exhaustive, and will therefore not stand in the way of future development.

A second paragraph might be added to this article. It would repeat the wording of article 33, paragraph 2, which establishes the predominant role played by the Ministry for Foreign Affairs in the relations of a diplomatic mission with the Government of the receiving State.

*Articles 3 to 6*

The rules governing the appointment of the members of a mission are in conformity with customary law and, in particular, the practice of Switzerland.

Articles 3 and 4 do not call for special comment.

As regards article 5, it appears prudent to make a rule which leaves it to the discretion of the receiving State to accept, by giving its express consent, its own nationals as members of the diplomatic staff of the sending State. In Swiss practice, the nationals of the receiving State are accepted as diplomatic agents only in exceptional cases and are accorded only the minimum privileges and immunities essential to enable them to exercise their functions. This practice is in accordance with article 30 of the draft.

It may be concluded, *ex contrario*, from the text of article 5 that a State is free to appoint nationals of the receiving State to the non-diplomatic staff of the mission without previously obtaining an authorization from that State. This, for linguistic and other reasons, is necessary for the proper functioning of the mission.

Article 6 is based on the general principle that the appointment of all the members of a diplomatic mission, including the head of the mission, the diplomatic and the non-diplomatic staff, is subject to the consent of the receiving State, in the form of express previous *agrément* for the head of the mission and of tacit agreement where other staff members are concerned.

According to paragraph (4) of the commentary, the fact that the draft does not say whether or not the receiving State is obliged to give reasons for its decision to declare *persona non grata* a person proposed or appointed should be interpreted as meaning that this question is left to the discretion of the

receiving State. To oblige the receiving State to give reasons for declaring an agent *persona non grata* would be an infringement of its sovereignty, for a State should be free at all times to accept a diplomatic representative or not. Nevertheless, it might be desirable to include in article 6 an explicit provision to the effect that the receiving State is not obliged to give reasons for its decision not to accept a diplomat. If a receiving State were obliged to state its reasons, this might cause greater friction between it and the sending State than a decision for which no reasons were given.

#### Article 7

Paragraph 1 of this article, on the limitation of the mission's staff, is both felicitous and well-advised and confirms the practice of recent years. The arguments cited in that connexion in paragraph (2) of the commentary are pertinent.

We also endorse the principle laid down in paragraph 2 of the article, which completes the preceding provision. Nevertheless, the second sentence, concerning military, naval and air attachés, should be replaced by the following text, taken from the last sentence of paragraph (3) of the commentary:

"In the case of military, naval and air attachés, the receiving State may require their names to be submitted beforehand for its approval."

It would appear preferable to consult the receiving State beforehand on the appointment of these attachés. Such a procedure would protect the sending State from the rebuff it would suffer if the receiving State were to refuse to accept persons already appointed.

#### Article 8

The draft provides for two possible ways of establishing the time at which the functions of a new head of mission commence. It would seem proper to retain only the alternative solution given in article 8, according to which the functions of the head of the mission begin only when he has presented his letters of credence. That system is more in conformity with the juridical intent of the formality. It is proper for the head of the mission to take up his functions by establishing contact with the highest authority of the receiving State. There is therefore no ground for changing the present rule of international law.

#### Article 9

It would be desirable to add, at the end of paragraph 1 of this article, a provision indicating the person or authority who should notify the name of the *chargé d'affaires ad interim* to the Government of the receiving State. In Swiss practice the notification must be made by the accredited head of the mission before his departure or absence, otherwise it is made by the Ministry for Foreign Affairs of the sending State. This leaves no room for doubt that the appointment of the *chargé d'affaires ad interim* is in conformity with the intentions of the sending Government.

#### Articles 10 to 14

The logical place for articles 10 to 14 on the classes of heads of mission is after article 2, which deals with the functions of missions, and before articles 3 to 7 on the appointment of the various diplomatic agents.

#### Article 10

This article of the draft maintains the distinction between ambassadors and ministers and eliminates only the class of ministers resident.

It appears regrettable that in the course of this codification no account was taken of the general tendency to abolish the distinction between the first two classes of diplomatic agents accredited to Heads of State, for this tendency in eliminating a difference in rank which is no longer justified by identical functions is in accordance with the general principle of the equality of States. A rule to that effect would have accelerated this trend and thus helped to eliminate some of the difficulties encountered in every period of transition from one system to another; these difficulties are mentioned in paragraph (3) of the commentary.

Furthermore, the use of the expression "other persons" in the definition of the second class may both cause confusion and

delay the disappearance of this class. If it should become necessary to establish other categories of agents of the second class for special or temporary missions, no definitive rule for such a case should be laid down in this convention, which deals only with regular and permanent diplomatic missions.

#### Article 11

No comment.

#### Article 12

According to the principle of "functional necessity", which underlies the provisions on privileges and immunities, precedence should be determined by the date of the commencement of functions, in other words, the date of the presentation of letters of credence, that being the traditional system—which, incidentally, is applied in Switzerland.

Paragraphs 2 and 3 do not call for comment.

#### Article 13

This article is in accordance with the practice and principle of non-discrimination.

#### Article 14

Same comment.

## IV

### Section II: Diplomatic privileges and immunities

As noted in paragraph (2) of the introductory comment, the draft is based on the sound principle that the privileges and immunities of diplomatic missions and agents should be interpreted in the light of "functional necessity" or, to use a more precise phrase, "the purpose of the mission". There would be some advantage in stating this principle in a general article to be placed at the head of section II. Such a provision would furnish a juridical basis for the limitations made necessary by the inordinate size to which diplomatic missions have grown today—in particular, the limitation of mission staff provided for in article 7—and would generally facilitate the interpretation of the convention and amicable or arbitral procedures for the settlement of possible disputes.

This general article might also include paragraphs 1 and 3 of article 33 on the conduct of the mission and its members, since these two provisions deal with abuses of the privileges and immunities of persons on the one hand and abuses of the inviolability of premises on the other; or, if so desired, the first provision might be included in article 22 on personal inviolability and the second in article 16 on the inviolability of the mission premises.

Furthermore, the general article on privileges and immunities should contain a clause prescribing that the mission must be established and members of its staff must reside in the capital, or its environs as agreed for this purpose by the receiving State.

#### Article 15

The present wording of this article, which obliges the receiving State to "ensure adequate accommodation" for the mission, fails to take into account the practical difficulties which that State might encounter in case of a housing shortage. The text should therefore be amended in accordance with the interpretation in the commentary:

"The receiving State shall either permit the sending State to acquire on its territory the premises necessary for its mission, or facilitate the accommodation of the Mission as far as possible in some other way."

#### Article 16

The provisions on the inviolability of the mission premises, as interpreted in the commentary, are in accordance with international customary law and with Swiss practice. Paragraph (4) of the commentary contains remarks on the inability of the receiving State to dispose of the mission premises without the consent of the sending State and on the circumstances in which the latter should give its consent. There might be some advantage in including a rule to that effect in the text of the convention. It is true that such a rule would merely constitute the application to a particular case of the general principle of "functional necessity", a principle which, as has been men-

tioned already, should be laid down at the beginning of section II.

Similarly, paragraph (3) of article 33, which prohibits improper use of the premises of a diplomatic mission, might be included in article 16.

It is of course understood that inviolability of mission premises does not preclude the taking of appropriate steps to extinguish a fire likely to endanger the neighbourhood or to prevent the commission of a crime or an offence on the premises. This accords with the principle that personal inviolability does not exclude either self-defence or measures to prevent the diplomatic agent from committing crimes or offences, as is stated in the commentary to article 22.

#### *Article 17*

Exemption granted by the receiving State to the diplomatic agent from all dues or taxes in respect of the premises of the mission, other than such as represent payment for services actually rendered, is in accordance with Swiss practice, which is based on reciprocity.

#### *Article 18*

Neither the provision on the inviolability of the archives nor the commentary call for remark.

#### *Article 19*

Neither the article nor the commentary call for remark.

#### *Article 20*

This provision on freedom of movement and the interpretation contained in the commentary are in agreement with Swiss practice. Indeed, the principle of freedom of movement, subject to limitation only for reasons of national security, is the logical consequence of the general principle of "functional necessity".

#### *Article 21*

The draft accords to a diplomatic mission freedom of communication "for all official purposes". This definition must be interpreted in the light of "functional necessity". It follows that the obligation of the receiving State to accord to the diplomatic mission freedom to employ all appropriate means of communication is limited in principle to the mission's exchanges, on the one hand, with the Government of the sending State and, on the other, with the consulates under its authority within the receiving State. It is not really essential for the diplomatic mission to be able to use all means of direct communication with the other diplomatic missions or consulates of the sending State situated in third countries. To grant such facilities is not a general international custom, and therefore this is done only in specific cases, by virtue of a special agreement or by tacit agreement.

In accordance with this view, Swiss practice allows diplomatic couriers only for communication between the diplomatic mission and the Government of the sending State and also, as an exception, for communication between the mission and another diplomatic delegation of the sending State, but not between the mission and the consulates of the sending State situated in a third State.

We have the following comment to make on the special provisions concerning diplomatic bags and couriers:

The inviolability of the diplomatic bag, as laid down in paragraph 2 of the article, is in conformity with both international custom and Swiss practice. The diplomatic bag is indeed essential for the performance of the mission's functions. The arguments to that effect in paragraph (3) of the commentary accord with the views on which Swiss usage is based. According to paragraph 3 of the article itself, the diplomatic bag may contain only "diplomatic documents or articles intended for official use". This last term may lead to misunderstanding. There would be no way of making a distinction between articles of a special nature which might be sent by diplomatic bag and "articles for the use of a diplomatic mission" which, under article 27 of the draft, enjoy full exemption from customs duties. The notion "articles intended for official use" would make it impossible to distinguish between licit and illicit consignments; it would thus encourage abuses which would bring discredit on the very institution of the diplomatic bag, and that would be contrary to the purpose of the preceding provision, which is to facilitate and accelerate communications and

the exchange of important diplomatic documents between the mission and the sending State.

For this reason, in Swiss practice, the diplomatic bag may contain only official correspondence and documents and no other articles whatsoever. It would therefore be necessary, at the very least, to give a restrictive definition of the articles of a special nature which may be transported in the diplomatic bag, taking into account "functional necessity", by some such phrase as: "articles of a confidential nature essential for the performance of the mission's functions".

Under article 21, paragraph 4, the diplomatic courier would enjoy unrestricted personal inviolability. This provision does not appear satisfactory. Unlike the members of the diplomatic mission, the diplomatic courier does not remain permanently in the receiving State; his stay is limited to the periods of travel during which he exercises his functions. It is therefore enough to grant him personal inviolability in the actual exercise of his functions. For this reason, the text of article 21, paragraph 4, should be drafted as follows:

"In the exercise of his functions the diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial. He shall enjoy no other privilege or immunity."

There should also be a special provision confirming the custom, which is becoming more and more general, of entrusting the diplomatic bag to the captains of the aircraft of regular airlines.

#### *Article 22*

Since the personal inviolability of the diplomatic agent derives from the general principle of "functional necessity", that principle also serves to delimit it. As noted in the commentary, the principle does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences.

#### *Article 23*

The principle of the inviolability of residence and property of diplomatic agents is in agreement with international custom and Swiss practice.

#### *Article 24*

The provisions of this article on immunity from jurisdiction and the commentary call for no remark, except the provision regarding the competent court in the sending State.

According to the modern theory of "functional necessity", which has replaced the "extritoriality" theory, the diplomatic agent is domiciled in the receiving State. Consequently if, under the law of the sending State, the competent tribunal is that of the domicile of the debtor, the agent cannot be brought before the courts of that State. It would be preferable to allow each State to settle this question as it sees fit. The second sentence of paragraph 4 should therefore be deleted.

#### *Article 25*

The rules on the waiver of immunity are in conformity with existing law, as are the remarks in the commentary.

#### *Article 26*

This provision on the exemption of a diplomatic agent from taxation is in general agreement with Swiss practice.

#### *Article 27*

This text enunciates the principle that articles for the use of a diplomatic mission and for the personal use of diplomatic agents shall be exempted from customs duties. Nevertheless, as is recognized in paragraph (3) of the commentary itself, the receiving State should be able to impose certain restrictions, in order to avoid possible abuses. It would therefore be advisable to include a general reservation in the actual text of the convention.

In Swiss practice, diplomatic agents enjoy exemption from customs duties with the following limitations:

Diplomatic agents who are not heads of mission are entitled to import their furniture duty-free only if it is to be used for their initial installation and on condition that it is imported in the course of the year following the transfer of the person concerned to Switzerland and that it is not sold for a period of

five years from the date of admission. The importation of automobiles is subject to the following regulations:

Heads of mission and other diplomatic agents have the right to import a car duty-free every three years and may not sell it before the end of that period. The spouse and minor children of a diplomatic agent are the only members of his family who enjoy exemption from customs duties. On the basis of reciprocity, heads of mission and their families are entirely exempted from customs control, whereas as a matter of principle other diplomatic agents are subject to the control; in practice, however, the customs authorities are lenient.

It would be advisable to mention in the text of the convention itself that the prohibitions and restrictions on import and export should not interfere with the customary treatment accorded with respect to articles intended for a diplomatic agent's personal use, as stated in paragraph (5) of the commentary. It is, however, understood that such a provision would refer only to economic and financial measures, and that prohibitions and restrictions in the interest of public welfare, such as health protection, would still apply.

#### Article 28

This provision, which defines the privileges and immunities of persons other than diplomatic agents, introduces several innovations which require careful study.

(a) The members of the family of a diplomatic agent forming part of his household would be accorded the same treatment as the agent himself. In Switzerland, the family circle enjoying privileges and immunities is limited to the spouse and minor children and, in the case of heads of mission, to parents and parents-in-law. The advantage of this system is that it avoids abuse and controversy, while not precluding the receiving State from making exceptions in special cases.

(b) Administrative and technical staff would be placed in every way on the same footing as diplomatic staff. In Switzerland, staff in this category enjoy immunity only for acts performed as part of their official functions and are accorded only limited customs privileges. It would therefore be preferable to maintain the present juridical situation, in which the receiving State may accord certain facilities at its discretion. Furthermore, the proposed innovation might contribute to the inordinate growth of diplomatic missions—which the draft seeks to arrest—and lead to abuse. Lastly, such a system would make it more difficult to appoint nationals of the receiving State as members of the administrative and technical staff, and yet there is a real need for this, in particular for linguistic reasons.

(c) Paragraphs 3 and 4 concerning the private servants of members of diplomatic staff appear satisfactory.

#### Article 29

No comment.

#### Article 30

This provision on the privileges and immunities accorded to diplomatic agents who are nationals of the receiving State is satisfactory. The commentary thereon is a useful addition to present doctrine.

#### Article 31

No comment.

#### Article 32

The proposed solution is interesting but incomplete. For example, there is no attempt to deal with the situation which would arise if there were a breach of diplomatic relations between the receiving or the sending State and the countries through which the diplomatic agent must pass; specific provisions on the subject would be desirable.

### V

#### Section III: Conduct of the mission and of its members towards the receiving State

##### Article 33

As mentioned under chapter II, relating to the structure of the draft, the various paragraphs of this article should be inserted in sections I and II and section III would thus be eliminated.

Paragraph 1 of this article lays down a needed rule—that it is the duty of diplomatic agents to respect the laws and regulations of the receiving State and not to interfere in its internal affairs.

Paragraph 2 contains a useful definition of the role of the Ministry for Foreign Affairs in the relations of the diplomatic mission with the receiving State. It would be more logical to embody this rule in article 2 which defines the functions of diplomatic missions.

As regards abuse of the premises of a diplomatic mission, dealt with in paragraph 3, it appears difficult to include absolute rules in the text of the convention. Switzerland, for its part, does not recognize the right to grant asylum in mission premises.

### VI

#### Section IV: End of the function of the diplomatic agent

##### Articles 34 to 36

These articles call for no special remark beyond the comments made under the chapter "Structure of the draft", where it was proposed to eliminate section IV and to transfer the articles from that section to sections I and II.

### VII

#### Section V: Settlement of disputes

##### Article 37

If it is intended that any dispute concerning the interpretation or application of the convention should be submitted to the International Court of Justice, it would be advisable to give the Court compulsory jurisdiction so that each State should have the right to bring the dispute before the Court unilaterally by a simple application.

### 18. UNION OF SOVIET SOCIALIST REPUBLICS

*Transmitted by a note verbale dated 11 March 1958 from the Permanent Representative of the Union of Soviet Socialist Republics to the United Nations*

[Original: Russian]

1. Article 5 of the draft provides that members of the diplomatic staff of embassies and missions may be appointed from among the nationals of the receiving State only with the express consent of that State.

An additional clause should be added to provide that the receiving State may stipulate that members of the administrative, technical and service staff of diplomatic missions also may be selected from among the nationals of the receiving State only with the consent of that State.

2. Article 25 sets out the arrangements for the waiver of the immunity of diplomatic agents from the criminal and civil jurisdiction of the receiving State. It would be advisable also to provide for arrangements for the waiver of immunity from administrative jurisdiction and to stipulate that such waiver must be expressly stated.

3. Article 26 refers to the taxation privileges of diplomatic agents.

Provision should also be made for diplomatic agents to be exempt from all personal obligations in the form of services or payments. This type of exemption is generally recognized in international law and international practice.

4. Article 28 extends privileges and immunities to the administrative and technical staff of diplomatic missions, together with the members of their families forming part of their respective households, if all these persons are not nationals of the receiving State.

Bearing in mind current practice, it would be advisable to provide in article 28 that, by agreement between the States concerned, privileges and immunities may be extended on a basis of reciprocity to members of the administrative, technical and service staff of a diplomatic mission, including the private servants of the head or members of the mission.

5. *Article 37* should be redrafted as follows:

"Any dispute between States concerning the interpretation or application of this convention that cannot be settled through diplomatic channels, shall be referred to conciliation, submitted to the International Court of Justice in accordance with the Statute of the Court, or referred to arbitration in accordance with existing agreements."

19. UNITED KINGDOM OF GREAT BRITAIN AND  
NORTHERN IRELAND

*Transmitted by a letter dated 10 March 1958 from the Secretary of State for Foreign Affairs in the United Kingdom*

[Original: English]

Her Majesty's Government wish to take this opportunity of placing on record their high appreciation of the painstaking study which the Commission has devoted to its subject, and of expressing their broad agreement with the rules and principles embodied in the draft articles, subject, however, to the detailed comments contained in the accompanying memorandum, and to the reservation that certain of the draft articles are still under consideration: comments on these will follow as soon as possible.

Subject to any such supplementary comments, it may be assumed, with regard to those articles on which no comment is made or where no contrary opinion is expressed, that the practice of Her Majesty's Government in the United Kingdom is in line with the proposals of the Commission or that no serious objection is seen to these proposals, to which Her Majesty's Government would be prepared to conform.

*Memorandum**Article 2: The functions of a diplomatic mission*

It is for consideration whether the functions specifically enumerated in this article should include a reference to cultural activities, that is to say, the function of projecting the culture and way of life of the sending State in the receiving State, which seems in modern times to be one of the acknowledged functions of a diplomatic mission. It is noted, however, that the article as drafted purports to enumerate certain functions *inter alia* and it may therefore be that a specific reference to cultural functions is unnecessary.

*Article 5: Appointment of nationals of a receiving State*

It is not the normal practice of Her Majesty's Government to grant such express consent as is contemplated in this article.

*Article 7: Limitation of staff*

Her Majesty's Government do not require their previous *agrément* to be sought to the appointment of military, naval or air attachés to foreign diplomatic missions in London.

*Article 8: Commencement of the functions of the head of the mission*

It is the practice of Her Majesty's Government to regard a head of mission as having taken up his functions from the date on which he notifies his arrival and presents to the Foreign Office a copy of his letters of credence, and they would prefer the final version of this article to be drafted in accordance with the first of the two alternatives contained in the draft.

*Article 9: Chargé d'affaires ad interim*

Her Majesty's Government in the United Kingdom regard the head of a foreign diplomatic mission as remaining in charge of his mission while he is within the confines of the United Kingdom, even though incapacitated by sickness: they do not regard the appointment of a *chargé d'affaires ad interim* as appropriate in such circumstances. On the other hand, Her Majesty's Government would not see any particular objection to the system proposed by the Commission.

Normally Her Majesty's Government require the appointment of a *chargé d'affaires ad interim* to be notified to them by the accredited head of mission prior to his own departure from the country. Should such notification be impracticable, Her Majesty's Government require the appointment of the

*chargé d'affaires* to be notified to them by the Minister for Foreign Affairs of the sending State. An exception to this general rule might arise in the case of an emergency caused by the death of the head of the mission when, in the absence of any contrary notification from the Government of the sending State, Her Majesty's Government would regard the charge of the mission as devolving upon the senior member of the diplomatic staff.

*Article 11: Classes of heads of mission*

A redraft of this article is suggested in the following terms:

"States shall mutually agree the level of their diplomatic representation at each other's capitals."

*Article 12: Precedence*

In the practice of Her Majesty's Government the determining date of the order of precedence of the diplomatic representative is the date of the delivery of the copy of his credentials to the Foreign Office. Her Majesty's Government accept the terms of this article in this sense.

*Article 17: Exemption of mission premises from taxes*

The practice of Her Majesty's Government does not recognize the exemption of the premises of a foreign diplomatic mission from local dues or taxes. Her Majesty's Government have no power to require the municipal authorities in the United Kingdom to refrain from levying on the occupiers of diplomatic premises the local rates which they are empowered by statute to levy, although arrangements exist for partial relief from rates on a basis of reciprocity, the principle applicable being that of payment by the diplomatic mission concerned of that proportion of the rates leviable which is attributable to municipal services from which the mission is deemed to derive direct benefit.

*Article 21: Freedom of communication*

Her Majesty's Government make no objection to the use of wireless receiving and transmitting apparatus by foreign diplomatic missions for the purpose of communicating with their respective Governments. The missions concerned are not required to seek any special permission or to obtain a licence to operate such installations.

*Article 22: Personal inviolability*

Article 22, paragraph (2), defines the term "diplomatic agent" as denoting the head of mission and the members of the diplomatic staff of the mission and in the context of article 22, paragraph (1), appears to limit personal inviolability to this class of persons only. It thus appears to be in conflict with article 28, paragraph (1), which extends to persons who do not come within the definition of "diplomatic agent" the privileges and immunities of articles 22-27. It is suggested that the drafting of article 22 be reviewed in the light of this apparent inconsistency.

*Article 23: Inviolability of residence and property*

In the commentary to this article the inviolability is described as extending to the diplomatic agent's bank account. It is assumed that this has reference to the freedom of such accounts from exchange control measures. It is suggested that the point be made clear in the text of the article.

*Article 25: Waiver of immunity*

In criminal proceedings Her Majesty's Government would not insist on waiver being effected by the Government of the sending State; waiver by the head of mission would be regarded as adequate, assuming him to have the necessary authority to make it.

*Article 26: Exemption from taxation*

As indicated in the comment on article 17, Her Majesty's Government do not recognize the title of a diplomatic agent to enjoy as of right exemption from local (i.e., municipal) taxation (known in the United Kingdom as "local rates") though a partial relief from these charges may be given on a basis of reciprocity. No distinction is made in this connexion between property occupied for diplomatic purposes (i.e., the residence normally occupied by the diplomatic agent in his diplomatic capacity) and property occupied by the diplomatic agent for purposes of private relaxation.

In the matter of Income Tax Schedule A (which is concerned with the taxation of profits deemed to accrue to the taxpayer from the ownership of property) the practice of Her Majesty's Government is to regard the residence in or near London of a member of the diplomatic staff as occupied for diplomatic purposes and as qualifying for exemption from tax. A second residence, and the residence of members of the non-diplomatic staff, are not regarded as occupied for diplomatic purposes and do not qualify for exemption, but the individual is entitled to claim, as an offset to the assessment, any personal reliefs from tax to which he may be entitled under the provisions of the relevant United Kingdom legislation.

*Article 31: Duration of privileges and immunities*

It is the practice of Her Majesty's Government to regard the privileges and immunities of entitled persons as commencing from the date on which the notification of assumption of duties is made to the Foreign Office by the head of mission concerned and as persisting after the notification of the termination of his diplomatic employment for such reasonable period as is necessary to enable him to wind up his affairs and leave the country.

20. UNITED STATES OF AMERICA

*Transmitted by a note verbale of 24 February 1958 from the Acting Representative of the United States of America to the United Nations*

[Original: English]

*General observations*

The Government of the United States of America directs its first observations to the question of the form in which the draft articles concerning diplomatic intercourse and immunities will be submitted to the General Assembly. Paragraph 15 of the introduction to the draft articles states that the draft was prepared on the provisional assumption that it would form the basis of a convention, and that the final decision as to the form in which the draft will be submitted to the General Assembly will be taken in the light of comments received from Governments.

The United States Government fully subscribes to the sentiments expressed by the General Assembly in its resolution 685 (VII), adopted on 5 December 1952, in which the International Law Commission was requested to undertake "the codification of the topic 'Diplomatic intercourse and immunities', and to treat it as a priority topic". As stated in that resolution, the common observance by all Governments of existing intercourse and immunities, particularly in regard to the treatment of diplomatic representatives of foreign States, is to be desired. However, Governments are not always in agreement as to the requirements of international law. Accordingly, a codification by the International Law Commission on the subject should materially contribute to the improvement of relations between States. Governments which sincerely endeavour to honour their international obligations will welcome a concise statement of what those obligations are today.

Some of the articles concerning diplomatic intercourse and immunities submitted for comment by Governments, however, cannot be considered as a codification of existing principles of international law on the subject. In a number of respects, the draft articles appear to represent an amendment and extension of existing international law, and appear to lay down certain new rules at variance with existing rules.

The United States Government is opposed to the suggestion that the draft articles be submitted to the General Assembly in the form of a convention. Its principal objections to a convention are as follows:

1. It is unlikely that a significant number of Governments would become parties to a multilateral convention of this character. Governments have consistently shown a reluctance to enter into multilateral treaties which prescribe rules for the treatment of diplomatic representatives of one Government in the territory of the other.

2. Adoption of such a multilateral convention by some Governments and not by others would result in disagreement and

confusion with respect to the treatment of diplomatic personnel of adhering countries in the territory of non-adhering countries, and *vice versa*.

3. Adoption of a convention along the lines of the draft articles would tend to freeze the *status quo* and would prevent normal development of desirable diplomatic practices.

4. Adoption of such a convention would effect or require changes in existing national laws and regulations with respect to many matters which have to date sensibly been left to the discretion of the States concerned and have not been regulated by international law.

5. A number of the articles apparently represent an effort to compromise the conflicting views of Governments as to what a particular rule should be. The result is too frequently a vague or ambiguous statement, obscure in meaning and susceptible of different interpretations. The United States Government believes that, unless a rule can be stated simply and with clarity, the Commission should merely note that, on the issue involved, the law is unsettled.

The United States Government further observes that the draft articles would have greater application than appears to have been contemplated. The report of the International Law Commission states that the draft articles are expressly confined to permanent diplomatic missions, thereby excluding the general subject of international organizations. However, acceptance by the United States of the draft articles would also have an effect on the treatment accorded representatives to certain international organizations and members of their staffs. For instance, section 15 of the Agreement between the United States and the United Nations regarding the Headquarters of the United Nations, signed on 26 June 1947 (11 UNTS 11), provides that the privileges and immunities to which various classes of individuals shall be entitled are those which, subject to corresponding conditions and obligations, members of diplomatic missions accredited to the United States receive.

The United States Government further observes that the draft articles appear to reflect inadequate consideration of the principle of reciprocity, which presently underlies much of the practice of Governments in respect to diplomatic privileges and immunities. While certain rules of conduct should be observed by all Governments without discrimination, other rules need apply only on a basis of reciprocity.

The United States Government therefore recommends that the International Law Commission not undertake to revise the draft articles in the form of a convention but, rather, undertake to prepare a codification of existing principles of international law on the subject of diplomatic intercourse and immunities. Such a codification should restate those principles of international law and rules of practice which have become so clearly established and so well recognized that common observance by all Governments may be expected.

In addition to the observations of Governments regarding the draft articles, the replies to the Secretary-General's request dated 12 October 1955 for information regarding the laws, regulations and practice of States concerning diplomatic intercourse and immunities should be useful in determining those areas in which the particular principle of international law involved is so well settled that it may be codified. The fact that the practice of some Governments may be at variance with a particular rule may indicate only that such Governments are not presently honouring the international obligations which devolve on them as members of the family of States.

*Observations on individual articles*

*Article 1*

This article, which states that the establishment of diplomatic relations and of permanent diplomatic missions takes place by mutual consent between States, confirms the general practice. An additional paragraph might well be added dealing with situations where the head of a mission and perhaps other officials of the mission are accredited also to one or more other States. In that case, the sending State should first obtain the consent of each receiving State to such dual or multiple accreditation.

### Article 2

There would appear to be general agreement that a diplomatic mission may perform the functions enumerated in paragraphs (a) to (d) of article 2. However, the functions listed are obvious, and admittedly not exhaustive. The United States Government therefore considers that it is probably not practical to define the precise functions which a diplomatic mission may perform.

### Article 3

It is the general practice of States, including the United States, to obtain the *agrément* of the receiving State for the appointment of a new chief of mission.

### Article 4

Article 4 provides that, subject to the provisions of articles 5, 6, and 7, the sending State may freely appoint other members of the staff of the mission.

The intent and probable effect of this article are uncertain, both because the draft articles do not define with sufficient clarity the various categories of persons which compose the staff of the mission, and because the commentary following articles 5-7 is in some respects inconsistent with the provisions of the articles. In any event, the United States Government is of the view that this article should be revised to recognize the right of every State to refuse to receive in its territory any member of the staff of a diplomatic mission whom it considers unacceptable. This is true, even though the right is exercised only infrequently and under special circumstances. Under United States immigration laws, some form of acceptance by the United States Government is a condition precedent to the visa applicant's classification as a foreign government official or employee (see sections 101 (a) (15) (A) (i) and (ii) of the Immigration and Nationality Act, 66 Stat. 167, 8 U.S.C. 1101). A courteous refusal by the receiving State to issue appropriate entry documents to a particular individual would seem preferable to the receipt, by the mission immediately upon arrival of a new member thereof, of an unanticipated notification that such individual is *persona non grata* or not acceptable to the receiving State. See paragraph 3 of observations on article 6.

### Article 5

Article 5 provides that members of the diplomatic staff of a mission may be appointed from nationals of the receiving State only with express consent of that State. It would appear that this article might provide instead that they could be appointed except in cases where the receiving State expressly objected.

The United States of America declines to recognize one of its own nationals as a diplomatic officer of an embassy or legation in Washington, but ordinarily has no objection to the inclusion in the mission staff of American citizens employed in other capacities.

### Article 6

Paragraph 1 of article 6 provides that the receiving State may at any time declare a member of the staff *persona non grata* or not acceptable, and that the sending State shall recall such person or terminate his functions. The second paragraph provides that if the sending State refuses or fails within a reasonable time to recall or terminate the functions of such person, the receiving State may refuse to recognize the person concerned as a member of the mission.

This Government agrees that a person declared *persona non grata* or whose recall is demanded is entitled to a reasonable time to depart, during which time he continues to enjoy the immunities attaching to his previous position at the mission. However, in aggravated circumstances, or where national security is involved, the receiving State may demand his immediate departure, and refuse to recognize him thereafter as a member of the mission for the performance of official functions.

To assist Governments in determining the import and probable effect of article 4 and certain subsequent articles, a new article might be added which would set forth precisely what personnel compose the diplomatic, administrative, technical and service staff of a mission. Clear distinctions should be

made between officer and subordinate staff personnel, and between nationals of the sending State vis-à-vis nationals of the receiving State and of third countries employed by the sending State. Such an article should also make reference to military, naval and air attachés and their staffs. For instance, paragraph (6) of the commentary following article 6 states that the practice of appointing nationals of the receiving State as members of the diplomatic staff has now become fairly rare. This is true if the diplomatic staff is deemed to include only officer personnel. The staffs of diplomatic missions of the United States Government, just as those of many other Governments, include many nationals of the receiving State, employed to perform various subordinate functions.

Paragraph (6) of the commentary following article 6 states that one of the exceptions arising out of article 5 of the draft is where the sending State wishes to choose as a member of its diplomatic staff a person who is a national of both the receiving State and the sending State. The Commission takes the view that this should only be done with the express consent of the receiving State. In this connexion it should be noted that Governments sometimes differ on the question of who has and who does not have dual nationality. The United States Government is of the view that once a receiving State has validated for entry purposes as a member of the mission a passport issued by the sending State to a person considered by the sending State to be one of its nationals whether native-born or naturalized, the receiving State is precluded from thereafter attempting, prior to termination of such person's appointment and expiration of a reasonable time for his departure, to assert jurisdiction over such person on the ground that he is a national of the receiving State. This situation differs, of course, from the case of an individual possessing dual nationality but residing in the receiving State and subject to its jurisdiction at the time of his appointment to the staff of the mission. The United States Government suggests that the problem of exercise of jurisdiction, solely on the basis of nationality, by the receiving State over dual nationals who are members of a diplomatic mission should be dealt with in a separate article.

### Article 7

The first paragraph of article 7 provides that the receiving State may limit the size of a mission to what is reasonable and customary, having regard to circumstances and conditions in the receiving State, and to the needs of the particular mission.

As a restatement of a general principle the language used is, perhaps, as much as Governments will agree upon. However, the article is silent as to how to determine what is "reasonable and customary" under the circumstances and what are the "needs" of the mission. Accordingly, its application will solve neither the problem of inordinate increase to a size palpably unnecessary for the performance of the announced functions of the mission, or the problem of arbitrary demands by the receiving State that the diplomatic and administrative personnel of a mission be reduced to a size which the sending State believes will make performance of necessary and proper functions almost impossible.

In the absence of agreement among Governments as to a criterion by which these questions are to be determined in particular cases, the United States Government considers it impractical to frame a rule on the subject.

The second paragraph of article 7 provides that a State may also, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category and may decline to accept any persons as military, naval or air attachés without previous *agrément*.

The United States Government therefore strongly opposes the adoption of this paragraph, which appears objectionable for a number of reasons. It goes beyond existing principles of international law and, in some respects, would seem to sanction present practices of certain countries against which the United States and other Governments have protested. It not only fails to mention the principle of reciprocity, but apparently contemplates that the receiving State must treat all foreign missions alike, without regard to how the sending State treats representatives of the receiving State. Again, the

United States Government would not object to a provision that the receiving State is entitled to decline to receive a particular category of officials to perform a function which may be performed only as a matter of privilege and not as a matter of right. However, once the sending State is granted the right of legation, such State is entitled to staff its mission with all categories of persons necessary to the performance of those functions implicit in the right of legation. Also, the sending State and the receiving State concerned alone are in a position to determine the circumstances and conditions which may affect the size and composition of their respective missions in the territory of the other.

As noted in the observations regarding article 4, although the authority is exercised with restraint, any State may deny entry to any foreign national, including service attachés. The United States Government does not require *agrément*s for military, naval, or air attachés except on the basis of reciprocity. Since the Governments of Hungary, Italy, the Philippines, Romania and Spain require *agrément*s for the top service officers only, this Government reciprocates and requires a similar *agrément*. Even those Governments do not require *agrément*s for assistant military, air or naval attachés. In the event these Governments would eliminate the requirement for any such *agrément*s the United States Government would reciprocate.

#### Article 8

Article 8 lays down a rule as to the time when the head of a mission is entitled to take up his functions in relation to the receiving State. This is largely a matter of protocol or local custom. In the United States of America, ambassadors and ministers are received by the President, but a new head of mission first presents to the Secretary of State copies of his letters of credence, the letters of recall of his predecessor, and a copy of the remarks he proposes to make when received by the President. After this presentation to the Secretary of State he may perform all the functions of his office.

#### Article 9

This provides that if the post of head of mission is vacant, or if the head of mission is unable to perform his functions, the affairs of the mission shall be handled by a *chargé d'affaires ad interim*, whose name shall be notified to the Government of the receiving State. The article further provides that in the absence of such notification, the member whose name appears next on the mission's diplomatic list is presumed to be in charge.

The United States Government finds this article unacceptable. In each instance the United States Government would require appropriate notification before recognizing any member of the mission as *chargé d'affaires ad interim*. This is true whether the post is vacant, or whether the head of mission is temporarily away from the capital or is ill. The United States Government would not "presume" that a certain official was empowered to speak for his Government in the capacity of *chargé d'affaires ad interim*. Moreover, it would be particularly objectionable to require States to make such a presumption on the basis of the order in which names might appear on a diplomatic list. Some Governments do not publish such a list and, if they do, the published list may be out of date. Also, it should be noted that the diplomatic list is not intended to be used for the purpose of determining which officer shall be *chargé d'affaires ad interim*. Some Governments, for instance, customarily list, after the name of the head of mission, the name of the highest ranking military, naval or air attaché.

#### Article 10

This article divides heads of mission into three classes. It is suggested that this article might begin with the words "For purposes of precedence and etiquette . . .".

#### Article 11

This article restates the general practice of States, which is to agree on the class to which the heads of their missions are to be assigned. The United States Government observes, however, that the receiving and sending States concerned need not be represented by heads of mission of the same rank. One State may be represented by an ambassador, for instance,

while the other prefers to be represented by a minister or a *chargé d'affaires*.

#### Article 12

The rules of precedence of heads of missions prescribed in article 12 deal with matters of practice and protocol in the receiving State, rather than with principles of international law suitable for codification. See, also, observations on article 8 above.

#### Article 13

The United States Government agrees with the provisions of article 13, which would require each State to establish a uniform mode for the reception of heads of mission of each class.

It is suggested that the article further provide that such uniform mode of reception should be applied without discrimination. See, also, comment on article 8, above.

#### Article 14

The United States Government agrees that, except as concerns precedence and etiquette, there should be no differentiation between heads of mission by reason of their class.

#### Article 15

The United States Government agrees with the apparent intent of article 15, that it is the duty of the receiving State to ensure that the sending State has adequate accommodations, but that the receiving State is under no duty to make exceptions from its laws relating to title to or ownership of real property. The United States believes, however, that for added clarity the article should be revised to read somewhat as follows:

"The receiving State shall either permit the sending State to acquire in its territory the premises necessary for its mission, or, in some other way, ensure accommodations, including housing and other facilities, for members of the mission."

#### Article 16

The United States Government agrees that the premises of a diplomatic mission shall be regarded as inviolable and may not be entered by local authorities except with the consent of the head of the mission. However, such consent will be presumed when immediate entry is necessary to protect life and property, as in the case of fire endangering adjacent buildings.

Paragraph 3 of the article, considered in the light of the commentary thereon, presents special problems. This paragraph provides that the premises and furnishings of the mission shall be immune from search, requisition, attachment or execution. It would appear that paragraph 1 of the article covers "search" of a mission, as used in paragraph 3. If there is agreement to this, then the word "search" should be deleted from paragraph 3. If not, the United States Government would appreciate an explanation of what sort of search is intended. Second, while fortunately Governments have rarely been forced to requisition property used for foreign diplomatic missions, the United States Government is of the view that international law does not absolutely preclude the requisition of such property or its taking by exercise of right of eminent domain. This right, of course, could only be exercised under very limited circumstances, such as the happening of a disaster of great magnitude, or the necessity of making important improvements to the city which require the taking of all or some of the land on which the premises of the mission are located. In such case, the receiving State is obligated to make prompt and adequate compensation for the property taken and, if necessary, to use its good offices to assist the sending State in obtaining other suitable accommodations. Last, as to attachments and executions, in the case of rented or leased property international law requires only that the premises of the mission not be invaded to enforce an order of the court. The situation is different, of course, where the property is owned by the foreign Government and used for diplomatic purposes. In such case, the claim of sovereign immunity would preclude attachment or execution.

The United States Government does not agree with the last sentence of paragraph (2) of the commentary. It is not

clear what sort of judicial notices are referred to. The United States Government agrees that a process server may not serve a summons or process on the premises of the mission. However, this Government does not agree that judicial notices of any nature whatsoever need be delivered through the Minister for Foreign Affairs of the receiving State. If the person to whom the *subpoena* or process is addressed does not enjoy diplomatic immunity, the document should be served on him at his home or other appropriate place away from the premises of the mission. If the person concerned enjoys diplomatic immunity, he is not subject to the jurisdiction of the local courts in the absence of a waiver by his Government. The Foreign Office need become involved only where such a document has been erroneously served, and the head of mission requests the Foreign Office to return the process to the court with an appropriate suggestion of immunity.

The United States Government could not approve the language used in paragraph (4) of the commentary. It is suggested that the substance of this paragraph be restated as a rule of international law worded somewhat as follows:

"Notwithstanding the inviolability of the premises of the mission, real property is subject to the laws of the country in which it is situated. The sending State is obligated to permit the land on which the premises of the mission are situated to be used for carrying out public works, such as the widening of a road, for example. The receiving State, for its part, is obliged to provide prompt and adequate compensation and, if necessary, to place other appropriate premises at the disposal of the sending State."

#### Article 17

The United States Government agrees with this article, if it is intended to grant an exemption from taxes in respect of the premises of a diplomatic mission for which the foreign Government concerned would be liable either as owner or lessee. This Government does not agree, however, if the article is intended to grant an exemption from taxes levied against rented or leased property for which the landlord, rather than the sending State, is liable, or for taxes due with respect to real property owned by the head of the mission personally. Moreover, the article fails to clarify the particular categories of property which shall be considered as constituting the premises of the mission. The article might be revised to read as follows:

"The sending State shall be exempt from all national or local dues or taxes in respect of the premises of the mission owned by or on behalf of the sending State and used for legation purposes, other than, on a basis of reciprocity, such charges as represent payment for services actually rendered. For the purposes of this article, property used for legation purposes shall be deemed to include the land and buildings used for the embassy or legation, the chancery and all annexes thereto, and residence for officers and employees of the mission."

The commentary might explain that property used for legation purposes should be deemed to include the land on which the buildings are situated, including gardens, parking lots and vacant or unimproved land, provided such lands are adjacent to the land on which the buildings are situated.

#### Article 18

The United States Government agrees that the archives of the mission are inviolable, but suggests that the words "and documents" should be omitted, as the phrase is confusing and unnecessary.

The United States Government cannot agree with the statement in the commentary that the inviolability applies to "archives and documents, regardless of the premises in which they may be". The inviolability which properly attaches to the archives of the mission presupposes that archival material will be on the premises of the mission, in ordinary transit by courier or sealed pouch, or in the personal custody of duly authorized officers of the mission for use in the performance of their functions.

#### Article 19

The United States Government agrees that the receiving State should accord appropriate facilities for the performance

of the mission's functions. However, there should be some indication as to the meaning and scope of the words "full facilities".

#### Article 20

Article 20 is so broadly phrased as to sanction the present practice of certain Governments of restricting so extensively the travel of members of a diplomatic mission as to render the right of freedom and movement illusory. The latter part of the article would require that travel controls be applied without discrimination to diplomatic representatives of all States, including those which do not restrict the movements of representatives of the receiving State. The principle of reciprocity, however, is an integral factor in matters of this nature. It is believed that it would be preferable to have no article on the subject, rather than one so subject to arbitrary abuse.

#### Article 21

The United States Government concurs generally with paragraphs 1 and 3 of article 21. This Government recommends, however, that a new sentence be added to paragraph 2 of article 21, which would read as follows:

"Any article which is radio-active may not be considered as an article intended for official use of a diplomatic mission, and any diplomatic bag containing such an article may be rejected."

The United States Government further suggests that paragraph 4 be revised to read as follows:

"The diplomatic courier shall be protected while in transit in the receiving State or in the territory of a third State which he entered with proper documentation."

This Government is of the view that in a number of respects the commentary on this article does not reflect existing rules of international law.

#### Article 22

This provides that the persons of diplomatic agents, defined as the head of the mission, and members of the diplomatic staff of the mission, shall be inviolable, and that they shall not be subject to arrest or detention, be it administrative or judicial. As stated in the observations regarding article 4, above, the composition of the diplomatic staff requires more precise definition.

#### Article 23

The United States Government agrees with paragraph 1 of article 23, to the effect that the private residence of a diplomatic agent is inviolable. However, this Government is of the opinion that paragraph 2 requires further consideration. For instance, no inviolability would attach to the property, papers, and correspondence of a diplomatic agent pertaining to a commercial venture in the receiving State.

#### Article 24

This article undertakes to lay down a new rule of international law. While providing complete immunity from criminal jurisdiction, the article would make the exemption from civil jurisdiction subject to certain exceptions not presently recognized under international law. Moreover, paragraph 4 of the article undertakes to prescribe which court in the sending State is competent to exercise jurisdiction over its own diplomatic agents.

The United States Government is of the opinion that the article should be revised to restate existing principles of international law on the subject. This, it is submitted, requires complete exemption of persons entitled to diplomatic immunity from criminal and civil process, in the absence of a waiver by the sending State, except with respect to real property owned by such person in his private capacity. In the latter case, court proceedings are usually *in rem* rather than *in personam*. The United States Government also suggests that the last sentence of paragraph 4 of the article be deleted.

#### Article 25

The United States Government agrees with the principles expressed in paragraphs 1 and 2 of article 25, which provide that the immunity of diplomatic agents may be waived by the sending State, and that in criminal proceedings, the waiver must always be expressly made by the Government.

Paragraphs 3 and 4, however, recognize implied waivers of immunity in certain civil proceedings. This is inconsistent with the accepted theory that the immunity is for the benefit of the Government concerned, not the individual. For various reasons, the sending State may object to one of the members of its mission becoming involved in judicial proceedings in the receiving State. Accordingly, the United States Government is of the opinion that, in each case, there should be an express waiver of immunity by the sending State.

#### Article 26

Article 26 cannot be considered as a statement of the tax exemptions to which diplomatic agents are presently entitled under existing principles of international law. While some of the provisions thereof may conform with requirements of international law, others do not.

#### Article 27

Paragraph 1 of the article provides that customs duties shall not be levied on articles for the use of the mission or for the personal use of a diplomatic agent or members of his family belonging to his household. Assuming that the term "diplomatic agent" refers only to an individual recognized in an officer status, this paragraph conforms with United States practice in the matter.

Paragraph 2 of the article further provides that the personal baggage of a diplomatic agent may not be inspected except under limited circumstances and in the presence of such agent or his authorized representative. It is the view of the United States Government that the customary exemption from inspection by customs authorities of the personal baggage of a diplomatic officer is accorded as a matter of courtesy, and not because it is a requirement of international law.

#### Article 28

This article provides that, in addition to diplomatic agents, the privileges and immunities mentioned in articles 22 to 27 shall also be enjoyed by members of the family of the diplomatic agent, and likewise the "administrative and technical staff" of the mission, and their families, provided such persons are not nationals of the receiving State. Members of the "service staff", however, are to enjoy immunity only in respect of acts performed in the course of their duties and, if not nationals of the receiving State, are to be exempt only from dues and taxes on their salaries. The last two paragraphs of the article apply to private servants.

The United States Government considers that a careful and precise statement by the International Law Commission as to the privileges, immunities and exemptions to which the various categories of officers and employees of a mission should be considered entitled would materially contribute to the betterment of relations between Governments.

It is well known that few Governments are as generous as the United States Government in extending privileges and immunities to all members of the staff of a diplomatic mission. The United States, just as most Governments, does not extend immunity to families of employees of diplomatic missions in Washington whose names are not included in the Diplomatic List. Also, except on first arrival and for a reasonable period thereafter, such employees and their families do not, in the absence of reciprocal arrangements, enjoy free importation privileges and certain other tax exemptions enjoyed by officer personnel. Also, the United States Government, on request, suggests to American courts the immunity from jurisdiction of all officers and employees of a diplomatic mission in Washington, regardless of nationality, who have been duly notified to and accepted by the United States in such capacity, as well as the immunity of families of officers included on the Diplomatic List.

Other Governments may be of the opinion that the granting of diplomatic immunities to subordinate employees of a mission for other than official acts is not required under international law. The United States Government is hopeful that the International Law Commission will be able to restate the international law rule on the subject with sufficient clarity that it will serve as a firm guide to what immunities Governments must accord to members of foreign diplomatic missions.

#### Article 29

This article provides that, as regards the acquisition of nationality of the receiving State, no person enjoying diplomatic privileges and immunities in that State, other than the child of one of its nationals, shall be subject to the laws of the receiving State. This represents existing United States law on the subject and is in conformity with international law as the United States Government interprets it.

#### Article 30

This article provides that a diplomatic agent who is a national of the receiving State shall enjoy immunity from the jurisdiction only in respect of official acts performed by him in the exercise of his functions. The last paragraph of the commentary states that the proposed rule implies that members of the administrative and service staff of a mission who are nationals of the receiving State shall enjoy only such privileges and immunities as may be granted them by the receiving State.

The United States Government is of the opinion that all officers and employees of a diplomatic mission, regardless of nationality, should enjoy immunity from jurisdiction in respect of official acts. Such immunity is for the benefit of the Government, and not the individual (see observations regarding articles 6 and 28, above).

#### Article 31

The United States Government agrees with the provisions of article 31 specifying that entitlement of an individual to diplomatic privileges and immunities commences on the moment of his entry into the territory to take up his post, and continues until his departure on expiry of his appointment or a reasonable time thereafter in which to depart and have his effects removed. The United States Government submits, however, that where the person is already in the territory of the receiving State, his privileges and immunities begin only when his appointment is notified to and accepted by the Ministry for Foreign Affairs.

#### Article 32

The United States Government agrees with article 32, if it is intended to apply only to the duties of a third State with respect to a diplomatic agent passing through or in its territory in immediate and continuous transit proceeding on official business to or from a post to which he is regularly assigned. However, a third State is not obligated to accord inviolability to a diplomatic agent while in transit for other purposes or during a sojourn in such third State. The United States Government further observes that this article should be revised to cover other members of the staff of the mission.

It is of course a condition precedent to the claiming of any rights by persons in transit through a third State, whether as a diplomatic courier, a diplomatic agent, or any other person connected with a diplomatic mission, that the individual concerned be properly documented, and that the third State has authorized his transit, or that his presence in the third State is inadvertent and unplanned, being due to a unforeseen circumstance, as in the case of shipwreck or forced landing of an airplane.

#### Article 33

The United States Government agrees with the statement that persons entitled to diplomatic immunity should nonetheless respect the laws and regulations of the receiving State, and should refrain from interfering in the internal affairs of that State. Also, the United States Government further agrees that, in the absence of special agreement, the mission should conduct its business through the Foreign Office, and that the premises of the mission should not be used for purposes incompatible with the functions of the mission. However, see United States observations on article 2, regarding the functions of a mission.

#### Article 34

This article appears correctly to describe, *inter alia*, the various modes of termination of appointment, except that paragraph (c) should be reworded. A notification that an individual has become *persona non grata*, or a request that he be recalled, is customarily given by the receiving State to the head of the mission concerned, rather than to the individual.

Such notifications normally also provide that such person's appointment will be considered terminated as of a certain date.

*Article 35*

This appears to reflect existing practice regarding the duty of the receiving State to grant facilities for departure, even in case of armed conflict.

*Article 36*

This appears to reflect existing practice regarding the duty of the receiving State to respect and protect the premises, property and archives if diplomatic relations are broken off or if a mission is withdrawn or discontinued, and to permit the sending State's interests to be represented by a third State acceptable to the receiving State.

*Article 37*

This Article should be deleted if the draft articles are not prepared in the form of a convention.

21. YUGOSLAVIA

*Transmitted by a letter dated 19 May 1958 from the Permanent Representative of Yugoslavia to the United Nations*

[Original: English]

I

*General comments*

1. The present text of the draft rules concerning diplomatic intercourse and immunities of permanent diplomatic missions, elaborated by the International Law Commission at its ninth session, may be considered in principle as acceptable and could, subject to some smaller alterations, serve as a final proposal for the codification of the matter.

2. The United Nations Charter, which represents the basic source of contemporary international law, should provide the basis for this codification. However, in implementing this stand, concrete necessities should be borne in mind and compromise solutions should be adopted with regard to questions where differences between the new requirements of the Charter and earlier practices may occur, or where the provisions of the Charter do not affect directly the corresponding rules of the draft. Generally speaking, as far as diplomatic privileges and immunities and the protection of diplomatic persons are concerned, special guarantees are needed. Such guarantees were not provided by the Universal Declaration of Human Rights, which should be considered as the guiding principle of international law and which guarantees only a minimum of rights to each individual.

3. The Commission has acted properly when it extended its work to the field of the codification of rules concerning *ad hoc* diplomacy and the representation of States in international organizations. The Secretariat of State for Foreign Affairs considers that much more extensive and comprehensive studies will have to be carried out before taking up the codification of rules concerning *ad hoc* diplomacy and the representation of States in international organizations. The Commission has embarked on the best possible road when it has taken up the codification of rules regulating the status of diplomatic missions first. The Secretariat of State for Foreign Affairs considers that section I of the rules on permanent diplomatic missions could be implemented independently of other sections, and that the conclusion of an international convention would provide the most appropriate form for the implementation of such rules.

II

*Specific comments*

*Article 2*

The question of defining the functions of a diplomatic mission constitutes one of the most complex problems pertaining to this field. Contemporary practice is pointing to an ever increasing extension of these functions, so that classical rules do not appear to be satisfactory any more.

It is believed that the Commission should once more consider the formulation adopted at the ninth session, which is

based on classical principles but fails to exhaust all the functions of a diplomatic mission. It would be useful to consider the possibility of drafting a more detailed formulation, which would cover the functions more extensively, including the elements already embodied in the present formulation. The possibility of inserting these functions in a different part of the draft should be also taken into consideration, bearing in mind the elaboration either of a negative or of a positive formulation of these functions.

*Article 4*

The Secretariat of State for Foreign Affairs considers that it should be ascertained whether this provision applies only to the appointment of diplomatic personnel alone or to the whole staff of a diplomatic mission, both diplomatic and non-diplomatic. It should be also made clear what is meant by the expression "other members of the staff of the mission".

*Article 5*

As regards article 5, the Secretariat of State for Foreign Affairs wishes to underline that it is, in principle, opposed to the institution of members of the diplomatic staff of a mission appointed from among the nationals of the receiving State, as it considers that this institution constitutes an historic anachronism with regard to diplomatic agents and the diplomatic staff of missions. Nevertheless, if the Commission finally adopts this institution, care should be taken that the privileges and immunities necessary for the independent carrying out of functions should be guaranteed to such persons also.

It would be useful if the Commission also considered in the course of its further work the question of diplomatic agents and diplomatic staff who are nationals of third States.

*Article 8*

Bearing in mind the reasons by which the Commission was prompted when formulating the first alternative, namely, that "the head of the mission is entitled to take up his functions in relation to the receiving State when he has notified his arrival and presented the true copy of his credentials to the Ministry for Foreign Affairs of the receiving State", the Secretariat of State for Foreign Affairs admits the possibility of a discussion concerning its adoption. However, it wishes to emphasize that the second alternative, namely "when he has presented his letters of credence", is more in line with actual practice and offers a greater legal security, as the very act of presentation of letters of credence to the head of State is, in addition to its more solemn character, of a greater legal significance.

*Article 10*

As modern practice is developing intensively in the direction of the abolition of the class of ministers plenipotentiary, it would be useful if the Commission reconsidered this article with a view to the possible abolition of the class of ministers plenipotentiary. If the Vienna classification into three classes were maintained, it could be pointed out, at least in the commentary, that this classification is not in contradiction with the recognition of the sovereignty and equality of States in accordance with the United States Charter, as it does not deprive the States of the right to exchange those classes of diplomatic agents to which they have agreed. This is all the more desirable as the differentiation of diplomatic agents results in a definite inequality as regards protocol, and sometimes also in an inequality of substance if too much importance is attached to the provisions of protocol.

*Article 17*

As far as this article is concerned, it is necessary to give a precise definition of the expression "for services actually rendered", as a number of disputes have arisen in actual practice with regard to this matter.

*Article 28*

The basic remark with regard to this article is concerned with the granting of diplomatic privileges and immunities to the administrative and technical staff of a mission. On the basis of the general rules of international law, which exist today and are applied in the majority of States, the administrative and technical staff of a mission enjoy only the privileges and immunities they need for the unhindered carrying out of their functions, and which cannot be identified with the functions of

the diplomatic staff. It would be desirable to explain precisely what is meant by the expression "members of the family of a diplomatic agent forming part of his household", in order to define precisely the circle of persons enjoying diplomatic privileges and immunities.

The same applies to paragraph 2 of this article. It would be useful to clarify the meaning of the sentence "members of the service staff of the mission shall enjoy immunity in respect of acts performed in the course of their duties", in order to

ascertain the basis upon which they are granted diplomatic privileges and immunities.

The Secretariat of State for Foreign Affairs, on its part, wishes to emphasize that, in its opinion, articles 33, 34, 35 and 36 of the present draft should be reconsidered and elaborated in more detail, in view of the fact that they have been formulated in a rather incomplete manner and that they require an as comprehensive analysis as possible.

## CHECK LIST OF COMMISSION DOCUMENTS REFERRED TO IN THIS VOLUME

| <i>Document</i> | <i>Title</i>  | <i>Observations and references</i>  |
|-----------------|---|---|
| A/925           | Report of the International Law Commission covering its first session (12 April-9 June 1949)  | <i>Official Records of the General Assembly, Fourth Session, Supplement No. 10</i> ; also published in the <i>Yearbook of the International Law Commission</i> , 1949 |
| A/2163          | Report of the International Law Commission covering the work of its fourth session (4 June-8 August 1952)   | <i>Ibid.</i> , <i>Seventh Session, Supplement No. 9</i> ; also to be published in vol. II of the <i>Yearbook of the International Law Commission</i> for 1952         |
| A/2456          | Report of the International Law Commission covering the work of its fifth session (1 June-14 August 1953)   | <i>Ibid.</i> , <i>Eighth Session, Supplement No. 9</i> ; also to be published in vol. II of the <i>Yearbook of the International Law Commission</i> for 1953          |
| A/2693          | Report of the International Law Commission covering the work of its sixth session (3 June-28 July 1954)   | <i>Ibid.</i> , <i>Ninth Session, Supplement No. 9</i> ; also to be published in vol. II of the <i>Yearbook of the International Law Commission</i> for 1954           |
| A/2934          | Report of the International Law Commission covering the work of its seventh session (2 May-8 July 1955)   | <i>Ibid.</i> , <i>Tenth Session, Supplement No. 9</i> ; also to be published in vol. II of the <i>Yearbook of the International Law Commission</i> for 1955           |
| A/3159          | Report of the International Law Commission covering the work of its eighth session (23 April-4 July 1956)   | <i>Ibid.</i> , <i>Eleventh Session, Supplement No. 9</i> ; also published in the <i>Yearbook of the International Law Commission 1956, vol. II</i>                    |
| A/3623          | Report of the International Law Commission covering the work of its ninth session (23 April-28 June 1957)   | <i>Ibid.</i> , <i>Twelfth Session, Supplement No. 9</i> ; also published in the <i>Yearbook of the International Law Commission 1957, vol. II</i>                     |
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| A/CN.4/1/Rev.1  | Survey of international law in relation to the work of codification of the International Law Commission (Memorandum submitted by the Secretary-General)   | United Nations publication, Sales No.: 1948.V.1(1)  |
| A/CN.4/18       | Arbitral procedure: report by Georges Scelle, Special Rapporteur  | Mimeographed. Original text (French) published in the <i>Yearbook of the International Law Commission 1950, vol. II</i>   |
| A/CN.4/63       | Law of treaties: report by H. Lauterpacht, Special Rapporteur   | Ditto. To be published in vol. II of the <i>Yearbook of the International Law Commission</i> for 1953.  |
| A/CN.4/92       | Commentary on the draft convention on arbitral procedure adopted by the International Law Commission at its fifth session: document prepared by the Secretariat   | United Nations publication, Sales No. 1955.V.1  |
| A/CN.4/96       | State responsibility. International responsibility: report by F. V. García Amador, Special Rapporteur   | See <i>Yearbook of the International Law Commission 1956, vol. II</i>   |
| A/CN.4/101      | Law of treaties: report by G. G. Fitzmaurice, Special Rapporteur  | <i>Idem.</i>  |
| A/CN.4/106      | State responsibility. International responsibility: second report by F. V. García Amador, Special Rapporteur  | See <i>Yearbook of the International Law Commission 1957, vol. II</i>   |
| A/CN.4/107      | Law of treaties: second report by G. G. Fitzmaurice, Special Rapporteur   | <i>Idem.</i>  |
| A/CN.4/109      | Arbitral procedure. Draft convention on arbitral procedure adopted by the Commission at its fifth session: report by Georges Scelle, Special Rapporteur, (with a "model draft" on arbitral procedure annexed) | <i>Idem.</i>  |
| A/CN.4/116      | Diplomatic intercourse and immunities: summary of observations received from Governments and conclusions of the Special Rapporteur  | Mimeographed  |

NOTE. For the summary records of the Commission meetings referred to in this volume, see:  
*Yearbook of the International Law Commission, 1956*, vol. I, 331st to 381st meetings  
*Yearbook of the International Law Commission, 1957*, vol. I, 382nd to 430th meetings  
*Yearbook of the International Law Commission, 1958*, vol. I, 431st to 478th meetings



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