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Volume II

Documents of the eleventh 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 ELEVENTH SESSION, INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

STATE RESPONSIBILITY

[Agenda item 4]

DOCUMENT A/CN.4/119

International responsibility. Fourth report by F. V. García Amador, Special Rapporteur

RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS —MEASURES AFFECTING ACQUIRED RIGHTS

[*Original text: Spanish*]
[*26 February 1959*]

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Introduction

1. In his second report to the International Law Commission (A/CN.4/106), the Special Rapporteur submitted a draft, chapter IV of which deals with the international responsibility which the State may incur as a result of "non-performance of contractual obligations and acts of expropriation". However, the Special Rapporteur's consideration of the subject was not only somewhat summary but also limited to a survey of the precedents and other relevant matters which can be found in traditional doctrine and practice. Both these qualifications can be explained by the fact that the Special Rapporteur's object was to present to the Commission, with the least possible delay, a draft covering each and every aspect of "international responsibility of the State for injuries caused in its territory to the person or property of aliens". But that task having been completed, the Special Rapporteur believes, in view of the Commission's request that he should continue with his work, that no subject requires more thorough study—and, in a sense, even complete reconsideration—than the aspects of responsibility envisaged in chapter IV of the draft.

2. Moreover, it should be stressed that the present report is not merely an expansion of chapter IV of the second report, for there is also a difference in the method of study adopted in each of them. The present report, besides giving more exhaustive treatment to the traditional doctrine and practice in the matter, also dwells on the new doctrinal and practical trends which have made their appearance mostly since the last World War. Although they do not jointly constitute a uniform movement, and some are even contradictory, there is no doubt that they have made a deep impact on the traditional notions and ideas. This fact is so certain that it would be wholly unrealistic to disregard it and to deny that the new tendencies can make a valuable contribution to the development and codification of the relevant rules on international responsibility.

3. In seeking the most satisfactory method of work, the Special Rapporteur adopted as a basis the principle of "respect for acquired rights". The report thus starts from the premise that respect for private rights of a patrimonial nature constitutes one of the principles of international law governing the treatment of aliens. The traditional views on this principle may admittedly need revision, but, in the present state of development of international law, its existence and validity cannot be questioned. It can even be said that, coupled with the doctrine of "unjust enrichment", this principle constitutes the only solid basis on which the State's international responsibility in this context can be established. Moreover, from the technical-juridical point of view, it is the sole point of departure which permits a systematic and coherent consideration of the subject. There is no doubt, in fact, that, whatever the specific nature of the patrimonial rights involved or of the measures taken by the State, the latter's international responsibility will always be determined in the light of the principle of respect for the acquired rights of aliens.

4. The above considerations will be discussed in detail in chapter I. As regards the general structure of this report, chapter I deals with the basic notions which influence the present system of international protection of acquired rights and the component elements of the State's international responsibility in that connexion. Chapter II surveys "expropriation in general" and discusses the different international aspects of that measure, while chapter III concentrates on "contractual rights", in an endeavour to show the conditions and circumstances in which the State may incur international responsibility when the rights at issue are solely within that class. The Special Rapporteur unfortunately lacked the time necessary to deal with other aspects and matters which, today more than ever, are of fundamental relevance to the subject. These include, in particular, the extra-territorial effects of acts of expropriation and other problems of "private" international law, as well as the methods and procedures which lend themselves best to the settlement of international disputes arising in consequence of measures affecting the patrimonial rights of aliens.

CHAPTER I

INTERNATIONAL PROTECTION OF ACQUIRED RIGHTS

I. Respect of acquired rights as a principle of international law

5. As was stated in the introduction, this report starts from the premise that respect for private rights of a patrimonial nature constitutes one of the principles of international law governing the treatment of aliens. But notwithstanding the marked similarity and points of contact between the rules of international law in this matter and the "doctrine of acquired rights" in other contexts, the international application of this doctrine possesses its own characteristics and modalities and, above all, the juridical situations involved therein are of much greater complexity. This being so, consideration of the existing system of international protection accorded to such rights of aliens in specific circumstances should be preceded by a general survey of the subject. The first point to determine in this connexion is the mode of "acquisition" of such rights or, in other words, the juridical régime which governs an alien individual's capacity to acquire rights of a patrimonial nature.

1. Régime applicable to the acquisition of patrimonial rights

6. Under international law, the acquisition of private rights of a patrimonial nature is governed entirely by municipal law. This does not, of course, preclude the possibility of aliens also acquiring rights of that nature by virtue of an international treaty, as has been frequently demonstrated in practice and expressly recognized by international judicial decisions. But in the absence of conventional rules on the matter—and this second mode of acquisition will be considered hereunder—the position is as stated above. Especially in matters relating to ownership and other rights *in rem*, the *lex rei sitae* alone can apply. In fact, although in practice this is done infrequently, a State may even make it impossible for aliens to acquire immovable property in its territory; it may also prohibit or restrict the acquisition of other patrimonial rights, although this second practice is even less frequent than the first. This principle, which confirms the exclusive sovereignty of the State in all matters pertaining to its economic and social structure, is expressly enunciated in article 116 of the Inter-American Convention on Private International Law ("Bustamante Code").[1]

7. In apparent contrast with the foregoing, the American Declaration of the Rights and Duties of Man (Bogotá, March 1948) and the Universal Declaration of Human Rights (Paris, December 1948) explicitly recognize that "Everyone has the right to own property...". The object of that wording was undeniably to invest every person, at least in principle, with the capacity to acquire rights of a patrimonial character in any place whatever. But the primary purpose, which can be perceived in subsequent instruments on the recognition and protection of human rights and fundamental freedoms and even in the Universal Declaration itself, seems to be rather to protect private property, once acquired, against "arbitrary" actions of the State. It is doubtless for this reason that none of those instruments, as will be shown presently, establishes a régime applicable to the acquisition of ownership and other patrimonial rights. This peculiarity of private rights of a patrimonial nature in the matter of their acquisition reflects one of the fundamental differences between them and the other rights envisaged in the instruments referred to above or the rights which aliens have traditionally been held to enjoy *vis-à-vis* the State of residence. The acquisition of those other rights does not in any way depend on municipal law, as they are enjoyed in any place whatever by virtue of the principles of international law governing the treatment of aliens. Moreover, it is not difficult to see that this fundamental difference necessitates also a distinct régime applicable to the enjoyment and exercise of patrimonial rights alone. Although they deserve, once they are "acquired", the protection of international law, the resulting obligation of the State to respect them cannot be of the same nature and scope as when the rights involved are rights inherent in the human person.

8. At this stage, it is appropriate to consider the second mode of acquisition, i.e. cases in which international treaties or agreements confer on or recognize to the nationals of the contracting States the capacity to acquire property or patrimonial rights. An example can be found in the Treaty of Commerce and Navigation between Austria and Great Britain of 22 May 1924, article 3 of which contains a "most favoured nation" clause reading as follows:

> "The subjects or citizens of each of the Contracting Parties in the territories of the other shall be at full liberty to acquire and possess every description of property, movable and immovable, which the laws of the other Contracting Party permit, or shall permit, the subjects or citizens of any other foreign country to acquire and possess."[2]

Similarly, under article 10 of the draft Convention prepared by the Economic Committee of the League of Nations for the International Conference on the Treatment of Foreigners, held in Paris in 1929:

> "1. Nationals of all the High Contracting Parties shall be placed on terms of complete equality with the citizens or subjects of any one of the Parties as regards patrimonial rights, the right of acquiring, possessing..."[3]

And a recent European Convention provides as follows:

> "Nationals of any Contracting Party shall enjoy in the territory of any other Party treatment equal to that enjoyed by nationals of the latter Party in

[1] *The International Conferences of American States, 1889-1928*, p. 338.

[2] League of Nations, *Treaty Series* 1925, Vol. XXXV, p. 178.

[3] League of Nations publication, *II. Economic and Financial 1929 II.5, Addendum* (document C.36.M.21.1929.II) p. 5.

respect of the possession and exercise of private rights, whether personal rights or rights relating to property."[4]

2. The international obligation to respect acquired rights

9. The fact that the acquisition of patrimonial rights is governed, whenever there are no treaty provisions on the subject, solely by municipal legislation has not prevented international law from imposing on every State the obligation to respect those rights once they have become "acquired". This obligation to abide by the principle of respect for such rights of aliens assumes practical significance in two sets of circumstances: in cases of State succession, and in those that arise in a given State in consequence of some acts or omissions which are attributable to its authorities and affect those rights. The first point to consider, therefore, if only very briefly, is the position which results from the acquisition by a State of (all or) part of another State's territory.

10. On this point, diplomatic practice and international case law have built up a substantial volume of precedent from which the applicable rules can be readily discerned. So far as the general principle is concerned, the statement made on the subject by the Permanent Court of International Justice is unequivocal. In its Advisory Opinion on the German Settlers in Poland (1923), it held that

> "Private rights acquired under existing law do not cease on a change of sovereignty."

Elaborating that point, the Court added that

> "... even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty."

And later, the Court expressed the opinion

> "... that no treaty provision is required for the preservation of the rights and obligations now in question."[5]

These statements of the Permanent Court clearly show that, in the event of a territorial change, there exists an international obligation to respect the rights of private individuals acquired under the legislation previously in force.[6]

11. The same can be said regarding the rights acquired by foreign private individuals under a State's own legislation. In those cases, which are those of particular interest in the context of the present report, the position as regards the applicability of the general principle which requires the State to respect those rights is substantially the same. In one of the judgements cited in the preceding paragraph, the Permanent Court declared that

> "... the principle of respect for vested rights... forms part of generally accepted international law [*droit international commun*]...".[7]

Another express statement of the principle was made by the Special German-Romanian Arbitral Tribunal established to adjudicate on claims arising under paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles:

> "Respect for private property and the acquired rights of aliens undoubtedly forms part of the general principles recognized by the law of nations."[8]

Moreover, as will be shown in the appropriate context, there have been many other concrete instances in which international jurisprudence has held that the principle applied in the event of acts or omissions affecting this category of rights. And the same rule has been confirmed by conventional law. For the time being, and by way of illustration, it is worth citing the Economic Agreement of Bogotá, article 22 of which provides as follows:

> "Foreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts of technology they have supplied."[9]

12. In dealing with this obligation of the State, the question arises whether rights of a patrimonial nature belong among the "human rights and fundamental freedoms" which have been internationally recognized by the United Nations Charter and other post-war instruments. As was shown in the Special Rapporteur's second report (A/CN.4/106, chapter III, 10 (*b*)), some of these instruments expressly recognize the right to own private property and also lay down rules for its protection against the "arbitrary" action of the State. This point, however, will be considered below, during

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[4] The Convention, however, contains another provision which states: "Notwithstanding article 4 of this Convention, any Contracting Party may, for reasons of national security or defence, reserve the acquisition, possession or use of any categories of property for its own nationals or subject nationals of other Parties to special conditions applicable to aliens in respect of such property." *See* European Convention on Establishment (Paris, 13 December 1955), arts. 4 and 5, *European Treaty Series*, No. 19, p. 2.

[5] Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 6, Settlers of German Origin in Territory ceded by Germany to Poland, pp. 36 and 38. See also other statements of the Court in *Collection of Judgments*, series A, No. 2, The Mavrommatis Palestine Concessions case, p. 28, and series A, No. 7, Case concerning certain German interests in Polish Upper Silesia, pp. 22 and 42.

[6] For other comment on the application of the principle in cases of "State succession" see Sayre, "Change of Sovereignty and Private Ownership in Land", *American Journal of International Law* (1918), vol. 12, pp. 475-497, and "Change of Sovereignty and Concessions", *ibid*, pp. 705-743; Makarow, "Les changements territoriaux et leur effets sur les droits des particuliers", *Annuaire de l'Institut de droit international*, (1950), vol. I, pp. 208-255; O'Connell, *The Law of State Succession* (1956), *passim*.

[7] Series A, No. 7, p. 42.

[8] Affaire Goldenberg (1928), United Nations, *Reports of International Arbitral Awards*, vol. II, p. 909.

[9] *Documents on American Foreign Relations*, vol. X (1948), p. 521.

the consideration of the measure of international protection afforded to acquired rights and of the general component elements of the notion of "arbitrariness", which is the basic notion from which the State's international responsibility in this context derives.

3. Relationship between the above principle and the doctrine of "unjust enrichment"

13. In international judicial decisions, including those of the Permanent Court, the doctrine of "unjust enrichment" (*enrichissement sans cause*) has been used as a criterion for determining the quantum of reparation for damage caused by acts or omissions contrary to international law.[10] This, however, is not the sole function which the doctrine has fulfilled in practice. It has also served in the determination of the component elements of international responsibility in many cases which have a bearing on the subject-matter of the present report, although on one occasion a well-known Claims Commission held that the doctrine of "unjust enrichment", as a general principle of law recognized by civilized nations, "... has not yet been transplanted to the field of international law".[11] Yet, as will be shown more fully at the appropriate stage, "unjust enrichment" in this very sense has "... long been recognized as a legitimate cause of action under the various systems of law, including international law".[12] And it is precisely because it is a cause of action, i.e. a source of quasi-contractual obligations between States and aliens, obligations the non-fulfilment of which may render the State responsible at international law, that the doctrine of "unjust enrichment" is related, and indeed very closely related, to the principle of respect for acquired rights.

14. Moreover, this close relationship between the two doctrines or principles can be discerned not only in the above-mentioned context of responsibility, but also elsewhere within the system of international protection of acquired rights. For example, the very *raison d'être* of compensation for expropriation ordered in the public interest is the idea that the State, i.e. the community, must not benefit (unduly) at the expense of private individuals. On the other hand, private individuals have no right to expect the compensation which they receive in such cases for their property to be a "source of enrichment".[13] These are the reasons why it has rightly been said that the theory of compensation based on enrichment is much more flexible than one based on the principle of respect for private property, for it permits the taking into consideration of equities in favour not only of the individual but also of the community.[14]

4. Scope of international protection: the need to revise the traditional conception

15. International law imposes on the State the obligation to respect the patrimonial rights of alien private individuals. However, the principle of respect for acquired rights does not imply an absolute or unconditional obligation. The idea of "respect" in no way corresponds to that of "inviolability". From the purely juridical standpoint, none of the "human rights and fundamental freedoms", not even the right to life and the security of the person, is absolutely inviolable, and that qualification has been recognized in all of the post-war international instruments.[15] And the protection extended to patrimonial rights is—if such a term may properly be used—particularly "relative".[16] In fact, from the point of view of international law, respect for acquired rights is conditional upon the subordinate to the paramount needs and general interests of the State. This is not solely due to the fact that "in principle, the property rights and the contractual rights of individuals depend in every State on municipal law ..."[17] It is also, and indeed primarily, due to the fact that, according to a fundamental legal precept, private interests and rights, regardless of their nature and origin or of the nationality of the persons concerned, must yield before the interests and rights of the community. International law cannot ignore this universal precept. In the words of an Arbitral Tribunal, "the law of nations demands respect of private property, but recognizes that the State has the right to depart from that principle when its higher interests so require."[18]

16. Consequently, this report must seek to determine the extent to which at international law, the patrimonial rights of aliens are in fact protected; in other words, the essence and exact limits of the State's obligation to respect those rights. Only thus will it be possible to ascertain the component elements of international responsibility in the different circumstances which may arise. As will be shown, the scope of the international protection, and consequently also the existence and imputability of responsibility, will in each case depend both on the "acquired right" at issue and on the conditions and circumstances in which the act or omission on the part of the State takes place. But before referring to the criteria which serve as the basis for the determination of the component elements of responsibility, we should first see whether there is any genuine justification for the criticisms and objections voiced on occa-

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[10] On this point, see Schwarzenberger, *International Law*, vol. I, *International Law as applied by International Courts and Tribunals* (3rd ed., 1957), pp. 557, 653 *et seq.*

[11] General Claims Commission, United States and Mexico, Dickson Car Wheel Company (U.S.A.) *v.* United Mexican States (1931), United Nations, *Reports of International Arbitral Awards*, vol. IV, p. 676.

[12] Nussbaum, "The Arbitration between the Lena Goldfield's Ltd. and the Soviet Government", *Cornell Law Quarterly* (1950), vol. 36, p. 41.

[13] In Delagoa Bay Railway Arbitration (1900), the Tribunal explicitly declared that it would be "... contrary to the most elementary considerations of equity to make this measure [compensation] a source of enrichment for the Company ...", *see* Martens II (30) N.R.G., p. 413.

[14] Bin Cheng, *General principles of law as applied by International Courts and Tribunals* (1953), p. 48.

[15] On this point, see the Special Rapporteur's second report (A/CN.4/106, chapter III, 10 (*b*)).

[16] In the course of the deliberations of the *Institut de droit international* (Siena session), A. de Luna assimilated the right of ownership to what the classical jurists called *jus naturae secundarium*. See *Annuaire de l'Institut de droit international* (1952), vol. II, p. 254.

[17] Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 76, The Panevezys-Saldutiskis Railway case, p. 18.

[18] Arbitration between Germany and Portugal (1919), Award II (1930), United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1039.

sions in recent years against the principle of respect of acquired rights itself. As a general rule, these criticisms and objections fall into two categories: those based on reasons of a political and social nature and those supported by purely juridical arguments.

17. One of the most severe critics of the first group is Friedman, in whose view the concept of acquired rights is not only "obscure, ambiguous and indefinable" but also "finds no support in international judicial decisions and was practically repudiated by States during the preparatory work for the Codification Conference [1930] and cannot, therefore, be raised to the dignity of a principle of international law".[19] Most of the criticisms or objections, however, are more moderate in tone. Kaeckenbeeck has said that, as a means of solving disputes arising out of major social reforms ("nationalizations"), "the theory of acquired rights has proved to be totally inadequate and ineffective".[20] Similarly, Foighel has said that the (traditional) international jurisprudence reflects a period of history in which the sole economic system recognized in the principal countries was liberalism, and that, at present, in view of the changes in the conditions and circumstances which had served as its basis, the principle of respect is no longer important in the determination of the minimum standard of international law which States are unconditionally bound to observe in their relations with foreigners.[21]

18. As regards the position adopted by Governments before The Hague Codification Conference (1930), none of the replies received by the Preparatory Committee repudiated the State's obligation to respect the acquired rights of aliens on the grounds that the State enjoyed absolute legislative (or administrative) independence in the matter. A study of those replies indeed shows that all the Governments concerned admitted that the freedom of the State to "affect" the patrimonial rights of aliens was subject to specified conditions.[22] Substantially the same conclusion can be drawn from a survey of the opinions expressed by States Members of the United Nations in the course of the discussion in the United Nations of questions regarding expropriation and nationalization.[23]

19. Moreover, as will be shown in the next chapter, the essential notion of "respect for acquired rights" forms part of the existing system of international protection of "human rights and fundamental freedoms". Naturally, this does not in any way mean that the principle of respect can retain its traditional significance or scope or, *a fortiori,* the characteristics attributed to it by the "orthodox" school of thought.[24] The extent to which the "traditional" conception is open to the criticisms and objections which have been directed against it will be shown below; but there is no denying the need for revising it, with a view to bringing the principle of respect for the acquired rights of aliens fully into line with the idea that private ownership and all the other patrimonial rights—as sources of social obligations—require, regardless of the nationality of the person in whom they are vested, constantly increasing sacrifices in the interests of the community at large. This idea is already discernible as the common denominator in the socio-economic structures and legal systems of all the countries of the world. Furthermore, in order to take into account certain recent developments of another character, it will also be necessary to revise the position traditionally maintained regarding the application of the principle in certain specific cases.

20. The second class of criticisms and objections levelled against the principle of respect relies on purely technical juridical arguments.[25] Certain learned authors have expressed some doubts regarding its practical usefulness as a principle of general application, suggesting, instead, that the varied and different patrimonial rights under international protections should be considered individually and separately. Cavaglieri, for example, maintains that the more correct approach is to determine, in each concrete case, whether the measure adopted by the State with regard to the alien's property is consistent with the *minimum* rights which he is recognized to possess by international law.[26] More recently, Guggenheim has suggested that it might be preferable to abandon the traditional approach, in which the problem of the protection of patrimonial rights is considered in terms of "acquired rights", and instead to study each of the specific categories (rights *in rem,* concessions, etc.) which play a practical part in the protection of private ownership under the law of nations.[27]

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[19] S. Friedman, *Expropriation in International Law* (1953), p. 126.

[20] G. Kaeckenbeeck, "La protection internationale des droits acquis", *Recueil des cours de l'Académie de droit international* (1937-I), vol. 59, p. 361.

[21] Foighel, *Nationalization, A Study in the Protection of Alien Property in International Law* (1957), pp. 53-54. See, for similar views, K. Katzarov "Rapport sur la nationalisation", *International Law Association, New York Conference,* 1-7 September 1958, p. 10, and the same author's "La propriété privée et le droit international public", *Journal du droit international* (1957), No. 1, pp. 6-51.

[22] League of Nations Conference on the Codification of International Law, *Bases of Discussion,* vol. III; League of Nations publication, *V. Legal, 1929.V.3.*V. (document C.75.M.69.1929.V, pp. 33-37).

[23] The most recent official views on the subject are cited by M. Brandon in *The Record in the United Nations of Member States on Nationalization* (1958), work presented to the forty-eighth Conference of the International Law Association, *passim.*

[24] As will be shown in the two chapters that follow, according to the "orthodox" school of thought, expropriation, whatever its class or the conditions in which it is effected, gives rise to an obligation to pay "adequate", "rapid" and "effective" compensation; and in cases where there existed a contractual relationship between the State and the alien, the State's international responsibility derives directly from mere non-performance, by application of the principle *pacta sunt servanda* to all such contractual relationships and obligations.

[25] The very expression "acquired rights" has evoked objections such as that of Duguit: "Jamais personne n'a vu ce que c'était qu'un droit non acquis. Si l'on admet l'existence de droits subjectifs, ces droits existent ou n'existent pas; telle personne est titulaire d'un droit ou non. Le droit non acquis est l'absence de droit". See *Traité de droit constitutionnel,* vol. II, p. 201.

[26] Cavaglieri, "La notion des droits acquis et son application en droit international public", *Revue générale de droit international public* (1931) vol. 38, p. 293.

[27] P. Guggenheim, "Les principes de droit international public", *Recueil des cours de l'Académie de droit international* (1952-I), vol. 80, p. 126.

21. There can, in fact, be no doubt that not all patrimonial rights merit the same degree of protection, and that the measure of protection afforded must necessarily vary in accordance with the conditions and circumstances in which the State takes the measures in question. For example, is the content of the obligation to make reparation the same in the case of individual expropriations of the ordinary and usual type as in the case of expropriations which result from a change in the socio-economic structure of the State and are general and impersonal in character? Do the existence and imputability of international responsibility depend on the same factors in the various circumstances to which the failure to fulfil contractual obligations may give rise? These and many other examples which might be cited demonstrate the variety and complexity of the situations which must be considered in connexion with the international protection of acquired rights. Nevertheless, while each situation or category of situations must be examined and resolved individually and separately, the "principle of respect for acquired rights", as a principle of a general character, is undoubtedly of value from the technical and practical points of view. It is the basic principle on which the obligation (or obligations) of the State in this matter is founded and, consequently, the sole *raison d'être* of international responsibility. If supplemented by the notion of "unjust enrichment" in the manner outlined above, it can continue to provide the essential rules applicable to compensation, which is in fact the crucial issue in this area of international responsibility.

5. The notion of "arbitrariness" and the doctrine of abuse of rights

22. It remains to inquire as to the component elements of international responsibility for the acts or omissions with which this report is concerned. As has been seen, the measure of protection extended to aliens in this matter by international law and, consequently, the existence and imputability of responsibility depend in each case not only on the "acquired right" at issue but also on the conditions and circumstances in which the act or omission on the part of the State takes place. In contrast to the other cases of international responsibility for injuries caused to foreigners, the acts or omissions imputable to the State in this matter fall into two main categories: (*a*) those which constitute a "wrongful" act in themselves and (*b*) those which merely constitute an "arbitrary" act. It is not difficult to see the reason for this distinction—which cannot always be readily made in the case of other acts or omissions infringing the rights of aliens—as well as the different legal consequences which derive from acts or omissions in one or the other of these categories.

23. "Wrongful" acts or omissions are those which result from the non-performance by the State of any conventional obligation undertaken by it with respect to the patrimonial rights of aliens. The origin or source of this obligation, which imposes a specific standard of conduct, may be a treaty with the State of which the alien is a national or a contractual relation with the alien himself, provided in the latter case that the obligation is genuinely "international" in character. The juridical consequences of non-performance of such an obligation are obvious: as the wrong is "intrinsically" contrary to international law, it not only directly and immediately involves the responsibility of the State but also imposes on the State the "duty to make reparation" *stricto sensu,* that is to say, the reparation must take the form of restitution in kind or, if restitution is impossible or would not constitute adequate reparation for the injury, of pecuniary damages. In traditional practice, international obligations giving rise to acts or omissions of this kind have been a somewhat infrequent occurrence, but the situation has changed in relatively recent years and the contractual relations between the States and aliens raise problems that are of great importance to the development and codification of international law.

24. "Arbitrary" acts or omissions, on the other hand, although they also involve conduct on the part of the State that is contrary to international law, occur in connexion with acts that are intrinsically "legal". In the various cases of international responsibility examined in this report, the State is in fact exercising a right—the right to "affect" the patrimonial rights of individuals for various reasons and purposes and in various ways—and responsibility will therefore be incurred only if the right is exercised in conditions or circumstances which involve an act or omission contrary to international law. The position is not the same as in the case of "wrongful" acts or omissions, for simple "violation" of the principle of respect for acquired rights does not involve the international responsibility of the State. International responsibility exists and is imputable only if the State's conduct in the exercise of the right in question can be shown to have been "arbitrary". Consequently, in view of the intrinsic legitimacy of the measure "affecting" the alien's rights, any "arbitrary" acts or omissions imputable to the State cannot be regarded as having the same juridical consequences as acts that are merely "wrongful". It will be seen later that international responsibility in such cases cannot and should not imply a "duty to make reparation" *stricto sensu.*

25. The distinction between "wrongful" and "arbitrary" acts or omissions was explicitly recognized by the Permanent Court of International Justice in connexion with expropriations, as will be seen in the following chapter, and it has also been generally recognized in diplomatic practice, international case-law and the writings of publicists concerning State responsibility for the non-performance of obligations stipulated in contracts with aliens. It should be noted that the notion of "arbitrariness" is fully in conformity with the essential idea animating the present system for the international protection of "human rights and fundamental freedoms". The Universal Declaration of Human Rights (article 17, para. 2) states that "No one shall be *arbitrarily* deprived of his property". The use of the word "arbitrarily" is not accidental but reflects an intention to subordinate to specific conditions the exercise of the State's rights with regard to private property. As the legislative history of article 17 of the Declaration shows, the discussion centred on the problem of determining these conditions or of defining the scope of the word

"arbitrarily".[28] In this connexion, reference may appropriately be made to article 1 of the Protocol to the European Convention on Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952, which reads: "... No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Although not completely precise, this article is much more explicit with regard to the conditions governing the exercise of the State's competence.

26. What are the component elements of the notion of "arbitrariness"? In other words, on the basis of what rule or rules is it possible to decide when an act or omission is "arbitrary"? It is necessary first to distinguish between those criteria which are generally applicable and those applicable only to specific acts or omissions. It is, of course, impossible to discuss the latter in this context; and attention will therefore be directed to the criteria which are *grosso modo* applicable to any situation that may arise. The first of these criteria relates to the motives and purposes of the State's action. Although *prima facie* the question might be considered a purely domestic one in the sense that it is outside the scope of international law to judge the reasons and objectives which lead the State to take a measure affecting the patrimonial rights of individuals, whether national or alien, examination of the practice of international tribunals does not justify that conclusion. In principle at least, the question is of interest to international law and it is, therefore, within the province of international law to determine the motives or purposes that may justify the State's action or, in any event, to prescribe those which cannot justify it. Another generally applicable criterion relates to the method and procedure followed by the State authorities. Although the State's freedom of action is much greater in this respect than it is with regard to the grounds and purposes of the measure taken, this question also undeniably falls within the province of international law. The question that must be answered is whether an act or omission constituting a "denial of justice" is imputable to the State. In such case, as in the case of a measure which cannot be justified on grounds of genuine public interest, the "arbitrary" nature of the act or omission would be evident.

27. The third and last of the generally applicable criteria, and in a sense the most important, relates to discrimination between nationals and aliens.[29] The traditional view in this matter has been that, as in the case of other acts or omissions injuring aliens, the State is responsible if its conduct is not in conformity with the "international standard of justice", even if it has applied the same measure to its nationals. In effect, it was argued that in this matter also aliens should receive preferential treatment. Apart from the fact that this view has much less justification in the matter of patrimonial rights than in the case of rights inherent in the human person, the problem can no longer be posed in terms of the "minimum standard". As has more than once been pointed out in the Special Rapporteur's earlier reports, in giving recognition to human rights and fundamental freedoms contemporary international law makes no distinction between nationals and aliens and necessarily implies a régime of "equality" in the use and enjoyment of such rights and freedoms. Thus, in so far as concerns the notion of "arbitrariness", the alien is entitled only to claim that the State should not discriminate against him in taking or applying the measure in question, and that the measure should not have been taken solely by reason of his status as an alien.

28. The foregoing considerations emphasize the importance of the "doctrine of abuse of rights" in this area of international responsibility. As was pointed out in the Special Rapporteur's earlier reports, international responsibility is generally regarded as a consequence of "non-fulfilment or non-performance of an international obligation". Nevertheless, both in the writings of publicists and in diplomatic and legal practice it has been recognized that international responsibility may also be incurred if a State causes injury through the "abusive" exercise of a right; that is to say, if it ignores the limitations to which State competence is necessarily subject and which are not always formulated in exactly defined and specific international obligations.[30] It is not difficult to understand why it was recently said that "the *arbitrary exercise* of State competences and the use of juridical institutions for purposes alien to them are in fact *abuses of rights.*".[31]

29. The notion of "arbitrary action" is in fact so closely linked to the doctrine of "abuse of rights" as to be largely coterminous in practice. The acts or omissions in which international responsibility may originate in the cases with which the present report is concerned occur in connexion with the exercise of rights of the State. It is for this reason that it is necessary to invoke the limitations placed by international law on the exercise of State competence in this matter. This is not the case if there exist international obligations the non-performance or non-fulfilment of which result in "wrongful" acts giving rise to direct

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[28] With regard to the legislative history of article 17, the point to be noted is not so much that amendments tending to replace the word "arbitrarily" by the words "contrary to the laws" were rejected, since the real purpose of the amendments was rather to restrict the scope of the provision (cf. E/CN.4/SR.61), but the fact that the question was discussed with a view to determining the conditions to which the exercise of the State's right should be subordinated, particularly in the matter of compensation (cf. E/CN.4/AC.1/SR.38). The divergence of views in this respect was one of the main reasons for the decision to adjourn consideration of the matter *sine die* during the preparation of the draft Covenant on Economic, Social and Cultural Rights (E/CN.4/SR.418).

[29] The "arbitrary" character of the measure applied by the State may also depend on the "compensation". Nevertheless, as will be seen below, it is unnecessary to refer to compensation in the present discussion of generally applicable criteria.

[30] On the theoretical development and practical applications of the "doctrine of abuse of rights", see García Amador, "State Responsibility—Some New Problems", *Recueil des cours de l'Académie de droit international* (1958).

[31] R. L. Bindschedler, *La protection de la propriété privée en droit international privé*, ibid. (1956-II), vol. 90, pp. 212-213. It has also been said in connexion with expropriation that "international law undoubtedly gives broad discretion to the State in the exercise of the right to expropriate alien private property, but in this as in many other matters it would intervene in the case of manifest abuse..." Cf. Bing Cheng, "Expropriation in International Law", *The Solicitor* (London, 1954), vol. 21, p. 99.

and immediate responsibility on the part of the State. It is, however, necessary in all other cases, since the act or omission imputable to the State is related to an intrinsically lawful action. It is recognized that this view diverges from the traditional approach in that it characterizes as merely "arbitrary" acts and omissions which—like the denial of justice—have always been considered to be "wrongful" and as such to give rise to the "duty to make reparation". Nevertheless, no other course would seem possible if it is desired to work out a system consistent with the special character of the cases of international responsibility with which this report is concerned.

II. Nature and content of acquired rigths

30. Paradoxical though it may be, international law has established the principle of respect of acquired rights without defining or systematically classifying the rights in question. This is to be explained in part by the fact that under international law private patrimonial rights, whatever their nature or the nationality of their possessor, are governed, in the absence of treaties or of certain contractual relations between States and specific aliens, by municipal legislation. Nevertheless, certain questions raised by the nature and content of "acquired rights" are undeniably international in character, and many of those questions seem to have been resolved in practice.

6. Patrimonial rights *lato sensu*

31. The first problem that must be considered in connexion with the definition and systematic classification of acquired rights, from both the international point of view and that of comparative law, is one of terminology. There is an obvious lack of uniformity in the nomenclature employed even by countries belonging to a single legal system (common law, the "continental system", etc.). Frequently this lack of uniformity extends even to substantive matters, that is to say, to the nature and content of acquired rights. The absence of common institutions and concepts is, of course, even more marked when the municipal law of countries belonging to different legal systems is examined. Nevertheless, in all judicial systems "rights" may be divided into the two broad categories, "patrimonial" rights and "personal" rights. The first are essentially economic in content and possess a pecuniary value, unlike the second, which are purely moral or political in character. It may be added that in general patrimonial rights include not only rights in real and movable property and rights *in rem* in tangible goods but also rights in intangible goods, including contractual rights whose content is economic.

32. In diplomatic practice and international case-law there are some precedents bearing on this point which shed light on the character and content attributed to "acquired" or patrimonial rights. In the first place—and on this point absolute uniformity seems to exist—the right of (private) ownership of tangible goods is the typical expression of the "acquired right", to which the other rights *in rem* in such property, whether movable or immovable, may undoubtedly be assimilated for the purposes under discussion. The situation is not so simple in the case of "intangible" property. Some of the treaties of peace signed at the end of the First and Second World Wars contain provisions directed towards the protection of private "property" which cover not only movable and immovable tangible goods but also "rights" and "interests" of every kind including rights and interests in industrial, literary or artistic property.[32] An equally broad interpretation of the term "property" is to be found in some of the agreements concluded since the last war concerning the compensation to be paid to aliens whose "property, rights and interests" have been nationalized.[33] The most important question in the context of this report is, however, whether "intangible" property should be understood to include "contractual" rights, that is to say, rights acquired by aliens under a contract or other form of contractual relation (concessions, public debts, etc.) entered into with a State.

33. The difficulties in this connexion are principally attributable to the fact that the question is not always approached from the same point of view or with the same purpose in mind. From the point of view of their legal nature, such contractual rights undeniably fall, by reason of their characteristic economic content, within the general category of patrimonial rights. On this point, unanimity is virtually complete both in doctrine and in practice.[34] The problem really arises in relation to the treatment of this class of rights when they are affected through specific actions of the State; it must be decided, for example, whether they are capable, like tangible property, of being expropriated, or whether only the rules of traditional international law concerning the non-performance of the contractual obligations of the State should be applied in their case.[35] But this is a completely separate problem which will be examined in detail in chapter III.

7. Mixed (private and public) character of some of these rights

34. Acquired or patrimonial rights are commonly classified as "private" rights. However, the question of their true legal nature arises fairly frequently in both theory and practice because some of the rights in question are in fact of a mixed character (private and public). In particular, the question has had to be considered in the case of rights acquired under concessions granted by the State to individual aliens and the mixed character of such rights has in fact been expressly recognized in arbitral decisions. For example, in the Warsaw Electric Company case (1932), the single arbitrator (Asser) held that "... the concession granted by the City to the Company has, as is generally the case with all concessions, a double character: it falls

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[32] See, for example, article 297 (*c*) of the Treaty of Versailles (1919) and article 78, para. 9 (*c*), of the Treaty of Peace with Italy (1947).

[33] With regard to these agreements, see chapter II, section III, 18.

[34] See the numerous sources cited by Herz, "Expropriation of Foreign Property", *American Journal of International Law* (1941), vol. 35, pp. 243-262, footnotes 7 and 8.

[35] With regard to this distinction, see S. Friedman, *op. cit.*, pp. 151-153 *et seq.*

within the scope of both public and private law".[36] The question was considered by the Permanent Court of International Justice in the German Settlers in Poland case (1923),[37] and the dual character of such rights was also expressly recognized in the Report of the Transvaal Concessions Commission.[38] Some publicists go further and consider that concessions and other rights have the character of "public rights".[39]

35. What juridical consequences from the point of view of international responsibility ensue from the classification of such rights? For example, does the manner in which the rights are classified affect the extent of the State's obligations with regard to the rights of aliens? Discussing the question of "State succession", Kaeckenbeeck has maintained: "According as the private or the public character [of the concession] is thought to prevail, the application or rejection of the rule of respect for private rights appears justified. There is no doubt that the weight of opinion is at present in favour of the obligation to respect concessions, but in view of the considerable public importance which some concessions may have, it would be undue optimism to believe that the debate on this question is for ever closed." Further defining his position, he went on to say: "But, in my opinion, the gist of the matter is rather that the operation of the principle of respect for vested rights is not checked by a change in the person of the State as long as the private law character of the relation prevails, but it is checked when the public character of the legal relation prevails."[40] As will be seen in chapter III, the problem is somewhat different if the concession was granted by the State itself, especially in the case of a certain type of concession which cannot be considered on the same footing as concessions of the traditional kind. In any event, the mixed character of such legal relations undeniably affects the scope of the State's obligations.

8. Special situations which do not involve acquired rights

36. In practice, it is sometimes necessary to decide whether certain interests, expectancies and other special situations can be considered as falling within the sphere of acquired rights for the purposes of international protection. As Herz has pointed out, the civil law of a country in almost every one of its specific rules, and often also in its constitutional and administrative law, creates situations in the continuation of which an individual may be interested. These situations may be changed by acts of legislation or even of administrative practice, so that to give foreigners vested rights against each of these changes would mean to insure them against every change which may concern their interests. It is clear that a line of demarcation must be drawn between "acquired rights" properly so called and that which is beyond their sphere. Although, as Herz states, international law by no means gives a clear-cut solution,[41] some of these situations have been resolved in practice.

37. For example, good will, that is to say, the advantage or benefit of a specific commercial or industrial situation, was an issue in a case heard by the Permanent Court of International Justice and the question was decided in the negative. On that occasion, a claim was put forward to the possession of an "acquired right" in virtue of "the possession of customers and the possibility of making a profit" in the business established by a national of the claimant Government.[42] In his dissenting opinion, Sir Cecil Hurst, who, in this respect, agreed with the majority, discussed the point and held that "it would be right to say that an acquired right had been violated" if the Belgian Government had, for example, prevented the fulfilment of a contract which Chinn had entered into with a third party.[43] The Court of Arbitration for Upper Silesia held: "As a general rule, the freedoms relating to the employment of labour and to gainful activity, which rest on the general freedom of industry and trade, are not acquired rights. The latter must be based rather on a special title of acquisition: the law must regard them as specific rights . . ."[44]

38. Nor does it seem that industrial, literary or artistic property can be the subject of an international claim based on the notion of "acquired right", in the absence of conventions between the States concerned, as in the case mentioned above.[45] Reference might also be made to other special situations which have arisen in international practice, but the foregoing examples illustrate the basic criterion which seems to have been adopted. However, mention should be made of the situations which have arisen as a result of the establishment of State monopolies over insurance and other activities, which are the subject of copious literature and considerable divergence of opinion.[46]

CHAPTER II

EXPROPRIATION IN GENERAL

I. The right of "expropriation"

39. The patrimonial rights of private individuals may be "affected" by the State not only through acts of expropriation *stricto sensu,* but also in other ways

[36] United Nations, *Reports of International Arbitral Awards,* vol. III, p. 1687.

[37] Publications of the Permanent Court of International Justice, series B, No. 6, p. 39.

[38] Kaeckenbeeck, *loc. cit.,* p. 350.

[39] Bindschedler, *loc. cit.,* p. 221.

[40] "Protection of Vested Rights in International Law", *British Year Book of International Law,* 1936, pp. 11 and 12.

[41] Cf. Herz, *loc. cit.,* pp. 245-246.

[42] Oscar Chinn case (1934), Publications of the Permanent Court of International Justice, series A/B, No. 63, p. 88.

[43] *Ibid.,* p. 122.

[44] Jablonsky case, cited by Bindschedler, *loc. cit.,* p. 224.

[45] With regard to this special situation, see S. Basdevant, *Répertoire de droit international,* vol. VIII, p. 46.

[46] See, for example, Fachiri, "International Law and the Property of Aliens", *British Year Book of International Law* (1925), p. 50. Under a draft convention approved by the International Law Association, the establishment of state monopolies which may put an end to established businesses should entail the complete indemnification of any such businesses belonging to aliens. See *Report of the 37th Conference* (1932), p. 61.

and for different reasons and purposes. In Anglo-American legal literature there is an ever-increasing tendency to speak of "taking", which doubtless has a wider meaning than that generally attributed to the term "expropriation", but which also has the disadvantage, at least when translated into other languages, of being on occasions inexact. This is the case, for example, when the State's action consists or results in the destruction of the private property or in the non-observance of some contract or concession agreement. But in any event, this problem of terminology—which, in view of the diversity to juridical notions revealed by any study of comparative law and the existing imperfections in the relevant branch of the law of nations, would be very difficult to solve—is not the crux of the matter.

40. The truly important problem is that of substance, i.e., the essence of the right which entitles the State to "affect" private property by very varied means and for equally different reasons and objects. This act of "affecting"—as understood in its etymological and, to some extent also, juridical sense—includes every measure which consists of or directly or indirectly results in the total or partial deprivation of private patrimonial rights, either temporarily or permanently. This is the basis on which, without prejudice to the further comments on the point which will be made in this chapter and in the next, the international aspects of the State's right of "expropriation" will now be considered. The term "expropriation" itself will also be employed subject to the distinctions and definitions to be formulated below.

9. International recognition of the right

41. The right of "expropriation", even in its widest sense, is recognized in international law, irrespective of the patrimonial rights involved or of the nationality of the person in whom they are vested. This international recognition has been confirmed on innumerable occasions in diplomatic practice and in the decisions of courts and arbitral commissions, and, more recently, in the declarations of international organizations and conferences. Traditionally this right has been regarded as a discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory, or in the so-called right of "self-preservation", which allows it, *inter alia,* to further the welfare and economic progress of its population. In its resolution 626 (VII) of 21 December 1952 relating to the under-developed countries, the General Assembly has stated that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations".

42. Within the context of this report, the fact that the right of "expropriation" has been explicitly recognized by international law must obviously be stressed. In fact, save in the exceptional circumstances which will be considered below, an act of expropriation, pure and simple, constitutes a lawful act of the State and, consequently, does not *per se* give rise to any international responsibility whatever. As was pointed out in the preceding chapter (section 5), such responsibility can only exist and be imputable if the expropriation or other measure takes place in conditions or circumstances inconsistent with the international standards which govern the State's exercise of the right or, in other words, contrary to the rules which protect the acquired rights of aliens against "arbitrary" acts or omissions on the part of the State. As will be shown, the notion of "arbitrariness", which has been adopted as the basis for determining whether international responsibility arises, applies, although not always to the same extent, to each of the various forms which the exercise of this right by the State may assume. First, however, it is appropriate to consider the various means whereby the State may "expropriate" or "affect" the patrimonial rights of aliens and to determine which of them are of the greatest interest from the point of view of international responsibility.

10. The various forms which the exercise of the right of "expropriation" may assume

43. Naturally, not all the measures taken by States which "affect" the patrimonial rights of aliens are of equal interest to international law, and indeed some are virtually without interest. The confiscation of property, the imposition of fines and other measures of a penal character generally fall within this category. International case-law contains precedents which fully demonstrate the compatibility of such measures with the international rules governing the treatment of aliens.[47] The intrinsic lawfulness of such measures does not, of course, exclude the possibility of their adoption or application amounting to a "denial of justice", and of the act of omission concerned consequently giving rise to international responsibility.[48] But the possibility of the State incurring international responsibility is remote; and it is equally so when the State destroys property belonging to aliens for reasons of public safety or health, provided that the circumstances are ones in which the notion of *force majeure* or state of necessity is recognized by international law.[49] In international jurisprudence exemption from responsibility has also been based on the "police power" of the State.[50]

44. Even though it has been contended that international law places limits on the State's power to impose taxes, rates and other charges on the property, rights or other interests of aliens, particularly when the measures taken discriminate against the latter,[51] the fundamental

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[47] See, *inter alia,* the Robert Wilson case (1841), Moore, *History and Digest of Arbitration, etc.* (1898), vol. IV, p. 3373; and the Louis Chazen case (1930), United Nations, *Reports of International Arbitral Awards,* vol. IV, p. 564.

[48] See, for example, the *Bronner case* (1868), Whiteman, *Damages in International Law,* vol. II, p. 931. On "abuse of competence" in this context, see J. C. Witenberg, "La protection de la propriété immobilière des étrangers", *Journal Clunet* (1928), vol. 55, p. 579.

[49] See, in this connexion, the Special Rapporteur's third report (A/CN.4/111), chapter VI, No. 4.

[50] See, *inter alia,* the *J. Parsons* case (1925), Nielsen, *American and British Claims Arbitrations, etc.* 1926, p. 587.

[51] See on this point the report by Dr. J. C. Witenberg to the Protection of Private Property Committee, *Report of the 36th Conference of the International Law Association* (1930), pp. 322-325.

lawfulness of this class of measures in the international context, regardless of their nature or scope, has very seldom been disputed. The possibility of the State incurring international responsibility can only arise if the measure is of a discriminatory nature, and practical experience has shown this eventuality to be highly unlikely.[52] The same rule can be said to apply to rights of importers and exporters and to prohibition on the import or export of specified merchandise;[53] the State can only be held internationally responsible if the measure is not general but personal and arbitrary.[54] Nor are there any restrictions of an international character on the State's right to control the rate of exchange of its currency and to devaluate it, although the contrary view has been advanced also on this point.[55] In a case which arose after the Second World War, it was held that creditors who had made bank deposits before the devaluation of the legal currency were not entitled to claim the original value.[56]

5. The above survey does not in any way exhaust the various means whereby the State may "affect" the patrimonial rights of private individuals. Besides expropriation *stricto sensu* (and nationalization), as well as other kinds of "indirect" expropriation, there is a special category which relates to rights of a contractual nature or origin. In considering the measures which affect these patrimonial rights, a distinction should be drawn between acts which affect rights in this class alone and those which also involve an expropriation of tangible property. The latter will be referred to below, during the examination of other international aspects of the institution of expropriation.

[52] The Conference of the International Law Association referred to in the previous footnote resolved as follows: "There is a limit in International Law to a State's right to tax the property, rights and interests of foreigners; but this limit is one of fact and degree. In particular, taxes of this nature which discriminate against foreigners are contrary to International Law." *Ibid.*, pp. 361-362. In the draft convention which it approved at its Oxford Conference, the I.L.A. accepted the principle of non-distrimination, in the sense that a State should not be permitted to impose on aliens taxes or charges other or higher than those levied upon its own nationals. See *Report of the 37th Conference* (1932), p. 60. See for a similar view art. 7 of the draft code on the equitable treatment of foreign investment approved by the International Chamber of Commerce at its Twelfth Congress (Quebec, 1949), Brochure 129 (Paris, August 1949), p. 14.

[53] See Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), p. 182.

[54] See Lalanne and Ledour case (1903), Ralston, *Venezuela Arbitrations of 1903* (1904), p. 501.

[55] See Dupuis, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1903-II), vol. 32, p. 163. What can be admitted is that "National legislation—including currency legislation—may be contrary in its intentions or effects to the international obligations of the State". Separate Opinion of Judge Lauterpacht in the Case of Certain Nowegian Loans (1957), *Judgment of 6 July 1957, I.C.J. Reports 1957*, p. 37.

[56] Fabar case (United States v. Yugoslavia), *Settlement of Claims by Foreign Claims Settlement Commission* (1955), p. 23. In the Serbian Loans case, the Permanent Court declared that it was, of course, "a generally accepted principle that a State is entitled to regulate its currency". Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, Nos. 20-21, p. 44. As regards the scope of the State's rights in this respect, see Mann, "Money in Public International Law", *British Year Book of International Law* (1949), p. 259 *et seq.*

11. Expropriation *stricto sensu* and "nationalization"

46. There is no doubt that some of the measures to which reference has been made result in a direct economic benefit to the State at the expense of the owners of the property concerned. But this does not occur in every instance and such benefit is not always the purpose which affords the legal grounds and justification for the measure. In the case of expropriation *stricto sensu*, the situation is, however, perfectly well defined. Within the definition, formulated at the beginning of this chapter, of the State's right to "affect" private property generally, this specific measure can be characterized and distinguished from others as the act whereby the State appropriates patrimonial rights vested in private individuals in order to put them to a public use or to provide a public service. It should be noted that this definition, which is complementary to the earlier one, concentrates solely on the two essential component elements of expropriation: the "appropriation" of private patrimonial rights and the purpose to which the expropriated property is to be put. A more explicit definition, mentioning not only the content and purpose of the State's action but also the grounds on which it may be based, the methods or procedures through which it may be effected, the individual or general and impersonal character which may be attributed to it, the direct or indirect form which it may assume and the scope of the obligation to compensate for the expropriated property, besides being difficult in the present context, might provoke unnecessary complications from the point of view of international law. Moreover, the distinction between a State's acts of expropriation founded on the right of "eminent domain" and those which fall within the exercise of its police power—a distinction which originally stems from differences in grounds and purposes and also has a bearing on the question of compensation—is daily becoming more difficult to make, because of the evolution which the conception of the State's social functions has undergone in both those areas.[57]

47. Attention will be drawn in this chapter to the differences—at times substantial—between the several notions of expropriation and the régimes applicable thereto, currently prevalent in various countries or groups of countries. What consequences, then, can this lack of uniformity in the relevant municipal practice have from the point of view of international responsibility? This question will be answered explicitly in due course. For the time being, one thing alone needs stressing: that international law, lacking a definition of private ownership, has failed to establish a common or universal régime relating to expropriation. Without prejudice, of course, to the existing international rules which govern certain aspects of the institution, is it not therefore inevitable that the municipal law of the State which effects the expropriation should play an important part? The answer is obvious, for the traditional rules relating to this aspect of the international protection of acquired rights were themselves nothing but a faithful reflection of the principles contained in the

[57] On this point see Herz, "Expropriation of Foreign Property", *American Journal of International Law* (1941), vol. 35, pp. 251-252.

municipal law of States, principles which, at that time, were remarkably uniform. For the same reason, must not the profound transformation which has taken place during the last forty years in the social function of private ownership and in the character of expropriation also have fundamental consequences?

48. Before the First World War, expropriation was normally directed against individual property. But thereafter, various States began to generalize the practice—which was resumed and intensified after the Second World War—of carrying out acts of expropriation on a wide scale and impersonally. This type or form of expropriation is commonly referred to as "nationalization".[58] In contrast with individual or personal acts of expropriation, nationalization measures reflect changes brought about in the State's socio-economic structure (land reforms, socialization of industry or of some of its sectors, exclusion of private capital from certain branches of the national economy); or, looked at from another angle, nationalization measures constitute the instruments through which those changes in the former liberal economy are introduced. Although measures of this category are sometimes prescribed in the State's constitution, as a general rule they are adopted, and are always applied, pursuant to special statutory provisions which lay down the conditions and procedures for carrying the nationalization into effect.[59] There are also other differences, including some fairly marked ones, between nationalization and expropriation pure and simple, but any attempt to point them out would show that many of the characteristic features of the former can also be found, and in fact, often are found, in the latter.[60] In brief, therefore, except in the matter of compensation, where important distinctions can be noted, the two juridical institutions are, at least from the point of view of international law, substantially the same.

II. Other international aspects of expropriation

49. Of all the questions raised by expropriation, compensation is undoubtedly that of the greatest interest to international law and will therefore be considered in a separate section of the present chapter. This section will refer to other aspects of the institution, in order to show the extent to which they, too, are of interest in the international context. First, however, it is necessary to consider the notion of "unlawful" expropriation, which has been explicitly recognized in practice, in order to contrast it with the notion of "arbitrary" expropriation, and to analyse the special problems created by acts of expropriation involving the non-observance of contracts or concession agreements.

12. "Unlawful" expropriation and "arbitrary" expropriation

50. The first step must be to agree on the meaning of the term "unlawful". According to a generally accepted principle, an expropriation is not necessarily "unlawful" even when the action imputable to the State is contrary to international law. Unlike other acts and omissions of this nature which are qualified with the same adjective or the adjective "wrongful", an expropriation can only be termed "unlawful" in cases where the State is expressly forbidden to take such action under a treaty or international convention. By analogy, acts of expropriation which do not satisfy the requirements of form or substance stipulated in an international instrument are deemed to fall within the same category. This qualification, which stems from the idea that expropriation is intrinsically lawful both from the municipal and international points of view, has been confirmed in the decisions of the Permanent Court of International Justice and of other judicial bodies. The Permanent Court, for example, in the case concerning certain German interests in Polish Upper Silesia (1926 and 1928), held that expropriation was only "unlawful" in the two instances stated above.[61] Other aspects of this question will be referred to again, but, for the present, the point to stress is that the "unlawful" character of an expropriation assimilates it, so far as the existence and imputability of international responsibility are concerned, to other acts or omissions which render the State responsible directly and immediately. In other words, in the event of an "unlawful" expropriation, responsibility comes into play and becomes imputable merely by reason of the State's act being done, even though the measure of expropriation might be fully consistent with the conditions or requirements (municipal or international) to which the exercise of the right would have been subject in the absence of a treaty.[62]

51. Once this basis is established, and having regard also to the points developed in the preceding chapter (section 5), it is not difficult to determine what is meant by "arbitrary" expropriation. This second category covers measures of expropriation which are not in conformity with the international conditions and limitations to which the exercise of the right of expropria-

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[58] For a summary account of the "nationalization" measures taken before 1917 and during the period between the two world wars, see Friedman, *Expropriation in International Law* (1953), p. 12 *et seq.* As regards land reform and the nationalization of the oil industry in Mexico, see Kunz, "The Mexican Expropriations", *New York University Law School Pamphlets* (1940), Series 5, No. 1. On the Romanian land reform, see Deák, *The Hungarian-Rumanian Land Dispute* (1928), *passim*. On nationalization measures taken since 1945, see Doman, "Post-war Nationalization of Foreign Property in Europe", *Columbia Law Review* (1948), vol. 48, p. 1140 *et seq.*

[59] As regards constitutional provisions which envisage "nationalization", see K. Katzarov, "Rapport sur la nationalisation", paper prepared for the *International Law Association, New York Conference, 1-7 September 1958*, p. 11.

[60] As regards the various definitions which have been formulated of "nationalization", see, in particular, Foighel, *Nationalization, A Study of the Protection of Alien Property in International Law* (1957), pp. 13-20; Perroux, *Les nationalisations* (1945). With regard to the special aspects of the post-war nationalization measures, as well as the problems which they raise from the domestic point of view, see Scammel, "Nationalisation in Legal Perspective", *Current Legal Problems* (1952), vol. 5, pp. 30-54.

[61] Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 7 (Merits), pp. 21 and 22; cf. *ibid.*, series A, No. 17, Judgment 13 (Indemnities), pp. 46 and 47.

[62] When instead of a treaty a contract or concession agreement with the alien individual concerned prohibits expropriation, the position is, as will be shown in the next section, different.

tion is subject and which, consequently, involve an "abuse of right". But what are the "limitations" placed on the exercise of the right of expropriation? Or, to put the question in simpler terms, in what features of the institution can the notion of "arbitrariness" enter into play? A survey of diplomatic practice and international case-law in the matter of expropriation, whether individual or general, shows that the three aspects to consider in determining whether the State has acted in an arbitrary manner are as follows: the motives and purposes of the expropriation; the method or procedure adopted to effect it; and above all, the compensation given for the expropriated property.[63]

13. Measures of expropriation involving the non-observance of contracts or concession agreements

52. There is a tendency, of relatively recent origin but shared by some authoritative writers, to extend the notion of "unlawful" expropriation to cases in which the State and the alien individual are bound by a contractual relationship. Where such a relationship exists, one of two things may occur in practice: the expropriation may simply affect (annul, rescind or modify) the contract or concession agreement under which the expropriated property or undertaking was acquired, or there may be non-observance of a specific obligation not to expropriate or otherwise to affect the stipulations contained in such an instrument.[64] The tendency referred to above is based on the idea that, by analogy with treaties, the non-observance by the State of the obligations which it has assumed in those contracts or concession agreements constitutes a "wrongful" act, which gives rise to direct and immediate international responsibility. In brief, the premise is that the principle *pacta sunt servanda* applies equally to treaties and to contractual relationships between States and alien private persons.

53. The applicability of this principle to such contractual relationships will be considered in detail in the next chapter. But even at this stage it is worth citing some concrete examples of the tendency referred to above. In the draft presented to the *Institut de droit international* by Lapradelle, it was stipulated that "Nationalization, a unilateral act of sovereignty, shall respect obligations validly entered into, whether by treaty or by contract.[65] The resolution on the subject adopted by a Committee during the Cologne Conference (July 1958) of the International Bar Association stipulated, in much more explicit form, that "international law recognizes that the principle *pacta sunt servanda* applies to specific undertakings entered into by States with other States or with nationals of other States and that, consequently, any expropriation of private property which violates a specific contract concluded by the State is contrary to international law".[66] Similarly, it has even been said that the presence of an undertaking not to expropriate imposes a "higher obligation", the non-observance of which creates a liability not only to pay compensation for the expropriated property or undertaking but also to indemnify the alien for all the damage and loss which he has sustained.[67]

54. The majority opinion, however, does not seem to support this tendency. At its Siena session, the *Institut de droit international* rejected a proposal to the effect that the State should be bound to respect (express or tacit) undertakings not to nationalize entered into either with another State or with alien private individuals.[68] The argument invoked in support of this opinion relies on the juridical nature of contractual relationships between States and private individuals and on the irrenunciable character of the right of eminent domain. Foighel, for example, has stated in this connexion that there is no rule of international law which gives a special degree of protection to patrimonial rights.[69] As regards the second factor, R. Delson stated at the recent Conference of the International Law Association that "the right of the State to take property for public use is so fundamental that it cannot even be surrendered by contract (although, of course, proper indemnification for the taking must be made)".[70]

55. So far as this last aspect of the question is concerned, there can be no doubt whatever that, from the

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[63] As regards the different legal consequences of "wrongful" and "arbitrary" measures affecting patrimonial rights, see also chapter I, section 5, *supra*.

[64] The Agreement of 29 April 1933 between the Imperial Government of Persia and the Anglo-Persian Oil Company Limited stipulated, in its article 21, that "This Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities". I.C.J. Pleadings, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), p. 31. In the Agreement concluded in 1951 between the Government of India and three foreign companies concerning the establishment of oil refineries, the Government undertook not to expropriate the companies concerned or take over their operations during twenty-five years and to pay reasonable compensation in the event of expropriation after the expiry of that period. Other instruments merely specify the circumstances in which the State shall be entitled to revoke the concession; such was the case, for example, in a concession Agreement concluded by the Government of the United Kingdom of Libya (*Official Gazette of the United Kingdom of Libya*, 19 June 1955, clause 27, pp. 71 and 72).

[65] Lapradelle, "Les effets internationaux des nationalisations", *Annuaire de l'Institut de droit international* 1950, vol. 43, I, p. 68.

[66] At the time of preparing the present report, the Special Rapporteur did not have the printed text of the resolution at his disposal. The problem has already been considered by the Association in the past. On that occasion, the same view was advanced by, *inter alia*, F. M. Joseph, The International Aspects of Nationalization, an outline, paper prepared for the International Bar Association, *Fifth International Conference of the Legal Profession*, Monte Carlo (Monaco, 19-24 July 1954), p. 2.

[67] See Sir Hartley Shawcross, Some Problems of Nationalisation in International Law, *ibid.*, pp. 17 and 18.

[68] The proposal was rejected by 20 votes to 16, with 22 abstentions. See *Annuaire de l'Institut de droit international* (1952), vol. II, p. 318. A proposal covering only undertakings entered into with a State was adopted by a majority of 50 votes. *Ibid.*, p. 317.

[69] Foighel, *op. cit.*, p. 74.

[70] R. Delson, "Nationalization, Comments" (paper presented to the 48th Conference of the International Law Association, New York, September 1958), p. 3. For a similar view, see Farfanfarma, "The Oil Agreement between Iran and the International Oil Consortium: the Law Controlling", *Texas Law Review* (1955), vol. 34, p. 271.

municipal law point of view, the position is indeed as stated above.[71] But the important question, naturally, is whether the same rule applies in international law. Schwarzenberger, in whose view such undertakings "crystallized" the relations between the parties on the basis of the municipal law of the grantor as it existed at the time when the concession was granted, argues that they are internationally valid—again by analogy with treaties—except in cases where, by reason of some express constitutional provisions or generally known rules of constitutional law, the organs of the State are not free to contract.[72] Apart from the problem which such a line of reasoning raises as regards vitiated consent, can it juridically be applied to contractual relations between States and alien private individuals? In substance, this again raises the question whether the principle *pacta sunt servanda* can be applied to such relationships as a rule of international law.

56. On the basis of the considerations which will be pointed out in the next chapter, the first step must be to distinguish between, on the one hand, contracts and concession agreements which are governed by municipal law and, on the other hand, those modern instruments which are subject to the law of nations or to some legal system other than the local law. In the case of the former, which are the instruments envisaged in this section, the interests of the State and the notion of public untility on which the right of expropriation is based, must continue to prevail over private interests. No private individual, whether a national or an alien, can disregard this universal legal precept, and all that he has the right to demand is that compensation be granted for the expropriated property. With the second class of instruments the position is different, provided that the instrument in question has "internationalized" the contractual relationship to such an extent that the State is no longer entitled to invoke the rule of domestic jurisdiction.

14. Motives and purposes of expropriation

57. In distinguishing between expropriation *stricto sensu* and the other forms in which the State's right to "affect" the property of private individuals may be exercised, it was shown that the "destination" which the expropriated property is given, in other words, the motives and purposes of the action taken by the State, is one of the essential component elements of expropriation. The question that must now be considered is the extent to which international law regulates this aspect of expropriation. The view has been taken by some writers that "even in the extreme case where a State expressly takes foreign property without giving any reason or motivation for its action, international law does not contain any special rule dealing with such a case in a way different from ordinary expropriation for public use".[73] Other writers, while recognizing that expropriation is lawful only if it is justified by reasons of public interest, nevertheless hold that in this matter the State possesses unlimited discretionary powers.[74]

58. On the other hand, it has been argued that the power to expropriate finds its juridical basis in the requirements of the "public good" or the "general welfare" of the community and that, although the public welfare is considered by international law to be of such overriding importance that it is allowed to derogate from the principle of respect of private rights, such derogation is conditional upon the presence of a genuine public need, and is governed by the principle of good faith.[75] A number of decisions of international tribunals support this view. For example, the Permanent Court of Arbitration, in defining the power to expropriate in the Norwegian Claims case (1922), expressly circumscribed the exercise of that power to what might be required for the "public good" or for the "general welfare".[76] In the Walter Fletcher Smith case (1929), the arbitrator observed that "the expropriation proceedings were not, in good faith, for the purpose of public utility.... The properties seized were turned over immediately to the defendant company, ostensibly for public purposes, but, in fact, to be used by the defendant for purposes of amusement and private profit, without any reference to public utility."[77] The requirement that expropriation must be justified by reasons of public interest is also embodied in a number of international treaties.[78]

59. It is undeniable that, in principle at least, the test of "arbitrariness" is applicable to the motives and purposes of expropriation, for plainly, if international law recognizes the undoubtedly very wide power of the State to appropriate the property of aliens on the ground that, as under municipal law, the interests of the individual must yield to the general interest and public welfare, the least that can be required of the State is that it should exercise that power only when the measure is clearly justified by the public interest. Any other view would condone and even facilitate the abusive exercise of the power to expropriate and give legal sanction to manifestly arbitrary acts of expropriation. In certain circumstances it may, as will be shown below, be thought proper to exempt the State from the

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[71] The opinion of the Supreme Court of the United States in the case of Georgia v. City of Chattanooga (264 U.S. 472, 480 (1924), cited by Delson) gives an idea of the position which would be taken on this point by the courts of any country: "The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed essential to the life of the State. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will."

[72] See G. Schwarzenberger, "The Protection of British Property Abroad", *Current Legal Problems* (1952), vol. 5, pp. 313 and 314.

[73] J. H. Herz, *loc. cit.*, p. 253. Friedman considers that the motives of expropriation are a matter of indifference to international law, since the latter does not contain its own definition of "public utility". *Op. cit.*, p. 141.

[74] Cf. Bourquin, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1931-I), vol. 35, p. 166; Kunz, *loc. cit.*, p. 55.

[75] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), pp. 38 and 39-40.

[76] *The Hague Court Reports* (ed. by J. B. Scott, 1932), p. 66.

[77] United Nations, *Reports of International Arbitral Awards*, vol. II, pp. 917-918; see references to other cases in Cheng, *op. cit.*, p. 39.

[78] See, for example, article 22 of the Agreement of Bogotá cited in footnote 9 of the previous chapter and article III of the Treaty of Commerce between Afghanistan and India of 4 April 1950, in United Nations, *Treaty Series*, vol. 167, p. 112.

fulfilment of requirements which are in appearance as essential as this one, but in such cases the exception will be based on good gounds. In no circumstances, however, could a measure of this kind taken by the State capriciously or for reasons other than public utility, be regarded as valid at international law. This statement is not at variance with the view correctly advanced by various writers that the discretionary powers of the State in the matter are in practice unlimited, provided that the latter view is understood to mean only that it is for municipal law, and not for international law, to define in each case the "public interest" or other motive or purpose of the like character which justifies expropriation. Particularly at the present time, when régimes of private property vary widely, it would be idle to attempt to "internationalize" any one of them, however generally accepted it might seem to be, and to impose it upon States which have adopted another system in their own constitutional law. It is accordingly sufficient to require that all States should comply with the condition or requirement which is common to all; namely, that the power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d'être* is plainly absent, the measure of expropriation is "arbitrary" and therefore involves the international responsibility of the State.

15. Questions concerning the method of expropriation

60. International law allows States greater freedom of action with regard to the method of expropriation than with regard to the motives and purposes of expropriation. For example, the system of expropriation resulting from the constitutional law of the State concerned or, as is usual in cases of "nationalization", from special acts of the legislature, is totally irrelevant from the point of view of international law.[79] Nevertheless, as is recognized even by the authors who most strongly maintain the primacy of municipal law in matters of expropriation, an expropriatory act "must, in this respect, exhibit the same characteristics as acts habitually falling within the exercise of governmental power. It must be the normal result of the working of the machinery of political life, that is to say, of a smooth and regular functioning of the governmental machine. Failing this it would amount to an unlawful act".[80]

61. Schwarzenberger, basing himself on the decisions of the Permanent Court of International Justice, cites as examples summary expropriation without previous investigation of individual cases, lack of means of redress by legal action and non-compliance with the essentials of an expropriation procedure in force. If an act of expropriation is contrary to the minimum standard, its illegality is not affected even by the payment of an adequate compensation.[81] Provisions of this kind are embodied in certain treaties. Thus, the Treaty of Friendship, Commerce and Consular Relations between the United States of America and Germany concluded on 8 December 1923, specifies that property shall not be taken away without due process of law (article 1).[82] The Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952, although it also contemplates other conditions and aspects of expropriation, provides: "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law (article 1)."[83]

62. It would therefore seem clear that the test of "arbitrariness" can also be applied to the methods and procedures employed in expropriating alien property. Like any other measure affecting the patrimonial rights of aliens taken by the State, expropriation may in the course of the procedure by which it is effected result in a "denial of justice" and, in such case, the international responsibility of the State is undoubtedly involved. The most obvious example is, of course, that of procedures which unjustifiably discriminate between nationals and aliens to the detriment of the latter. Apart, however, from this eventuality, which is highly unlikely in the case of measures of individual expropriations, a "denial of justice" may result from grave procedural irregularities or, in its broadest sense, may be established on many other grounds.[84] Subject to these reservations, which seem inescapable in the light of the general but none the less fundamental principles governing the international responsibility of States, it may be said that a State is under no obligation to adopt a method or procedure other than those provided for in the relevant provisions of municipal law. A State may even, where special circumstances require and justify such a course, depart from the usual methods and procedures, provided that in so doing it does not discriminate against aliens or commit any other act or omission which is manifestly "arbitrary". In short, the State's freedom of action in regard to methods and procedures is in a sense wider than that it enjoys in regard to the grounds and purposes of expropriation.

III. Compensation

63. From the international point of view, compensation is undoubtedly the crucial question in the matter of expropriation in the public interest. Although an expropriatory measure may be "arbitrary" by reason of the non-observance of any of the requirements mentioned earlier, compensation remains the basic requirement, even in the case of expropriations of a general and impersonal character. It is for this reason that compensation has occupied so prominent a place in past diplomatic and judicial practice and in the writings of publicists.

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[79] In this connexion, see Herz, *loc. cit.*, p. 247.

[80] Friedman, *op. cit.*, p. 136.

[81] Schwarzenberger, International Law, vol. I, *International Law as applied by International Courts and Tribunals* (3rd ed., 1957), p. 206.

[82] The same stipulation is contained in article 1 of the Treaty signed by the United States of America and Norway on 5 June 1928.

[83] See also in the same sence the provision of the Agreement of Bogotá quoted in footnote 103 below.

[84] With regard to the broad conception of "denial of justice" see the Special Rapporteur's second report (A/CN.4/106), chapter II, section 8.

16. Legal nature of compensation

64. Before proceeding further it would seem desirable to define the term "compensation" in the context of expropriation, since the same word is used to designate one of the forms or types of "reparation" for injuries caused by an act or omission contrary to international law or, to use the terminology which is now familiar, an act or omission which is "wrongful" or "unlawful".[85] Although compensation and reparation have some points in common—and it is perhaps for this reason that some writers have studied the former in the light of the principles governing the latter—there can be no doubt that the two are in fact wholly distinct legal institutions. As was stated by the Permanent Court of International Justice in the *Chorzów Factory* case, the difference stems from the character of the act which gives rise to "compensation". In the case of an "illegal" act, including an "illegal" act of expropriation such as that which the Permanent Court was considering, compensation is one of the forms of "reparation" for the loss sustained and may, as such, cover not only the direct loss but also any other damages caused by the illegal act or omission for which reparation is to be made. Compensation for lawful expropriation, on the other hand, is limited to the value of the property expropriated.[86] Whereas in the case of an unlawful act, responsibility arises directly and immediately from the act or omission causing the injury, responsibility, if any, in the case of (lawful) expropriation will depend, in so far as indemnification is concerned, solely on the amount, promptness and form of the compensation paid. Responsibility would in fact arise from the "arbitrary" character of the compensation. It is therefore of importance to ascertain the exact legal nature of compensation for expropriation, not only in order to determine when and on what grounds international responsibility arises, but also—and in a sense chiefly—to avoid confusion concerning the criterion or criteria applicable in determining the quantum of compensation and the time and form of the payment.

65. Another question to be determined is whether compensation is a *sine que non* of expropriation on grounds of public interest. Both in legal theory and practice the prevailing opinion is that expropriation of alien property without compensation is "confiscation". It is even held by not a few writers that expropriation not accompanied by compensation satisfying the requirements of international law is also confiscatory. In this connexion, two questions must be answered: first, whether the State is in fact under an obligation to compensate aliens for expropriated property, and, second, the extent to which international law, if it imposes such an obligation upon States, regulates and establishes the requirements in regard to compensation. Both questions will be examined later in this section, but it should be noted at this point that, even if compensation is inseparable from expropriation, "confiscation" should not be confused, as it sometimes is, with "unlawful" expropriation. As it is the "unlawful" character of an act of expropriation which makes it intrinsically contrary to international law and hence capable of immediately and directly involving the responsibility of the State, measures not of this character cannot have the same juridical consequences. The position is, however, different in regard to what were called above "arbitrary" acts of expropriation; even if compensation is an inescapable requirement, "confiscation" is, or derives from, a measure which is lawful in itself, so that international responsibility could arise only from the non-observance of a requirement concerning compensation.[87] Perhaps of great importance, however, is the fact that, in the modern world at least, the real difference between expropriation and confiscation lies not so much in the presence or absence of compensation as in the motive or purpose of the measure taken by the State. In view of the fact that expropriation without compensation may be lawful (even from the international point of view), the term "confiscation" should be applied only to measures which are punitive in character or taken on political grounds. Consequently, the important factor in considering measures of this kind is that referred to in section I (10) of this chapter, namely, whether or not they are of an "arbitrary" character by reason of some act or omission on the part of the State constituting a "denial of justice".

17. The obligation to indemnify and the law governing it

66. It is of evident importance, in considering the question of compensation, to determine whether it is a rule of international law that expropriation of foreign property obliges the State to indemnify the foreign owner and, if so, by what law the obligation is governed. The problem is not merely to determine whether such an international obligation exists or not; it is also—and perhaps chiefly—to determine the law which governs it. In other words, it is necessary to ascertain to what extent the obligation, if it is found to exist, is regulated by international law itself and to what extent it is for municipal law to fix the quantum of compensation and the time and form of its payment. Although it might seem illogical to suggest that an obligation established by international law may be governed by other rules of law, the phenomenon is one not infrequently found in examining the organic and functional relationships between international and municipal law. The problem is in fact simply that of establishing the respective functions and spheres of application of the two legal systems in relation to the duty to pay compensation, a question which is of particular importance.

67. First, however, it is necessary to examine the crucial question, namely, whether international law imposes a duty upon States to pay compensation to aliens for expropriated property. In the opinion of some authors, the answer is in the negative. Strupp, for example, was of the opinion that "there is no rule of customary international law which prohibits the State

[85] As was shown in the previous reports, reparation in its broadest sense includes both "satisfaction" and reparation *stricto sensu*, while reparation includes restitution in kind (*restitutio in integrum*) and compensation or pecuniary damages. See in particular third report (A/CN.4/111), chapter IX, section 19.

[86] Publication of the Permanent Court of International Justice. *Collection of Judgments*, series A, No. 17, Judgment 13 (Indemnities), pp. 46-48.

[87] See, for example, Fachiri, "International Law and the Property of Aliens" in *British Yearbook of International Law* (1929), pp. 46, 54 and 55.

from expropriating the property of the nationals of another State, with or without compensation, provided that, in so doing, the expropriating State does not establish any difference in treatment or any inequality between its own nationals and aliens (in the absence of a treaty, equal treatment with nationals is the most an alien can demand) and that the measure in question is not in fact or in law directed against aliens generally or some aliens as such."[88] Kaeckenbeek has expressed the view that: "... the legislative abolition of an acquired right does not invariably give rise to a right to compensation" and that "it is therefore necessary to inquire whether international law provides a rule or standard which can be used to determine the cases in which the payment of compensation is essential"; he concludes that the only effectively recognized rule or standard is the principle of non-discrimination.[89] Other writers might be cited in the same sense[90] but, as will be seen, the preponderant view is that the State is under an international obligation to indemnify foreign property owners, although opinions differ as to the requirements that must be satisfied by the compensation paid.

68. The negative view does not appear to be supported by international practice. Traditional case-law, at least, which is based on the principle of respect for acquired rights and the prohibition of "unjust enrichment", offers ample precedents in support of the affirmative view. In the *Upton* case (1903), the Mixed Claims Commission held that "the right of the State ... to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof."[91] In the *de Sabla* case (1933), the Commission examined the problem directly from the standpoint of international responsibility: "It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility".[92] In another case, it was held that the right to expropriate "has no existence as a right apart from the obligation to make compensation."[93] In the *Chorzów Factory* case, the Permanent Court of International Justice declared, albeit less directly, that the payment of fair compensation was necessary to render an expropriation lawful.[94] To these and other precedents must be added those offered by international case-law in the matter of requisition in time of war or national emergency.[95]

69. This abundant and conclusive body of case-law is, however, rooted in the conception of private property which prevailed in municipal law until the First World War. Since that date, a number of tendencies have emerged which have destroyed the previous uniformity. As an outcome of these tendencies, differences, in some cases very substantial ones, are to be found in comparative law and contemporary systems of municipal law can be placed in three categories from this point of view. In a first group of States, which continue to adhere substantially to the principles of economic liberalism, expropriation in the public interest is lawful only if compensation is paid. This group still includes a large majority of States. In a second group of States, in consequence of the increased emphasis on the social function of property, compensation is no longer considered an essential element of expropriation. In the third group, consisting of States with a socialist economy in which ownership of the means of production has been transferred to the State and private property has been reduced to a minimum, compensation has completely lost its original compulsory character and has become wholly dependent on the will or discretion of the State.[96]

70. The foregoing must not, of course, be understood to mean that the resulting lack of uniformity in municipal law deprives of any basis the State's international obligation to pay compensation to aliens for property expropriated in the public interest. This obligation, although it may have originated as one of the "general principles of law recognized by civilized nations", has now become a principle of customary international law. Like any other principle, the international obligation to pay compensation may be modified or even set aside altogether if it ceases to be consistent with the needs and interests of the international community, as has happened in the case of some principles. But so long as this is not the case, the principle of respect for the acquired rights of aliens requires compensation in the case of any measure involving expropriation, whether individual or general, on grounds of public interest. As in the case of any international obligation, the State may not invoke the defence of "municipal law".

71. Nevertheless, without prejudice to the traditional validity and effectiveness of the principle, exceptions may be admitted. One exception which would seem wholly justified would be that of an expropriation of property acquired under the system of municipal law which does not contemplate compensation or leaves compensation wholly to the discretion of the State. An

[88] "Le litige roumano-hongrois concernant les optants hongrois en territoire roumain" in *La réforme agraire en Roumanie* (1927), p. 450.

[89] "La protection internationale des droits acquis" in *Recueil des cours de l'Académie de droit international* (1937-I), vol. 59, pp. 360-362.

[90] See, for example, Friedman, *op. cit.*, pp. 3 and 204 *et seq.*; N. Doman, Compensation for Nationalized Property in Post-War Europe, *The International Quarterly Review* (July 1950), vol. 3, p. 324.

[91] *United States-Venezuela Mixed Claims Commission* (1903), page 174. See in the same sense, the statement by the arbitrator in the David Goldenberg and Sons case (1928) quoted in footnote 109 below.

[92] American and Panamanian General Claims Arbitration, *Report of B. L. Hunt* (1934), p. 447.

[93] Eastern Extension, Australasia and China Telegraph Company, Ltd. case (1923) in *American and British Claims Arbitration*, Report of F. K. Nielsen (1926), p. 76.

[94] Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 46.

[95] With regard to the last category of cases, see Bin Cheng, *op. cit.*, pp. 45 and 46.

[96] In this connexion, see Friedman, *op. cit.*, pp. 7-12. For a detailed and systematic analysis of the position taken by the States Members of the United Nations on the various occasions when the subject was discussed in the General Assembly, the Commission on Human Rights and the Economic and Social Council, see M. Brandon, *The Record in the United Nations of Member States on Nationalization* (1958), paper submitted to the Forty-eighth Conference of the International Law Association, *passim*.

alien who makes an investment in such circumstances must remain subject to the provisions of that municipal law and accept as valid at international law any action taken by the competent state authorities in accordance with those provisions. The situation is completely different from that of an alien who is subjected to expropriatory measures which infringe the law in force at the time of the acquisition of his property, or to measures taken under new legislation which abrogates or amends with retroactive effect the law previously in force. The situation is not necessarily the same where a State invites or encourages, by advertisement or other means, foreign capital to invest in industries necessary for the economic development of the country. It has been argued that, in such cases, the application of the principles of *estoppel* or *venire contra factum proprium* precludes expropriation without compensation.[97] But unless the inviting State has expressly undertaken not to expropriate without compensation, it is difficult to see how the foreign investor can "acquire", merely by reason of the invitation, the right to compensation in the event of expropriation. If the invitation is silent on that point, the alien concerned cannot acquire more rights than those specified in the provisions of municipal law in force at the time of the investment.

72. The second of the two questions—the extent to which the obligation to pay compensation is governed by international law itself and the extent to which it is for municipal law to fix the quantum of compensation and the time and form of its payment—is of particular importance and, particularly is contemporary practice, is indeed frequently the only question that gives rise to serious difficulty. In the absence of treaties which determine when and in what amount compensation is to be paid, the mere acceptance of the principle that the State is under an international obligation to indemnify foreign property owners is not sufficient in itself, for the principle cannot in itself serve to establish the rules which govern the amount, promptness and form of compensation. According to the doctrine which has long been upheld by certain States and which has comparatively recently acquired some currency in legal writings, international law not only imposes an obligation to pay compensation but also requires that compensation must, in order to be internationally valid, be "just" (or "adequate"), "prompt" and "effective".[98]

73. The question whether this doctrine—which expresses the orthodox position in the matter—faithfully reflects contemporary international practice or is at any event consistent with international case-law will be examined below, but it may be useful first to consider the crucial question whether the requirements in regard to compensation are the same in cases of individual expropriation as in the case of "nationalization". Those constitutional systems which still provide for the payment of prompt, just and effective compensation are concerned with expropriations of the ordinary type, that is to say, with expropriatory measures of an individual and personal character. This is corroborated by the fact that even in countries whose constitutional law provides for compensation of this kind, a different system is usually introduced when general or impersonal measures of expropriation are carried into effect. The international consequences of the introduction of this new system will be shown below when the practice followed in the case of "nationalizations" is examined. First, however, the system followed in the case of expropriations of the ordinary type will be examined, although it should be observed that the distinction cannot be stated in absolute terms, since it is technically possible to apply either of the two systems to measures of expropriation in both categories. Nevertheless, the distinction is an important one and must be made if the two great tendencies in state practice in the matter are to be properly assessed.

18. Amount of compensation and criterion for valuation of the property expropriated

74. With regard to the quantum of compensation, the general tendency in individual expropriations has been and continues to be in favour of the payment of "just" or "adequate" compensation. This statement is borne out by international case-law, at least so far as traditional practice is concerned, although the precedents are neither very abundant nor very explicit on the point. In the Delagoa Bay Railway case (1900), under the *compromis* of 13 June 1891, the arbitration tribunal was given authority to "... pronounce, as it shall deem most just, upon the amount of the indemnity due by Portugal..."[99] The tribunal ordered the payment of the sum of 15.5 million francs as compensation.[100] In the Norwegian Claims case (1922), the Permanent Court of Arbitration held that the claimants were entitled to "... just compensation ... under the municipal law of the United States, as well as under the international law..."[101] In the Chorzów Factory case

[97] See W. Friedman, "Some Impacts of Social Organization on International Law" in *American Journal of International Law* (1956), vol. 50, p. 506.

[98] See, for example, Viénot, *Nationalisations étrangères et intérêts français* (1953), p. 38; Report of the Committee on Nationalization of Property, in *Proceedings and Committee Reports of the American Branch of the International Law Association* (1957, 1958), pp. 66, 67; Report of the Netherlands Branch Committee of the *International Law Association, New York University Conference* (1958), pp. 18 and 22; resolution adopted by the Committee on the "Protection of Investments Abroad in Time of Peace" at the Cologne Conference (1958) of the International Bar Association quoted in footnote 66 above; Barros Jarpa, *Answers to the Questionnaire of the International Committee on Nationalization*, distributed in English during the Forty-eighth Conference of the International Law Association (1958), p. 2. According to Viénot, "Cette compensation doit présenter un triple caractère selon les termes maintenant très généralement adoptés; elle doit être prompte, adéquate et effective.... La rapidité du versement de l'indemnité est incontestablement un élément fondamental de la valeur de l'indemnisation. Quant à l'adjectif 'adéquate', il implique une équitable estimation du préjudice subi et la remise au propriétaire dépossédé d'une masse de biens en nature ou en espèces, équivalente à celle dont il a été privé. Le terme "effective" implique que l'indemnisation ne doit pas être une simple promesse, ou revêtir des modalités telles que le bénéficiaire ne puisse disposer de l'indemnité."

[99] Moore, *op. cit.*, vol. II, p. 1875.

[100] *Sentence finale du Tribunal arbitral de Delagoa* (Berne, 1900), p. 89. However, regarding the real nature of this compensation, see section 32 below.

[101] See *The Hague Reports* (1932), vol. II, p. 69.

the Permanent Court of International Justice stated that "fair compensation" was necessary to render an expropriation lawful.[102]

75. The term "*adequate* compensation" or a similar expression appears in a number of treaties, to most of which the United States is a party. As a general rule, these treaties also stipulate, in accordance with the classic view, that the compensation shall be "prompt" and "effective". Examples of this practice are the Treaty of Friendship, Commerce and Navigation with Greece of 3 August 1951, article VII of which provides for "the prompt payment of just compensation... in an effectively realizable form" of "the full equivalent of the property taken...", the Treaty of Friendship, Commerce and Navigation with Japan of 2 April 1958, which contains a similar provision, and the Agreement with Czechoslovakia relating to commercial policy of 14 November 1946, which provides for "adequate and effective compensation". The Economic Agreement of Bogotá, signed at the Ninth International Conference of American States (1948), is the most explicit in this respect: "The States shall take no discriminatory action against investments by virtue of which foreign enterprises or capital may be deprived of legally acquired property rights, for reasons or under conditions different from those that the Constitution or laws of each country provide for the expropriation of national property. Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner."[103] The Convention between Belgium and Poland concerning certain questions relating to private property, rights and interests of 30 December 1922 envisaged "proper" compensation (article IV), and the Danish-Russian Preliminary Agreement of 23 April 1923, "full" compensation (article IV). Some treaties between European countries signed since the last war also provide for the payment of just or adequate compensation.[104]

76. In view of the substantial extent to which international case-law, the treaties mentioned above and general doctrine in the matter have been influenced by municipal law, it may be of interest to draw attention to an apparent change of emphasis which is discernible in the most recent constitutions. The constitutions drafted before the last war generally provided—and those still in force continue to provide—for "just", "adequate" or "full" compensation, whereas the post-war constitutions tend frequently to employ such terms as "fair", "equitable" and "reasonable". In some cases at least, these differences may, of course, be purely terminological rather than a reflection of a change in the conception of private property resulting in a different assessment of the amount of compensation payable by the State. Of much greater significance, perhaps, is the fact that a great many modern constitutions which consider compensation to be an essential element of expropriation on grounds of public interest make no reference whatever to the amount of compensation considered proper or authorize the State to fix the amount when expropriatory measures are carried into effect.[105]

77. In any event, it is clear that the mere requirement that compensation should be "adequate" or "just" does not in itself provide a sufficient basis to determine the quantum of compensation to be paid. Even where there is no doubt as to their interpretation, the use of any of these terms immediately raises the question of determining the amount of compensation that should in fact properly be paid to the owners of expropriated property in the various cases and circumstances that may arise. In other words, it is necessary to ascertain the rule or rules that must be followed in assessing the value of expropriated property. And in this connexion, it must be noted that, in spite of their undeniable similarity and the points of contact between them, these rules should not be confused with the rules applied in determining the amount of compensation in the case of injury caused by "unlawful" acts or omissions imputable to the State. Unfortunately, however, if the problem is narrowed to that of the rules applicable in cases of expropriation *stricto sensu*, it is extremely difficult, if not entirely impossible, to set out systematically the criteria which seem to have been observed in practice. For example, in the case repeatedly cited in this chapter, the Permanent Court laid down, albeit indirectly, the criterion of the "value of the undertaking at the moment of dispossession, plus interest to the day of payment".[106]

78. But even under this rule not all the difficulties would be resolved. For example, in estimating the (market) value, what weight is to be given to the possible depreciation of the property or of the currency in which the indemnity is to be paid? How are accounts receivable or other intangible property to be evaluated? These and many other questions which may arise and have in fact arisen in practice have not been resolved in the same way in all cases, nor will it always be possible to solve them in accordance with fixed and predetermined rules. The marked degree of uncertainty that exists results from the different situations to which expropriation gives rise because of the variety of the property which may be the object of expropriation and the diversity of circumstances in which it may be carried out.[107]

19. Promptness of compensation and form in which payment is to be made

79. The other two conditions that must in the orthodox view be satisfied if the compensation is to conform to international law—that is, that it should be

[102] Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 46. As will be seen below, the word "fair" was used by the Permanent Court in the same sense as the word "just" or "adequate".

[103] Article 25. However, seven of the signatory countries made reservations with respect to this provision of the Agreement. See *International American Conferences*, Second Supplement, 1945-1954 (1956), pp. 163, 169, 170.

[104] See Foighel, *op. cit.*, p. 116.

[105] See Peaslee, *Constitutions of Nations* (1950).

[106] *Loc. cit.*, series A, No. 17, p. 47.

[107] With regard to the criteria and considerations which must be taken into account in evaluating expropriated property, see Joseph, *loc. cit.*, pp. 4 and 5, and Brandon, Legal Aspects of Private Foreign Investments, *The Federal Bar Journal* (Washington, 1958), vol. 18, pp. 314, 315.

"prompt" and "effective"—do not have the same support in practice, even in the case of individual expropriations, as the requirement that compensation should be just. The absence of satisfactory precedents is particularly marked in regard to the "effectiveness" of the compensation. On the other hand, in a number of decisions of international tribunals, explicit reference is made to the requirement that payment should be prompt. For example, in the *Norwegian Claims* case, the Court spoke of "... just compensation in due time",[108] and in the *Goldenberg* case (Germany-Romania, 1928), the arbitrator held that "... although international law authorizes the State to make an exception to the principle of respect for the private property of aliens when the public interest so requires, it does so on the condition *sine qua non* that fair payment shall be made for the expropriated or requisitioned property as quickly as possible."[109]

80. As has been seen, in treaties referring to the matter it is generally stipulated not only that the compensation shall be "adequate" but that the payment shall also be "prompt" and "effective". However, in another group of treaties which are typical of the post-war period, provision is made for the payment of compensation in instalments, extending, in some cases, over a period of years. The treaties in question are not "lump-sum agreements", the most striking feature of the new practice which will be examined below, and generally provide for the payment of compensation covering the total value of the property expropriated.[110] Nevertheless, it should be noted that the treaties in this second and more recent group embody the settlement reached by the States concerned with the nationalizing State. The treaties in the first group are, on the other hand, normative in character. Before considering what conclusions can be drawn in this respect, it will be useful to examine the position in municipal law.

81. As was noted earlier, the great majority of constitutional provisions relating to expropriation still provide for the payment of an indemnity covering the value of the expropriated property. Only about half, however, provide for the "prior" or "prompt" payment of the compensation. Those which do not impose this additional obligation on the State either make no mention of the matter or explicitly provide that in certain emergencies payment of the indemnity may be deferred.[111] With regard to the "effectiveness" of the payment, it cannot for obvious reasons be expected that constitutions should contain provisions establishing the form in which payment is to be made. The usual practice is for compensation to be paid in cash in the legal currency. In the post-war European legislation under which measures of nationalization were carried out, the deferred payment of compensation is frequently found, even in the case of some western European countries, payment, as will be seen in the next section, being made in the form of public bonds.

20. Lump-sum agreements

82. In earlier sections, attention has been directed chiefly to the practice with regard to individual expropriations. This section deals with the practice in the case of nationalizations, in particular those carried out immediately after the Second World War as part of the broad programmes of socio-economic reform undertaken by various countries of eastern and western Europe. It was in connexion with these general and impersonal expropriations that "lump-sum" agreements were concluded under which the expropriating State and the State of nationality of the aliens affected by the expropriation agreed on a lump-sum compensation as indemnification for all the property expropriated, without regard to its real value. This practice, as will be seen below, is of interest both from the point of view of the quantum of compensation and also to some extent from that of its "promptness" and "effectiveness".[112]

83. From the point of view of compensation, a number of facts should be noted in connexion with the post-war European nationalizations. First, provision was made in all cases for the payment of compensation for the property or undertakings expropriated. In the central European countries, an exception was made in the case of persons who had collaborated with the enemy or behaved unpatriotically during the war; in this case, the non-payment of compensation was a confiscatory measure imposed as a penal sanction. In the other cases, the compensation did not as a rule cover the total value of the property or undertakings, and sometimes was less than half the estimated value. In exceptional cases, compensation was payable immediately, payment normally being made in the form of public bonds or sometimes shares of the expropriated undertakings themselves, redeemable at different dates. Practically none of the enactments made distinctions on the basis of the nationality of the persons affected and some even provided for preferential treatment of aliens affected by the nationalization.[113]

84. The practice embodied in the agreements mentioned has a number of general characteristics which should be noted before considering the aspects more directly related to compensation.[114] In the first place, unlike agreements concluded in order to regulate the amount, form and time-limit for payment of compensa-

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[108] *Loc. cit.*, in footnote 76 above.

[109] United Nations, *Reports of International Arbitral Awards*, vol. II, p. 909. In another arbitral decision (Portugal v. Germany, 1930) reference is made to a "reasonable time". See *Annual Digest and Reports of Public International Law Cases*, years 1929-1930, p. 151.

[110] With regard to these instruments see Foighel, *op. cit.*, pp. 120-121.

[111] See Peaslee, *op. cit., passim.*

[112] The practice appears to have been initiated with the Agreement of 30 May 1941, between Sweden and the USSR, the text of which has not been published. See Foighel, *op. cit.*, p. 97. The sums agreed on as compensation for the American and British petroleum interests nationalized by Mexico in the pre-war period might also be considered examples of this practice. See Friedman, *op. cit.*, pp. 28-29.

[113] With regard to these and other features of the post-war European legislation on the subject, see Doman, Post-War Nationalization of Foreign Property in Europe, *Columbia Law Review* (1948), vol. 48, pp. 1140 *et seq.*

[114] An account of these agreements—some twenty-five in all—appears in Foighel, *op. cit.*, p. 133.

tion to be paid in the future, these agreements were concluded *a posteriori* and embody the settlement of a dispute or the adjustment of a situation between the two States concerned. Such arrangements envisage "negotiated" compensation, separate and independent from any which may have been fixed unilaterally under the nationalization measures. The agreements, therefore, as a rule involve "compromise" formulas which vary according to the cases and circumstances. In this respect, the practice followed is markedly similar to that adopted in other agreements concluded in the past for the purpose of fixing a lump sum as full "reparation" for injuries to aliens caused by wrongful acts or omissions imputable to the contracting States, and which settle or discharge the individual claims to which such acts or omissions have given rise.[115] The agreements under discussion also have the effect of discharging claims. Thus, article 3 of the Swiss-Yugoslav agreement stipulates that, after the payment of the agreed compensation, the Swiss Government will consider all claims by its nationals as finally settled. Lump-sum agreements of this type have various other features which are not so directly relevant to the purposes of this report.[116]

85. Although lump-sum agreements are also of interest from the point of view of the "promptness" and "effectiveness" of compensation, the chief matter of interest is the lump sum agreed upon as compensation for all the property expropriated from the nationals of the claimant State. The relationship between this figure and the real value of the property or, as the case may be, the total amount of the claims, is appreciably different in the various agreements. It has, for example, been calculated that the compensation which Poland agreed to pay Great Britain amounted to only one-third of the value of British investments and the proportion was the same in the case of the compensation agreed upon with Czechoslovakia. On the other hand, it is considered that the compensation paid under the settlement with Yugoslavia covered half the value of the investments and that paid under the agreement with France relating to British interests in the French gas and electric industry amounted to 70 per cent of the value of the investments.[117] These examples, which are illustrative of the relationship between the amount of the compensation stipulated in other treaties and the estimated value of the property or the total amount of the claims, show that lump-sum agreements, far from envisaging "just" or "adequate" compensation, provide for "partial" indemnification, the amount of which varies appreciably depending on the case and the circumstances. In the case of lump-sum agreements, there is no absolute uniformity with regard to the rule followed in valuing the property and determining the amount of compensation,[118] which is understandable in view of the diversity of the situations giving rise to this type of international settlement.

86. As regards the "promptness" of compensation, these agreements do not as a rule provide for the immediate payment of the total amount. The Yugoslav-United States agreement is an exception in this respect, part of the funds transferred to the Federal Reserve Bank by the Yugoslav Government during the German occupation being used for the purpose. The other agreements provide for the payment of the compensation in two or more instalments, with or without interest, and often in the form of obligations or shares in the industries or undertakings expropriated. For example, under the Anglo-French agreement referred to in the last paragraph, the credit-vouchers were payable in seven annual instalments and bore interest at the rate of 3 per cent. In the agreements concluded with the countries of eastern Europe the instalments extended over a considerable period, in some cases up to seventeen years, although under some of the agreements a substantial proportion of the compensation was payable in the first instalment. It is clear that the time-limit for the payment of the agreed compensation necessarily depends on the circumstances in each case and, in particular, on the expropriating State's resources and actual capacity to pay. Even in the case of "partial" compensation, very few States have in practice been in a sufficiently strong economic and financial position to be able to pay the agreed compensation immediately and in full.

87. Similar considerations apply with regard to the "effectiveness" of the compensation. Although a wide variety of forms of payment are contemplated in the agreements, payment is generally effected through the use of frozen assets of the expropriating State in the other State, or through the delivery of specified raw materials or other goods. An example of such payment in kind is furnished by the agreement between Poland and France, which provided for the delivery of specified quantities of coal over a number of years. Examples of the first form of payment are offered by the Yugoslav-United States agreement mentioned earlier and the agreement between Switzerland and Romania, under which 25 per cent of the agreed compensation was to be paid from Romanian funds frozen in Swiss banks. In the Swiss-Hungarian agreement, on the other hand, it was stipulated that part of the compensation would be paid in the legal currency of the expropriating State.

21. General considerations concerning the requirements in regard to compensation

88. In the discussion in a preceding section of the international obligation of the State to compensate foreign property owners, no conclusion was reached with regard to the law by which that obligation is governed. It remains to ascertain to what extent the obligation, if it is assumed to exist, is regulated by international law itself and to what extent it is for municipal law to fix the quantum of the compensation and the time and form of its payment. This second question, in which the greatest difficulties usually originate, can now be examined in the light of the international practice discussed above. In the interests of

[115] See in this connexion Whiteman, *op. cit.*, vol. III, pp. 2067, 2068.

[116] In this connexion see Bindschedler, La Protection de la propriété privée en droit international public, *Recueil des cours de l'Académie de droit international* (1956-II), vol. 90, pp. 278-297.

[117] See Schwarzenberger, "The Protection of British Property Abroad", *Current Legal Problems* (1952), vol. 5, p. 307.

[118] See in this connexion Foighel, *op. cit.*, pp. 117-119.

consistency, expropriation and nationalization will again be discussed separately, for the requirements in regard to compensation may not always be the same in the two cases.

89. What are the requirements in regard to compensation in the case of expropriations of the ordinary and usual type? So far as the "amount" is concerned, the general principle followed in judicial and diplomatic practice and still recognized in most domestic constitutional enactments is that the compensation must be "adequate", that is to say, that it must cover the value of the property expropriated. The principle is referred to as a "general" one because there may be cases and situations in which compensation which does not cover the full value of the expropriated property must be regarded as valid and effective from both the domestic and the international standpoint. For example, if the foreign investment has been made in a country whose constitution does not provide for the payment of full compensation, there will be no ground for requiring the State to pay compensation equivalent to the actual value of the property. Mention should also be made of the case of investments made under a constitutional system which does not contemplate compensation or which leaves the question of compensation wholly to the discretion of the State. The situation is substantially the same and must be resolved in the same way. In none of these cases can the principle of respect for acquired rights properly be invoked.

90. On the other hand, it would be contrary to international law if the expropriating State discriminated between nationals and aliens to the prejudice of the latter in fixing the amount of the compensation. This situation would, of course, arise only in the case, which rarely occurs in practice, of expropriations of this type affecting national and foreign property owners. Sir John Fischer Williams formulated a good many years ago what has come to be the prevailing doctrine in this respect: "where no treaty or other contractual or quasi-contractual obligation exists by which a State is bound in its relations to foreign owners of property, no general principle of international law compels it not to expropriate except on terms of paying full or 'adequate' compensation... This conclusion does not imply that a State in the absence of a treaty or contractual obligation is free to discriminate against foreigners and attack their property alone."[119] The position is similar with regard to the "promptness" and "effectiveness" of compensation and practice affords even less justification for the view that precise rules of international law exist in this respect. If payment is made within the time-limits and in the form required by municipal law and if the compensation is not manifestly arbitrary in either respect, there would appear to be no ground for requiring the State to make payment more rapidly or in a more effective form. In spite of the absence of international rules precisely regulating these two aspects of compensation, it may, however, be required that aliens should receive the most favourable legal treatment to which nationals of the expropriating State would be entitled in like circumstances.

91. In the case of expropriations of the "nationalization" type, owing no doubt to the complexity of the situations involved and the uncertainties by which practice is still characterized, three different schools of thought continue to exist. The orthodox view, held by the authorities and associations cited in footnote 98, and others, is that the distinction between the two types of expropriation has no juridical effect so far as the "amount", "time" or "effectiveness" of compensation are concerned, since the fundamental principles involved are the same.[120] The relevant provision of the draft submitted by Lapradelle to the *Institut de droit international* was opposed by some of the members of the *Institut* on the ground that traditional doctrine was applicable to nationalization.[121] Other authors take the opposite view and hold that in the case of nationalizations involving a change in a country's socio-economic structure, the question of compensation in all its aspects is a matter entirely within the discretion of the State, thus echoing the position taken by some Governments.[122] A third group of publicists, who seem to constitute a majority, are strongly inclined to favour the application of principles that are more flexible and thus consonant with the system of lump-sum agreements. One of the first to maintain that the obligation to pay full compensation might in practice have the consequence of making a projected reform impossible was Judge Lauterpacht.[123] The notion of physical "impossibility" is shared by other publicists belonging to this group.[124] Other authors are more explicit on this point and hold that the nationalizing State's capacity to pay is one of the most important of the factors which must be taken into account in establishing the amount, time and form of compensation.[125]

[119] "International Law and the Property of Aliens", *British Year Book of International Law* (1928), p. 28. In the same sense, see Cavaglieri, "La notion des droits acquis et son application en droit international public", *Revue générale de droit international public* (1931), vol. 38, p. 296. See also the authors cited in footnotes 89-91 above.

[120] See Podestá Costa, *Derecho Internacional Público* (Third edition, 1955), vol. I, pp. 469, 470; Bullington, "Treatment of Private Property of Aliens in Land in Time of Peace", *Proceedings of the American Society of International Law* (1933), p. 108; Rubin, "Nationalization and Compensation: a Comparative Approach", *University of Chicago Law Review* (1950), vol. 17, p. 460.

[121] See *Annuaire de l'Institut de droit international* (1950), vol. I, pp. 73-112 and (1952), vol. II, p. 251 *et seq.*

[122] See, for example, Friedman, *op. cit.*, p. 208.

[123] "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1937-IV), vol. 62, p. 346. See also Oppenheim-Lauterpacht, *International Law* (eighth edition, 1955), vol. I, p. 352. The argument of "financial impossibility" was invoked by Romania in the agrarian reform carried out in the 'twenties (see *op. cit.* in footnote 58 above), and later by Mexico in connexion with its agrarian reform (see Kunz, *loc. cit.*, p. 27).

[124] See De Visscher, *Theory and Reality in Public International Law* (translated by P. E. Corbett, 1957); Bindschedler, *loc. cit.*, p. 250.

[125] See, *inter alia*, Lapradelle, *Les effets internationaux des nationalisations*, article 11 of the draft submitted to the *Institut de droit international*, *Annuaire* (1950), vol. I, p. 69; Charguéraud-Hartman, "Les intérêts étrangers et la nationalisation", *Etudes internationales* (1948), vol. I, p. 348; Vitta, *La Responsibilità Internazionale dello Stato per Atti Legislativi* (1953), pp. 143 *et seq.*; Guggenheim, "Les principes de droit international public", *Recueil des cours de l'Académie de droit international* (1952-I), vol. 80, p. 128. In marked contrast to this position, it has been maintained that "... A territorial sovereign may find its very right to expropriate conditioned upon its power to pay". *See* Charles Hyde, "Compensation for Expropriation", *American Journal of International Law* (1939), vol. 33, p. 112.

92. It may be added in this connexion that, in solving the problem, it is necessary to take into account not only juridical considerations but also considerations of equity and considerations of a practical, technical and political character. The argument of "impossibility" is of great importance for, if it is desired to remain consistent with the idea which legitimates the institution of expropriation in general—that is to say, that private, national or foreign interests must yield to the interest of the community—it would be unjust to deprive the less wealthy States and the under-developed countries of the power to exploit directly their natural resources and public service or other industries or undertakings established in their territory. "Capacity to pay" is also of importance from the point of view of the promptness and effectiveness of compensation not only because it must be taken into account in both connexions but also because the expropriating State will, if not pressed to make the payment or granted concessions with regard to the form of the payment, in many cases undoubtedly be able to pay compensation more "adequate" to the value of the property.[126] In the case of "nationalization", the compensation should be subject to flexible requirements or conditions, much less rigid than those which may properly be required in the case of expropriation of the usual or ordinary type. But neither this nor any other of the considerations set out above should be taken to imply abandonment of the principle that there should be no discrimination between nationals and aliens to the prejudice of the latter, which must necessarily be applied in every measure affecting acquired rights; nor do these considerations authorize the State to fix compensation which, by reason of its amount or the time or form of payment, transforms the expropriation into a confiscatory measure or a mere despoliation of private property.

CHAPTER III

CONTRACTUAL RIGHTS

I. Treaties and contracts as sources of private rights

93. According to a theory which has gained currency of late, a State assumes the same international obligations upon entering into a contractual relationship with an alien private individual as when it establishes a relationship of the same nature with another State. This would mean that the principle *pacta sunt servanda,* which demands respect of private rights acquired pursuant to a treaty, also applies to rights acquired by virtue of contracts concluded between States and aliens. The implications of this theory are obvious: that the existence and imputability of international responsibility derive in both cases solely from the mere non-performance of the contractual obligation in question.

94. The above theory stems from the analogy—usually purely formal—which exists between treaties and such contractual relationships. But is there any other basis for assimilating the two categories of relationships, all rights and obligations, so far as responsibility is concerned? The problem is naturally no longer the same as the one which confronted traditional doctrine and practice, nor can it be resolved solely according to the notions and principles which they established. Certain developments in the realm of contractual relations between States and alien private individuals indicate the need for a reconsideration of some fundamental aspects of this question. This process will be attempted in the present chapter.

22. Treaties relating to private rights of a patrimonial nature

95. The first question to consider is that of private rights acquired by virtue of an international treaty. Instruments of this type may assume a variety of forms, although for the purposes of the present report, this fact is not necessarily of special significance. A distinction is often drawn, for instance, between treaties which confine themselves to creating rights and obligations between the Contracting States and those which also vest certain rights directly in the nationals of all or some of the parties to the instrument. The most frequently cited example of the second variety is the Agreement of 1921 between Poland and the City of Danzig (*Beamtenabkommen*), regarding which the Permanent Court of International Justice declared that, if such was the intention of the Contracting Parties, there was nothing to prevent individuals acquiring direct rights under a treaty.[127] As will be shown hereunder, the fundamental question, from the point of view of international responsibility, is solely whether the State has defaulted in the performance of any obligation stipulated in the treaty, and, in that connexion, the specific act or omission which can be imputed to it is of no importance.

96. One of the varieties of instruments referred to above is composed of treaties which expressly forbid one of the Contracting States to expropriate specified property. Stipulations of this nature were contained in some of the Peace Treaties concluded at the end of the First World War, and the Geneva Convention of 15 May 1922 between Germany and Poland, which prohibited the expropriation by the latter of certain property in Polish Upper Silesia, gave the Permanent Court an opportunity to rule on the juridical consequences of non-compliance with such provisions.[128] Earlier examples of this type of instrument can be found in the Treaties of Commerce and Navigation concluded at the end of the nineteenth century between Japan and Great Britain, Germany and France, which were the subject of an award by the Permanent Court of Arbitration.[129] In recent times, the more frequently encountered type of instrument provides for the pro-

[126] Lump-sum agreements have other practical, technical and political advantages. In this connexion see Foighel, *op. cit.*, p. 98.

[127] Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions,* Series B, No. 15, pp. 17 and 18.

[128] On this point see chapter II, section 12, *supra.*

[129] See S. Friedman, *Expropriation in International Law* (1953), pp. 187 and 188.

tection of private ownership and other patrimonial rights not by prohibiting expropriation but by subjecting its exercise to specified conditions.

97. Not all the treaties in this last group envisage the same system of protection. The general purpose of all such instruments, however, is to protect private property against the arbitrary exercise of the right of expropriation, especially in the matter of compensation. Some merely require that compensation shall be paid for all classes of property or for specified categories expressly mentioned in the treaty; others call for observance of the conditions stipulated in the municipal legislation on the same terms as in cases involving nationals of the contracting State; while yet another group stipulates the relevant conditions and requirements directly and explicitly. Examples of these different forms and varieties of instruments were given in the preceding chapter.[130]

98. There is no need to explain the basis of a State's international responsiblity in these cases: the mere non-observance of the prohibition against expropriation or of the conditions and requirements to which the exercise of the rights of expropriation is subordinated constitutes non-performance of an "international" obligation. According to the terminology which is being used in this report, such non-performance is "unlawful" (see section 28, *infra*). But there is the possibility—indeed not very remote—of an instrument of the type mentioned not being drawn in sufficiently explicit terms. It then becomes necessary, in order to determine whether the measure taken by the State is wholly consistent with the terms of the instrument, to fall back on the rules of international law regarding the interpretation and application of treaties. In these circumstances, a somewhat different situation may arise: the measure in question, or the manner in which it was adopted or carried into effect, may reveal, at most, an "abuse of right", which has caused unjustified damage to the alien incompatible with the purposes of the instrument concerned. In such a case, the existence and imputability of international responsibility would depend rather on the "arbitrary" character of the action taken.

23. Object and forms of "public contracts"

99. A State may enter into contractual relations with alien individuals or bodies corporate, just as with its own nationals, for many purposes and by means of various instruments. The purpose or object of any such instrument may equally well be the purchase and sale of some category of merchandise as the provision of a specified technical or professional service. A third group of instruments provides for the exploitation of some of the country's natural resources, such as oil or other minerals, or for the operation of certain public services such as transport or electric power. Yet a fourth group relates to matters of a very different nature, namely, loans and bonds issued by the State. As will be shown in part III of this chapter, the last-named, notwithstanding their special characteristics, also give rise to an essentially contractual relationship.[131]

100. Many of the instruments referred to above are as a rule concluded between States which are "underdeveloped", i.e., lacking in modern technical facilities, and private individuals or companies from highly industrialized States, who possess the necessary technical capacity to ensure the intensive exploitation of a country's national resources or to furnish the public services necessary to modern life. These instruments consequently form the basis for almost all investment of foreign private capital.

101. So far as their juridical nature is concerned, these instruments may assume different forms. Besides the special case of the bonds and other debentures referred to above, a distinction has at times been drawn between ordinary contracts and concession contracts. The term "concession" is used both in municipal law and in international relations in general to describe such a multitude of activities that it has rightly been stated that there is no agreed definition of the word in international law.[132] It is true that, so far as their content is concerned, concession contracts sometimes confer on the contracting individual or company certain rights and prerogatives, and consequently also impose obligations, of a semi-political character, such as the right to import or export free of all duty or other state charges, the right to exercise control or authority over the part of the territory in which the foreign undertaking is operating, including responsibility for the maintenance of public order, the right to expropriate land required for purposes of exploitation, and so forth.[133] But apart from this and their purely formal characteristics, such concession contracts are not substantially different from ordinary contracts. There is thus almost unanimous agreement that they merely constitute one variety of contract which States may conclude with private individuals.[134]

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[130] See, for other illustrations of the different systems of protection, Wilson, "Property-Protection Provisions in the United States Commercial Treaties", *American Journal of International Law* (1951), vol. 51, pp. 83-107, and M. Brandon, "Provisions relating to Nationalization in Treaties registered and published by the United Nations", *International Bar Association, Fifth International Conference of the Legal Profession* (Monte Carlo, 1954), pp. 59 *et seq.*

[131] As regards the various approaches adopted in trying to explain the special juridical nature of "public loans", see Borchard, "International Loans and International Law", *Proceedings of the American Society of International Law* (1932), pp. 143-148.

[132] See Huang, "Some International and Legal Aspects of the Suez Canal Question", *American Journal of International Law* (1957), vol. 51, p. 296.

[133] On this point see McNair, "The General Principles of Law recognized zy Civilized Nations", *British Yearbook of International Law* (1957), p. 3.

[134] See Gidel, *Des effets de l'annexion sur les concessions* (1904), p. 123. According to a more recent view, an economic concession is a contract between a public authority and the concessionaire and, whatever might be its form, always involves a complicated system of rights and obligations between the concessionaire on the one part and the State on the other. Such a relationship is of a mixed public law and private law character. See O'Connell, *The Laws of State Succession* (1956), p. 167. As regards other opinions expressed on the juridical nature of concessions, see Carlston, "International Role of Concession Agreements", *Northwestern University Law Review* (1957), vol. 52, pp. 620-622.

102. In view of the factors pointed out above, however, and because of their economic importance, there is now a tendency to regard concession contracts as instruments *sui generis* and even to use other names or expressions to designate them.[135] It has been suggested, for example, that they should be called "international economic development agreements", so as to stress their international status and the fact that the State is consequently responsible for non-compliance with their terms.[136] This, however, already touches on the fundamental aspect of the question—i.e., the law which governs the various contractual relations which a State may establish with alien private individuals.

II. Law governing contractual relations between States and aliens

103. The question which arises is whether the similarity which may exist between contractual relations established by States with private individuals or bodies corporate of foreign nationality and relations of the same nature which States enter into between themselves affords juridical grounds for affirming that the principle *pacta sunt servanda* is equally applicable to such relations. In order to answer this question properly, it is first necessary to know what law or legal system governs the various different contractual relations which a State may enter into with an alien. The problem is similar to, and to some extent identical with, that which is ordinarily known in private international law as the "choice of law", and which may here be called simply the determination of the "law of the contract"; i.e., of the law or juridical rules which, by the express, tacit or presumed agreement of the parties—or, in certain cases, by virtue of overriding provisions contained in the local legislation—govern the rights and obligations stipulated in the contract. Only when this preliminary question is answered will it be possible to determine how the principle *pacta sunt servanda* (as a principle of international law) applies to contractual relations between States and aliens.

24. The traditional position

104. Strictly speaking, in traditional international law this problem did not even arise, for—as was shown in the Special Rapporteur's second report (A/CN.4/106, chapter IV, section 12)—the basic assumption was that all such contractual relations were always governed by municipal law. One of the most equivocal and explicit statements of the traditional position can be found in the judgement of the Permanent Court of International Justice in the Serbian Loans case (1929). The Tribunal stated:

> "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law. The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine this law only by reference to the actual nature of these obligations and the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the parties."[137]

105. In the cases of the Serbian and Brazilian loans, the Permanent Court approached the question of the "applicable law" strictly from the point of view of private international law, in that it considered the possibility of the applicable rules being those of a State other than the contracting State by reason of an express agreement between the parties or of a presumption which could be inferred from the terms of the instrument.[138] The important point in the present context, however, is what "substantive" law governs the contractual relationship established between the State and the alien private individual. In this connexion, the Court clearly took it for granted that such relationships are governed, so far as the validity and other substantive aspects of the relevant instrument are concerned, by the municipal law of a State. Even in the hypothetical case in which the rules governing the conflict have been established by international conventions or customs and thus possess the character of "true international law governing the relations between States", those rules, by reason of their strictly "adjective" character, would serve no other function than to resolve the conflict between the possible applicable laws. In brief, the "choice of law" would always be a matter for the municipal law of a State.

106. The decisions of international claims commissions contain many statements of the traditional position.[139] Basing itself on that body of judicial precedent and on diplomatic practice, the Committee established by the League of Nations for the study of international loan contracts conceded that "Every contract which is not an international agreement—i.e., a treaty between States—is subject (as matters now stand) to municipal law..."[140] The question has at times arisen, both in the Permanent Court and in cases dealt with by arbitral commissions, whether the municipal law governing the contractual relation is the law of the contracting State,

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[135] On the importance of concession contracts in the world economy, see Carlston, *op. cit.*, pp. 629 *et seq.*

[136] See J. N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources", *American Journal of International Law* (1956), vol. 60, p. 862, and Carlston, "Concession Agreements on Nationalization", *ibid.* (1958), vol. 52, p. 260.

[137] Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, Nos. 20/21, p. 41. See for the same view the judgment in the Brazilian Loans case, *ibid.*, p. 121.

[138] See also *ibid.*, pp. 42 and 123.

[139] See, *inter alia*, Feller, *The Mexican Claims Commissions 1923-1934* (1935), p. 178.

[140] See Report of the Committee for the Study of International Loan Contracts, League of Nations Publication, *II. Economic and Financial, 1939.II.A.10* (document C.145.M.93. 1939.II.A), p. 21.

the law of the State of which the private individual is a national or the law of some other country. This aspect of the question, however, has no bearing on the concrete problem under consideration, although it can be said that, as a general rule, the applicable law is that of the contracting State.[141] And this is indeed easily understandable in view of the nature and purpose of the usual type of contractual relationship, which is unlikely to be governed by a law other than that of the contracting State.

25. Recent instruments and jurisprudence

107. The type of contractual relationship envisaged during the development of the traditional doctrine is undoubtedly that embodied in the common type of "public contract". But some of the more recent instruments of the type considered in the preceding section contain clauses which make it impossible to assimilate them, at least *in toto*, to contracts of that nature. These clauses expressly stipulate that the contractual relationship shall be governed, either wholly or in certain particulars, by a legal system or specified legal rules other than the municipal law of the contracting State or of any other State. One of the earliest examples of such a clause was contained in the "5 per cent 1932 and 1935 bonds" of the Czechoslovak Republic, guaranteed by the French Government and concluded with French bankers, regarding which it was agreed that "Any disputes which may arise as to the interpretation or execution of the present provisions shall be subject to the jurisdiction of the Permanent Court of International Justice at The Hague acting in execution of Article 14 of the Covenant of the League of Nations. The Czechoslovak State undertakes to lay such disputes before the Permanent Court of International Justice whose jurisdiction it accepts." As was pointed out by Mann, in commenting on this provision, according to generally recognized principles, the submission to the jurisdiction of a specific court implies the submission to the law of that court.[142]

108. The Concession Agreement entered into by the Imperial Government of Persia and the Anglo-Persian Oil Company on 29 April 1933 also envisaged recourse to an international jurisdiction, but was much more explicit on the point to which reference has just been made. Article 22 of that Agreement, after stipulating that any differences between the parties of any nature whatever were to be settled by arbitration, according to the method and procedure prescribed in the article itself, provided that "The award shall be based on the juridical principles contained in Article 38 of the Statute of the Permanent Court of International Justice". Another interesting detail of these instruments, which appears in article 21 of the Persian Concession Agreement, was first inserted in the Concession Contract entered into in 1925, between the Soviet Union and the Lena Goldfields Ltd. This clause reads: "The contracting parties declare that they base the performance of the present Agreement on principles of mutual good will and good faith as well as on a reasonable interpretation of this Agreement." A provision to the same effect appeared in the Concession Agreement of 11 January 1939 between the Sheikh Shakhbut of Abu Dhabi and the Petroleum Development (Trucial Coast) Ltd.

109. A more exhaustive and detailed provision to this effect is contained in article 45 of the 1954 Consortium Agreement between Iran, a private company of the nationality of the contracting State and other companies of various foreign nationalities. The articles provides as follows: "In view of the diverse nationalities of the parties to this Agreement, it shall be governed and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals". The elaborate methods and procedures of settlement envisaged by this Agreement are also of a markedly "international" character.[143] A Concession Agreement entered into by the Libyan Government provides that the "Concession shall be governed by and interpreted in accordance with the laws of Libya and such principles and rules of international law as may be relevant, and the umpire or sole arbitrator shall base his award upon those laws, principles and rules".[144]

110. International jurisprudence relating to such instruments, although neither plentiful nor wholly conclusive, casts considerable light on the question of the law which governs them. An example can be found in the Lena Goldfields Arbitration (1930). So far as the question of the applicable law was concerned, the Court of Arbitration accepted the distinction formulated by counsel for the plaintiff company, namely, that on all domestic matters not excluded by the contract, including its performance by both parties inside the USSR, Russian law was "the proper law of the contract"; but that for other purposes, "the proper law" was contained in the general principles of law such as those recognized by Article 38 of the Statute of the Permanent Court of International Justice, because, among other reasons, many of the terms of the contract contemplated the application of international rather than merely national principles of law. In dealing with the question of compensation for damage caused, the Court of Arbitration stated that it preferred to base it award on the principle of "unjust enrichment", as a general principle of law recognized by civilized nations.[145] In

[141] As regards the criteria which have been applied in international jurisprudence to solve conflicts of laws arising in this connexion, see Schwarzenberger, *International Law*, vol. I: *International Law as applied by International Courts and Tribunals* (third ed., 1957).

[142] See Mann, "The Law Governing State Contracts", *British Yearbook of International Law* (1944), p. 21.

[143] See articles 42-44 in J. C. Hurewitz, *Diplomacy in the Near and Middle East, A Documentary Record*: 1914-1956 (1956), p. 48.

[144] *The Official Gazette of the United Kingdom of Libya*, 19 June 1955, p. 73. The Concession Agreement concluded on 8 April 1957 between the Libyan Government and the Gulf Oil Co. contains an arbitral clause (clause 28) to the same effect.

[145] See Nussbaum, "The Arbitration between the Lena Goldfields Ltd. and the Soviet Government", *Cornell Law Quarterly* (1950), vol. 36, p. 51.

the arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi (1951), the sole arbitrator, Lord Asquith, interpreted the clause relating to the law governing the Concession Agreement, which used substantially the same wording as the one in the last-cited case, with the statement that "... Clause 17 of the agreement ... repels the notion that the municipal law of any country, as such, could be appropriate." In his opinion, the terms of that clause clearly prescribed "... the application of principles rooted in the good sense and common practice of the generality of civilized nations—a sort of 'modern law of nature'."[146] In a later arbitration relating to a contract which contained no provision on the applicable law, the arbitrator set forth similar opinions and conclusions.[147]

26. New orientation of scientific doctrine

111. In keeping with the criterion applied in practice, traditional doctrine was quasi-unanimous in contending that contractual relationships between States and aliens were governed—with all the consequences which that implied from the point of view of international responsibility—by municipal law. More recently, however, a group of international jurists, basing itself mostly on the instruments and decisions to which reference has been made, has stressed the need for a reconsideration of the question with a view to revising the traditional theory. One of the pioneers of this group was Mann.[148] In his view, having regard to the Young Loan case and other precedents, the formula according to which a contract is to be "localized" in a particular country is too narrow. It is the "legal system" to which a contract is subject. The parties may submit their contract to international law, i.e. "internationalize" it, or even refer it to rules of strict public international law. There are also some cases of State contracts which even though *prima facie* subject to municipal law, have been submitted by the parties to international law rather than to the law of a particular country. Such was the case, for example, with the Czechoslovak bonds. Moreover, in the absence of an express reference, a state contract should be regarded as "internationalized" if it is so rooted in international law as to render it impossible to assume that the parties intended it to be governed by a national system of law. Mann cites the Young Loan case as an example of such an "implied internationalization" of a contract.[149]

112. Schwarzenberger also suggests that the principal factor, in determining the legal system to which the contractual relationship should be subject, is the intention of the parties. The State granting the concession must be presumed authorized to submit the contract to a foreign municipal law or to international law. In such cases, it is clear that it was the intention of the parties that the concession should not be affected by any subsequent change in the grantor's municipal law nor be subject to any other form of interference by the grantor's state organs.[150] Farmanfarma, in whose view the intention of the parties is also fundamental, dwells on the extent to which the traditional notions regarding public international law and private international law have been modified by recent arbitral decisions. In his view, the least that can be said is that the line of demarcation between those two bodies of law has become obscured; or rather, that an intermediate area has appeared and—with the spread of the international activities of large corporations, such as the oil companies—seems to be expanding. Consequently, if a Government and a corporation conclude a contract containing an arbitration clause, the corporation has removed itself from the realm of national law and jurisdiction and has subjected itself to a legal system halfway between public international and private law.[151]

113. Jessup approaches the problem in the light of his notion of "transnational law", which covers all law that regulates actions or events which transcend national frontiers, including both public and private international law as well as other rules which do not wholly fit into such standard categories. In his opinion, there is nothing in the character of the parties which precludes the application of one or the other bodies of law into which the legal field is traditionally divided. The liability of a State for its actions may be governed by (public) international law, by conflict of laws, by its own domestic law or by foreign national law; nor is there anything in the character of the forum which precludes it from applying one or the other of those bodies of law.[152] Huang, in opposing the traditional doctrine, states that the "internationalizing" factors inherent in concessions of international importance constitute cogent and persuasive arguments for the application of public international law. They constitute "points of contact" or "connecting factors" which a municipal or an international tribunal, applying established rules of conflict of laws, would take into consideration in trying to find the proper law of the contract of transaction.[153]

114. Finally, Lord McNair, in a recent detailed study of the subject, believes that a distinction should be drawn between two different situations. When the contracting State and the State of the alien's nationality both possess sufficiently developed legal systems, capable of governing modern contracts, the parties negotiating the contracts, or tribunals in adjudicating upon them, are likely to adopt one of those systems, or one for certain parts of the contract and the other for other parts. But when the legal system of the country in

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[146] The complete text of the award can be found in *International and Comparative Law Quarterly* (1952), pp. 247-261; the passage cited is on page 251.

[147] See Arbitration between the Ruler of Qatar and International Marine Oil Co. Ltd., *International Law Reports* (Edited by Lauterpacht), Year 1953, p. 541.

[148] The idea that some of these contractual relationships are governed by international law had in fact been expressed at the beginning of the century, in connexion with "public debts", by Wuarin, Freund and von Liszt. See Borchard *op. cit.*, p. 148.

[149] Mann, *op. cit.*, pp. 19-21.

[150] Schwarzenberger, "The Protection of British Property Abroad", *Current Legal Problems* (1952), vol. 5, p. 315.

[151] See Farmanfarma, "The Oil Agreement Between Iran and the International Oil Consortium: The Law Controlling", *Texas Law Review* (1955), vol. 34, p. 287.

[152] See Jessup, *Transnational Law* (1956), pp. 2, 102.

[153] See Huang, *op. cit.*, p. 285.

which for the most part the contract is to be performed is not sufficiently "modernized" for the purposes of regulating this type of contract, it is unlikely that the territorial law of either party can afford a solution that will commend itself to the parties or to tribunals, except in regard to some obligation which has special reference to the local law such as the employment of local labour. In the second case, the system of law most likely to be suitable would be not public international law *stricto sensu,* for the contract is not one between States, but the "general principles of law recognized by civilized nations".[154]

27. Applicability of the principle *pacta sunt servanda*—recent opinions in the affirmative

115. In the light of these precedents and of the trends of learned opinion concerning the law which governs contractual relations between States and aliens, the next question to be considered is that of the applicability of the principle *pacta sunt servanda* (as a principle of international law) to such contractual relations. The question is crucial for the purposes of international responsibility, since, as was indicated at the beginning of this chapter, the applicability of this principle will determine whether, by analogy with interstate agreements, international responsibility exists and is imputable solely by reason of the non-performance of obligations stipulated in the contract or concession.

116. The question appears to have been raised for the first time, at least in the terms in which it is now formulated, by the Swiss Government in its memorandum to the Permanent Court of International Justice in the *Losinger and Company* case (1936). The Swiss Government contended that the principle was applicable and based its contention on the following considerations: "The principle *pacta sunt servanda*... must be applied not only to agreements directly concluded between States, but also to agreements between a State and an alien; precisely by reason of their international character, such agreements may become the subject of a dispute in which a State takes the place of its nationals for the purpose of securing the observance of contractual obligations existing in their favour. The principle *pacta sunt servanda* thus enables a State to resist the non-performance of conventional obligations assumed by another State in favour of its nationals... A State may not invoke any provisions of its domestic private law or of its public law in order to evade the performance of valid contractual obligations. To admit the contrary would introduce an element of chance into all contracts entered into by a State with aliens, since the State would have the power to repudiate its obligations by means of special legislation."[155]

117. On the basis of a supposed analogy between treaties and contracts between a State and an alien, it is thus argued that the principle *pacta sunt servanda* is applicable as a principle of international law. It is claimed that the principle is applicable to such contracts by reason of their "international character" and also because failure to apply the principle would place the validity and effectiveness of obligations assumed in favour of alien individuals at the mercy of unilateral decisions on the part of the contracting State. On other occasions, however, it has been contended that the principle is applicable as one of "the general principles of law recognized by civilized nations". The Losinger and Company case was settled out of court, thus depriving the Permanent Court of International Justice of an opportunity to give a ruling on the subject, but in the arbitration which preceded the submission of the case to the Court, the umpire, H. Thelin, held: "It must therefore be assumed that Yugoslav law, like the law of the other European countries, embodies the principle of respect of contractual obligations, without which no transaction would be secure. *Pacta sunt servanda; pactis standum est; jura vigilantibus scripta;* these ancient Roman maxims continue to be valid."[156]

118. Some writers on public international law have supported this view, without necessarily excluding the other. L. Wadmond, for example, maintains that a contract between a State and an alien "is binding on both parties. It is binding under international law. It is binding as well under the general principles of law accepted by civilized nations".[157]

119. The Swiss position received some support in the studies recently made by non-governmental organizations of state measures affecting the patrimonial rights of aliens. The resolution adopted in committee during the Cologne Conference of the International Bar Association (1958) quoted in chapter II is one of the most explicit endorsements of this position: "International law recognizes that the principle *pacta sunt servanda* applies to the specific engagements of States towards other States or the nationals of other States and that, in consequence, a taking of private property in violation of a specific state contract is contrary to international law."[158] The same position is taken in some of the replies to the questionnaire prepared for the Forty-eighth Conference of the International Law Association (New York, 1958). In its reply, the American Branch states: "the contractual obligations freely assumed by a State [towards aliens] are no less binding that its treaty obligations".[159] Other replies received by the International Law Association's International Committee

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[154] See McNair, *op. cit.*, p. 19. Under one of the provisions formulated by the League of Nations Committee referred to during the consideration of the traditional position, the proposed International Loans Tribunal was to adjudicate "on the basis of the contracts concluded and of the laws which are applicable ... as well as on the basis of the general principles of law". League of Nations Publication, *II. Economic and Financial,* 1939.II.A.10 (document C.145.M.93.1939.II.A).

[155] Publications of the Permanent Court of International Justice, *Pleadings, Oral Statements and Documents,* series C, No. 78, p. 32.

[156] *Ibid.*, pp. 83-84.

[157] "The Sanctity of Contract between a Sovereign and a Foreign National". Address delivered on 26 July 1957 at the London meeting of the American Bar Association, p. 6.

[158] See footnote 66. In this sense, it has also been argued that, since States are obliged to exercise good faith in their relations with aliens, it follows that they are bound by the contractual agreements they enter into with aliens, although such agreements are not *stricto sensu* international agreements. See M. Brandon, "Legal Aspects of Private Foreign Investments", *The Federal Bar Journal* (Washington, 1958), vol. 18, pp. 338-339.

[159] See *loc. cit.* (footnote 98).

on Nationalization draw the same analogy and maintain that the principle *pacta sunt servanda* must be applied without reservations; they therefore deny categorically to the State any right to end a concession or contract before the expiry of its term.[160]

120. In other replies, on the other hand, a somewhat more liberal or flexible position is taken. Some of them express the view that a State may end a contract prematurely without violating a rule of international law, provided that it pays the alien concerned an adequate, prompt and effective compensation.[161] Other replies would admit that possibility only if such state action was justified by a grave change of circumstances, as in cases of *force majeure*.[162] In one of the replies the view was taken that it should be made possible to reduce the obligations incurred by a capital-importing country where this was necessary under the *clausula rebus sic standibus*.[163] In another context, it was held that, where a concession has acquired a certain international status, as, for example, by a provision for international arbitration or by the conclusion of an international "umbrella agreement" to shield the concession, a breach of such provisions would certainly constitute an international wrong.[164] In the resolution which it adopted on the subject, the Conference of the International Law Association contented itself with a declaration that "the principles of international law establishing the sanctity of a State's undertakings and respect for the acquired rights of aliens require... (ii) that the parties to a contract between the State and an alien are bound to perform their undertakings in good faith. Failure of performance by either party will subject the party in default to appropriate remedies".[165]

28. Position taken in the prevailing doctrine and practice

121. In accordance with the doctrinal position described above, the mere non-performance of the contract would, at least in principle, constitute an "unlawful" act, but in traditional practice and doctrine non-performance gives rise to state responsibility only if it involves an act or omission contrary to international law. Borchard, one of the first to contribute to the formulation of the traditional doctrine, contended that "diplomatic interposition" in such cases of responsibility "will not be based on the natural or anticipated consequences of the contractual relation, but only on arbitrary incidents or results, such as a denial of justice or flagrant violation of local or international law".[166] Miss Whiteman recognized that in such cases it is often impossible to show that a legal wrong exists, or that one of the parties has the particular right it alleges to have under the contract until the court having jurisdiction of the matter has ascertained the facts and passed upon the questions in dispute. For this reason, in order to substantiate an international claim of this kind, it is necessary to prove that the respondent Government has committed a wrong through its duly authorized agents or that the claimant has suffered a denial of justice in attempting to secure redress.[167] Other American writers have expressed themselves in the same or similar terms.[168] The same view has been taken by European publicists. Lipstein, for example, maintains that "...the failure of a State to fulfil a contractual obligation [towards an alien], unless such a failure is confiscatory or discriminatory in nature, does not automatically result in a breach of international law".[169] Hoijer had contended earlier that "unlawful invasion of the [contractual] rights of an alien does not *per se* constitute a violation of international law; the latter is violated only if no reparation is made for the injuries sustained after the remedies established by the laws of the country have been exhausted".[170]

122. In the draft codifications, both private and official, which deal with the various cases of international responsibility of States for non-performance of contractual obligations towards aliens, the same view prevails with regard to the acts or omissions which give rise to state responsibility in such cases. With the exception of the Bases of Discussion drawn up by the Preparatory Committee of The Hague Conference (1930), which considered that a State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which "...directly infringes rights derived by the foreigner" from a concession or contract, the draft codifications adopt the traditional view. Even the Harvard Research draft (1929) does not consider that the State is responsible for injury to an alien resulting from the non-performance of a contractual obligation unless local remedies have been exhausted or the non-performance as such constitutes an unlawful act.[171]

123. Diplomatic practice and international case-law have traditionally accepted almost as a dogma the idea

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[160] See replies of Prof. Gihl and Dr. Weiss-Tessbach, in International Law Association, New York University Conference (1958), International Committee on Nationalization, p. 9.

[161] Prof. Foighel, Mr. Röed and the Netherlands and Swiss Branches, *Ibid.*

[162] Prof. Magerstein and Swedish Branch, *Ibid.*, p. 10.

[163] *Ibid.*, p. 13.

[164] Prof. A. Magarasevic, Prof. Magerstein and the Swiss Branch. Prof. E. Lauterpacht pointed out that not only the violation of a treaty but perhaps also the violation of "international interest" (for example, interference with a public international service) could constitute such a violation. *Ibid.*, p. 10.

[165] When the Spanish original of the present report was drafted, the printed text of the resolution was not yet available. *Translator's note:* In the printed English text of the resolution in question, which has since become available, the word "penalties" appears instead of "remedies".

[166] *The Diplomatic Protection of Citizens Abroad,* 1915, p. 284.

[167] *Damages in International Law* (1943), vol. III, p. 1158.

[168] See, *inter alia,* Eagleton, *The Responsibility of States in International Law* (1928), pp. 160 and 167-168; Feller, *op. cit.*, pp. 173, 174; Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 111, 112.

[169] "The Place of the Calvo Clause in International Law", *British Yearbook of International Law* (1945), p. 134.

[170] Olof Hoijer, *La responsabilité internationale des Etats* (Paris, Les Editions internationales, 1930), p. 118. In the same sense see Witenberg, "La recevabilité des réclamations devant les juridictions internationales", *Recueil des cours de l'Académie de droit international* (1932-III), vol. 41, pp. 57-58.

[171] With regard to these draft codifications, see the Special Rapporteur's second report (A/CN.4/106), chapter IV, section 12.

that the mere non-performance by a State of its obligations under a contract with an alien individual does not in itself necessarily give rise to international responsibility. The abundant precedents in this matter will be examined in greater detail in the last section of this chapter, but it may be useful at this point to refer by way of illustration to some arbitral awards in which the traditional view is explicitly stated. In the *George W. Cook* case (1930), the General Claims Commission (United States-Mexico) held that: "The ultimate issue upon which the question of responsibility must be determined... is whether or not there is proof of conduct which is wrongful under international law and which therefore entails reponsibility upon a respondent Government.[172] In the International Fisheries Company case (1931), the same Commission stated even more explicitly and unequivocally: "If every non-fulfil ment of a contract on the part of a Government were to create at once the presumption of an arbitrary act, which should therefore be avoided, Governments would be in a worse situation than that of any private person, a party to any contract."[173] Some exceptional decisions might be cited in which the State appears to have been held to have incurred responsibility by reason of non-performance as such, on the grounds that, as was maintained on one occasion by United States Commissioner Nielsen, such non-performance involves "confiscatory" action. On examination of these cases, it is, however, evident that the "confiscatory" character of the non-performance amounts in fact either to a denial of justice or to an arbitrary repudiation of the contract on the part of the executive authorities.[174]

29. Reconsideration of the traditional position

124. The analysis made above points clearly to the need for reconsideration of the traditional position with regard to the existence and imputability of international responsibility arising from contractual relations between States and aliens. It is undeniable that the traditional position contemplated contractual relations of the ordinary type and that it will therefore not always be possible to deal satisfactorily with the situations resulting from the modern forms of such contractual relations by a strict application of the traditional notions and principles. In order to ascertain whether the principle *pacta sunt servanda* is applicable, with all the legal consequences which this implies in regard to the responsibility of the contracting State, it is necessary first to determine whether the contract or contractual relation in question is (directly) governed by public international law or by a body of laws other than the municipal law of a particular country. In other words, it must be determined whether the obligations stipulated in the instruments in question are genuinely "international" in character. It will be seen below that, from a strictly legal point of view, it is only in this case that the principle *pacta sunt servanda* is applicable, by analogy with treaties and conventions between States. With this criterion in mind, contractual relations between States and aliens may be classified in two main groups.

125. The first group comprises contractual relations of the traditional type, which are still the most numerous and frequent, and in which there is no stipulation, expressed or implied, providing that the instrument shall be governed wholly or in certain particulars by legal principles of an international character.[175] It is obvious that the obligations assumed by a State in these cases are "internal" in character since, as was pointed out in the Special Rapporteur's second report (chapter IV, section 12), a private person who enters into a contract with a foreign Government thereby agrees to be bound by the local law with respect to all the consequences of that contract. Accordingly, the principle *pacta sunt servanda* would be applicable to such obligations only as a principle of municipal law and in accordance with the legislation of the contracting State. Although it has been maintained that the principle is applicable as one of "the general principles of law recognized by civilized nations", it is clear that the powers possessed by the State by virtue of its right to "affect" private property, whatever its nature or the nationality of its owner, include the right to terminate before the expiry of their term, any contractual relations it may have entered into with private persons.[176] Consequently, the only international obligations of the State are those relating to the conditions and circumstances of non-performance. In such cases, international responsibility is incurred not by reason of the failure to observe the principle *pacta sunt servanda* but because non-performance involves an act or omission contrary to international law; in other words, what is important is not the mere fact of non-performance but its "arbitrary" character. This question will be considered again in part III, in connexion with the distinction between "unlawful" non-performance and "arbitrary" non-performance.

126. The contractual obligations comprised in the second group involve more complex situations, chiefly because of the diversity of the clauses contained in the more recent instruments. As has been seen, these instruments are generally of two types: (*a*) those which contain the stipulation, express or implied, that the instrument shall be governed wholly or in part by (public) international law, the "general principles of law" as a source of international law, or some other "legal system" described in less precise terms but substantially similar in content; and (*b*) arbitration clauses which contemplate the settlement of disputes by means of international arbitration or some other method or procedure. There appears to be no sound basis for adding, as has been suggested by some writers, a third category comprising those contracts or concessions which, because of their nature, object or importance to the world economy, involve "international interests".[177] Although at first sight this suggestion seems

[172] United Nations, *Reports of International Arbitral Awards*, vol. IV, pp. 215-216.

[173] *Ibid.*, p. 700.

[174] In this sense, see Feller, *op. cit.*, pp. 174-175.

[175] This is, of course, without prejudice to the problems of private international law which arise in connexion with the choice of the law governing the contract from among the municipal legislations of two or more States.

[176] With regard to this question see section 13 *supra*.

[177] See Wadmond, *op. cit.* (in footnote 157) and E. Lauterpacht, *loc. cit.* (in footnote 160 *supra*).

logically and even legally justified, since the presence of such interests does in fact "internationalize" the contractual relation, the test proposed is somewhat vague and imprecise and would inevitably give rise to numerous difficulties in practice. As will be seen below, it must be assumed in the absence of any stipulation, express or implied, to the contrary that such contracts or concessions are governed by municipal law.

127. In instruments of the first type, the fact that it is expressly stipulated that a particular substantive law shall apply necessarily implies the intention of the parties to exclude the contract, or some of its particulars, from the application of municipal law. As has been observed by some of the writers cited in section 24, this has the effect of "internationalizing" the contractual relationship in question by making it subject to a body of law or legal principles foreign to, and of a higher order than, the municipal law of the State. As the obligations in question are genuinely "international" in character, the principle *pacta sunt servanda* can properly be applied.[178] In so far as the contract is governed by international law or international legal principles, mere non-performance by the State would directly give rise to international responsibility, as in the case of acts or omissions imputable to the State which are incompatible with the provisions of a treaty or other international agreement. As will be seen below, the purpose of the "internationalization" of a contractual relation must be to "liberate" the relation from municipal law, so as to preclude the State from invoking its municipal law to justify a failure on its part to perform the obligations assumed towards an alien private individual.

128. In the case of the second class of instruments, the situation is substantially the same, although much simpler. The mere fact that a State agrees with an alien private individual to have recourse to an international mode of settlement automatically removes the contract, at least as regards relations between the parties, from the jurisdiction of municipal law.[179] Unlike the *Calvo Clause* which reaffirms the exclusive jurisdiction of the local authorities, agreements of this type imply a "renunciation" by the State of the jurisdiction of the local authorities. If an arbitration clause of this type were governed by municipal law, it could be amended or even rescinded by a subsequent unilateral act of the State, which would be inconsistent with the essential purpose of stipulations of this type, whatever the purpose of the agreement or the character of the contracting parties. Accordingly, as the obligation in question is undeniably international in character, non-fulfilment of the arbitration clause would directly give rise to the international responsibility of the State. In so far as concerns the substantive law to be applied by the arbitral body, there would be a strong presumption, in the absence of any stipulation, express or implied, to the contrary, that it is the intention of the parties that the interpretation and application of the contract should be governed by municipal law. The reason for this presumption in plain: given the nature and scope of the State's powers with respect to patrimonial rights, whatever their character or the nationality of their owners, the substance of the contractual relation can be governed by a body of law other than the municipal law of the State only if there is an express stipulation to that effect or the State has, at least, given its tacit consent thereto.

129. In this connexion, it cannot be argued on the basis of the traditional position that because individuals are not subjects of international law rights and obligations resulting from a contract between a State and an individual cannot be regarded as "international" in character. It is not necessary to deal further with this point, which is examined in several places in the Special Rapporteur's earlier reports.[180] It need only be remarked that, as Jessup has said, there is nothing in the character of the parties or of the forum which precludes the application of a body of law other than the domestic one, even if it is (public) international law itself.[181] Schwarzenberger is even more explicit: "A Head of State or Government has discretionary power to recognize an entity as an international person and to enter into relations with it on the basis of international law. If international law is declared to be the law applicable to a concession, the situation is somewhat similar. For purposes of the interpretation and application of the concession, the grantor [State] agrees to treat the grantee [private individual] as if the latter had international personality.[182] In the matter of contracts, the international personality and capacity of the individual depend on the recognition granted to them by the State in its legal relations with him. Agreements which provide in one form or another for the application of a legal system or of principles alien to municipal law, or for the settlement of disputes by international means and procedures, differ from those governed exclusively by municipal law in that the contractual relation between a State and a private person is raised to an international plane, thus necessarily conferring upon that person the necessary degree of international personality and capacity.

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[178] This view must not be confused with the position taken in the Swiss memorandum in the Losinger and Co. case: "In a wide sense, the notion of international obligations, or engagements, covers not only those existing directly between States, but also those existing between States and private individuals protected by their Governments, when such engagements produce international repercussions and when, by their origin or their effects, they extend in reality to several countries." See *loc. cit.*, p. 128. The Swiss position is more closely related to the "theory of international contract" in French jurisprudence, to which J. Donnedieu de Vabres refers in *L'évolution de la jurisprudence française en matière de conflits de lois* (1938), p. 561, quoted in A.S. Proceedings (1958), p. 269.

[179] See, in this sense, Barros Jarpa, *loc. cit.*, p. 5 (in footnote 169). The reference is, of course, to methods and procedures of settlement of a genuinely international character, such as those provided for in the instruments mentioned in section 23, and not to those which have long been included in many contracts and concessions providing for arbitration or other modes of settlement governed by municipal law.

[180] See the Special Rapporteur's first report (A/CN.4/196, chapter V, sections 16, 17 and 18) and third report (A/CN.4/111, chapter VIII, section 15).

[181] See *op. cit.* in footnote 152, *supra*.

[182] See *op. cit.* in footnote 150, *supra*.

III. Effects of non-performance of contractual obligations

130. It is necessary lastly to examine the conditions and circumstances which determine the existence and imputability of the international responsibility of the State for non-performance of obligations entered into with alien private individuals. It will then be possible to establish the various legal consequences of non-performance and, in particular, the real character of the "compensation" due in the case of contracts governed by municipal law. Before proceeding further, however, a distinction must be drawn in the light of the various categories of contractual relations examined in part II.

30. "Unlawful" non-performance and "arbitrary" non-performance

131. The reason and justification for the distinction drawn between the "unlawful" and the "arbitrary" non-performance by the State of contractual obligations entered into with an alien private individual will be readily understood in the light of the considerations set out at the end of part II of this chapter. The terms and the sense in which they are used are already familiar, the more so as the same distinction was discussed in the chapter dealing with expropriation in general (chapter II, section 12). In both contexts, the distinction is an expression of the same basic idea. The only difference in the present context is in regard to the matter of "unlawful" non-performance, since an expropriation of tangible assets can be unlawful only if it violates a treaty obligation, whereas, in considering contractual rights, another possibility must be envisaged, that of contractual relations between a State and an alien which create obligations of an "international" character. As in the case of treaties, when a contract or concession is governed by international law or by international principles, or provides for a mode of settlement of a genuinely international character, the rights of aliens derive from an "international" source and the obligations of the State are necessarily also international. It follows that the mere non-performance of these obligations directly and immediately gives rise to state responsibility.

132. In other cases, the position is completely different. In accordance with the traditional view, the mere non-performance of obligations entered into with aliens (and governed by municipal law) does not directly and immediately give rise to the international responsibility of the State. Responsibility exists and is imputable only if the non-performance occurs in a manner or in circumstances which involve a violation of international law. In accordance with the traditional view, the presence of any such condition or circumstance converts non-performance into an "unlawful" act or omission or, to use the Anglo-American terminology, a "tortious" breach. In other words, non performance in these cases is deemed to constitute an act or omission which gives rise to the "international responsibility of the State for injuries caused in its territory to the person or property of aliens". In the case, however, of contractual obligations governed by municipal law, should non-performance, whatever the conditions or circumstances of its occurrence, be treated, from the strictly legal point of view, as an act or omission which gives rise to state responsibility for acts which are merely "unlawful"? If the real character of the acts or omissions constituted by the non-performance of obligations entered into by States with private persons, including aliens, is considered, it is clear that, from the strictly legal point of view, they cannot be regarded as acts which are merely "unlawful".

133. The reason is very simple and in a sense may even be called obvious. Why has it been held traditionally that the State is not responsible for the "mere" non-performance of contractual obligations entered into with aliens? In other words, what is the real basis of the distinction which has been made between this category of acts and omissions and those which give rise directly and immediately to international responsibility? In the two previous chapters, and more particularly in the discussion of expropriation in general, it was pointed out that, as the State has a right to expropriate, international responsibility cannot arise and be imputable to the State by reason of the act of expropriation *per se*; it is incurred by reason of the failure of the State to observe the rules of international law governing the exercise of the right. It was also pointed out that the right to expropriate, in its widest sense, included the right to rescind, amend, etc. contracts entered into with private persons. On this point, no doubt whatever seems to arise in municipal law, because the right to expropriate is exercised by virtue of the State's power of "eminent domain", its police power or by virtue of any other right inherent in the sovereignty which it exercises in its territory over persons, things and legal relations.[183] Accordingly, if the non-performance by the State of a contractual obligation of the type under consideration in fact constitutes the exercise of a right, at least in principle, there is no justification for the adoption of rules for the determination of the international responsibility of the State different from those followed in the case of the expropriation of tangible property.

134. In this connexion, the traditional view does not appear to be wholly consistent, since it is only by recognizing that the State exercises a right when it fails to perform a contractual obligation with private individuals that it is possible to maintain that the mere fact of non-performance does not give rise directly and immediately to the international responsibility of the State. The inconsistency lies in the fact that, while this "right of non-performance" is admitted, at least implicitly, the acts and omissions which give rise to responsibility in such cases are at the same time treated as "unlawful" acts whose "unlawfulness" derives from the fact that they are intrinsically contrary to international law. In order to remove this inconsistency, the word "arbitrary" should be used to describe non-performance in conditions and circumstances capable of giving rise to the international responsibility of the State.[184] As in

[183] On this point, see section 13 and footnotes 68-71.

[184] In diplomatic and judicial practice, as well as in the writings of publicists, the term is used comparatively frequently with reference to the non-performance of such contractual obligations of the State, but in these cases it is used to mean an "unlawful" act or omission.

the case of other acts of expropriation, the non-performance of contractual obligations by municipal law can give rise to responsibility only by reason of the "arbitrariness" of the measure or act or omission imputable to the State. If it is admitted that non-performance *per se* is intrinsically lawful, the failure on the part of the State to observe the (international) legal requirements to which the exercise of that right is subject cannot convert it into an "unlawful" act. By analogy with expropriation, the failure on the part of the State to observe any of these requirements, even in regard to compensation, does not suffice to convert non-performance into an "unlawful" act *stricto sensu*. Responsibility exists and is imputable to the State, but it arises from other grounds and has very different juridical consequences.

135. In both contexts, this concept of "arbitrary" non-performance is of evident importance. Before considering the juridical consequences, which will be examined at the end of the chapter, it may be useful to discuss the conditions and circumstances which must attend non-performance for it to give rise to international responsibility imputable to the State. Naturally, the problem arises in substantially the same form as in the case of the "arbitrary" expropriation of property and in general in any other case involving the exercise of the State's right to "affect" the patrimonial rights of individuals.

136. In the preliminary draft submitted to the Commission in the Special Rapporteur's second and third reports, attention was drawn to three categories of acts or omissions contrary to international law, namely those in which the non-performance (*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 the preliminary draft.[185] These rules, which set out (in general terms) the component elements of "arbitrary" non-performance and which reflect the practice generally accepted as law in the matter, must be considered in conjunction with the rules relating to "compensation", to ensure their general conformity with the distinction that has been drawn between "arbitrary" and "unlawful" non-performance. It is desirable, however, to examine the precedents in international case-law which were not considered in the Special Rapporteur's previous reports, in so far as they relate to the component elements (general and special) of "arbitrary" non-performance.

31. Component elements (general) of arbitrary non-performance

137. This and the three following sections are not intended to be exhaustive. Their purpose is simply to elucidate the elements which have been considered in international case-law to be the component elements of the responsibility imputable to the State by reason of the non-performance of contractual obligations entered into with aliens. As the analysis is intended to be purely illustrative, the main emphasis will be placed on the causes and circumstances which have been considered to give rise to international responsibility in regard to various contracts or classes of contracts. Since a more detailed classification not only would entail serious difficulties but would also not be relevant to the purpose of this report, contracts will be considered under the headings of contracts in general, *ultra vires* contracts, contracts entered into with political subdivisions, and public debts. This classification is, of course, without prejudice to the fact that some of the conditions and circumstances giving rise to responsibility are or may be common to all types of contractual relationships between States and alien individuals. This is true, in particular, of the cases examined below.[186]

138. In the great majority of the cases adjudicated by international courts and tribunals, the "arbitrary" character of the non-performance is linked to the notion of "denial of justice" construed in a sufficiently wide sense to include acts and omissions of the Executive and even of the Legislature. In some decisions it has been held that the non-performance of a contract was a gross injustice done to the alien.[187] The other decisions as a rule have simply found the claim to be admissible, depending on whether a denial of justice on the part of state organs was established or not.[188] In some cases, the State has been found to have incurred international responsibility by reason of the fact that its conduct was motivated by purely political ends and purposes implying an act of reprisal against the State of which the contracting alien was a national.[189] In another group of cases, the responsibility of the State is based on the notion of "unjust enrichment", i.e.; on the ground that the State derived an economic or financial benefit from the non-performance of its contractual obligations to the alien concerned.[190]

32. *Ultra vires* contracts and contracts with political subdivisions

139. The question which must be answered in connexion with these contracts is whether the State incurs international responsibility by reason of non-performance or repudiation where the official who entered into the contract with the alien had no authority to do so. In other words, may the State decline responsibility on the grounds that the contract is *ultra vires*? As has

[185] See article 7 (A/CN.4/111, appendix). The last paragraph of article 7 excludes cases in which the contract or concession embodies the *Calvo Clause*. In accordance with other provisions of the draft (article 13), the State does not incur responsibility if the measures taken are the consequence of *force majeure* or are justified by some other grounds for exoneration from responsibility.

[186] On this point, see commentary on article 8 of the Harvard Research draft, *op. cit.*, pp. 169-173, and Eagleton, *op. cit.*, pp. 160 *et seq.*

[187] See Pond's case and Treadwell's case in Moore, *Digest and History of International Arbitrations to which the United States has been a Party* (1915), vol. IV, pp. 3467 and 3468.

[188] See, for example, Salvador Commercial Company case in *Foreign Relations of the United States* (1902), pp. 844-845.

[189] See case of "Compagnie générale de l'Orénoque" in J. H. Ralston, *Report on the French-Venezuelan Mixed Claims Commission of 1902* (1906), pp. 360-367.

[190] In this connexion, see the cases mentioned in chapter I, section 3, and in footnote 193 *infra*.

recently been pointed out, international case-law on the subject shows a more liberal approach towards the admission of state responsibility, particularly in cases where the contract was made within the apparent authority of the contracting official.[191] Arbitral awards rendered in the nineteenth century and at the beginning of the twentieth century, at least, clearly reveal the then prevailing tendency not to consider the State responsible for the repudiation of such contracts. These decisions were apparently based on the fact that "the right of an individual to make contracts for his Government must be clearly established, in order to render such Government responsible therefor. It is thus not sufficient... to show that the person with whom the contract was made is one who... discharged the duty of issuing supplies to the garrison; but it is further necessary to prove that he had the power to make contracts for such supplies on behalf of the Government".[192]

140. Not all the decisions holding a State responsible at international law are based on the same grounds. Some of them are based on the notion of "unjust enrichment" and hold the State responsible for the failure, without justification, to perform a quasi-contractual obligation.[193] In other decisions, the State is held to have incurred international responsibility by reason of the fact that it "ratified" the contract by subsequent action and thus converted it into a valid contract. The idea that a State may, by an act or a series of acts of its organs, validate a contract which was void *ab initio* under its municipal law, is explicitly contained in several decisions.[194] In these, and more particularly in other cases, the arbitral tribunal or commission emphasized the "apparent authority" of the contracting official, the international responsibility of the State being founded on the arbitrary or unjustified character of its conduct in repudiating the contract.[195]

141. In the Special Rapporteur's earlier reports and in the preliminary draft submitted to the Commission, questions concerning the international responsibility of the State for acts or omissions of organs or officials of its political subdivisions were deliberately omitted. The reason for that omission—the remarkable development of the international personality of some of these entities—also justifies the omission of any examination of the international case-law concerning contracts entered into by aliens with political subdivisions of a State (see in particular, second report, commentary to chapter II). Such contracts raise questions other than that of the responsibility imputable to the State for non-performance on the part of the contracting political subdivisions. On occasion, the question has also arisen of determining whether responsibility can be imputed to the State for acts or omissions which "interfere" with the performance of effectiveness of such contracts. On this last point, an analogy can be drawn between a contract of this type and a purely private contract (between an alien and a national of the respondent State) and the question again arises of the international responsibility of the State for acts or omissions which interfere with the performance or effectiveness of the contract.

33. Public debts

142. An account is given in the Special Rapporteur's second report (chapter IV, section 13) of the position generally taken in codifications and by leading writers with regard to the international responsibility imputable to the State when it repudiates or purports to cancel its public debts (or suspends or modifies the service of the public debt in whole or in part); this position emphasizes the differences between public debts and other contractual relations, which justify a less rigid approach to the question of determining State responsibility in such cases. This view, as well as the arguments and grounds on which it is based, substantially coincides with the trend of international case-law in the matter, as is shown by some of the well-known cases cited below.

143. In one of these cases, the umpire expressly held that a person who holds an interest in the public debt of a foreign country is entitled to the same support in claiming and recovering it as he would be in a case where he has suffered from a direct act of injustice or violence.[196] In another case, it was held that "It is a principle of international law that the internal debt of a State, described as public debt... can never be the subject of international claims to obtain immediate payment in cash".[197] As in the case-law relating to other types of contractual relations, there are instances in which the State has been held responsible at international law for non-payment, when the act or omission imputable to it has been manifestly arbitrary or completely unjustifiable. In the prevailing case-law, only in exceptional cases has it been held that "fundamentally . . . there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the State, as itself the wrongdoer, is immediately responsible".[198]

34. Legal nature of "compensation"

144. As was indicated in section 30, in accordance with the traditional view, if the non-performance by

[191] See, on the development of case-law on this subject, the recent and thorough study by Theodor Meron, "Repudiation of *Ultra Vires* State Contracts and the International Responsibility of States" in *The International and Comparative Law Quarterly* (1957), vol. 6, pp. 273-289.

[192] See Case of Mary Smith in Moore, *op. cit.*, vol. IV, p. 3456. See also Case of Beales, Nobles and Garrison, *ibid.*, p. 3548 and the so-called Tinoco case, United Nations, *Reports of International Arbitral Awards*, vol. I, pp. 387 and 397-399.

[193] See, for example, William A. Parker case, *ibid.*, vol. IV, p. 35, and the more recent General Finance Corporation case (1942), *United States Department of State Publication 2859*, pp. 541-548.

[194] See, *inter alia*, H. J. Randolph Hemming case, United Nations, *Reports of International Arbitral Awards*, vol. VI, p. 53, and the *Jalapa R. R. and Power Company case, United States Department of State Pubilcation 2859*, pp. 542, 543.

[195] In this sense, see Trumbull's case, Moore, *op. cit.*, vol. IV, pp. 3569, 3570, and *Aibolard* case, *Revue de droit international privé et droit pénal international* (1905), vol. I, p. 893.

[196] See Colombian Bond cases, Moore, *op. cit.*, vol. IV, p. 3612.

[197] See Ballistini case, Ralston's Report (1904), p. 503.

[198] See Aspinwall case, Moore, *op. cit.*, vol. IV, p. 3632.

the State of its contractual obligations with an alien occurs in conditions or circumstances contrary to international law, the non-performance is treated as an act or omission which gives rise to international responsibility by reason of its "unlawful" character. The notion of "unlawful" non-performance logically and automatically entails the notion of "reparation", namely, the duty of the State to make reparation to an alien in the form of pecuniary damages if restitution in kind is impossible or inadequate. In some cases, "satisfaction" may also be required as a form of reparation. The practice of arbitral tribunals and commissions furnishes ample precedents to demonstrate the character and extent of the "compensation" payable by a State responsible for the non-performance of its contractual obligations.[199] The award in the *Delagoa Bay Railways* case (1900) is particularly interesting in this respect. Although this was a typical case of the expropriation of tangible property, the Tribunal, after drawing a clear distinction between the two forms of assessing "compensation", held that "the State, which is the author of such dispossession, is bound to make full reparation for the injuries done by it".[200]

145. It has already been seen, however, that the non-performance of contractual obligations, in conditions or circumstances contrary to international law—like the expropriation of tangible property and for the same reasons—can give rise only to "arbitrary" acts or omissions. Accordingly, by inescapable analogy with the basic institution (expropriation), all that can be demanded is "compensation" of the character examined in part III of the previous chapter, i.e., indemnification in respect of the interests of the alien affected by the non-performance. The question accordingly arises of the manner in which the compensation or indemnification would be determined in cases other than those in which non-performance involves an expropriation of tangible property, to which the rules set out in chapter II would be applicable. The legal relationship involved being governed by municipal law, the relevant provisions of that law will necessarily apply. If the municipal law makes no provision for indemnification, or the compensation it contemplates is less than that provided for in the generality of countries, the alien must be presumed to have been aware of that fact and to have entered voluntarily into a contract with the State on that basis. He cannot therefore plead ignorance and claim that the State should indemnify him in accordance with rules alien to its municipal law and different from those established therein. The position is different in the case of retroactive measures; in this case, the alien would be entitled to compensation in accordance with the rules in force when he entered into the contract. It would not be an easy task to formulate other rules to cover all the cases which may arise as a result of the non-performance of contractual obligations, owing to the diversity and variety of the circumstances in which such non-performance may occur. The only case to which it is necessary to refer, because of its special bearing on the principle of respect of acquired rights and the important role it has played in practice, is that in which compensation is required when the State derives direct enrichment from non-performance. The wide powers possessed by the State in the matter must not constitute a source of enrichment at the expense of private individuals who have entered into contracts with that State and have duly performed their obligations.

146. When the contract or concession is governed not by municipal law but by a legal system or legal principles of an international character, the situation is different since non-performance in such cases is "unlawful". The situation will not, of course, always occur in the same circumstances; the circumstances may indeed vary considerably. For this reason, it is sufficient to say that, in principle, non-performance in such cases calls for "reparation".

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[199] In this connexion, see Majorie M. Whiteman, *Damages in International Law* (Washington, United States Government Printing Office, 1943), vol. III, pp. 1577-1579.

[200] *Ibid.*, p. 1698. Nevertheless, in accordance with its terms of reference, the Tribunal had to pronounce, as it deemed most just, "upon the amount of the idemnity due by Portugal" in consequence of the rescission of the concession "and of the taking possession of that railroad...". See Moore, *Digest and History of the International Arbitrations*, etc. (1898), vol. II, p. 1875.

LAW OF TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/120

Fourth report by Sir Gerald Fitzmaurice, Special Rapporteur

[Original text: English/French]
[17 March 1959]

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Introduction

1. In his three previous reports,[1] the Rapporteur covered the subjects of the conclusion and termination of treaties (formal and temporal validity), and also that of essential validity; and although he may wish to suggest modifications in some of the articles proposed and the views expressed in those reports, they complete a chapter on the general topic of validity for a Code on the Law of Treaties. It remains to deal with the rest of the subject. Having considered what brings a treaty into existence, what makes it valid, and what brings it to an end, it then becomes necessary to consider what effects it has during the period of its existence.

2. This is obviously a matter that depends primarily on the terms of the treaty itself, and which, in that sense, is peculiar to each individual treaty—or, up to a point, class of treaties. In that sense, no general rules can be formulated on the subject other than the rules of treaty interpretation—and these do not consist so much of rules as to what the effects of treaties in fact are, but rather of rules for (so to speak) deciding how to decide what is the effect of a particular treaty or treaty provision, or class of either. In short, rules of (or for) interpretation represent adjectival rather than substantive law. Moreover, such rules are necessary for determining not only the effect of a given treaty, but also questions relating to its conclusion and entry into force, its essential validity and its termination. In other words, the rules of treaty interpretation qualify the whole subject, and not merely that part of it that relates to the topic of the effects of treaties. Therefore, despite the fact that "interpretation" and "effects" are often coupled together—witness such phrases as "The interpretation and application of treaties"—the Rapporteur

[1] Document A/CN.4/101 in *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), p. 104; document A/CN.4/107 in *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No.: 1957.V.5, vol. II), p. 16; document A/CN.4/115 in *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No.: 58.V.1, vol. II), p. 20.

considers that they are separate, and must be separately dealt with. The subject of interpretation would accordingly form a separate and later chapter of the Code, the provisions of which would, so far as requisite, be relevant to and capable of use in connexion with all other parts of the Code.

3. But if the subject of interpretation must be treated separately from that of effects, and if also the effects of any given treaty depend primarily on the individual terms of that treaty, and to that extent cannot therefore be determined on an *a priori* basis, what then is left for a chapter on the "Effects of Treaties"? Clearly what will be left, and what will be comprised in such a chapter, will be all those rules which combine the two following characteristics, namely:

(*a*) Of depending not on the interpretation of the particular treaty, but on objective rules of general international law outside the treaty—rules that apply *to* treaties but do not derive *from* them;

(*b*) Of being applicable generally and indifferently, either to *all* treaties irrespective of their particular content; or, in some cases, only to certain well-defined classes of treaties—but again, irrespective of the particular content of the treaty within its class. Under these heads would come, first of all, an important set of general rules governing the juridical nature of the treaty obligation—its extent (i.e., in what circumstances and despite what conflicts or impediments it must always be performed or responsibility be incurred for non-performance); and its limits (i.e., in what circumstances non-performance will be justified and will not give rise to responsibility). Next there are rules governing more particular questions of application (but questions still common to all or most treaties) such as territorial application, application to and in respect of the individual organs or institutions of the State on the domestic plane, and application to and in respect of private individuals or entities within the State. Finally, there is the topic of the consequences of breach of a treaty obligation, and of redress for such breach (sometimes, though not very appropriately, known as "enforcement"). It can be maintained that this last topic is not really part of the subject of treaty "effects". Nevertheless, as will be seen, it is so closely linked to it as not in practice to be separable.

4. The topics just mentioned arise principally in the application of the treaty for, or as between, the actual parties to it. They are treated of in the present report as part I of a chapter on "The Effects of Treaties". There is, however, also the subject of the effects of treaties for and in relation to "third States", not parties to the treaty concerned. This will constitute part II of the chapter and will be covered by a later report.

5. The subject-matter of the present report has presented the Rapporteur with various difficulties. One of these (probably precisely because the effects of a treaty depend primarily on its particular terms, rather than on general rules of law) is that most authorities devote extremely little space to it, and few make any attempt to deal with it systematically—still fewer to treat of it comprehensively. Rousseau[2] is systematic and more comprehensive than most writers. The Harvard Volume on Treaties[3] deals fairly exhaustively with the positive aspects of the character of the treaty obligation, but hardly goes beyond that. Arnold D. McNair's Law of Treaties,[4] based on the opinions of the English Law Officers of the Crown, deals illuminatingly with a large number of miscellaneous points. Some of the private codes (Field, Fiore, Bluntschli, Bustamante, and others)[5] contain a number of provisions on the subject. Many writers, however, hardly touch on it, or do so only as part of the subject of treaty interpretation. The Rapporteur has therefore had to rely somewhat heavily on his own experience or inclinations for filling up gaps or dealing with obscurities.

6. Another difficulty is that, while the Rapporteur has tried to make the draft as comprehensive as possible, it is probable that further study of the matter might bring to light a considerable number of points which, if by no means pertinent to the subject of the effects of "all" treaties, might be relevant to a sufficiently large number (or to sufficiently prominent classes) of treaties, to warrant inclusion. But to take this further would require not only a systematic study of a great many individual treaties, but also, in all probability, information from Governments as to their practice in relation to these treaties or classes of treaties. The Rapporteur has not yet been able to make such a study; and further, although reference is made to the matter in the body of the report,[6] he doubts whether, for the immediate purposes of the present report, it is necessary to do so. It will be better to establish the more general principles first. If later it is thought desirable and practical to do so, it will always be possible to add one or more sections dealing with matters of detail arising with reference to the application of certain kinds or classes of treaties.

7. Then there are the usual difficulties of classification, arrangement and overlapping. These are, so to speak, both "internal" and "external". "Internally", parts of the present draft could be differently classified or arranged, and tend to overlap with others. For instance, the whole subject of the consequences of breach of treaty is closely linked to that of what justification there may be in certain cases for the non-observance of a treaty. Again, the more detailed aspects of the topic of the effect of a treaty on the domestic plane, in relation to its organs and governmental institutions, is really part of, and derives from, such general principles concerning the juridical character of the treaty obligation, as that of the supremacy of international over domestic law with reference to the discharge by a State of its international obligations. Yet again, there must be some doubt under precisely which head to classify the reciprocity principle in the application of treaties. All

[2] Charles Rousseau, *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944), vol. I, pp. 355-451.

[3] Harvard Law School, *Research in International Law*, III. *Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29, 1935, Washington, D.C., The American Society of International Law, ed., pp. 707-710.

[4] Oxford, Clarendon Press, 1938.

[5] The texts of some of these figure in the annexes to the Harvard Volume.

[6] See article 23, and paragraphs 113 and 162 of the commentary.

these matters are further discussed in the body of the report.[7] In general, the Rapporteur has, in matters of classification and arrangement, followed in the present report the system of Rousseau but is not satisfied that he (i.e., the Rapporteur) has made the best use of it. It may be possible to suggest improvements later, before the time when the Commission comes to deal with this part of the subject.

8. "Externally", there is inevitably some overlapping with previous reports. The whole subject of treaties is one that is rather specially susceptible to the possibility that theoretically distinct portions of it have strong practical affinities or relationships with others. Several of the general principles considered in the present report have already proved relevant in connexion with the subject-matter of previous reports. Again some of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *termination* of a treaty. Yet, for reasons fully explained in the body of the report,[8] the two subjects are quite distinct, if only because in the case of termination (considered in the Rapporteur's second report) the treaty ends altogether, while in the other (considered in the present report) it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but "looks towards" a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present, or have ceased to exist. It may eventually be possible to "marry" certain elements at present treated of in different reports, but for the moment this must await further consideration.

9. Finally, there are difficulties inherent in the whole subject, of a kind that has been mentioned in the introductions to previous reports—for instance, that of finding formulae or principles that really are applicable to all treaties, and the necessity for some purposes of distinguishing certain categories from others. Similarly, general phrases such as "breach of treaty" are constantly employed; but not all breaches or infractions are of the same order. Infractions may take such diverse forms as (*a*) failure by a party to perform some positive obligation which it is itself under a duty to perform; (*b*)—a subdivision or other aspect of (*a*)—failure or refusal to grant the other party treatment to which that party is entitled under the treaty; (*c*) failure or refusal to allow the other party to perform some act, or to exercise some right or licence, which, under the treaty, it is entitled to perform or exercise; (*d*) the taking of any action by one party which is subject to a treaty *prohibition*. At least for the purpose of dealing with the consequences of breach of treaty, it is necessary to distinguish between these different cases; a closer study might well show that this should also be done for certain other purposes.

10. In conclusion, the Rapporteur would like to say that he has followed the precedents of his previous reports in three respects: first, in drafting the articles not in the precise and rather tight language appropriate to such an instrument as an international convention, intended to be signed and ratified by States, but rather in the more colloquial and less formal language that (within certain limits, of course) is permissible, and up to a point desirable, in a code; secondly, in putting as much into the articles themselves as is reasonably possible without overloading them, so that they are relatively self-explanatory and could stand without a commentary, though the latter is in fact provided; and thirdly, in not shirking or minimizing, but rather attempting to bring out, the difficulties of the subject, which are often glossed over, or completely ignored.

11. With reference to the last of these points, the Rapporteur feels that it is only in the light of a full appreciation of the difficulties involved that the Commission will eventually be able to devise a satisfactory and probably simplified and much improved text. He has, therefore, in the present report as in previous ones, regarded it as part of his duty as Rapporteur to try and draw attention to all the relevant factors and aspects of the subject.

I. TEXT OF ARTICLES

Second Chapter. The effects of treaties

[1. The present report starts a second chapter of a draft Code on treaties, covering the effects of treaties. The Rapporteur's previous three reports (dated 1956-1958 inclusive) completed a first chapter on validity (formal, temporal and essential; or the conclusion, termination and essential validity of treaties).

2. Subject to possible modification later, the present (second) chapter, which is to be followed in due course by a third chapter on the interpretation of treaties, will consist of two main parts:

Part I. The effects of treaties as between the parties (operation, execution and enforcement), which is the subject of the present report.

Part II. The effects of treaties as regards third States, to form the subject of a subsequent (1960 report.]

Part I. The effects of treaties as between the parties (operation, execution and enforcement)[9]

Article 1. Scope of part I

1. The effect of a treaty as between the parties thereto depends primarily on the substantive content and terms of the treaty, as correctly interpreted and determined according to the principles of interpretation

[7] See paragraphs 172, 142 and 101 of the commentary.

[8] See paras. 55-57 and 67 of the commentary.

[9] The present part I has two main divisions:
A. Operation and execution of treaties.
B. Consequences of and redress for breach of treaty (enforcement).
These divisions are subdivided as follows:
Division A:
Section 1. Character, extent and limits of the treaty obligation.
Sub-section i. Nature and extent of the treaty obligation.
Sub-section ii. Limits of the treaty obligation (circumstances justifying non-performance).

set out in chapter 3 of the present Code (which will form the subject of a later report). In consequence, the present chapter purports to contain only those general principles and rules relating to the effects of treaties which are applicable to all treaty instruments indifferently, and irrespective of the particular character of their content.

2. Except as regards the fundamental principles of treaty law set out in article 2 below, and further developed in certain subsequent articles, the application of any provision of this part of the present chapter may be negatived or modified by an express term of the treaty excluding it.

DIVISION A. OPERATION AND EXECUTION OF TREATIES

SECTION 1 : CHARACTER, EXTENT AND LIMITS OF THE TREATY OBLIGATION

Article 2. Fundamental principles governing the treaty obligation

1. In general, and subject to the specific provisions of this part of the present chapter, the effects of treaties (apart from such as are derived from the actual content of the treaty) depend on the application of, and on appropriate inferences to be drawn from, the following principles of general international law, namely:

(*a*) The principle of consent (*ex consensu advenit vinculum*);

(*b*) The principle *pacta sunt servanda*;

(*c*) The principle of the unity and continuity of the State;

(*d*) The principle of the supremacy of international law over domestic law;

(*e*) The principle *pacta tertiis nec nocent nec prosunt*.

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virtue of a condition of the treaty implied in it by international law.

Section 2. Particular questions of treaty application.

Sub-section i. Temporal and territorial application of treaties.

Rubric (*a*). Temporal application.

Rubric (*b*). Territorial application.

Sub-section ii. Effect of the treaty on the internal plane.

Rubric (*a*). Effect of treaties on and respecting the institutions of the State.

Rubric (*b*). Effects of treaties on and in respect of private individuals and juristic entities within the State.

Division B:

Section 1. Consequences of breach of treaty.

Section 2. Modalities of redress for breaches of treaty.

Sub-section i. General statement of available remedies.

Sub-section ii. Special procedural considerations affecting certain means of redress.

Rubric (*a*). General principles and classification.

Rubric (*b*). Non-performance justified *ab extra* by operation of a general rule of international law.

Rubric (*c*). Non-performance justified *ab intra* by

SUB-SECTION I. NATURE AND EXTENT OF THE TREATY OBLIGATION

Article 3. Obligatory character of treaties: ex consensu advenit vinculum

1. The immediate foundation of the treaty obligation is the consent given to it by the parties, it being an antecedent principle of international law that consent finally and validly given creates a legally binding obligation.

2. The foundation of treaty rights is equally the consent given to the enjoyment of those rights, and the undertaking to accord them.

Article 4. Obligatory character of treaties: pacta sunt servanda

1. A treaty being an instrument containing binding undertakings and creative of vested rights, the parties are under a legal obligation to carry it out.

2. A treaty must be carried out in good faith, and so as to give it a reasonable and equitable effect according to the correct interpretation of its terms.

3. In relation to any particular treaty, the application of the foregoing provisions is conditional on the treaty possessing the necessary validity under chapter I of the present Code—that is to say, on its having been regularly concluded and come into force in accordance with the provisions of part I of that chapter; on its possessing essential validity under part II; and on its being still in force and not validly terminated in accordance with part III. In the case of multilateral treaties, these conditions must obtain not only in respect of the treaty itself, but also in respect of the participation of the particular party whose rights or obligations are in question.

4. It follows from the foregoing provisions of the present article that the existence of circumstances falling within one of the two following classes of cases cannot of itself justify non-performance of the treaty obligation:

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

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

Article 5. Obligatory character of treaties: relationship of obligations to rights

1. In general, though with particular reference to the case of multilateral treaties:

(*a*) A party to a treaty has a duty towards the other party or parties to carry it out, irrespective of whether any direct benefits to such other party or parties will accrue therefrom; and correspondingly, any party to a treaty has, as the counterpart of its own obligation, the right to require due performance by any other party of its obligations under the treaty, irrespective of any such factor;

(*b*) Each party is under an obligation to refrain from applying a treaty in such a way, from taking such action in relation to it, or from otherwise so conducting itself, as may be calculated to impair the authority of the treaty as a whole, to diminish the force of the treaty obligation, or to prejudice the enjoyment of the rights or benefits the treaty provides for, whether on the part of the other party or parties as such, or of individual persons or entities.

Article 6. Obligatory character of treaties: the principle of the unity and continuity of the State

1. The rights and obligations provided for in the treaty attach to the parties to it as States, irrespective of the particular form or method of its conclusion. The Government or administration of the State for the time being, irrespective of the character of its origin, or of whether it came into power before or after the conclusion of the treaty, acts as the agent of a State to carry the treaty out, or to claim rights and benefits under it, as the case may be, and is bound or entitled accordingly.

2. In consequence, the treaty obligation, once assumed by or on behalf of the State, is not affected, in respect of its international validity or operative force, by any of the following circumstances:

(*a*) That there has been a change of government or régime in any State party to the treaty;

(*b*) That some particular organ of the State (whether executive, administrative, legislative or judicial) is responsible for any breach of the treaty;

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

In all such cases, the treaty obligation remains internationally valid, and the State will incur responsibility for any failure to carry it out.

Article 7. Obligatory character of treaties: the principle of the supremacy of international law over domestic law

1. In case of conflict, obligations arising under a treaty take precedence of, and prevail internationally over the provisions of the internal law or constitution of any party to it.

2. Accordingly, the treaty obligation, once assumed, is not affected in respect of its international validity and operative force by the existence of inconsistencies between it and the provisions of the internal law or constitution of the party concerned, whether these have been enacted previously or subsequently to the coming into force of the treaty; not by deficiencies or *lacunae,* or special features or peculiarities of the law or constitution or governmental organization of that party which may affect the performance of the obligation on the internal plane. In all such cases, the obligation remains internationally valid, and the State will incur responsibility for any failure to carry it out.

3. The foregoing provisions of the present article apply where any provision of the local law or constitution has the effect of defeating or preventing the performance of the treaty obligation, or of justifying its non-performance on the internal plane—irrespective of the particular subject-matter of that provision, and of whether it does or does not purport to relate specifically to the treaty or the class of matter covered by the treaty, or is said to have an object or purpose different from that of the treaty.

Article 8. Obligatory character of treaties: the case of conflicting treaty obligations

1. Except as provided in paragraph 3 below, a conflict between two treaties, both of them validly concluded, can in principle only be resolved on the basis that both have equal force and effect, in the sense that the parties incur international responsibility under each of them. In such a case, the question which of the two treaties is actually to be carried out, and which, by reason of the fact that it cannot be or is not carried out, gives rise to a liability to pay damages or make other suitable reparation for a breach thereof, is governed by the provisions of articles 18 and 19 of part II of chapter 1 of the present Code.

2. Accordingly, the mere fact that a treaty obligation is incompatible with obligations under another treaty is not in itself a ground justifying non-performance.

3. The foregoing provisions of the present article do not apply:

(*a*) Where an obligation under one treaty is superseded, cancelled, or replaced by an obligation under a later treaty between identical parties;

(*b*) As between States parties to both treaties, and having intended, as between themselves, to supersede, cancel, or replace the earlier obligation;

(*c*) Where, according to the provisions of article 18 of part II of chapter 1 of the present Code, one of the treaties or treaty obligations concerned is rendered null and void by reason of conflict with the other;

(*d*) By reason of Article 103 of the Charter of the United Nations:

(i) As between Member States of the United Nations, in respect of any treaty obligation in conflict with the obligations of the Charter;

(ii) As between a Member and a non-member State, as respects the performance of any such conflicting obligation, but not as respects international responsibility and liability for the resulting non-performance.

SUB-SECTION II. LIMITS OF THE TREATY OBLIGATION (CIRCUMSTANCES JUSTIFYING NON-PERFORMANCE)

RUBRIC (*a*). GENERAL PRINCIPLES AND CLASSIFICATION

Article 9. General definition of non-performance justified by operation of law

1. In certain special cases, international law operates to confer a right of non-performance where this would not otherwise have existed according to the actual terms, express or implied, of the treaty itself.

2. In such cases, international law necessarily operates independently of the terms of the treaty, or of any special agreement between the parties as to non-performance, in the sense that it provides grounds of non-performance that may operate even though they are not specifically contemplated by the treaty or by the agreement of the parties.

Article 10. Scope of the present sub-section

1. The present sub-section relates to the circumstances justifing *ad hoc* non-performance, either in whole, or as to a particular provision of the treaty—the latter being itself, and remaining, in full force. The separate, though related, question of the circumstances causing or justifying termination or indefinite suspension of a treaty, in whole or in part, is dealt with in part III of chapter 1 of the present Code.

2. It follows that, except in cases where the nature of the circumstances otherwise indicates (as may for instance happen under articles 21, 23 and 24), the present sub-section contemplates cases in which performance can and must be resumed so soon as the circumstances justifying non-performance have ceased to exist.

Article 11. Classification

1. Non-performance may take place only under the treaty itself or by operation of law. It will therefore be justified if and only if:

(*a*) It occurs in circumstances specifically contemplated and specified by the treaty, or necessarily to be implied from its terms;

(*b*) The circumstances are such as to give rise to one of the situations provided for in articles 13 to 23 below.

2. It follows that, except where non-performance is contemplated by an express or implied term of the treaty, it can only be justified by operation of law, that is to say:

(*a*) Either *ab extra,* by the operation of a general rule of international law permitting non-performance in certain circumstances;

(*b*) Or *ab intra,* by the operation of a condition which, whether it is actually expressed in a treaty or not, is deemed by international law to be implied, either in all treaties, or in the particular class to which the treaty concerned belongs.

Article 12. Certain general considerations applicable in all cases where a right of non-performance by operation of law is invoked

1. Where the provisions of the treaty specifically exclude any grounds of non-performance, such provisions will prevail, notwithstanding the fact that non-performance on these grounds would otherwise be justified by operation of law. The same applies where a treaty obligation is specifically entered into with reference (and is intended to apply) to a state of affairs that might otherwise give rise to a right of non-performance.

2. In those cases where the operation of international law gives a faculty of non-performance, such faculty must be exercised within a reasonable time after it is alleged to have arisen. Failure to do this will entitle the other party or parties to claim execution of the treaty in full, provided that the treaty is being duly executed by such party or parties.

3. Where the event, occurrence or circumstances giving rise to the ground of non-performance by operation of law has been directly caused or contributed to by the act or omission of the party invoking it (unless this act or omission was itself both necessary and legally justified), such party will either be precluded from invoking the ground in question, or (if the event, occurrence or circumstances nevertheless in their nature entail non-performance) will incur responsibility for any resulting damage or prejudice, and will be liable to make reparation therefor.

4. *Mutatis mutandis,* the case of non-performance of a treaty obligation by operation of law is subject to the same considerations and to the same rules as are set out in paragraph 5 of article 16 in part III of chapter 1 of the present Code for the case of the termination or suspension of a treaty by operation of law.

RUBRIC (*b*). NON-PERFORMANCE JUSTIFIED *ab extra* BY OPERATION OF A GENERAL RULE OF INTERNATIONAL LAW

Article 13. Acceptance of non-performance by the other party or parties

1. Non-performance, or partial non-performance, of a treaty obligation will not, or will cease to constitute a breach of the treaty, if, either by express agreement, or else tacitly (e.g., by acquiescence or non-objection), the non-performance is accepted by the other party to the treaty, or, in the case of multilateral treaties, is accepted by all the other parties (unless, in the latter case, the obligation is owed to one or more parties only, when acceptance by such party or parties will suffice).

2. The acceptance, even though it may be tacit, must be clear and unmistakable, and must in effect indicate or warrant an inference of actual agreement to non-performance. The mere fact that a party does not seek redress in respect of the non-performance, or avail itself of remedies afforded by the treaty or otherwise, or take counter-action, does not *per se* amount to acceptance of, or acquiescence in, the non-performance.

Article 14. Impossibility of performance

1. Temporary or *ad hoc* impossibility of performance[10] justifies non-performance of a treaty obligation provided that the impossibility is literal and actual, in the sense of imposing an insuperable obstacle or impediment to performance in the nature of *force majeure,* and not merely of rendering performance difficult, onerous or vexatious.

2. Performance of the treaty must be resumed immediately the obstacle to it is removed or performance otherwise becomes possible again.

[10] See article 10. A temporary or *ad hoc* impossibility is necessarily the only kind that can be relevant in the present context, since if it were permanent it would be a ground for the total termination, or at least the indefinite suspension of the treaty, or treaty obligation, and not merely for a particular non-performance. Impossibility leading to termination or indefinite suspension is dealt with in article 17 of part III of chapter 1 of the present Code.

3. Changed conditions falling short of rendering performance impossible do not in themselves justify non-performance. The principle *rebus sic stantibus* which may, in the circumstances and subject to the conditions stated in articles 21 to 23 of part III of chapter I of the present Code, justify the suspension and eventual termination of a treaty, has no application to the case of a particular non-performance of a treaty obligation.

Article 15. Legitimate military self-defence

1. The requirements of legitimate military self-defence [11] justify the non-performance of a treaty obligation on such particular occasions as give rise to these requirements, provided :

(*a*) That, subject to the provisions of paragraph 3 below, actual naval, military or air operations are taking place or are in immediate contemplation ;

(*b*) That the case is one of legitimate self-defence according to the recognized principles of international law and to any relevant conventional obligations ;

(*c*) That the non-performance is essential in the circumstances, in the sense that performance would be incompatible with the necessities of self-defence or would seriously prejudice the defence operations involved ;

(*d*) That the scope and area of non-performance are circumscribed as much as possible and confined to what is strictly necessary for the immediate purposes of self-defence.

2. Except in those cases where war or other hostilities justify the termination or permanent suspension of a treaty or treaty obligation, performance of it, or of any part of it which has not been performed, must be resumed as soon as the requirements of legitimate self-defence are met, or no longer necessitate non-performance, or if the circumstances giving rise to these requirements have ceased to exist.

3. A threat of war or other hostilities, or of the occurrence of events calling for the exercise of legitimate self-defence, will not justify non-performance of a treaty obligation except where the performance would itself directly contribute to such occurrence or to the materialization of the threat.

Article 16. Civil disturbances

The provisions of article 15 apply, *mutatis mutandis,* to the case of riots and other civil disturbances, or of civil war.

Article 17. Certain other emergency conditions

1. Under the same conditions, *mutatis mutandis,* as those specified in paragraph 1 (*c*) and (*d*) of article 15 above, non-performance of a treaty, or of some particular part of it, is justified if rendered absolutely necessary by a major emergency arising from natural causes, such as storm devastation, floods, earthquakes, volcanic eruptions, wide-spread epidemics or plant diseases on a national or quasi-national scale.

2. In order to justify non-performance in these cases, the circumstances must be such that performance would aggravate the emergency, or would be incompatible with the steps necessary to deal with it, or would render these ineffective or unduly difficult to take.

3. Except in those cases where the emergency renders further performance totally impossible and results on that account in the termination of the whole obligation, performance must be resumed as soon as the emergency is over or conditions make resumption of performance possible.

4. In the absence of emergency conditions of a character clearly affecting the performance of the treaty obligation in the manner specified by paragraphs 1 and 2, the fact that there are circumstances rendering performance difficult or onerous is not a ground justifying non-performance.

Article 17A. Previous non-performance by another party

[See article 20 below. Although an article on this subject could figure there, it has seemed to the Rapporteur preferable, for the reasons given in paragraph 102 of the commentary, to place it in rubric (*c*).]

Article 18. Non-performance by way of legitimate reprisals

1. In those cases where a reciprocal, equivalent and corresponding non-observance of a treaty obligation, following on a previous non-observance by another party to the treaty, as provided in article 20 below, would not afford an adequate remedy, or would be impracticable, the non-observance of a different obligation under the same treaty or, according to circumstances, of a different treaty may, subject to the provisions of paragraphs 3 and 4 below, be justified on a basis of legitimate reprisals.

2. The principle of reprisals may also be invoked, subject to the provisions of paragraphs 3 and 4 below, in order to justify the non-observance of a treaty obligation because of the breach by another party to the treaty of a general rule of international law.

3. Whatever the circumstances, action by way of reprisals may only be resorted to :

(*a*) If, as stated in paragraph 1 of this article, the matter cannot be dealt with by means of the application of the reciprocity rule as provided by article 20 below ;

(*b*) If the breach of treaty or illegality against which the reprisals are directed has been established or is manifest ;

(*c*) If prior negotiations or exchanges between the parties have not led to any solution or settlement, or if requests for negotiations, or for a resumption of performance or cessation of the treaty infraction, have been rejected or not responded to ;

(*d*) If, in those cases where the counter-action does

[11] The case contemplated here is not the same as that of the termination or indefinite suspension of treaties or parts of treaties by reason of war or of hostilities amounting to war (see para. 70 of the commentary below).

not consist simply of a corresponding non-observance of the same obligation, it can be shown to be necessary in the circumstances, in order to provide adequate redress or avoid further prejudice;

(*e*) Provided that the treaty concerned is not a multilateral treaty of the "integral" type, as defined in article 19, head (*b*) of part II, and article 19, paragraph 1 (iv) of part III, of chapter 1 of the present Code, where the force of the obligation is self-existent, absolute and inherent for each party, irrespective and independently of performance by the others;[12]

(*f*) Provided the appropriate procedures set out in article 39 below have first been resorted to.

4. The particular reprisals resorted to must be appropriately related to the occasion giving rise to them, and must also be proportionate and commensurate in their effects to the prejudice caused by the previous non-observance of a treaty or international law obligation by the other State concerned, as well as limited to what is necessary in order to counter such non-observance. They must be conducted in accordance with the general rules of international law governing self-redress by way of reprisals.

5. Non-observance based on legitimate reprisals must cease so soon as occasion for it has ceased by reason of a resumption of performance by the other party or parties concerned.

RUBRIC (*c*). NON-PERFORMANCE JUSTIFIED *ab intra* BY VIRTUE OF A CONDITION OF THE TREATY IMPLIED IN IT BY INTERNATIONAL LAW

Article 19. Scope of the present rubric

1. Where a right not to perform a treaty obligation in certain particular circumstances can be derived, or is said to be derivable, by implication from one of the terms of the treaty, the existence and scope of the right depend on the correct interpretation of the treaty itself, and this is a matter governed by the general rules relating to the interpretation of treaties contained in chapter 3 of the present Code (which will form the subject of a later report). The present rubric relates only to the case of conditions implied in or attached to the treaty by operation of law.

2. Alternatively, it is implicit in the type of case treated of in the present rubric that, on the face of it, the treaty concerned creates a specific obligation, so that the question is whether international law implies a condition justifying the non-performance of that obligation in certain circumstances. Since the very issue, whether non-performance is justified, is one that assumes the existence of a *prima facie* or apparent obligation under the treaty, conditions expressed in or implied by the language of the treaty itself relate to the existence and scope of the obligation, not to the justification for its non-performance.

3. A condition implied by law as described in the preceding paragraphs may be implied in the case of all treaties or only of certain particular classes of treaties.

[12] An example of the type of treaty here contemplated would be those of the social or humanitarian kind, the principal object of which is the benefit of individuals.

Article 20. Conditions implied in the case of all treaties of reciprocity or continued performance by the other party or parties

1. By virtue of the principle of reciprocity, and except in the case of the class of treaties mentioned in paragraph 3 (*e*) of article 18, non-performance of a treaty obligation by one party to the treaty will, so long as such non-performance continues, justify an equivalent and corresponding non-performance by the other party or parties.

2. In the case of multilateral treaties, however, such non-performance will only be justified in relation to the particular party failing to observe the treaty.

3. Where a treaty provides for certain action to be taken by the parties jointly or in common, it does not follow that the failure or refusal of one party to take or co-operate in taking this action will entitle the other or others to take it alone. This is a matter depending on the interpretation of the particular treaty. However, a renunciation of or failure by a party to exercise a joint right does not affect the right of the other party or parties.

Article 21. Conditions implied in the case of all treaties: condition of continued compatibility with international law

1. A treaty obligation which, at the time of its conclusion, is incompatible with an existing rule or prohibition of general international law in the nature of *jus cogens,* lacks essential validity *ab initio,* with the consequences set out in articles 21 and 22 of part II of chapter 1 of the present Code. Accordingly, the case contemplated by the present article is that of supervening incompatibility with such a rule or prohibition of international law.

2. A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility, subject to the same conditions, *mutatis mutandis,* as are set out under case (vi) in article 17 of part III of chapter 1 of the present Code in respect of the termination or indefinite suspension of the treaty.

3. The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.

4. Where the circumstances do not involve incompatibility with a rule or prohibition in the nature of *jus cogens,* but merely a departure from, or variation by, the parties (for application *inter se*) of a rule in the nature of *jus dispositivum,* no ground for non-observance will exist.

Article 22. Conditions implied in the case of all treaties: condition of unchanged status of the parties

1. In those cases where one or both of the parties to a bilateral treaty lack treaty-making capacity, the treaty

will lack essential validity *ab initio*. In the case of multilateral treaties, the same principle applies to the validity of the participation in the treaty of any entity in this position. These cases are dealt with in article 8 of part II of chapter 1 of the present Code. The present article is accordingly confined to the case of supervening changes in the status of parties originally possessed of treaty-making capacity.

2. The case of an alteration in international status involving a change or total loss of identity of the party concerned, leading (subject to the rules of state succession) to the termination of the treaty as a whole, is governed by the provisions of case (i) in article 17 of part III of chapter 1 of the present Code.

3. Subject to the rules of state succession, a supervening change of international status not involving a complete loss or change of identity will justify non-performance of a treaty obligation in those cases where, as a result of the change, performance is no longer dependent on the sole will of the party concerned. In such circumstances, however, there may arise an obligation for another international entity to perform or ensure performance of the treaty obligation.

Article 23. Conditions implied in the case of particular classes of treaties

1. Certain classes of treaties or treaty obligations are to be regarded as being automatically subject to certain implied terms or conditions justifying their non-performance in appropriate circumstances, irrespective of their actual language, unless this language is such as expressly, or by necessary implication, to exclude any such term or condition.

2. The classes and the terms or conditions involved depend on the state of international law for the time being, and on the development of treaty practice and procedure, and cannot therefore be exhaustively enumerated. The following are given by way of example:[13]

(*a*) Treaties dealing with undertakings relating to topics of private international law are to be read as subject to the implied condition or exception of "*ordre public*"—i.e., that the parties are not obliged to implement the treaty in any case where to do so would be contrary to the juridical conceptions of "*ordre public*" as applied by their courts. No such term or condition is, in the absence of an express clause to that effect, to be read into treaties or treaty clauses not coming within this category.

(*b*) The establishment clauses of commercial treaties are normally to be read as subject to an implied condition to the effect that they do not prejudice the right of the local authorities to refuse admission to particular individuals, either on grounds personal to themselves, or in pursuance of a general immigration policy, or policy respecting the taking of employment, applied to all foreigners without discrimination; and similarly to expel or deport individuals.

(*c*) Commercial treaty clauses relating to the admission or import or export of goods and cargoes are normally to be read as subject to an implied condition enabling the local authorities to prohibit entirely, or to institute special regulations for, the importation or exportation of certain categories of articles on grounds of public policy, health or quarantine, such as arms, gold bullion, narcotic drugs, works of art, pest-carrying plants, etc.; or to do so on particular occasions if rendered necessary by local circumstances (e.g., to prohibit the importation of cattle coming from infected areas).

(*d*) The operation of treaties of guarantee is subject to an implied condition of appropriate conduct on the part of the State in whose favour the guarantee operates. Accordingly, the obligation to act in accordance with the guarantee will not be effective if the State in whose favour it was instituted has itself been responsible for the occurrence bringing the guarantee into play, or has refused or failed to take action, legally open to it, and possible, which would have rendered the implementation of the guarantee unnecessary, or materially less onerous.

SECTION 2. PARTICULAR QUESTIONS OF TREATY APPLICATION

SUB-SECTION 1. TEMPORAL AND TERRITORIAL APPLICATION OF TREATIES

RUBRIC (*a*). TEMPORAL APPLICATION

Article 24. Beginning and duration of the treaty obligation

1. Subject to the provisions of articles 41 and 42 of part I of chapter 1 of the present Code, and unless the treaty itself otherwise provides, the binding effect of a treaty arises immediately on, and the obligation to carry it out dates from, its coming into force. The same applies to the faculty to claim rights under a treaty.

2. In the case of multilateral treaties, the relevant date is the coming into force of the treaty in respect of the party whose rights and obligations are in question, as provided by paragraph 4 of article 41 in part I of chapter 1 of the present Code.

3. Subject to the provisions of articles 27 to 31, inclusive, of part III of chapter 1 of the present Code, the rights and obligations provided for by a treaty continue until valid termination in accordance with the provisions of that part.

4. Unless a treaty specifically so provides, or a necessary implication to that effect is to be drawn from its terms, it cannot give rise to retroactive rights or obligations, and there exists a presumption against retroactivity.

RUBRIC (*b*). TERRITORIAL APPLICATION

Article 25. General principles

1. The provisions of the present sub-section have no

[13] Numerous categories of treaties are involved; e.g., air traffic conventions, maritime conventions, labour conventions, extradition treaties, etc. An exhaustive consideration of the matter (which the Rapporteur does not think it necessary to undertake at the present juncture) would require a detailed study of a large number of treaties and conventions belonging to each of the different classes, and also an inquiry of Governments concerning their practice in relation to the application of these treaties. Such a study would probably have to be based on information provided or collected by the Secretariat.

relevance to the case of those classes of treaties or treaty clauses that do not normally involve any question of territorial application, such as treaties of alliance, guarantee, collective self-defence, peace and friendship, recognition, institution of diplomatic relations, etc.

2. In those cases where the question of territorial application is relevant, the matter is governed primarily by the terms of the treaty itself, or of any ancillary instruments accompanying it; or, where the treaty so permits, of any declarations made by a party at the time of signature, ratification or accession.

3. In all other cases, and unless the application of a treaty is, by its terms, specifically confined (or by its nature can only relate) to a certain particular part of the territory, or of certain particular territories, of one or more of the contracting parties, its territorial application will be governed by the provisions of the remaining articles of the present rubric.

Article 26. Application to metropolitan territory

1. Unless a treaty otherwise provides, it applies automatically to the whole of the metropolitan territory (or to all territories forming part of the metropolitan territory) of each contracting party.

2. Subject to the provisions of paragraph 3 below, the term "metropolitan territory" is to be understood as denoting all those territories of a contracting party which are administered directly by its central government under the basic constitution of the State, in such a manner that this government is not subject, either in the domestic or in the international field, to any other or ulterior authority.

3. The constituent states, provinces or parts of a federal union or federation, notwithstanding such local autonomy as they may possess under the constitution of the union or federation, are considered to be part of its metropolitan territory for treaty and other international purposes.

Article 27. Application to dependent territories

1. The term "dependent territories" denotes any territories of a State that are not metropolitan territories as defined in paragraph 2 of the preceding article.

2. Subject to the provisions of paragraph 3 below, a treaty extends automatically to all the dependent territories of the contracting parties unless it otherwise provides, or unless it contains a clause permitting the separate extension or application of the treaty to such territories.

3. However, unless a treaty specifically provides to the contrary, it will have no automatic extension to dependent territories coming within any of the following classes:

(*a*) Territories which, though dependent in respect of the conduct of their foreign relations, are internally fully self-governing;

(*b*) Territories which, though not fully self-governing internally, are so in respect of the subject-matter or field to which the treaty relates;

(*c*) Territories which, though not fully self-governing, either generally, or in relation to the subject-matter or field of the particular treaty, possess their own quasi-autonomous or responsible local legislative or administrative organs; and where, according to the constitutional relationship between these territories and the metropolitan government, such organs must be consulted in regard to the application of any treaty; or where action on the part of such organs will be necessary to implement the treaty locally, if it becomes applicable to the territory.

4. In the cases covered by the preceding paragraph, the fact that the metropolitan government may possess, and may in the last resort be able to exercise, ulterior powers which would enable it to effect the compulsory application of the treaty to the territory concerned, is not a ground on which the automatic application of the treaty can be predicated.

Article 28. Determination of the status of metropolitan and dependent territories

1. The determination of the status of any territory, whether as a metropolitan or a dependent territory, is a question of law and fact depending on the correct interpretation of the relevant constitutional provisions and international instruments.

2. Subject to any relevant treaty provisions, and to any international right of recourse that may exist,

(*a*) Such determination is, in the first instance, one for the metropolitan government to make;

(*b*) The metropolitan government may also indicate what is covered, or not covered, as the case may be, by any particular territorial appellation or geographical description.

3. Any such determination or indication, where it purports to depart from the apparent geographical or political position as it exists at the time, must, in order to be applicable for the purposes of any particular treaty, be made and declared at the time of the conclusion of the treaty, unless it has already been notified or published in advance.

4. Paragraph 3 of the present article does not, however, as such, relate to any determination or indication resulting from a genuine change in the status or constitutional position of the territory concerned, or in the relations between it and the metropolitan government. In such cases, the applicability of the treaty in respect of the territory will depend on its terms and on the rules of (or on rules analogous to those of) state succession.

SUB-SECTION II. EFFECT OF THE TREATY ON THE INTERNAL PLANE

RUBRIC (*a*). EFFECT OF TREATIES ON AND RESPECTING THE INSTITUTIONS OF THE STATE

Article 29. Relevance of the domestic aspects of treaty application

The treaty obligation produces its effects primarily in the international field, it being the duty of the parties

to carry it out in that field. The question of its effects in the domestic field is relevant only in so far as it may affect the capacity of the parties to discharge this duty.

Article 30. Duties of States in relation to their laws and constitutions

1. It is the duty of every State to order its law and constitution in such a way that it can, so far as that law and constitution are concerned, carry out any treaty it has entered into, and can give to any treaty obligation assumed by it such effect in its domestic field as the treaty or obligation may require.

2. From the international standpoint, the achievement of this object may result indifferently from the fact that the local law and constitution place no obstacles in the way of the due performance of the treaty obligation; or because, under the local law and constitution, treaties duly entered into are automatically applicable and self-executing domestically, without the intervention of any legislative or other specific internal action; or because the necessary legislative or other necessary steps have in fact been taken; or because the treaty is of such a character that it can be carried out without reference to the position under the domestic law or constitution concerned.

3. In those cases, however, where the treaty cannot be carried out without specific legislative, administrative or other action in the domestic field, a party to the treaty which finds itself in this position is under a duty to take such action.

4. A State having assumed a treaty obligation is equally under a duty not to take any legislative, administrative or other action, whether at the time of the entry into force of the treaty, or at any subsequent time while it remains in force, that would cause the obligation to cease to be capable of being carried out in the domestic field.

5. Provisions in treaties stating expressly that the parties undertake to take the necessary legislative and other measures necessary for the execution of the treaty are merely declaratory in their legal effect. The absence of such a provision from a particular treaty in no way absolves the parties to it from their obligations in this respect, which are inherent in the character of a treaty and in the general rules of international law applicable to treaties.

Article 31. Position and duties of particular organs of the State

1. Internationally, and irrespective of whether its domestic constitution is a unitary or a federal one, a State constitutes a single indivisible entity, and it is on this entity that the duty to carry out treaty obligations rests. The agency or organ of the State responsible on the internal plane for carrying out the treaty, or for any failure to carry it out, as the case may be, is a matter of purely domestic, not international, concern.

2. It follows that the State, as an international entity, is, in respect of any treaty obligation undertaken by it, both internationally bound to secure due performance of the obligation on the part of its legislative, judicial and administrative or other organs, and also internationally responsible for any failure on their part to do so.

3. The fact that a particular organ of the State is, on the domestic plane, justified in not performing (and even possibly obliged not to perform) the treaty, in no way affects the international responsibility of the State.

RUBRIC (*b*). EFFECTS OF TREATIES ON AND IN RESPECT OF PRIVATE INDIVIDUALS AND JURISTIC ENTITIES WITHIN THE STATE

Article 32. Treaties involving obligations for private individuals or juristic entities

In those cases where a treaty provides for duties to be carried out in their individual capacity by nationals (including juristic entities) of the contracting States, or imposes prohibitions or restrictions on specified kinds of individual conduct, the contracting States are under an obligation to take such steps as may be necessary in order to ensure that their nationals and national entities are free under the relevant domestic laws to carry out these duties or to observe these prohibitions or restrictions; and also that, in so far as may be necessary, they are obliged under those laws to do so.

Article 33. Treaties involving benefits for private individuals or juristic entities

1. Subject to the provisions of paragraph 2 below, where a treaty provides for rights, interests or benefits to be enjoyed by private individuals (including juristic entities), or where the treaty otherwise redounds to their advantage, it is the duty of the contracting States to place no obstacle in the way of the enjoyment of these rights, interests, benefits or advantages by the individuals or juristic entities concerned, and to take all such steps as may be necessary to make them effective on the internal plane.

2. The provisions of the preceding paragraph do not affect the discretionary power of a State or Government to waive, compound or forgo rights, interests, benefits or advantages enjoyed by its nationals under a treaty to which it is a party. Private individuals and juristic entities may also, in so far as they are concerned, waive, compound or forgo rights, interests, benefits or advantages, reserved or accruing to them under or by reason of a treaty. Such action cannot, however, deprive their State or Government, as a party to the treaty, of the right to claim or insist on full performance of it.

SUB-SECTION III. MISCELLANEOUS PARTICULAR QUESTIONS OF TREATY APPLICATION

[Left blank for the time being for reasons stated in the commentary.]

DIVISION B. CONSEQUENCES OF AND REDRESS FOR BREACH OF TREATY

SECTION 1. CONSEQUENCES OF BREACH OF TREATY

Article 34. Basic principles

1. Failure to comply with the provisions of a treaty will constitute a breach of it, or alternatively involve an

illegality—i.e., breach of international law—unless this takes place in circumstances justifying non-performance as indicated in division A above.

2. Where there is a breach of a treaty, it gives rise to international responsibility, irrespective of its character or gravity. This responsibility must be discharged as soon as possible by such means as may be necesary or appropriate for the purpose, in accordance with the provisions of the present section.

3. A State which has committed a breach of treaty is itself responsible for taking the necessary steps for bringing about a cessation of the breach and for making any reparation due in respect of it, in accordance with the provisions of the present section.

4. A breach of treaty by one party, or a failure by it to take the necessary steps to discharge the responsibility arising from the breach, confers on the other party or parties a right of redress, and of taking remedial action, as indicated in section 2 below.

Article 35. Method of discharging the responsibility arising from breach of treaty

1. The method of discharging the responsibility arising from a breach of treaty, or of making the reparation due in respect of such a breach, depends in the first place on the provisions of the treaty, or, if these are silent on the matter, then, subject to the provisions of the present section, on the general rules of international law relating to state responsibility.

2. Breaches of treaty may assume various forms, and may in particular arise from:

(*a*) Some action prohibited by the treaty;

(*b*) A failure to carry out a specific requirement of the treaty (which may consist in the failure to perform some act, to grant certain treatment, or to allow the exercise of certain rights or performance of certain acts);

(*c*) Action taken in a manner, or for a purpose, that is not in conformity with the treaty.

3. In the classes of cases indicated in the preceding paragraph, the measures appropriate to discharge the international responsibility of the State having committed the breach are as follows:

(i) *In case (a):* Immediate cessation of the action in violation of the treaty prohibition where this is still continuing, and the furnishing of suitable reparation, by way of damages or otherwise, in respect of the violation;

(ii) *In case (b):* Immediate execution of the requirements in question and the furnishing of suitable reparation for its previous non-execution; or, if execution is no longer possible, or would not be adequate in the circumstances, damages or other reparation for non-performance;

(iii) *In case (c):* Correction or cessation of the action in question, as may be appropriate, together with the furnishing of suitable reparation for any prejudice caused.

4. Subject to any specific provisions of the treaty itself, all such questions as those of the appropriate measure of damages, indirect damages, remoteness of damage, payments by way of interest, etc., are governed by the ordinary principles of international law applicable to the reparation of international injuries.

Article 36. Consequences of breaches of treaties involving benefits for individuals

Where there has been a breach of a treaty obligation involving benefits for individuals, the measure of damages or of other reparation due, apart from any obligation of specific performance, will *prima facie* be the prejudice caused to the individual concerned. Where, however, the breach involves a specific prejudice to the contracting State itself, over and above, or independently of, that caused to the individual, additional reparation will be due in respect of it.

SECTION 2. MODALITIES OF REDRESS FOR BREACHES OF TREATY

SUB-SECTION 1. GENERAL STATEMENT OF AVAILABLE REMEDIES

Article 37. Action by way of redress open to the parties

In the event of a breach of treaty by one party or, as the case may be, of a failure by that party to take the necessary action by way of reparation as provided in section 1 above, the other party or parties will, subject to the provisions of the present section, be entitled:

(*a*) To take any step, or seek or apply any remedy or means of recourse, specifically provided for in the treaty itself;

(*b*) Resort to any other available means of recourse if none are provided in the treaty;

(*c*) Subject to the provisions of article 38 below, to regard the treaty obligation as finally and definitively terminated in those cases where the breach is of a fundamental character as defined in articles 18 to 20 of part III of chapter 1 of the present Code, and provided also that the treaty is not a multilateral treaty of the kind described in paragraph (3) (*e*) of article 18;

(*d*) Subject to the provisions of article 20 and of article 39, to have recourse to an equivalent and corresponding non-performance of the treaty;

(*e*) Subject to the provisions of article 39, to sequestrate, detain or place an embargo on any public property or assets of the party having committed the breach, and situated within the jurisdiction of the other party or parties, not being in the nature of diplomatic or consular property or assets;

(*f*) Subject to the provisions of article 18 and of article 39, to have recourse by way of reprisals to non-performance of some other provision of the treaty, or of another treaty with the party having committed the breach, or, in respect of that party, of some general rule

of international law which would otherwise require to be observed.

SUB-SECTION ii. SPECIAL PROCEDURAL CONSIDERATIONS AFFECTING CERTAIN MEANS OF REDRESS

Article 38. Case (c) of Article 37

In order to justify action under sub-paragraph (*c*) of article 37, the conditions and procedures specified in articles 18 to 20 of part III of chapter 1 of the present Code must be strictly complied with.

Article 39. Cases (e) and (f) of Article 37

1. In order to justify action under sub-paragraphs (*e*) and (*f*) of article 37, either:

(i) The breach, unless admitted, must have been established by the finding of an appropriate international arbitral or judicial tribunal; or

(ii) The counter-action must be accompanied by an offer to have recourse to arbitration or adjudication if the breach is denied, or by acceptance of a request for it, if made by the other party.

2. Where an offer of, or request for, arbitration or adjudication has been accepted under paragraph 1 (ii) above, any counter-measures instituted under sub-paragraph (*e*) of article 37 can only take the form of an embargo or *saisie conservatoire* pending the final decision of the tribunal on the substantive merits of the case. In the case of counter-measures instituted under sub-paragraph (*f*) of article 37, however, the tribunal may, if it thinks fit, order the suspension of any such counter-measures.

3. The counter-measures instituted must:

(*a*) Be necessary in the circumstances, in order to provide adequate redress or avoid further prejudice;

(*b*) Be proportionate to the breach justifying them;

(*c*) Cease so soon as the occasion for them is past, by reason of resumed performance of the treaty obligation, or cessation of its infraction, provided, however, that reparation has been made in respect of the non-performance or infraction.

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.[14]

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.

[14] For the arrangement of the present chapter, see footnote 9.

Second chapter. The effects of treaties

Part I. The effects of treaties as between the parties (operation, execution and enforcement)

Article 1. Scope of part I

1. Part I of the present chapter deals with the effects of treaties as between the actual parties to the treaty concerned. The effects in relation to third States, and the position of the latter with reference to a treaty to which they are not parties, will be considered in part II, which will be the subject of a later report.

2. The terms "operation, execution and enforcement" in the title to part I are more or less traditional. Possibly, a better terminology would be "operative force, performance and redress for breach". "Enforcement", in particular, is of doubtful suitability, since in the present state of international organization, treaties cannot normally be directly enforced.

3. *Paragraph 1* reflects the fact that, when all is said and done, the effect of a treaty depends first and foremost on the text of the treaty itself. This fact has already been alluded to in the introduction to the present report, where it is pointed out that a chapter on the effects of treaties can only be of a very generalized character, setting out those effects which can be regarded as more or less common to all treaties, whatever their particular character or content.

4. More detailed provisions on the effects of treaties could only be formulated with respect to particular categories of treaties having a common element, and would require a very close preliminary study of a large number of such treaties, together with, in all probability, an inquiry from Governments as to their practice in relation to these treaties. It is not possible now, in connexion with the present chapter, to engage in such a study or inquiry, but if it were eventually thought desirable that a Code on the law of treaties should deal in a fairly detailed way with questions affecting particular classes of treaties (e.g., commercial treaties, maritime treaties, civil aviation conventions, trading agreements, and so on), a separate section dealing with these matters could be compiled later.

5. *Paragraph 2.* Although certain rules and principles of treaty execution and performance apply generally in respect of all treaties, it is normally open to the parties to any particular treaty to exclude or modify the application to that treaty of some particular rule of treaty law that would otherwise govern it. It would seem, however, that the more fundamental principles of treaty law could not be treated in this way. Such principles as *pacta sunt servanda*, the continuity of the State, the supremacy of international law over domestic law, etc. are juridical facts. They are unalterable, because without them no binding treaty could exist.

6. In this last respect, the Rapporteur finds it difficult to accept the view put forward in such a provision as article 23 of the Harvard Draft Convention on Treaties.[15] In that article, the statement of the rule that failure to perform a treaty obligation cannot be justified

[15] Harvard Law School, *Research in International Law*, III. *Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29, 1935. In the corresponding provision in

on the ground of municipal law deficiencies or constitutional difficulties, is prefaced by the phrase "Unless otherwise provided in the treaty itself". It is correctly pointed out in the Harvard Draft that although "such provisions in treaties... have been rare... they have not been entirely lacking"; and examples are cited of treaties containing a clause providing that "should either party be prevented by future action of its legislature from carrying out the terms of this arrangement, the obligations thereof shall thereupon lapse".

7. In the opinion of the Rapporteur, any such "arrangement" is not properly speaking a treaty, and does not involve legal, but at most moral obligations, or a sort of political or administrative understanding—perhaps a sort of "gentleman's agreement" between governments. The clauses quoted are based on the cardinal error of equating the party to the treaty (which is properly speaking the *State,* and the *whole* State) with what is only one organ or part of the State, namely, the government or administration. Treaties (considered as legal instruments) are binding on all the organs of the State, and a failure to carry out the treaty attributable to any of these organs (including the legislature) is a breach of it, and entails international responsibility. The existence in the instrument concerned of a provision on the lines above quoted simply means that the party to the treaty, the State, can at any time (through its legislature) legitimately fail to perform it, or cause the "obligation" to cease. This is no more, therefore, than a voluntary undertaking without ultimate legal continuity or force, and such a position has no place in the law of treaties proper.

8. The general question of treaties and the domestic laws of the parties is discussed in connexion with article 7 below; and exactly the same type of consideration applies *mutatis mutandis* to the suggestion made in article 24 of the Harvard Draft that parties to a treaty can equally "contract out" of the rule (deriving from the principle of the unity and continuity of the State) that changes of government in a State do not affect the treaty obligations of the State; as to this, see further below in connexion with article 6.

DIVISION A. OPERATION AND EXECUTION OF TREATIES

SECTION 1. CHARACTER, EXTENT AND LIMITS OF THE TREATY OBLIGATION

Article 2. Fundamental principles governing the treaty obligation

9. The present section deals with the general topic of the character and extent of the treaty obligation and of the limits of that obligation. A second main section of division A treats of certain particular questions of treaty application; while division B deals with the consequences of, and redress for breach of treaty (enforcement, so-called).

10. Article 2 sets out in very general form certain fundamental principles of treaty law which have already twice been referred to in previous reports presented by the Rapporteur. The first of these occasions was in the first (1956) report (A/CN.4/101, pp. 108 and 118). This report, which dealt primarily with the subject of the conclusion of treaties, contained a section entitled "Certain Fundamental Principles of Treaty Law", articles 4 to 6 of which covered some of the principles mentioned in article 2 of the present section. In his commentary to those articles, the Rapporteur expressly mentioned that these principles really appertain more to the subject of the operation and effect of treaties, but he posed the question whether, notwithstanding that fact, it might nevertheless be desirable to have some mention of these important principles at the beginning of the Code. At its eighth session in 1956, the Commission devoted two or three meetings to a very general discussion of the Rapporteur's first report, in the course of which this and certain other matters were mentioned. While no final conclusions were reached, the Rapporteur had the impression that the Commission did not think it necessary to deal with these principles at the beginning of the Code, and would prefer that they should appear in their logically correct position as part of the subject of treaty operation and effects. Therefore, there will be no difficulty in eventually omitting the articles on this subject which were included in the Rapporteur's first report.

11. In the meantime, however, these same principles have also shown themselves to be directly relevant to the subject of the termination of treaties which was dealt with in the Rapporteur's second (1957) report (A/CN.4/107, pp. 23 and 39-43). While it was perhaps not essential to do so, the Rapporteur thought it desirable to include in that section of the work an article (article 5 in part III of chapter 1 of the Code) stating a number of grounds which do *not* justify a party to a treaty in purporting to terminate it or to treat the obligation as being at an end.[16] As has already been explained in the introduction to the present report, the subject of the termination of treaties, considered in the 1957 report, has considerable affinities with part of the content of the present chapter, in so far as the latter deals with the question of the grounds that may, and those that will not, justify a party in failing to carry out a treaty obligation. Just as certain grounds may, according to circumstances, either justify the *ad hoc* non-performance of a particular treaty obligation (though without bringing the treaty itself, or the obligation, to an end), or else may justify the complete termination of the treaty as a whole, so also do some of the same grounds (although often put forward) *not* justify either non-performance of a particular treaty obligation or the termination of the treaty or obligation

a previous report, i.e., that on treaty termination (article 5 in the second (1957) report), the Rapporteur followed the Harvard draft without commenting on the matter. A revised view is now presented.

[16] It was not strictly necessary to do so because, as this section of the work professed to state affirmatively what were the elements that would cause a treaty to come to an end or justify a party in regarding it as terminated, and to state these exhaustively, it could be said to follow automatically that any other ground was necessarily excluded. However, as was explained in the commentary to article 5 in the Rapporteur's second report, certain other grounds have so frequently been put forward by Governments, at one time or another, as justifying the termination of a treaty, that it seemed desirable in any Code to indicate them definitely as being insufficient.

as a whole. In these circumstances, and without prejudice to the arrangement ultimately to be adopted for the present Code, it seems better to leave undisturbed the provisions on this subject, and the commentary thereto, which already figure in part III of chapter 1 of the Code (Rapporteur's second (1957) report), and refer to these as may be necessary in commenting on the corresponding articles of the present chapter.

12. It is clear that any really detailed commentary on the principles set out in article 2 of the present section would involve something like a treatise on the fundamental philosophy of international law, and this is not necessary for present purposes. As has already been stated, however, certain observations are contained in the commentary to article 5 in the Rapporteur's second report (1957), and reference is accordingly made to these, and also to the commentary to articles 3 to 8 below.

SUB-SECTION 1. NATURE AND EXTENT OF THE TREATY OBLIGATION

Article 3. Obligatory character of treaties: ex consensu advenit vinculum

13. *Paragraph 1.* This is sufficiently covered by the remarks already made in connexion with article 2 above. The paragraph does, however, attempt to give effect to the important principle that the foundation of the treaty obligation does not really lie in the treaty itself, even if it may superficially appear to do so. No treaty would be binding if there were not already a rule of law to the effect that undertakings given in certain circumstances and in a particular form create binding obligations. Such a rule must necessarily lie outside the treaty, since no instrument can derive binding force from itself alone. The principle that consent given in due form creates a legal obligation is not a treaty rule of law, though it is a rule on which the whole of treaty law is founded. Such a rule could not be created by treaty because the very treaty purporting to do so would not itself be binding without such a rule already pre-existing independently, as a rule of general international law (and of course the rule that consent gives rise to obligation has applications far wider than those of the particular sphere of treaties).

14. *Paragraph 2.* The position regarding treaty rights is merely the converse of that relating to treaty obligations. It has nevertheless seemed desirable to include this paragraph, because perhaps too much emphasis tends to be laid on the role of treaties in creating obligations as opposed to their role in creating rights. It is true that some treaties involved only, or mainly, obligations;[17] but as regards the great majority of treaties, the intention is that the performance by one party of its obligations will confer on the other party (or parties) a benefit which the latter can legally claim; and this is normally reciprocal. Even in those cases where a treaty appears to involve nothing but obligations for one or more, or all, the parties, nevertheless each party (although it may itself receive no direct benefit therefrom) has a right to claim the performance of the obligation by every other party.

Article 4. Obligatory character of treaties: pacta sunt servanda

15. *Paragraph 1.* This requires no special comment, apart from the general observations already made. There is no need for philosophical discussion when it is so obvious that treaties would lose their entire purpose and *raison d'être* as legal instruments, were it otherwise than as here provided.

16. *Paragraph 2.* The question of the—so to speak—spirit in which a treaty must be carried out perhaps belongs strictly to the sphere of treaty interpretation, which will be the subject of a later report. It seems nevertheless desirable to include some general statement of principle in the present chapter. The principles of good faith and of reasonableness (which are not quite identical) in the execution of treaties, are well recognized, and have been given effect to by international tribunals.[18] Indeed the very lack, internationally, of the same possibilities of enforcement as exist in the case of private law contracts, probably imposes on States and Governments something in the nature of a special duty under international law to use the utmost good faith in the execution of treaties.[19]

17. "... so as to give it a reasonable and equitable effect..." The question whether or not, and if so in what circumstances, a treaty ought to be given the "maximum" effect of which it is capable, is again really a question of interpretation. It is the familiar question of a restrictive *versus* a liberal interpretation of treaty obligations. As such, it does not fall to be dealt with here. It is, however, germane to the present chapter to give some indication as to the general spirit in which the treaty ought to be carried out, and for that purpose to try to give some element of precision to the rather vague term "good faith". Whether, in particular circumstances, some provision of a treaty ought to be interpreted restrictively or the reverse is a matter of the rules of interpretation; but within those limits it is

[17] For instance, treaties of the social or humanitarian type engage the parties to conform to certain modes of conduct, mainly in the interest and for the benefit of individuals as such, irrespective of nationality, and with no direct material benefit for any of the States parties to the treaty, apart from such as they may indirectly derive from the good will and improvement in international and other relations that may be expected to result from the observance of such treaties. Treaties dealing with human rights afford a very good illustration of this type of treaty.

[18] See, for instance, as an example amongst modern cases, the dictum of the International Court of Justice in the Morocco case (*I.C.J. Reports 1952*, p. 212) when, speaking of the exercise of a certain right under a treaty, the Court said "The power... rests with the... authorities, but it is a power which must be exercised reasonably and in good faith." See also the four-judge minority opinion in the case of Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: *I.C.J. Reports 1948*, pp. 82-93.

[19] It has been suggested (Schwarzenberger, *International Law as applied by International Courts and Tribunals*, vol. 1, 3rd ed. (1957), p. 448) that "treaties may be described as *bonae fidei negotia* as distinct from *stricti juris negotia*". The present Rapporteur also, in a course of lectures delivered at The Hague Academy of International Law in 1957, suggested that a doctrine corresponding to the private law doctrine of action *uberrimae fidei* might be applicable generally in the discharge of international obligations.

always possible for parties to adopt a reasonable and equitable approach to their duty of carrying out the treaty, so as to give it an adequate effect.

18. "... according to the correct interpretation of its terms..." The exact nature of the obligation, of course, always depends on the correct interpretation of the treaty according to its terms. The duty to apply it in good faith, and so as to give it a reasonable and equitable effect, can only exist within the scope of the treaty obligation itself, according to its correct interpretation. What paragraph 2 as a whole means is that the correct interpretation of a treaty having been ascertained, it *then* becomes the duty of the parties to carry it out reasonably, equitably and in good faith, accordingly.

19. *Paragraph 3.* This needs no particular comment. The obligation to carry out a treaty naturally presupposes that there *is* a valid treaty, which has been regularly concluded, is still in force, and which is not vitiated by any element affecting its essential validity; and, in the case of multilateral treaties, that the State concerned is and remains a party to it. Only on those assumptions can there be an obligation to carry out the treaty, because only on those assumptions is there a binding obligation. These matters have of course already been dealt with in chapter 1.

20. *Paragraph 4.* This draws the deduction, so to speak, from the positive aspect of the principle *pacta sunt servanda*, and from the remaining provisions of the article, especially those of paragraph 1. It will be sufficient, by way of comment, to refer to paragraphs 33 to 36 of the commentary to the corresponding provisions in the sections on termination of treaties (article 5 (iii) in the Rapporteur's second (1957) report).

Article 5. Obligatory character of treaties: relationship of obligations to rights

21. This article deals with one or two points which, while basically general, usually arise with reference to multilateral treaties; and *paragraph 1* refers in particular to a point already mentioned in paragraph 14 and footnote 17 above. As there explained, certain kinds of multilateral treaties do not involve direct benefits for *any* of the participating countries. The benefit is of a general character arising from participation in a common cause for the general good. What each party has a right to claim as the counterpart of its own performance of the treaty, is that it shall be duly performed by each of the other parties.

22. *Paragraph 2.* It is considered that as a statement of principle, the provision here suggested must be correct. It was stated in general terms by the International Court of Justice in the case of the Reservations to the Convention on Genocide,[20] when the Court said that none of the parties to an international convention "is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention." Difficulties may nevertheless arise in applying this principle in particular cases. Something was said under this head in connexion with the subject of "renunciation of rights" dealt with in article 15 of part III of chapter 1 of the present Code,[21] to which reference may be made. Clearly, and especially in the case of multilateral treaties, a failure by one or more parties to claim or enforce their rights under a treaty may very much weaken its force, and in practice render it impossible for the other parties to insist upon or obtain its execution. At the same time, it is difficult in principle to deny the right of a party to renounce its rights under a treaty or not to insist upon them. The conclusion must be that paragraph 2 of article 6 would require to be applied with particular regard to the circumstances of each case. Nevertheless, as a statement of principle it appears to be justified.

23. On the other hand, it is necessary to treat as a special case the situation that arises in connexion with multilateral treaties when the provisions of an earlier treaty are or may be affected by those of a later one concluded by some only of the parties to the earlier treaty. Even though the parties to the later treaty still remain technically bound towards those parties to the earlier who are not also parties to the later treaty, the position of these latter parties may be prejudiced in fact, if not in law. This case, to which exceptional considerations apply, in such a way that the later treaty is not necessarily invalidated, is fully dealt with in connexion with the subject of conflicting treaties in article 18 of part II of chapter 1 of the Code and the commentary thereto.[22]

Article 6. Obligatory character of treaties: the principle of the unity and continuity of the State

24. *Paragraph 1.* The first sentence of this article indicates that the treaty obligation always rests upon the State, since it is the State which is the international entity. A State has, however, always to act through agents, such as Heads of State, Governments, Ministers, etc. Provided the agency is a regular one, and the formal method of conclusion involved is one that binds the State in accordance with the provisions of part I of chapter 1 of the present Code,[23] it is immaterial what particular form or method, or what particular agency, is chosen to act on behalf of a State.

25. The principle embodied in the second sentence of the paragraph follows inevitably from the first. Governments are the agents of the State, and if a State is bound, the Government as the agent is obliged to carry out the treaty.

26. "... irrespective of the character of its origin, or of whether it came into power before or after the conclusion of the treaty...". The obligation of a Government, as the agent of a State, to carry out the State's treaty obligations is in no way affected by the fact that the treaty was not actually concluded by that particular Government but by some previous Govern-

[20] *I.C.J. Reports 1951*, p. 21.

[21] Rapporteur's second (1957) report (A/CN.4/107), paras. 82-85 of the commentary.

[22] See the Rapporteur's third (1958) report (A/CN.4/115), commentary, paras. 88-90.

[23] See Rapporteur's first (1956) report (A/CN.4/101).

ment or administration; for the change of Government has in no way affected the continuity of the *State*, and therefore at no point has the treaty obligation been terminated or diminished. Nor does it matter by what means the particular Government concerned has come into power, whether in the ordinary course of events or by some abnormal or "unconstitutional" means. If it purports to be and in fact is the Government of the State, it must carry out the State's international obligations.

27. *Paragraph 2* states certain particular consequences of the general principle enunciated in paragraph 1. It is in relation to these matters that the principle of the unity and continuity of the State comes most frequently into play as respects treaty obligations. With reference to the general principle of the identity and continuity of the State, the following passage from Hall is cited because of its importance with reference to the far-reaching effects (*vide infra, passim*) of the fact that governments are only the agents of the State and not the State itself:[24]

> "It flows necessarily from this principle that internal changes have no influence upon the identity of a State. A community is able to assert its right and to fulfil its duties equally well, whether it is presided over by one dynasty or another, and whether it is clothed with the form of a monarchy or a republic. It is unnecessary that governments, as such, shall have a place in international law, and they are consequently regarded merely as agents through whom the community expresses its will, and who, though duly authorized at a given moment, may be superseded at pleasure. This dissociation of the identity of a State from the continued existence of the particular kind of government which it may happen to possess is not only a necessary consequence of the nature of the state person; it is also essential both to its independence and to the stability of all international relations. If, in altering its constitution, a State were to abrogate its treaties with other countries, those countries in self-defence would place a veto upon change, and would meddle habitually in its internal politics. Conversely, a State would hesitate to bind itself by contracts intended to operate over periods of some length, which might at any moment be rescinded by the accidental results of an act done without reference to them. Even when internal change takes the form of temporary dissolution, so that the State, either from social anarchy or local disruption, is momentarily unable to fulfil its international duties, personal identity remains unaffected; it is only lost when the permanent dissolution of the State is proved by the erection of fresh States, or by the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable."

28. *Sub-paragraph* (a) *of paragraph 2.* No better statement of the *rationale* of this rule could be found than that contained in the commentary to article 24 of the Harvard Draft Convention on Treaties,[25] which gives the following explanation:

> "Forms of government and constitutional arrangements in these days are constantly being changed, and if the enjoyment of treaty rights and the duty of performance were dependent upon the continuance of the *status quo* in respect to the governmental organization or constitutional system of the parties, one State would never be able to count with certainty on rights which have been promised it by another—and promised, it may be, for a period of indefinite duration. If changes in the organization of a State's form of government or modifications of its constitutional system had the effect of terminating or altering its treaty obligations or of rendering them voidable, a State which desired to avoid or reduce its obligations would need only to introduce a change in the organization of its government or alter its constitutional system. If such changes produced that effect, States would hesitate to enter into treaties, because in that case one of the foundations of the treaty system, namely, the permanence of treaties, would cease to exist and treaty obligations would be terminable or impairable at the will of any party."

29. Of course, a particular treaty obligation may, *by reason of its actual subject-matter,* be such that it applies, and can only apply, on the basis that the particular form of government prevailing in the contracting States at the time of the treaty continues. Thus, to quote the Harvard Draft again:[26]

> "...a treaty between two States having the monarchical form of government may provide for the mutual protection of their respective monarchs or relate to matters affecting their royal families or with other matters peculiar to the monarchical form of government."

The Harvard Draft continues:[27]

> "Manifestly, the obligations of such a treaty would necessarily be affected by a transformation of one or both of these States into a republic."

However, as the Harvard Draft goes on to say,[28] such cases are and have always been rare, and no special provision is necessary for them. Furthermore, when they do occur, they are clearly covered by the principles either of impossibility of performance (see below, article 14, and also case (iv) in article 17 of part III of chapter 1 of the present Code[29]), or else by that of the complete failure of the *raison d'être* of the treaty or treaty obligation—a case which, as a ground of termination of a treaty, has already been considered as case (v) in part III of chapter 1 of the Code.[30] In all such cases, the justification for non-performance lies in the

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[24] William Edward Hall, *A Treatise on International Law*, 8th ed., Pearce Higgins, 1924, p. 21.

[25] Harvard Law School, *Research in International Law*, III. *Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29, 1935, p. 1045.

[26] *Ibid.*

[27] *Ibid.*

[28] *Ibid.*, pp. 1045, 1046.

[29] Rapporteur's second (1957) report (A/CN.4/107). For comment, see paras. 98-100 of the commentary in that report.

[30] *Ibid.*, commentary, paras. 101-103.

particular circumstances and in the nature of the treaty, not in any general principle that a change of administration or régime is a ground for non-performance.

30. The Harvard Draft goes on to refer to the quasi-unanimity of the authorities in the above sense and cites a large number of them[31] from which it appears that they are "in complete agreement that, as a general principle, changes in the governmental organization or constitutional system of a country... have no effect on the treaty obligations of States which undergo such changes".[32] It may be of interest to cite some of the more striking passages from these authorities, as given in the Harvard Draft. Thus Vattel, as there quoted, says:[33]

> "Since, therefore, a treaty... relates directly to the body of the State, it continues in force even thought the State should change its republican form of government and should even adopt the monarchical form; for State and Nation are always the same, whatever changes take place in the form of government, and the treaty made with the Nation remains in force as long as the Nation exists."

The same principle was affirmed in Protocol No. 19 of the Conference on Belgian Affairs held in London in 1831:[34]

> "According to this higher principle, treaties do not lose their force by reason of any change in policy... the changes which have taken place in the status of a former State do not authorize it to consider itself released from its previous undertakings."

Similarly, in the Swiss case of Lepeschkin v. Gosweiler,[35] the Swiss Federal Tribunal said:

> "It is a principle of international law, recognized and absolutely uncontested, that the modifications in the form of government and in the internal organization of a State have no effect on its rights and obligations under the general public law; in particular, they do not abolish rights and obligations derived from treaties concluded with other States."

Finally, Moore stated:[36]

> "As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another, cannot alter the relations of the socity to the other members of the family of States as long as the State itself retains its personality. The State remains, although the government may change; and international relations, if they are to have any permanency or stability, can only be established between States, and would rest upon a shifting foundation of sand if accidental forms of government were substituted as their basis..."
>
> "A State subject to periodical changes in the form of its government or in the persons of its rulers has a deeper interest, perhaps, in the maintenance of this doctrine than another more securely rooted in the principles of social order, but it is absolutely necessary to the whole family of States, as the only possible condition of intercourse between nations. If it was not the duty of a State to respect its international obligations, notwithstanding domestic changes, either in the form of the government or in the persons who exercise the governing power, it would be impossible for nations to deal with each other with any assurance that their agreements would be carried into effect, and the consequence would be disastrous on the peace and well-being of the world."

31. *Revolutionary changes of social and political orders.* While there is little difficulty, and an almost complete consensus of opinion as regards "ordinary" or constitutional changes of government, or even "normal", "unconstitutional" changes, it has been maintained in recent times that the same is not the case where the change goes beyond the sort of change of government or régime (whether regular or irregular) that is to be expected as one of the incidents of international life, the possibility of which States may be supposed to have taken into account in entering into treaties. According to this view, the position is different where the change goes beyond this and affects the whole social and political order of the State concerned. A good statement of this view was given by M. Korovin, Professor of International Law in the State University of Moscow, as follows:[37]

> "Every international agreement is the expression of an established social order, with a certain balance of collective interests. So long as this social order endures, such treaties as remain in force, following the principle, *pacta sunt servanda,* must be scrupulously observed. But if in the storm of a social cataclysm one class replaces the other at the helm of the State, for the purpose of reorganization not only of economic ties but the governing principles of internal and external politics, the old agreements, in so far as they reflect the pre-existing order of things, destroyed by the revolution, become null and void. To demand of a people at last freed of the yoke of centuries the payment of debts contracted by their oppressors for the purpose of holding them in slavery would be contrary to those elementary principles of equity which are due all nations in their relations with each other. Thus in this sense the Soviet Doctrine appears to be an extension of the principle of *rebus sic stantibus,* while at the same time limiting its field of application by a single circumstance—the social revolution."

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[31] *Op. cit.*, pp. 1046-1051.

[32] *Ibid.*, p. 1046.

[33] E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains,* vol. I, reproduction of books I and II of 1758 edition (Washington, D.C., Carnegie Institution of Washington, 1916), book II, chap. XII, para. 185.

[34] Jules de Clercq, *British and Foreign State Papers,* vol. 18, p. 780.

[35] *Journal des tribunaux et revue judiciaire,* 1923, p. 582.

[36] John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., United States Government Printing Office, ed. 1898), p. 3552.

[37] "Soviet Treaties and International Law" in *American Journal of International Law,* 1928, p. 763.

Some of the reasoning in this passage is clearly unacceptable. But certain underlying ideas merit serious consideration. Commenting upon it, the Harvard Draft says: [38]

> "It can hardly be denied that there is some foundation for the distinction which the Soviet jurists and the writers on international law cited above make between the effect on treaty obligations of ordinary governmental and constitutional changes, on the one hand, which occur normally in the process of the political and constitutional development of a State, and changes, on the other hand, which are the result of violent revolutions which involve not only an alteration of the governmental organization or constitutional régime of the State but also a complete transformation of the political and even the economic and social organization of the State, and which result in the establishment of a new order of things with which treaties concluded under preceding régimes are wholly or largely incompatible. But like other distinctions in law and political science which may be sound in principle, the lack of precise criteria by which the line of demarcation between the two types of changes can be drawn makes it difficult to lay down a rule which would be just and free from danger but which at the same time would recognize exceptions to the general principle that the obligations of a State are not affected by changes in its governmental organization or constitutional system. See as to this, Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), vol. I, sect. 100."

The last sentence of this passage brings out very well the dangers of admitting an exception to the general rule in order to meet this type of case—dangers which could well be serious for the integrity and continuity of treaties. The Harvard Draft continues: [39]

> "Under these circumstances, it would seem to be the safer course to adopt a rule which enunciates the general principle and to leave States whose governments and constitutional systems have undergone profound and far-reaching transformations, such as those referred to above, which result in a new order of things to which existing treaties are no longer applicable, to seek by negotiation a revision or abrogation of the treaties or to invoke the application of the rule *rebus sic stantibus* as a means of freeing themselves by an orderly and lawful procedure from the obligation of further performance."

The present Rapporteur is content to leave it at that—remarking only that it is somewhat doubtful if the doctrine of *rebus sic stantibus* in any way necessarily applies in such a case, according to the principles laid down in respect of that doctrine in the Rapporteur's second (1957) report.[40] Nevertheless, provided the State concerned is willing, in invoking the doctrine of *rebus sic stantibus*, to submit to the procedures provided by article 23 in part III of chapter 1 of the present Code,[41] it would at least be entitled to argue the case and seek the application of that doctrine.

32. *Sub-paragraph* (b) *of paragraph 2.* The principle of the singleness—that is of the unity and continuity—of the State equally entails that, when a breach of treaty occurs, it is quite immaterial through what agency of the State it takes place, or what particular organ, whether by act of commission or omission, has caused, or is (*on the internal plane*) responsible for the breach. This is a purely domestic matter. Internationally, the result is the same: the treaty has been broken, and the State (which is an indivisible whole internationally) is responsible.

33. The most obvious and frequent application of this principle occurs in the field of legislation and of the acts or failures of the legislature in relation to the implementation of the treaty. This aspect of the matter will be more conveniently considered in connexion with article 7 below, under the head of the supremacy of international law over domestic law. A not less striking application of the rule is afforded by considering the position of the judiciary. As to this, the Harvard Draft says: [42]

> "Under the jurisprudence or practice of many States the courts are obliged to apply, and the executive authorities to enforce, municipal legislation rather than treaty stipulations with which the legislation is inconsistent. If the enactment of legislation of this kind affords no such excuse, the action of the courts of the State which enacted it in upholding its infra-territorial validity, or of the executive authorities in enforcing it, when they are obliged under their own municipal law to do so, does not add anything to the legitimacy of the excuse for non-performance. The municipal law of the State which thus obliges its courts and executive authorities is itself inconsistent with the principle here asserted, namely, the obligation of a State to fulfil its treaty engagements regardless of what its municipal law my require."

Even in the United States, where Congress exercises such a marked influence on treaty implementation, writers of great authority express the same view. Thus Hyde says: [43]

> "It must be clear that, while an American court may deem itself obliged to sustain an Act of Congress, however inconsistent with the terms of an existing treaty, its action in so doing serves to lessen in no degree the contractual obligation of the United States with respect to the other party or parties to the agreement. The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States."

All contrary views are based on the cardinal error of treating the State as a divisible entity for international purposes—an error which the government of the State

[38] *Op. cit.*, p. 1054.

[39] *Ibid.*, p. 1054.

[40] See A/CN.4/107, and in particular articles 21 and 22 together with paras. 141-179 of the commentary in that report.

[41] *Ibid.*, para. 180 of the commentary.

[42] *Op. cit.*, pp. 1035, 1036.

[43] *Ibid.*, p. 1036.

in breach of the treaty not infrequently itself commits. Thus governments have been known to disclaim responsibility on the ground that the breach was not their act, but that of the legislature or judiciary, over which, so they say (and this may be correct internally), they have, constitutionally, no control. Thus, they say, they are not responsible for what has occurred. On the internal plane, this may be true. But internationally, the exact attribution of responsibility internally is a domestic matter, and irrelevant. The responsibility or otherwise of the government as such—i.e., of the executive organ—simply does not arise, for the *State* is responsible. The government may be morally blameless, but it must, as the executive organ, accept responsibility for a failure of the statal system as a whole to carry out treaty obligations incurred, by and on behalf of the State as such. As good a statement as can be found of the error involved by any other view was given by Sir Eric Beckett in the following terms:[44]

> "... this contention is based on an error—an error which consists in attributing international responsibility to the government alone (though the government is merely the executive organ of the entity internationally responsible) instead of attributing it to the State *itself*, which is an entity that comprises the legislative organ, the judicial organ, and even the people, as well as the executive organ, the government."

34. *Sub-paragraph* (c) of *paragraph 2*. It is unnecessary to linger over this rule, which is well recognized, and equally derives from that of the continuing identity of the State which, according to Hall,[45] "is considered to subsist so long as a part of the territory which can be recognized as the essential portion through the preservation of the capital or of the original territorial nucleus, or which represents the State by continuity of government, remains either as an independent residuum or as the core of an enlarged organization". Where identity is completely lost as a result of territorial changes (annexation, merger, division into two or more States, etc.), a case of state succession arises. The treaty obligation may or may not devolve on the new State or States concerned, but that is a matter of the law of state succession which does not affect the principle of the present sub-paragraph.

35. It may of course be that certain territorial changes render the further performance of the treaty literally *impossible*; but, in that case, the legal justification for non-performance would arise from the impossibility itself, not from the territorial change as such, which would merely be the cause of the impossibility.

36. Naturally, if the obligation relates specifically to territory lost as the result of the change, there will, as the sub-paragraph recognizes, no longer be any duty to carry out the obligation. But this is really simply a specific case of impossibility and need only be mentioned for the avoidance of doubts.

Article 7. Obligatory character of treaties: the principle of the supremacy of international law over domestic law

37. *Paragraph 1*. This states the principle in its traditional form in so far as it relates to treaties. In commenting, it is not necessary to go into philosophical issues concerning the precise relationship between international law on the one hand and domestic or national law on the other, or to discuss theories of monism, dualism, etc., especially since, despite the great theoretical divergencies between these doctrines, the practical result of them all, though arrived at by different means, is the same and is as stated in the article.[46]

38. "... take precedence of, and prevail *internationally* ..." The article does not attempt to say that, in the event of a conflict between a treaty obligation and some domestic law, the treaty law will necessarily prevail *on the internal plane,* in the sense that the judge must give effect to the treaty obligation even if this involves contravening some provision of the domestic law which is otherwise binding upon him. The point is that, whatever happens, *the international obligations and responsibilities of the State are not affected.* If the judge in fact applies the treaty, there will be no breach of an international obligation. If he does not, then the responsibility of the State will be entailed, and this will not be affected by the fact that, purely as a matter of domestic law, he was justified in his act, for, in such a case, the domestic law itself is at fault, and responsibility exists on that ground. As to this, see the remarks already made in paragraphs 31 and 33 above.

39. *Paragraph 2*. This and the succeeding paragraph state the main practical deductions to be drawn from the general principle laid down by paragraph 1. The *rationale* of the principle, and of its consequences in the treaty field, was expressed by the United States Secretary of State with reference to the Cutting case, as follows:[47]

> "... if a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfilment of international duties. Such regulations may either exceed or fall short of the requirements of international law and in either case that law furnishes the test of the nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its support."

Attention may also be called, in illustration of the general principle, to the well-known case of the

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[44] "Les questions d'interêt général au point de vue juridique dans la jurisprudence de la Cour permanente de Justice internationale", *Recueil des cours de la Haye*, vol. 39 (1932, I), p. 155. Sir Eric Beckett was Principal Legal Adviser to the Foreign Office, London, 1945-1953.

[45] *Hall, op. cit.* (see footnote 24).

[46] On this subject, see the Rapporteur's lectures given at The Hague Academy of International Law in 1957, sections 41-47 (to be published in due course in the *Recueil des cours*).

[47] *Papers relating to the Foreign Relations of the United States*, 1887, p. 751; Moore, *A Digest of International Law*, vol. 2, 1906, p. 235.

Alabama, in which the fact that United Kingdom legislation was deficient in provisions enabling the Government to prevent unneutral expeditions from being fitted out and leaving the country in time of war (the United Kingdom being neutral), was held not to afford any answer to a charge of a breach of the rules of neutrality.[48] The principle involved was stated as follows in the United States argument in the case:[49]

> "It must be borne in mind, when considering the municipal laws of Great Britain, that, whether effective or deficient, they are but machinery to enable the Government to perform the international duties which they recognize, or which may be incumbent upon it from its position in the family of nations. The obligation of a neutral State to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation; but it can neither create nor destroy it, for it is an obligation resulting directly from international law, which forbids the use of neutral territory for hostile purpose."

40. That the same principle applies not merely to conflicts with ordinary provisions of municipal law, but also to conflicts with provisions of the constitution of the State concerned, was made clear by the Permanent Court of International Justice in the case of the Treatment of Polish Nationals in Danzig, when the Court said:[50]

> "It should... be observed that... according to general principles of law... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent on it under international law or treaties in force... it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig."

The Permanent Court made the same affirmation in regard to municipal law in the Graeco-Bulgarian Communities case, as follows:[51]

> "...it is a generally accepted principle of international law that in relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."

41. "...whether enacted previously or subsequently to the coming into force of the treaty...", "...nor by deficiencies or *lacunae*..." It is obviously immaterial (because the practical result is the same—namely, inability to perform the obligation) whether the conflict arises from some positive provision, *a contrario*, of the local law or constitution; or negatively, by reason of a lack of such enabling provisions as may be required internally for the execution of the treaty; and similarly, whether these conflicts or deficiencies were in existence at the time when the treaty entered into force, or have been created, or have come about, subsequently.

42. "...or special features or peculiarities of the law or constitution..." This is taken from article 23 of the Harvard Draft, and by way of comment reference may be made to the discussion on pages 1039 to 1044 of the relevant volume.[52] The case is there considered mainly with reference to the special features of federal constitutions; but clearly the principle is of general application. The authors of the Harvard Draft evidently took the view that, although under a given federal constitution certain powers may be reserved to the component states of the Federation, so that the federal government cannot intervene in the matters thus regulated, this would not absolve the Federation from responsibility for a failure to carry out a treaty or other international obligation. In the last resort, the constitution can be amended, and, if it is not, the State must abide by the international consequences of an inherent inability to carry out its international obligations in certain respects. However, most federal constitutions vest in the federal authority the power to conduct the foreign relations of the State. This power involves a right for the federal legislature to legislate in such manner as may be required to control the action of the various component states (or withdraw from them certain powers) in relation to foreign affairs. Thus the Harvard Draft, citing a number of United States authorities, says[53] that

> "...if, as a result of the governmental organization of a State, the execution of its treaty obligations is dependent in part upon the action of the local governments and it is within the power of the national government to remedy this situation by withdrawing from the local governments the authority which they have in respect to the execution of treaties and transferring it to the national government, and if it refuses to do this, it should likewise bear the responsibility for the non-performance of any treaty obligations which may result therefrom. This appears to have been admitted by Presidents Harrison, McKinley, and Roosevelt, who urged Congress to enact legislation of this kind which would enable the United States to enforce more effectively its treaty obligations in respect to the treatment of aliens."

By way of illustration, two cases are cited:[54]

> "Switzerland acted on this principle when, after becoming a party to the Paris Convention of March 20, 1883, for the protection of industrial property, a matter to which the legislative competence of the Confederation did not extend, Article 64 of the Swiss Federal Constitution was amended to bring

[48] This case led directly to the passing of the so-called "Foreign Enlistment Act", 1870, in the United Kingdom, in order to prevent any such occurrence in the future.

[49] *Papers relating to the Treaty of Washington, Geneva Arbitration*, 1872, p. 47.

[50] Publicactions of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinons*, series A/B, No. 44, p. 24.

[51] *Ibid.*, series B, No. 17, p. 32.

[52] See footnote 15.

[53] *Ibid.*, p. 1043.

[54] *Ibid.*, pp. 1043, 1044.

the protection of industrial property within the competence of the national government and thus enable the State to execute the stipulations of the treaty... It may be assumed that the Congress of the United States acted on the same principle when, by the Act of August 29, 1842, passed as a result of the McLeod affair, it extended the jurisdiction of the federal courts to cover such cases, and thus removed the possibility of future conflicts with foreign countries arising out of incidents over which the local rather than the national courts formerly had jurisdiction."

43. *Paragraph 3.* This paragraph has been inserted because of the recent decision of the International Court of Justice in the Guardianship of Infants case (Netherlands v. Sweden)[55] which, although it certainly cannot have been intended by the Court to throw doubt on the principle of the prevalence of treaty obligations over domestic law provisions, appears to have implications dangerous to that principle, as was cogently brought out in the (on this point) dissenting views expressed by Sir Hersch Lauterpacht. Without attempting to go into all the facts of this case, the question it raises may be stated as follows. There may exist a treaty between two States about subject-matter (A)—e.g., "Guardianship of Infants", where the infant is a national of one of the parties resident in the territory of the other—and the specific laws of the parties respecting the guardianship of infants as such may be in perfect conformity with the treaty. However, there may be a law on another subject (B), which is technically distinct from (A) —e.g., "Child Welfare", "Protection of Young People" etc.—and the provisions of this law may be such that if applied they will, or may, result in consequences contrary to those apparently contemplated by the treaty. In such a case, the defendant party may seek to justify its action on the ground that the treaty cannot have been intended to prejudice the operation of general laws not directly concerned with the subject-matter of the treaty, and having a different primary object. In the Guardianship of Infants case before the International Court of Justice, this type of contention resulted in custody of the person of a minor, which (as the relevant treaty *prima facie* required) would, on "guardianship" grounds, have been conferred on a certain person, being conferred on someone else, on "child welfare" grounds.

44. It is clear that all such cases must depend very much on their own facts, and also on the interpretation of the particular treaty involved; and the Rapporteur is not concerned here to question the correctness of the decision of the Court as such, which, as the separate opinions showed, could also be based or explained on other grounds (see below, paras. 47 and 48; also footnotes 56 and 62). This type of contention nevertheless has disquieting implications. No doubt, in theory, a distinction can be drawn between, on the one hand, the case where a State clearly evades the application of a treaty by relying on provisions of its legislation that ostensibly relate to another subject, but nevertheless lead to non-performance of the treaty; and, on the other hand, cases where the treaty itself can be interpreted as having been intended by the parties only to prevent (or compel) some particular action, on certain specific grounds—but not necessarily on others, if applicable. But the distinction is nevertheless a fine one, which in many cases it will be difficult to draw clearly or satisfactorily.

45. In his separate (but, on the main issue, concurrent)[56] opinion, Sir Hersch Lauterpacht stated the question as follows:[57]

"If a State enacts and applies legislation which, in effect, renders the treaty wholly or partly inoperative, can such legislation be deemed not to constitute a violation of the treaty for the reason that the legislation in question covers a subject-matter different from that covered by the treaty, that it is concerned with a different institution, and that it pursues a different purpose?"

Sir Hersch went on to point out that the difficulty was increased by the fact that the conflict between the treaty and the legislation in question may be concealed, or may be "made to be concealed", by what might be "no more than a doctrinal or legislative difference of classification"; and he drew attention to the fact that an "identical provision which in the law of one country forms part of a law for the protection of children may, in another..., be included within the provisions relating to guardianship". "That," he said, "as will be seen, is no mere theoretical possibility."[58] He refused to admit that a valid distinction could be based on the mere fact that the treaty and the law had different objects, if in practice the substance was the same, and added that when a State concludes a treaty "it is entitled to expect that that treaty will not be mutilated or destroyed by legislative or other measures which pursue a different object but which, in effect, render impossible the operation of the treaty or of part thereof".[59] The correct view was, therefore, so he thought, that a treaty must be held to cover "every law and every provision of a law which impairs, which interferes with, the operation of the treaty".[60]

46. In giving practical illustrations of what might occur, Sir Hersch Lauterpacht said:[61]

"The following example will illustrate the problem and the consequences involved: States often conclude treaties of commerce and establishment providing for a measure of protection from restrictions with regard to importation or export of goods, admission and residence of aliens, their right to inherit property, functions of consuls, and the like. What is the position of a State which has concluded a treaty of that type and then finds that the other party

[55] *I.C.J. Reports 1958*, p. 55.

[56] Sir Hersch concurred in the *dispositif* of the decision, namely, the rejection of the Netherlands claim; but he did so on the *ordre public* point mentioned below (see paras. 48 and 115) which the parties had treated as the main issue in the case, although the Court itself thought it unnecessary to pronounce on it.

[57] *I.C.J. Reports 1958*, p. 80.

[58] *Ibid.*, pp. 80, 81.

[59] *Ibid.*, p. 81.

[60] *Ibid.*

[61] *Ibid.*, pp. 81, 82.

whittles down, or renders inoperative, one after another, the provisions of that treaty by enacting laws 'having a different subject-matter' such as reducing unemployment, social welfare, promotion of native craft and industry, protection of public morals in relation to admission of aliens, racial segregation, reform of civil procedure involving the abolition of customary rights of consular representation, reform of the civil code involving a change of inheritance laws in a way affecting the right of inheritance by aliens, a general law codifying the law relating to the jurisdiction of courts and involving the abolition of immunities, granted by the treaty, of public vessels engaged in commerce, or any other laws 'pursuing different objects'? It makes little or no difference to the other party that the treaty has become a dead letter as the result of laws which have so obviously affected its substance, but which pursue a different object." [62]

Sir Hersch eventually went on to make the following general statements of principle: [63]

"A State is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty. There is a disadvantage in accepting a principle of interpretation, coined for the purposes of a particular case, which, if acted upon generally, is bound to have serious repercussions on the authority of treaties."

"...

"Once we begin to base the interpretation of treaties on conceptual distinctions between actually conflicting legal rules lying on different planes and for that reason not being, somehow, inconsistent, it may be difficult to set a limit to the effects of these operations in the sphere of logic and classification."

47. It is on the views thus expressed by Sir Hersch Lauterpacht in this case that the Rapporteur has based paragraph 3 of article 7 of this section. As far as the principle of the thing goes, these views seem clearly correct. This is not to say that there may not be cases where, on the interpretation of the particular treaty, it appears that it did not purport to limit the freedom of action of the parties in certain respects, despite the fact that in some cases this could have consequences different from what would have resulted from the strict application of the treaty if no other considerations had existed. This indeed seems to have been the real basis on which the majority of the Court reached their conclusion.) [64] What is inadmissible is the *general proposition* that to recall Sir Hersch's language (see paragraph 46 above)—a State is entitled "to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty".

48. Equally, there may be cases, or classes of treaties, where international law or custom implies a condition in the treaty, of such a nature as even to allow, on certain grounds, action that would otherwise be contrary to its *express terms*. The exception of *ordre public*, inherently to be implied in treaties dealing with private international law topics (on which a number of individual opinions in the Guardianship of Infants case—though not the decision of the Court itself—were based), is a case in point; and other cases are considered below in connexion with article 23. But this again is quite a different matter from a proposition of a general character permitting non-performance of a treaty merely because such non-performance can be based on the application of a law which, as a matter of classification, relates to some other field or institution.

Article 8. Obligatory character of treaties: the case of conflicting treaty obligations

49. *Paragraphs 1 and 2.* In principle, a State which becomes a party to two treaties that are in mutual conflict is nevertheless bound by both of them. This does not mean to say that it can in practice carry both of them out, but that it incurs international responsibility for the failure to perform whichever of them is not carried out. Which this is to be depends on considerations discussed in an earlier report.[65] Assuming (for otherwise there is no real conflict) that the two treaties were concluded with two different parties, then, for each of these two parties, the other treaty is *res inter alios acta*, and each of these parties is, by reason of the principle *pacta tertiis nec nocent nec prosunt*, entitled to insist on the due performance of the particular treaty concluded with itself, or on reparation for any failure to do so. It should perhaps be added that the Rapporteur has not felt it necessary to say any more here about the "effect" of a later treaty or treaty obligation on an earlier one than has already been said in his second and third reports, for two reasons. In the first place, the matter is primarily one of the interpretation of the two treaties or treaty obligations concerned. Secondly (apart of course from the cases coming within the scope of the

[62] Sir Hersch here pointed out that some of the laws he had just mentioned might be of such a nature as to come within the scope of certain exceptions always implied in treaties or in some classes of treaties—a matter considered below in connexion with article 23 of the present draft; but, he said, "the argument here summarized does not proceed on these lines. It is based on the allegation of a difference between the treaty and the law which impedes its operation".

[63] *I.C.J. Reports 1958*, p. 83.

[64] See the Court's final conclusion reading as follows (*I.C.J. Reports 1958*, p. 71):

"It thus seems to the Court that, in spite of their points of contact and in spite, indeed, of the encroachments revealed in practice, the 1902 Convention on the guardianship of infants does not include within its scope the matter of the protection of children and of young persons as understood by the Swedish Law of June 6th, 1924. The 1902 Convention cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly the Court does not in the present case find any failure to observe that Convention on the part of Sweden."

[65] See the Rapporteur's third (1958) report (A/CN.4/115), articles 18 and 19 and commentary thereto.

present article), either the later obligation terminates the earlier (whether by actual cancellation or by replacing it with an amended version), or the existence of the earlier one has the effect of invalidating the later. These aspects of the effects of treaties on one another are therefore, or should be, fully covered by the sections on termination and essential validity. Where, on the other hand, neither of the two treaties or treaty obligations is either terminated or invalidated by the other, but yet they conflict, then and only then will the situation contemplated by the present article arise.

50. *Paragraph 2. Sub-paragraphs* (a) *and* (b) require no comment beyond what has already been made in an earlier report.[66] Strictly, in neither case is there any true conflict. In the one, the parties have by their own action eliminated one of the two sets of obligations concerned; and in the other, one set of obligations is rendered null and void.

51. *Sub-paragraph* (c) *of paragraph 3.* Article 103 of the Charter of the United Nations provides that "in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under *any other* international agreement, their obligations under the Charter are to prevail." Since all Members of the United Nations, whether in relation to pre-existing or to subsequent treaties, have become Members on this basis, it must be assumed that they have also accepted the fact that if any treaty obligations owed to them by other Members conflict with the obligations of those Members under the Charter, the latter will prevail—with the result that performance of the treaty cannot be claimed, and no responsibility will be incurred *vis-à-vis* another Member State of the United Nations in respect of such non-performance.

52. In respect of non-member States, on the other hand, the position cannot be quite the same. It is clear that for the Member State, its Charter obligations will duly prevail over those of any other treaty, even though the other party to the treaty is not a Member of the United Nations. It is less easy, however, to hold that, in such circumstances, the Member State incurs no responsibility at all for the breach of the treaty, and that the non-member State, party to the treaty, has no valid international claim. On the basis of the principle *res inter alios acta* and *pacta tertiis nec nocent nec prosunt,* this provision of the Charter cannot be a ground *vis-à-vis* a non-member State for violating a treaty with such a State. The Charter obligation may prevail in the sense that the other treaty cannot be carried out because of the Charter obligation and of Article 103; but it would seem that the Member State will nevertheless be under an obligation to make due reparation to the non-member for the breach involved.[67]

SUB-SECTION ii. LIMITS OF THE TREATY OBLIGATION (CIRCUMSTANCES JUSTIFYING NON-PERFORMANCE)

53. The extent of the treaty obligation is not unlimited, nor does the obligation prevail in all circumstances. The object of this sub-section is to group together a statement of those circumstances in which non-performance of a treaty obligation would, in principle, be justified. This is considered under three heads:

(*a*) General principles and classification;

(*b*) Non-performance justified on general grounds of law;

(*c*) Non-performance justified by virtue of a term or condition implied by law in the treaty.

RUBRIC (*a*). GENERAL PRINCIPLES AND CLASSIFICATION

Article 9. General definition of non-performance justified by operation of law

54. The point sought to be brought out in this article is that the grounds of non-performance mentioned in the present sub-section do not derive from (and therefore they necessarily operate independently of) any specific term of the treaty. It goes without saying that, if the treaty itself provides certain grounds of non-performance or permits of non-performance in certain circumstances, then non-performance on those grounds or in those circumstances will be justified; but that is a matter of the interpretation of the treaty, and not therefore within the scope of the present chapter.

Article 10. Scope of the present sub-section

55. The object of this article is to make it clear that the case dealt with in the present sub-section, though a related one, is distinct from that of the grounds upon which, by operation of law, a treaty as such, or a particular part of it, can be regarded as wholly terminated or indefinitely suspended. The latter case has been considered elsewhere.[68] The present sub-section assumes that the treaty itself remains in force, and considers the circumstances in which, despite this fact, its non-performance, either in whole or in part, may become justified. Consequently, whereas in the report on the termination of treaties (Rapporteur's second (1957) report) the grounds of termination there considered looked towards a permanent or semi-permanent outcome—namely, complete termination, or at least indefinite suspension, of the treaty, either as a whole or as regards some particular obligation under it—the present sub-section has in view mainly non-performances of a temporary or *ad hoc* character which, so far from having any element of permanence, look forward to a *resumption* of performance so soon as the occasion that justified the non-performance is past. It is in this that the real difference between the subject of "grounds of non-performance" and that of "grounds of termination" lies, and which calls for their separate treatment, despite the close analogy between them.

56. Notwithstanding these considerations, the Rapporteur has thought it desirable to include two cases in which, in the nature of things, the non-performance will

[66] *Ibid.*

[67] See the similar conclusion reached in paragraph 85 of the commentary in the Rapporteur's third (1958) report (A/CN.4/115).

[68] See the Rapporteur's second (1957) report (A/CN.4/107), articles 16-23 and commentary thereon.

be permanent and for all practical purposes the obligation will terminate or lapse (subject in one case to the rules of state succession). These cases form the subject of articles 21 and 22 below. They have already figured in the sections on termination (see footnote 68 hereto), although in one case perhaps not quite adequately. They are re-introduced here in order to take the opportunity of distinguishing them from the superficially similar cases arising with reference to the subject of Essential Validity which was considered in the Rapporteur's third (1958) report.[69] As to this, see below in the commentary to articles 21 and 22. (Some rearrangement of all this may eventually be desirable.)

57. Article 23, on the other hand, which may also give rise to semi-permanent situations of non-performance, involves considerations of a different order, and had to be included in the present sub-section.

Article 11. Classification

58. This article attempts to give a general statement, under main heads, of the circumstances in which non-performance of a treaty obligation may be justified. *Paragraph 1* is little more than a restatement in more analytical form of article 9, the commentary to which is contained in paragraph 54 above.

59. *Paragraph 2.* There is a certain ambiguity in the division in this paragraph between justifications for non-performance operating *ab extra* and *ab intra* the treaty. Strictly, both operate *ab extra,* inasmuch as neither derives from any specific *term of the treaty* permitting non-performance, or even from a term of the treaty which can be read by implication as permitting non-performance. The grounds in question are either general legal grounds justifying non-performance having nothing at all to do with the treaty, or else they can consist of conditions which, by general operation of law, are to be read into the treaty, even though they are not expressed or even implied by any actual term of it. All these grounds are considered under rubric (*b*) of the present sub-section.

Article 12. Certain general considerations applicable in all cases where a right of non-performance by operation of law is invoked

60. Whatever the ground of non-performance, and however it may arise, assuming it to be a ground provided for in the present sub-section, certain common considerations will govern its operation.

Paragraph 1. This paragraph is self-explanatory. Obviously no ground of non-performance, however much otherwise justified by general considerations of law, can be invoked if specifically excluded by the treaty itself. Moreover, just as in the case of war, some treaties are specifically concluded with a view to application in time of war or hostilities (Hague, Geneva Conventions, etc.)—and therefore obviously do *not* fall under what might otherwise be the terminative or suspensory effect of war on treaties—so equally may some treaty obligations be specifically intended to apply to some of the situations contemplated in the present sub-section.

61. *Paragraph 2.* Some grounds of non-performance, such as impossibility of performance, do not involve any choice; but in most cases, they involve circumstances affording a *faculty* of non-performance to the party concerned, and that party can elect whether to exercise this faculty or not. This being so, it would seem that such party must exercise the faculty within a reasonable time. If it does not do so, it will be taken to have accepted the situation that originally gave rise to the faculty as being one that does not affect its obligation to continue performance of the treaty in full. Naturally, this principle cannot be invoked by any other party to the treaty not itself performing its obligations under the treaty.

62. *Paragraph 3.* The principle involved here is the same, *mutatis mutandis,* as the one already discussed in an earlier report in relation to the grounds for the termination of treaties. For comment reference may be made to the Rapporteur's second (1957) report (A/CN.4/107), paragraph 91 of the commentary.

63. "...(unless this act or omission was both necessary and legally justified)...". This deals with a rather difficult point, perhaps not altogether satisfactorily handled in the earlier report referred to. Some contributory acts might involve no illegality, yet be unnecessary and such as could have been avoided. *Per contra* no *illegal* act can be said to be "necessary". Therefore, only if the contributory act (where it exists) can be shown to have been both lawful *and* necessary, will it not preclude the party concerned from invoking the relevant ground of non-performance.

64. *Paragraph 4.* It is sufficient to refer to the commentary to article 16, paragraph 5, in the Rapporteur's second (1957) report (A/CN.4/107, para. 92 of the commentary).

RUBRIC (*b*). NON-PERFORMANCE JUSTIFIED *ab extra* BY OPERATION OF A GENERAL RULE OF INTERNATIONAL LAW

Article 13. Acceptance of non-performance by the other party or parties

65. This article and articles 14 to 19, inclusive, deal with the grounds of non-performance based on general legal considerations and having no reference to the particular treaty. Article 13 itself requires no explanation, since it is obvious that, even if a non-performance is not intially justified, its acceptance by the other party or parties concerned will suffice to legitimize it. As is stated in paragraph 2, however, to have this effect the acceptance must be clear and unmistakable, and must indicate that the other party does more than merely tolerate the non-performance in the sense of not seeking any redress for it and not taking counter-action or having recourse to any available remedies. All these things can occur without the other party having in any way given its consent to the non-performance. There must consequently be such an acceptance as amounts to an agreement by the other party that performance shall not take place.

[69] See footnote 22.

Article 14. Impossibility of performance

66. *Paragraphs 1 and 2.* In connexion with these paragraphs, it will be sufficient *mutatis mutandis* to refer to paragraphs 98 to 100 of the commentary to the Rapporteur's second report, dealing with the case of impossibility as a ground for the termination of a treaty, except of course that, *ex hypothesi,* the requirement of the permanent and irremediable character of the impossibility —necessary as a ground of termination—will not apply in the present case.

67. "Temporary or *ad hoc* impossibility of performance..." A permanent impossibility would of course bring the treaty or the particular obligation to an end altogether. The case here contemplated is therefore necessarily that of a temporary impossibility justifying non-performance for the time being. This really applies to all the grounds of non-performance considered in this report—at least to all those coming under rubric (*a*) of the present sub-section (see paras. 55-57 above). The point (which, though made with reference to the question of *force majeure* (i.e., impossibility), really applies in respect of all the grounds of non-performance considered in the present rubric), is well brought out in the following passage from Rousseau: [70]

> "The causes for the lapse of treaties should not be confused with *force majeure,* which may create an obstacle to the performance of a treaty. This distinction is made both in theory and in conventional law. On the one hand, Professor Scelle clearly distinguishes impossibility of fulfilment from desuetude *(Précis,* II, p. 419). On the other hand, the convention on treaties adopted at Havana on 20 February 1928 by the Sixth International Conference of American States deals in two separate articles with *force majeure* (art. 14) and the *rebus sic stantibus* clause (art. 15).
>
> "In international law, the effect of *force majeure* will be to exonerate a State from the responsibility which would normally devolve upon it for non-performance of a treaty. When the *force majeure* disappears, the obligation of performance will reappear, this being proof that the treaty subsists."

68. *Paragraph 3.* The reasons for this paragraph arise out of the very nature of the plea of *rebus sic stantibus.* It is obvious that this plea is never likely (and certainly ought not) to be raised, in respect of any provision of a treaty that is not fundamental to the treaty. It follows that, if there are valid grounds for the plea of *rebus sic stantibus* at all, they will be grounds for terminating the treaty altogether. The principle that the plea of *rebus sic stantibus* can only be put forward on a basis fundament to the continuation in force of the treaty has already been fully brought out and discussed in relation to articles 21 to 23 of part III of chapter 1 of the Code.[71] Change of circumstances having reference to a treaty obligation which is *not fundamental to the treaty* in question, can hardly itself be a fundamental change of circumstances of the kind required for the application of the principle of *rebus sic stantibus*; and it must be concluded therefore that that principle has no application to the case of the non-performance of a particular treaty obligation except in those cases where the obligation is fundamental, so that the principle *rebus sic stantibus,* if applicable at all, would tend towards the termination of the treaty. It is no doubt true that minor obligations may become obsolete. Their termination or justified non-performance may occur through acquiescence or desuetude, and it seems unnecessary to provide specially for such cases.

69. The Rapporteur has also considered whether what figured as case (v) in article 17 of the sections on termination of treaties,[72] namely, complete disapperance of the *raison d'être* of the treaty or treaty obligation, ought to figure in the present sub-section also. It is of course perfectly possible that a treaty as a whole remains in force, but that certain of its provisions have become obsolescent or inapplicable. An example of the kind of case involved might be that already considered above in another connexion, in paragraph 29 of this commentary—i.e., where there are in a treaty certain provisions based on the existence of a monarchical system of government for the parties, but they have subsequently become republics. However, it would seem that such cases would normally both be covered by the principle of impossibility of performance, and, in any event, would involve the total extinction or termination of the obligation concerned rather than any mere non-performance as such, so that the question of simple non-performance would not arise or be relevant. It does not therefore seem necessary to deal with this case in the present context.

Article 15. Legitimate military self-defence

70. The case here contemplated, namely, that of the temporary non-performance of a particular treaty obligation on grounds of legitimate military self-defence, is distinct from the case of the termination or suspension of a treaty as a whole by reason of war or hostilities, which falls to be dealt with as a separate matter.[73] War does not necessarily terminate or suspend all treaties or treaty obligations, but when it does do so, it effects either a complete termination or a suspension for the duration of the hostilities. What is contemplated in the present context is the case of a specific and more or less *ad hoc* non-performance of some particular obligation of an otherwise still subsisting treaty, on the ground of legitimate self-defence. The present case therefore assumes that the treaty remains in full force and, in principle, fully operative, and merely considers the circumstances in which, on grounds of legitimate self-defence, it may be permissible not to perform for the time being a particular obligation of the treaty, or possibly all the obligations of the treaty. It should perhaps also be mentioned that the case is, in principle, also distinct from that of impossibility of performance, although in practice impossibility might in fact well exist.

71. *Paragraph 1.* The Rapporteur does not consider that so-called "necessity", sometimes suggested as a general ground justifying non-performance of treaty

[70] Charles Rousseau, *Principes généraux du droit international public* (Paris, Editions A. Pédone, 1944), vol. I, p. 365.

[71] See A/CN.4/107, paras. 141-180 of the commentary.

[72] *Ibid.*, paras. 101-103 of the commentary.

[73] *Ibid.*, para. 106 of the commentary.

obligations, can (considered as a category) be regarded as being a valid ground of non-performance. To put the matter differently, *the only kind of necessity which entails that justification* is legitimate military self-defence. Again, the term "military" has been used advisedly in order to exclude other contexts in which the term "self-defence" has recently come to be used, such as "economic self-defence" or "ideological self-defence". Certain of these factors might be grounds upon which a party might seek to avail itself of any legitimate method of bringing the treaty to an end, or, in some cases, they might give rise to a situation of impossibility of performance, or of the application of the doctrine of *rebus sic stantibus*, which might cause or justify the termination of the treaty in accordance with principles set out in a previous report; but so long as the treaty subsists, they are not, in general, grounds for failing to perform its obligations. The case of military self-defence is different in principle, provided that the conditions specified by *sub-paragraphs (a) to (d)* are fulfilled.

72. These conditions are self-explanatory. The one contained in *sub-paragraph (b)* is necessary in order to avoid a pretext for the non-performance of treaty obligations in the course of an operation that does not properly consist of military self-defence being made.

73. *Paragraph 2* is self-explanatory. This, as already indicated in connexion with articles 10 and 14 (paras. 55-57 and 66-69 above), is of the essence of the type of non-performance not affecting the basic continuance of the obligation, which is contemplated in this part of the Code.

74. *Paragraph 3* is the corollary of paragraph 2 (*a*). Apart from the exception mentioned, it would seem that a mere threat, that may or may not materialize, is not a sufficient justification, and that nothing but acual operations, or an obvious and imminent threat of them ("in motion" so to speak) will justify non-performance of the obligation on this ground.

75. It should perhaps be mentioned here that the case chiefly contemplated by this article is where the other party to the treaty is not itself the author of, or concerned in, the military operations that have given rise to the need for non-performance. If the other party should be in that position, it would then become very probable that justification for non-performance would exist not merely on this but on certain of the other grounds mentioned in the sub-section (e.g., reprisals). Alternatively, the case is likely to come within the scope of the rules about the effect of "war" (including hostilities) on treaties—see paragraph 70 above, and footnote 73.

Article 16. Civil disturbances

76. This article requires no detailed comment beyond what has been furnished in connexion with article 15. Something must be said, however, about the principle involved. Little is contained in most of the authorities; but the [case is] recognized in Lord McNair's work on treaties,[74] in which a number of opinions of the Law Officers of the Crown in England are quoted in illustration of it (as indeed also of the general principle of article 15 above). Thus, in an opinion given by the King's Advocate[75] (the well-known Court of Admiralty jurist and internationalist, John Dodson), dated 6 February 1835, the following view was expressed:[76]

> "I must take leave, however, to add that under the special circumstances of a disputed succession to the Throne, and an internal Civil War, Spain may possibly be justified, by a necessary attention to her own security and preservation, in making prohibitory municipal regulations applicable to British Vessels in common with those of all other Foreign Friendly Nations, but which in case of certain Ports should not apply to her own vessels, since no Nation is bound to abide by a Treaty of Commerce under circumstances which render an adherence to it inconsistent with its own security."

In a footnote to this passage, Lord McNair expresses doubts about some of the possible implications of this view, as follows:[77]

> "This language comes dangerously near that which is used by some writers stating the *rebus sic stantibus* doctrine. But the temporary suspension of a commercial treaty in order to cope with a rebellion belongs to a different order of ideas."

The present Rapporteur also would query the reference to "security" at the end of Dodson's opinion. Clearly, what was involved (it being only a civil war) was not the security of the State as such (the international entity and party to the treaty), but that of the Government, or of a particular régime. It is therefore scarcely on this that any right of non-performance of an otherwise applicable treaty can be founded. Lord McNair founds it on the idea of an implied condition which international law reads into all treaties, so as to cover this kind of case (i.e., he would place the case in effect amongst those covered by rubric (*b*) of the present sub-section). It can certainly be viewed in that light; but the Rapporteur feels there are grounds for giving this exception a more objective status, as an independent rule of law rather than as a condition implied by law (in the treaty). The case is closely analogous to that of self-defence (article 15 above). A government is not the

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[74] Arnold Duncan McNair, *British practice and opinions* (Oxford, Clarendon Press, 1938).

[75] The King's (or Queen's) Advocate in England was a member of an institution known as "Doctors' Commons", the members of which were trained (and were doctors) in the civil rather than the common law. They were usually known as "the civilians" or "the doctors". Their special field was canon law, succession, and maritime and international law. Doctors' Commons was founded in the 16th century, and continued until it was abolished by Act of Parliament in 1857, its functions having then been integrated in the general legal system of the country. In the preface to his *International Law Opinions* (Cambridge, 1956, 3 vols.), and in his address to the Grotius Society, "The Debt of International Law in Britain to the Civil Law and the Civilians" (*Transactions of the Grotius Society*, vol. 39, 1953), Lord McNair has shown the extent of the recourse which, over several centuries, the Crown and its executive advisers had to Doctors' Commons for advice on international law questions.

[76] McNair, *op. cit.*, p. 236.

[77] *Ibid.*

State; but, if it is the legitimate government, it represents the State and alone has the right to do so. It has a right to maintain itself against unconstitutional attempts to overthrow it, and no government can govern without the right—and as of right—to deal with riots and civil disturbances. If therefore it proves unavoidable for the exercise of these rights, then treaty obligations must, it is conceived, temporarily (though only temporarily) and subject, *mutatis mutandis,* to the same conditions as are mentioned in article 15, take second place.

Article 17. Certain other emergency conditions

77. *Paragraphs 1 and 2.* Although, as already stated, the Rapporteur does not consider that any general doctrine of "necessity" can be included amongst the grounds justifying non-performance of a treaty obligation, it is generally considered that, in addition to the cases specified in articles 15 and 16, major emergencies arising from natural causes (or, in English legal terminology, from "acts of God") such as storm damage, earthquakes, volcanic eruptions, etc., may justify non-performance of a treaty obligation. In some of these cases a situation of impossibility, either permanent or temporary, may arise, and in all of them a situation of near impossibility, actual or moral, must exist in order to justify non-performance. *Paragraph 2* is intended to afford the necessary tests.

78. This case also is considered by Lord McNair,[78] who quotes an opinion given by Lord Phillimore (then Sir Robert Phillimore) as Queen's Advocate, dated 29 August 1866, with regard to a prohibition of the export of cereals, under famine conditions, from the (at that time) Turkish principalities of Moldavia and Wallachia. The opinion stated:[79]

> "That a Treaty of Commerce, such as that between Her Majesty and the Sultan (signed at Kanlidja 29th April, 1861), does not prevent one of the contracting States from prohibiting, in time of famine, the exportation of native produce necessary for the sustenance of the people—is a proposition of International Law, which may be said to be well established by the reason of the thing, and by the usage of States (Vattel L.2; c.12; s.179). Such a dearth appears, according to the letter of Mr. Consul Green (Bucharest 13th August, No. 24) actually to exist in these Principalities, so far as the Cereals, Maize, Barley, and Millet are concerned; upon the first of which crops the food of the people is said mainly to depend.
>
> Assuming this to be the true state of the case, I am of opinion that it was competent to the Government of these Principalities to prohibit, during the continuance of this dearth, the exportation of these Cereals. I am further of opinion that Her Majesty's Government cannot be advised to claim, as a matter of right, that Contracts for these Cereals made by British Merchants with Traders in the Principalities, previously to the issue of the order, shall be exempted from its operation, and that grain, thus already contracted for, shall be allowed to be exported."[80]

A somewhat similar opinion regarding a prohibition on the import of cattle, on grounds of public health, is also cited by Lord McNair as an illustration of the same principle. The present Rapporteur has, however, preferred to deal with this as a case illustrating the principle embodied in article 23, *sub-paragraph (c)* of this subsection. The right to apply a country's normal quarantine regulations, despite what might appear to be the conflicting terms of a commercial treaty, has come to be regarded as an implied exception or condition to be read into commercial treaties as a class; whereas the case of emergency, due to famine conditions, seems rather to turn on objective principles of law outside the treaty. But no doubt the distinction may be a fine one.

79. *Paragraph 3* requires no comment.

80. *Paragraph 4* is intended to emphasize the fact that, despite the circumstances, mere difficulty in the performance of the treaty obligation is not in itself a ground justifying non-performance.

Article 17A. Previous non-performance by another party

81. The reasons why no article dealing with this matter is included at this point in rubric (*b*) of the present sub-section are given in paragraph 102 below in connexion with article 20 in rubric (*c*), which contains provisions on the subject.

Article 18. Non-performance by way of legitimate reprisals

82. *Paragraph 1.* This article involves an issue of considerable difficulty. Before discussing it, and in order to clear the ground, it should be mentioned that, as the opening paragraph of the article states, the case contemplated is not that of the application of the simple reciprocity condition normally to be read into all treaties, except such as fall within certain special categories,[81] and by reason of which if one party fails to carry out a treaty obligation of the "reciprocal" or "interdependent" type,[82] the other party is *pro tanto* absolved likewise from doing so in relation to that party—or, at any rate, the first party will have no legal ground of complaint if this consequence results from its own prior non-observance of the treaty. This case is covered by article 20 of this sub-section. It can of course also be regarded as a case of "reprisals", which in a certain sense it is. The right involved seems, however, to spring much less from the general international law principle of reprisals as such, and much more directly from the normal requirement of reciprocity implicit in the treaty relationship, and implied by law in all treaties involving reciprocal or mutually interdependent rights and obligations. Therefore, it seems best to deal with it

[78] *Op. cit.* in footnote 74.

[79] McNair, *op. cit.*, p. 240.

[80] Sir Robert Phillimore went on to say that compensation might be due in the latter class of case.

[81] See paragraph 3 (*e*) of article 18.

[82] These terms are explained in article 19, and the commentary thereto, in the Rapporteur's second (1957) report (A/CN.4/107).

in that way, leaving those cases that would not be covered by the reciprocity rule to be dealt with on a basis of reprisals.

83. "... where [the application of the reciprocity rule] ... would not afford an adequate remedy, or would be impracticable ..." Action on a "reciprocity" basis is only possible and effective in certain kinds of cases. It applies mainly in cases where the breach of treaty is negative in character, i.e., involves a simple non-performance of some requirement of the treaty. Thus, if State A withholds from State B certain mutual tariff concessions provided for by treaty, State B can proceed (and it will usually suffice for it to proceed) to an equivalent withholding of the same concessions from State A. But many breaches of treaty are not of this kind. For instance, if a treaty provides, *inter alia,* for the payment of certain sums of money, as compensation, by State A to State B, and A fails to pay, B may be unable to resort to like action because no specific payments are due from it to A, either under the treaty or otherwise, so that any counter-action, to be effective, must take another form. Again, if A, contrary to a treaty provision, nationalizes or expropriates property of B or its nationals in A's territory, it may be theoretically *possible,* but actually quite *impracticable,* for B to proceed to a like action in respect of the property of A or its nationals in B's territory—or perhaps there may be no such property, or only in amounts quite incommensurate with the B property existing in A territory.

84. It is clear, therefore, that—subject to the safeguards against abuse set out in paragraphs 3 and 4 of this article—effective self-redress[83] must include the possibility in certain cases of resorting to action that may involve not a precisely corresponding non-performance or infraction of the treaty in question, but a non-performance or infraction of some other provision of the treaty, or, it may be, of a different treaty.[84] This would have to be based on the principle of reprisals and this is the case contemplated by the present article.

85. Subject to the overriding rules of international law about the aggressive or otherwise illegal use of force, there can be no doubt about the general right of legitimate reprisals, i.e., reprisals within the limitations of such conditions as, for example, that the action taken must have some appropriate relationship to the act or omission provoking it, and must be proportionate or commensurate in its effects—or at any rate not manifestly the contrary—and also must be limited to what is necessary in order to obtain redress. Subject to these conditions, reprisals are, for instance, according to Oppenheim:[85]

> "... admissible not only, as some writers maintain, in case of denial or delay of justice, or other ill-treatment of foreign citizens prohibited by International Law, but in all other cases of an international delinquency for which the injured State cannot get reparation through negotiation or other amicable means, be it non-compliance with treaty obligations, violation of the dignity of a foreign State, violation of foreign territorial supremacy, or any other internationally illegal act."

Rousseau[86] equally recognizes the right of reprisals (subject to the same safeguards) as being specifically applicable to the case of breaches of treaty, but remits the study of the matter to a later volume dealing with the general subject of redress, use of force, etc.[87] Hyde[88] also admits the practice, though inclined on historical grounds to confine it to cases of the taking or withholding of foreign property by way of retaliation. Other authorities[89] recognize the doctrine of reprisals, while also, in certain cases, regarding it (correctly of course) as a consequence of the insufficiently organized condition of the international society. Thus Guggenheim[90] says:

> "Since there is no differentiation of functions in customary international law, that is the only way in which the injured party can react against the wrong which has been done to it. Its only recourse is to acts which, if they did not constitute a sanction—that is, if they were not the expression of a means of legal protection—would have to be considered a violation of law."

In a footnote to this passage, Guggenheim adds: "Kelsen was the first to defend the precise theory in 'Unrecht und Unrechtsfolge im Völkerrecht', *Zeitschrift für öffentliches Recht,* 1932, 571/55." He continues:[91] "Reprisals may consist of any acts having *per se* the character of acts contrary to international law, with the exception of those constituting acts of war." By this, of course, is meant acts that would be illegal if they were not justified by way of reprisals for a prior illegality, and the author makes it clear that they can only legitimately take place subject to certain conditions. Spiropoulos equally, after citing the same conditions, says:[92] "Although the suspension of an international obligation by way of reprisal is certainly contrary to law, it nevertheless does not constitute an *unlawful* act in itself." Hall, in discussing the measures of redress "which it is permissible to take", instances reprisals, and in listing what they may consists in, states "... or, finally, in the suspension of the operation of treaties".[93] Similarly, Verdross[94] says:

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[83] Owing to the undeveloped condition of international institutions, international law must, for the present, continue to be a system which, subject to the rules about the use of force, admits of certain limited possibilities of what might be called peaceful self-redress.

[84] This is not of course intended to sanction gratuitous treaty-breaking.

[85] L. Oppenheim, *International Law: A Treatise,* vol. II, 8th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1955), pp. 136, 137.

[86] *Op. cit.* in footnote 70 above, p. 371.

[87] Oppenheim also classifies the matter in this way.

[88] 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. 1660 *et seq.*

[89] Besides those cited or quoted from in the text, such authorities as Rivier, Heffter, Wheaton, etc. may be mentioned.

[90] Paul Guggenheim, *Traité de droit international public* (Geneva, Géorg et Cie, S.A., 1953), vol. II, pp. 84, 85.

[91] *Ibid.*, p. 86.

[92] Jean Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), p. 289.

[93] *Op. cit.* in footnote 24 above, p. 433.

[94] A. Verdross, *Völkerrecht* (Vienna, Springer Verlag, 1950), p. 328.

"By a reprisal is to be understood a derogation from [international] law on the part of a State which has suffered prejudice in its international law rights, with the sole juridical object of inducing the State which has taken up this illegal position against it, either to make reparation for the wrong done, or to cease from further prejudical acts."

Verdross adds: [95]

"Reprisals have been recognized since the birth of modern international law, as a means of legal protection in inter-State relations."

Finally, Accioly and Kelsen may be cited together in the following quotation from Accioly [96] (Rapporteur's translation from the Portuguese):

"Kelsen maintains... that reprisals 'are not illegal, in so far as they take place as a reaction against an illegality'. Indeed, it would seem possible to attribute to such a reaction the character of legitimate [sclf] defence—which, as is known, is expressly admitted by the Charter [of the United Nations].

"The eminent Austrian master elsewhere defines as reprisals... 'acts which, being normally illicit, are exceptionally permitted as the reaction of a State against a violation of its rights by another State'."

86. These citations from diverse authorities, both older and more modern, would appear to be sufficient to establish the following propositions:

(*a*) In certain circumstances, and subject to certain conditions and safeguards required by international law, there exists, at the least, a right of what might be termed "peaceful reprisals", not involving the aggressive or illegal use of force.

(*b*) Such reprisals may take the form of non-observance of what would otherwise be a treaty obligation, or of a breach of such an obligation.

(c) Such a derogation from a treaty obligation (provided it is appropriate to the circumstances and no lesser action will meet the case) may take place as a "reply" either to a derogation from the same obligation by the other party to the treaty, or from another obligation of that treaty or from an obligation under another treaty, or from a general international law obligation.

87. At this point, it becomes necessary to consider the doctrine of "election" which is not infrequently put forward, but which the Rapporteur considers—at any rate in the present context, and in the form it usually takes—to be erroneous. It is stated in the Harvard Research Volume on Treaties as follows: [97]

"...since the breach of a treaty by one of the parties thereto does not automatically terminate the treaty, it is evident that the innocent party may simply elect to regard the treaty as continuining in force between it and the party which committed the breach. In that case, the innocent party is itself relieved of none of its obligations under the treaty, for even if it had a right to abrogate unilaterally the treaty relation existing between it and the party committing the breach thereof, failure to exercise that right leaves the treaty binding upon all parties in exactly the same manner as prior to the breach."

It is no doubt true that, as stated in the above-quoted passage, where a right exists to elect to regard a treaty as terminated, and this right is not exercised, the treaty remains in force for both parties. But it does not at all follow, as a necessary deduction from this, that one party must go on observing the treaty in all respects although the other party is not doing so, or is failing to observe some particular provision of it. This would be to ignore the fact that international law has always admitted the possibility not only that a treaty itself, and as such, may remain in force, although it is not in all respects being observed by one or more of the parties —indeed the whole of this sub-section is founded on that assumption—but also that the non-observance by one party may justify a corresponding, or (by way of reprisals) a different non-observance by the other. In short, what the Harvard system—if it may be so called—implies, is that there is no middle course, when a breach of treaty occurs, between complete termination of the treaty by the injured party, or a complete and integral observance of the treaty obligations by that party, despite non-observance of some or all of these by the other party. This is certainly not the true position.

88. Nor are the authorities cited in the Harvard Volume in support of the above-quoted proposition very convincing. Several of them [98] consist of citations from decisions of domestic tribunals, particularly in common-law countries. But analogies drawn from private law do not hold in this case, for private law has nothing corresponding to the international law doctrine of legitimate self-redress in certain circumstances, by way of counteraction or reprisals. It is no doubt true under many systems of private law that, if a contract is broken in certain ways, the other party has a right to treat it as being at an end; but that, if that party does not elect to exercise his right, it must continue to perform its part of the contract, subject to a right to seek damages or other redress *in the courts* for the non-performance by the other party. International law, on the other hand, has to take into account the absence in many cases of any sure right of redress through international tribunals, or of any sure means of securing enforcement of their decisions, if not carried out; and therefore, within limits, recognizes what is in effect a middle course, namely, the legitimacy of certain measures of self-redress taken as a means of meeting that situation.

89. The Harvard Volume also cites certain international authorities, but these do not seem really to support the deduction that because, in certain events, a treaty remains in force despite the fact that some obligation under it is not being carried out by one of the parties (and the other party has not contended that the treaty is at an end), such other party must nevertheless itself observe all the provisions of the treaty and cannot resort even to a corresponding—still less to any different—form of non-observance, i.e., to no *via media*

[95] *Ibid.*

[96] Hildebrando Accioly, *Tratado de Direito Internacional Público*, Rio de Janeiro, 1956-1957, vol. 3, p. 82. The quotations from Kelsen are given as coming from his *Principles of International Law*, pp. 23 and 24.

[97] *Op. cit.* in footnote 15, p. 1078.

[98] See *op. cit.*, pp. 1078 and 1079.

[99] See *op. cit.*, p. 1079.

between termination and integral observance. There is, for instance, a reference to Oppenheim; but the passage referred to[100] merely says that "Violation of a treaty by one of the contracting States does not *ipso facto* cancel the treaty; but it is within the discretion of the other party to cancel it on this ground."[101] This is true (subject to the requirement that the discretion exists only if the breach is a fundamental one—see footnote 101, below), but it in no way supports the further proposition that, if the other party elects *not to exercise this discretion*, it has no other means of redress for the breach except a (possibly or, at any rate, probably) non-existent faculty of bringing the matter before an international tribunal. Lord McNair is also cited by the Harvard Volume, in respect of a statement contained in his course delivered (in French) at The Hague Academy of International Law in 1933.[102] But again, the relevant passage does not support the Harvard deduction. It reads:[103]

> "Violation of a treaty by one of the contracting States does not *ipso facto* cancel the treaty, but at the most, allows the other party to opt in favour of its cancellation (All violations are not, of course, serious enough to justify such action . . .)."

In this passage, the phrase "at the most" would seem to refer to the fate of the treaty as a *whole*, i.e., it means that in respect of termination, the most that exists is a *faculty* of abrogation for the injured party, not an automatic abrogation *ipso facto*, if a breach occurs. Again, it does not in any way follow that because this faculty is not exercised in a particular case (assuming that the breach were sufficiently fundamental to justify that), and the treaty consequently subsists, the injured party has no other or lesser rights, i.e., of counter-action by way of a corresponding, or of some different non-observance. Moreover, in those cases—which are the ones principally contemplated by the present sub-section—where the breach by the other party is not sufficiently fundamental to give rise to a faculty of termination for the other party at all, so that no such faculty exists, there can be no doubt about the right of corresponding or other non-observance under the conditions laid down in these articles. It may well be that, *as a matter of policy*, a State which wishes to preserve the existence of a treaty, despite infractions by the other party, would deem it expedient *not to avail itself of its right of retaliation* or counteraction; but that, of course, is another matter.

90. Crandall[104] also is cited in the Harvard Volume; but here again the position is that Crandall discusses the matter with reference to the question of treaty termination, and largely on the basis of what kind of breach by one party will justify the other in denouncing the treaty; this is, of course, quite a different question.

91. For all these reasons, the present Rapporteur feels that, while the view put forward in the Harvard Volume is not implausible,[105] it is, in fact, not correct as a matter of international law, and is derived largely from private law doctrines that have no application in the international field. He considers the correct position on this particular matter to be as stated in article 18 of the present draft under discussion, and also in article 20, discussed below, to which much of the argument equally applies. No doubt, as regards the propriety of counter-action by way of reprisals, a good deal turns on the exact moment at which it is permissible to take such action. No one would suggest that the right arises immediately and before any attempt at settlement has been made. This is the reason for the inclusion in article 18 of such provisions as sub-paragraphs (*c*) and (*f*) of paragraph 3.

92. *Paragraph 2 of article 18.* This is amply supported by the authorities cited earlier.

93. *Paragraph 3, sub-paragraph (a).* This merely repeats, *ex abundanti cautela*, the qualification already mentioned in paragraph 1.

94. *Paragraph 3, sub-paragraphs (b), (c) and (d).* These state conditions which, as general safeguards, it is believed that international law normally attaches to the exercise of reprisals in any circumstances.

95. *Paragraph 3, sub-paragraph (e).* It follows automatically from the nature of the class of treaties

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[100] In the 4th edition; it is also reproduced verbatim in the 8th (Lauterpacht) edition, vol. 1, p. 947.

[101] Earlier editions of Oppenheim took the view that to confer this faculty, the breach need not even be a fundamental one. In a footnote to the 4th edition, Lord McNair, as editor, queried the correctness of this view, which is in effect abandoned in the 8th (Lauterpacht) edition—see footnote 4 on p. 947 of vol. 1. See also the Rapporteur's second (1957) report (A/CN.4/107), articles 18-20 and commentary thereto.

[102] "L'application et l'interprétation des traités d'après la jurisprudence britannique", *Recueil des cours*, 1933, I.

[103] See *op cit.*, p. 282.

[104] Crandall, *Treaties, their Making and Enforcement*, 2nd ed., 1916, pp. 456, 462 *et seq.*

[105] An argument might be advanced as follows. It might be said that three cases must be distinguished:

Case 1. One of the parties to the treaty purports illegally to repudiate or put an end to it. In those circumstances, the other party may elect either to accept the repudiation or termination, subject to its right to seek redress or reparation for the illegality involved, or to decline to accept the repudiation or termination as being illegal and null, but, in that case, must continue to regard the treaty as remaining in full force. If so, however, that party has voluntarily and designedly waived its right to accept termination, and must therefore continue itself to carry out the treaty, although, of course, it will retain its right to seek redress or reparation for the non-performance by the other party.

Case 2. One party, without actually repudiating or purporting to terminate the treaty, commits a fundamental breach of it of a kind which, in accordance with the principles stated in the Rapporteur's second (1957) report, articles 18-20, will justify the other party in regarding the treaty as terminated, or in bringing it to an end. Here again, such other party has a right of election. If it does not elect to terminate the treaty, then it is bound itself to continue to observe the treaty while seeking redress or reparation for the non-performance by the other party.

Even if, however, it were accepted in the above cases that there is no middle course between absolute termination and absolute observance, the argument could not cover case 3.

Case 3. This is the case contemplated by articles 18 and 20, i.e., where one party neither repudiates the treaty nor commits such a fundamental breach of it as would justify the other party in bringing it to an end, but simply commits a breach of the treaty. In that case, the other party, not having a right to terminate it simply on the basis of that breach, has no direct remedy except to have recourse to a corresponding non-performance or, if that is insufficient, then, by way of reprisals, to a non-performance of some other obligation of that treaty, or of another treaty between it and the same party.

referred to in this paragraph that no violation of such a treaty will justify non-observance by another party. Still less would a party to such a treaty be justified in any non-observance of it by way of counter-action to the *violation by another party to it of some other treaty,* or of a general rule of international law. There is no room for "reprisals" in connexion with such treaties.

96. *Paragraph 3, sub-paragraph (f).* Because of the difficulties that may arise in the application of this article and the uncertainties that may exist as to whether, on the grounds stated, a right of non-observance has accrued, it is considered that it should only be possible to invoke this ground of non-observance subject to the safeguards involved by following the appropriate procedures set out in article 39. The general reasons for this are of a very similar order as those which led the Rapporteur to think that safeguards and procedures of this character must be followed where it is a question of invoking the principle of *rebus sic stantibus,* or that of fundamental breach, as grounds for regarding a treaty as terminated (see second (1957) report, A/CN.4/107).

97. *Paragraph 4.* This states a general rule of international law invariably considered as governing the *character of the reprisals* that may legitimately be resorted to. It is also intended to subordinate the whole process to general international law. Reprisals taking the form of the non-observance of a treaty obligation are, after all, only one kind of reprisal, and not generically different in their legal characteristics from other kinds.

98. *Paragraph 5.* This states the rule normally applicable in cases coming under the present subsection (see paragraphs 55, 56 and 67, above).

RUBRIC (*c*). NON-PERFORMANCE JUSTIFIED *ab intra* BY VIRTUE OF A CONDITION OF THE TREATY IMPLIED IN IT BY INTERNATIONAL LAW

Article 19. Scope of the present rubric

99. *Paragraphs 1 and 2.* This rubric deals with the case of non-performance justified not by a general rule of international law wholly outside the treaty, but by a condition which, though not actually written into the treaty or to be implied from its terms, is nevertheless to be read into it by virtue of a rule of international law. With this comment, *paragraph* 1 is self-explanatory. Where conditions are written into a treaty, or arise as a clear implication from its actual terms, the matter is one simply of the interpretation of the treaty, and does not call for the application of any external rules.

100. Another way of putting the point would be to say that it is implicit in the type of case treated of in the present rubric that, on the face of it, the treaty concerned creates a specific obligation, so that the question is whether international law implies a condition justifying the non-performance of that obligation in certain circumstances. Since the very issue of whether non-performance is justified is one that assumes the existence of a *prima facie* or apparent obligation under the treaty, conditions expressed in or implied by the language of the treaty itself, relate to the existence of the obligation, not to justification for its non-performance, and this is a matter governed by the general rules relating to the interpretation of treaties to be contained in chapter 3 of the present Code.

101. *Paragraph 3.* The point of this paragraph may be seen by contrasting the ensuing articles 20 to 22, inclusive, with article 23.

Article 20. Conditions implied in the case of all treaties: condition of reciprocity or continued performance by the other party or parties

102. As is so often the case with regard to the law of treaties, it is possible to classify a given rule under more than one head. It is possible to take the view that (apart from treaty or other international obligations in the nature of *jus cogens,* release from which cannot result from any mere non-performances by another State) there is a general *international law rule of reciprocity* entailing that the failure of one State to perform its international obligations in a particular respect, will either *entitle other States to proceed to a corresponding non-performance* in relation to that State, or will at any rate *disentitle that State from objecting to such corresponding non-performance.* On the basis of this general principle, applied to treaties, the case dealt with by the present article 20 could figure as an article in rubric (*b*) above, in the space provided for article 17A. On the other hand, it is possible, and it is probably more appropriate, to regard the requirement of reciprocity in the light of a condition which is inevitably to be implied, and is by law to be read into all treaties of the "reciprocal" or "interdependent" types (see para. 82 above), i.e.—all treaties other than those of the absolute or self-existent kind, already referred to in article 18, paragraph 3 (*e*) above and paragraph 95 of the present commentary. It is upon this view of the matter that the present article 20 is based (see further comment in para. 82 above).

103. Hall, in discussing the difficult case which has already been considered in the commentary to article 18 (see paras. 82-91 above, much of which is applicable here also), clearly implies that whether the breach of the treaty affords ground for regarding it as wholly terminated or not, non-performance of a particular obligation will on the basis of an implied condition of reciprocity normally justify a corresponding non-performance by the other party. Hall, under the rubric "Implied Conditions under which a Treaty is made", says that it is "obviously an implied condition of the obligatory force of every international contract that it shall be observed by both of the parties to it."[106] He then goes on to discuss the subject of *fundamental* breaches giving rise to a right to terminate the treaty, and finally considers the case of lesser infractions that would not normally have that result. In discussing this latter case, Hall says[107] that "it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant... could in fairness *absolve the other party from performance of*

[106] *Op. cit.* in footnote 24 above.

[107] *Ibid.*, p. 409.

his share of the rest of the agreement..." (italics added). The words italicized clearly imply that even if no case exists for the non-performance of the treaty as a whole or for regarding it as terminated, there is a case for the non-performance by the other party or parties of the particular provision which has been the subject of the infraction. To these considerations may be added almost the whole of the argument given in relation to article 18 in paragraphs 82-91, on the basis that the greater, wider or more drastic right must include the lesser.

104. *Paragraph 2.* This requires no explanation. A similar provision might perhaps have been added to article 18, but it would seem otiose to do so, since it must be clear that anything in the nature of reprisals can only be directed against the particular party culpable.

105. *Paragraph 3.* This paragraph has been included because of the advisory opinion given by the International Court of Justice in the second phase of the Peace Treaties case.[108] Certain treaties contained a provision for the settlement of disputes, according to which, if a dispute arose, each party was to appoint a member of a three-member Arbitral Commission, and the parties were to agree on the third member. If, however, they failed to do so within a month, either party could ask the Secretary-General of the United Nations to appoint the third member. It was not stated—nor probably could it have been—that the Secretary-General was bound to comply with the request. In the actual cases which were the subject of the request for an advisory opinion, not only had the parties not agreed on the third member of the Commission, but one of them denied there was a dispute, and refused to appoint its arbitrator or to co-operate in any way in the treaty procedure for the settlement of disputes. In these circumstances, the question arose whether the other party, if it had appointed its arbitrator, and if the time limit specified by the Treaty had expired, could call upon the Secretary-General to appoint the "third" member of the Commission; and whether in that case, and if the appointment was made, the resulting *two*-member Commission would be validly constituted under the Treaty, and could proceed to hear the case and render a legally binding decision. The Court answered these questions in the negative, on the ground that, however much one party might be (and was) in breach of the Treaty by refusing its co-operation in setting up the treaty tribunal, this situation could not, in the given case, be met by proceeding without it, since this would result in setting up a tribunal that was not the one contemplated by the treaty. In its opinion (three of the Peace Treaties were involved in the case), the Court said that

> "The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties."[109]

The Court also said[110]

> "The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists."

The Court did however indicate that in other circumstances the position might be different:[111]

> "...the Secretary-General would be authorized to proceed to the appointment of a third member [only] if it were possible to constitute a Commission in conformity with the provisions of the Treaties."

In short, the matter is one for the interpretation of the particular treaty, and paragraph 3 of article 20 has been drafted accordingly; but it seemed desirable to make some reference to the matter, in view of this important pronouncement by the Court on what is a not uncommon type of case.

Article 21. Conditions implied in the case of all treaties: condition of continued compatibility with international law

106. *Paragraph 1.* The object of this paragraph is to bring out the difference between the case where incompatibility with a rule or prohibition of general international law in the nature of *jus cogens* affects the treaty at its very inception, thus rendering it lacking in essential validity in accordance with the articles of the Code referred to in this paragraph.[112] That is not the case dealt with here, which assumes the original validity of the treaty, and deals with the question of justification for non-performance of some obligation of the treaty by reason of a rule of international law which has gained general acceptance subsequent to the treaty, and which is incompatible with the performance of the obligation.

107. *Paragraph 2.* Since the conditions governing non-performance of a treaty obligation on the grounds contemplated by this article are broadly the same as those which will justify regarding a treaty as being wholly terminated, it will be sufficient for the present to refer to the commentary to case (vi) in article 17 of part III of chapter 1 of the Code.[113]

108. *Paragraph 3.* It is necessary to cover not only the case where, after the conclusion of the treaty, a new incompatible rule of international law in the nature of *jus cogens,* with which the treaty is in conflict, receives general acceptance, but also the case where circumstances not present at the time of the conclusion of the

[108] *I.C.J. Reports 1950,* p. 65.

[109] *Ibid.,* p. 229.

[110] *Ibid.,* p. 227.

[111] *Ibid.,* p. 228.

[112] See Rapporteur's third (1958) report (A/CN.4/115), articles 21 and 22 and relevant commentary.

[113] See paras. 104 and 105 of the commentary in the Rapporteur's second (1957) report (A/CN.4/107).

treaty have arisen subsequently, and have brought into play an existing rule of international law of this kind, which was not relevant to the circumstances as they were when the treaty entered into force. An obvious example of this type of case is that of a treaty concluded in time of peace, and primarily applicable under peace-time conditions, in the event of a war arising either between one of the parties and a third State, or between two third States, giving rise to circumstances in which questions of the law of neutrality may become material for one or other of the parties, in relation to the execution of the treaty. Some illustrations of this are given by Lord McNair in his work on *The Law of Treaties* based on the opinions of the Law Officers of the British Crown. Thus, in an opinion dated 17 August 1885,[114] the Law Officers approved of instructions being sent to the British Ambassador in Japan to the effect that a certain treaty between Great Britain and Japan "must be read subject to the obligations of international law in time of war, and that Great Britain could not claim, under the treaty, to commit any act which would involve Japan in a breach of neutrality...". Instructions were sent accordingly. The point at issue was the right which Great Britain might otherwise have been able to claim under the treaty to use certain naval yards and hospitals in Japan in the event of a war in which Great Britain might be involved, Japan being neutral. Again, in an earlier report dated 23 August 1870, given by the Queen's Advocate[115] (Mr. Travers Twiss, afterwards Sir Travers Twiss), the opinion was expressed that the International Telegraphic Conventions of 1865 and 1868 must, as between a belligerent and a neutral State, be construed as being subject to the duties imposed by general international law upon neutral States. The Queen's Advocate observed[116] that

> "As a war between France and Prussia would impose upon the other contracting parties supervening duties incidental to a state of neutrality, they [i.e. the contracting parties] must..., in the absence of express words to the contrary, be taken [sc. only] to have become parties to the treaty subject to their obligation of fulfilling those duties."

109. *Paragraph 4.* The significance of this paragraph depends upon the distinction between *jus cogens* and *jus dispositivum*. This matter has already been sufficiently gone into in relation to the subject of the essential validity of treaties.[117]

Article 22. Conditions implied in the case of all treaties: condition of unchanged status of the parties

110. *Paragraph 1.* This paragraph is intended to bring out the distinction between the case of a lack of treaty-making capacity existing in one or more of the parties at the time when the "treaty" is concluded, thus entailing lack of essential validity for the instrument concerned, considered as an international treaty. This subject has already been dealt with in article 8 of part II of chapter 1 of the Code, and a commentary on it will be found in paragraphs 19 to 30 of the Rapporteur's third (1958) report. The present article 22 deals with the case that arises where no such incapacity existed at the time when the treaty was made, but there has been a change in the status of one of the parties subsequently.

111. *Paragraph 2.* This refers to the case where the subsequent change of status involves a total loss of its previous identity on the part of the party concerned. This, subject to the rules of State succession, will normally lead to the termination of the whole treaty (if it is a bilateral treaty) or to the participation of that party in it (if it is a multilateral one). This case has already been considered as case (i) in article 17 of part III of chapter 1, and is commented on in paragraph 95 of the Rapporteur's second (1957) report.

112. *Paragraph 3.* This deals with the case to which the present article 22 is really intended to relate, namely where there has been a supervening change of status —not, however, being such as to involve a complete loss or change of identity for the party concerned. *Prima facie*, this will not in itself entail any diminution of the treaty obligation, or afford a ground for its non-performance. Where, however, as the result of the change, a situation arises in which the performance of the treaty obligation is no longer dependent on the sole will of the party concerned, that party must, considered as such, be regarded as absolved from futher performance. Hall[118] states the principle involved as follows:

> "It is also an implied condition of the continuing obligation of a treaty that the parties to it shall keep their freedom of will with respect to its subject-matter except in so far as the treaty is itself a restraint upon liberty, and the condition is one which holds good even when such freedom of will is voluntarily given up. If a State becomes subordinated to another State, or enters a confederation of which the constitution is inconsistent with liberty of action as to matters touched by the treaty, it is not bound to endeavour to carry out a previous agreement in defiance of the duties consequent upon its newly-formed relations."

However, although in accordance with what has just been said a change of status on the part of one of the original parties to the treaty may take out of the hands of that party the capacity to ensure the performance of the treaty, and thereby absolve it from performance, it does not follow that the obligation will wholly lapse. Thus, to take the cases cited by Hall, where one State comes under the protection of another, the rules of State succession may oblige the Protecting Power to take over the responsibility for carrying out the treaty obligation. It may be the same if a State becomes part of a federal union, and also in other circumstances. This, however, is a matter of the law of State succession, and therefore not further discussed here.

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[114] McNair, *op. cit.* in footnote 74 above.

[115] See explanation given in footnote 75 above.

[116] McNair, *op. cit.*, p. 247.

[117] See the Rapporteur's third (1958) report (A/CN.4/115), para. 75 of the commentary.

[118] *Op. cit.* in footnote 24 above.

Article 23. Conditions implied in the case of particular classes of treaties

113. *Paragraph 1.* The conditions considered in the immediately preceding articles can fairly be regarded as being implied by international law in the case of all treaties. There are, however, a number of conditions which international law implies according to circumstances, in the case of particular classes of treaties.

114. *Paragraph 2.* It is not possible at present to deal exhaustively with this matter, partly because it depends on the development of treaty practice and procedure and is therefore not static, and partly for reasons which are given in a footnote to the article itself. The present paragraph 2 of the article, however, instances a certain number of prominent examples of this class of case.

115. *Sub-paragraph (a).* The question of an implied exception on grounds of *ordre public* in treaties relating to private international law topics came up for consideration recently before the International Court of Justice in the Guardianship of Infants case (Holland v. Sweden).[119] The Court, however, decided the case on another point, and while referring to the question of *ordre public,* did not consider it necessary to pronounce upon it. On the other hand, some of the judges delivering separate opinions,[120] laid great stress on the recognized existence of this exception as an implied condition of treaties dealing with questions of private international law and conflicts of laws. These opinions appear to the Rapporteur to be sufficiently cogent to warrant the inclusion of this exception in the present article, though of course only for this class of treaty.

116. *Sub-paragraph (b).* It is well known that, according to the common form of commercial treaties, articles of a very wide general character are included which, on the face of them, confer national treatment upon foreigners in the matter of access to the country concerned, to carry on trade and commerce there, etc. These claims, read literally, might appear to confer something like absolute rights in the matter. Such treaties have, however, never been read as prejudicing the right of the local authorities of a country to prohibit entry to individual persons on grounds personal to themselves, or in pursuance of a general and non-discriminatory policy concerning immigration or the taking of employment. It is true that in some of the more modern commercial treaties the previous apparently absolute right tends to be specifically qualified by certain phrases. For instance, the subjects or citizens of the contracting parties are only to have rights of access etc. on the basis of national treatment "upon conforming themselves to the laws and regulations applicable generally to nationals". Such phrases do not always appear in earlier treaties. They have nevertheless clearly been regarded as implied, and their subsequent appearance in later treaties must probably be regarded as declaratory of an existing position, rather than as creating anything new. In the same way, the right of deportation has never been regarded as affected by these clauses.

117. *Sub-paragraph (c).* Very similar considerations apply here too, except that what is normally involved in the case of imports and exports of goods is not national but most-favoured-nation treatment. Nevertheless, the general right to trade conferred by many commercial treaties has never been regarded as prejudicing the right of the local authorities to prohibit altogether traffic in certain categories of goods or articles, or in certain particular circumstances as indicated in the article. Again, it is true that in many of the later treaties specific clauses are included referring to such a right of prohibition in terms; but as before, the effect of such provisions appears to be little more than declaratory. Lord McNair instances an opinion given by the English Law Officers of the Crown dated 18 March 1867,[121] in which the Law Officers considered the effect of an Anglo-Italian Commercial Treaty containing "the usual reciprocity clauses with respect to the free importation to any country of produce of one of the contracting parties into the country of the other". The question was whether this prevented the United Kingdom authorities from prohibiting the import of cattle on health grounds (e.g. suspected foot and mouth disease). The Law Officers said that in their view "no clauses of this description can be rightly considered as restraining the power of the Government to prohibit, when exceptional circumstances, as the present, exist, and for the sake of public health and well-being of the country, the importation of foreign cattle." That the Law Officers were not, however, postulating any general principle of so-called "necessity" as a ground justifying non-performance is clear from the following sentence: "It is a maxim of international law that cases of this kind are always considered as tacit and necessary exceptions from the treaty." In short, a condition covering this type of case is to be regarded as implied in commercial treaties.

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[119] *I.C.J. Reports 1958,* p. 55.

[120] In particular Judges Badawi, Lauterpacht, and Moreno Quintana. The following passage from Sir Hersch Lauterpacht's opinion is quoted as giving the most comprehensive and forceful statement of the principle (Report, pp. 91, 92):

> "In the first instance, the Convention now before the Court is a Convention of public international law in the sphere of what is generally described as private international law. This means: (*a*) that it must be interpreted, like any other treaty, in the light of the principles governing the interpretation of treaties in the field of public international law; (*b*) that that interpretation must take into account the special conditions and circumstances of the subject-matter of the treaty, which in the present case is a treaty in the sphere of private international law.
>
> "Secondly, in the sphere of private international law the exception of *ordre public,* of public policy, as a reason for the exclusion of foreign law in a particular case is generally —or, rather, universally—recognized. It is recognized in various forms, with various degrees of emphasis, and, occasionally, with substantial differences in the manner of its application. Thus, in some matters, such as recognition of title to property acquired abroad, the courts of some countries are more reluctant than others to permit their conception of *ordre public*—their public policy—to interfere with title thus created. However, restraint in some directions is often offset by procedural or substantive rules in other spheres. On the whole, the result is the same in most countries—so much so that the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law."

[121] *Op. cit.* in footnote 74 above.

118. *Sub-paragraph (d).* This deals with an implied term which has always, and in the nature of the case, been regarded as a condition of treaties of guarantee, and it needs no special comment.

SECTION 2. PARTICULAR QUESTIONS OF TREATY APPLICATION

SUB-SECTION 1. TEMPORAL AND TERRITORIAL APPLICATION OF TREATIES

RUBRIC (*a*). TEMPORAL APPLICATION

Article 24. Beginning and duration of the treaty obligation

119. *Paragraphs 1-3.* These provisions are of a routine character, but nevertheless require to be included in a complete Code. They relate to the exact moment at which the treaty obligation begins and that at which it ends. The references to other parts of the Code are to those provisions which determine the coming into force and the termination of any treaty.[122]

120. *Paragraph 2.* In the case of multilateral treaties, as has already been seen from article 41, paragraph 4, in part I of chapter 1 of the Code,[123] the coming into force of a treaty, as such, only creates obligations for those States which at that date have taken the necessary steps, whether by signature, ratification or accession, to indicate their participation in it. For other parties, their obligation will arise subsequently, as and when they deposit their instruments of ratification or accession.

121. *Paragraph 4.* The principle embodied in this paragraph was recognized by the International Court of Justice in the first phase of the Ambatielos case, when the Court rejected a certain argument on the ground that it "... would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the treaty, comes into force ... upon ratification."[124]

122. "Unless a treaty specifically so provides, or a necessary implication to that effect is to be drawn from its terms ...". This exception to the rule of non-retroactivity was again recognized by the International Court in the same case, when it said[125] that the conclusion that a given article of the relevant treaty was not retroactive "... might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation." There is some danger of confusion about the subject of the retroactivity of treaties. In a certain sense, a treaty, whatever it may say, can never be retroactive, because it can never come into force previous to the date provided for according to its terms, or in default of clear terms on the subject, according to the principles already set out in part I of chapter 1 of the Code.[126] But a treaty can of course perfectly well provide that, although it does not come into force until a certain date, it shall nevertheless, when it does come into force, be deemed to relate back in certain ways to events that have already occurred. Where a treaty has retroactive effect in this sense, the obligation to apply it, or any particular provision of it retroactively, can nevertheless not exist before a certain date, namely the date of the coming into force of the treat; but that fact does not prevent the obligation that has to be applied retroactively, arising when this date is reached—on the contrary, it causes it to do so. It is clear that only express terms or an absolutely necessary inference can produce such a result. The presumption must always be against retroactivity.

RUBRIC (*b*). TERRITORIAL APPLICATION

Article 25. General principles

123. *Paragraph 1.* Questions of the territorial application of a treaty do not normally arise in those cases where the whole process of the operation and execution of the treaty can be carried out exclusively through the action of the central metropolitan Government of the State concerned, and in this category figure especially the classes of treaties mentioned in this paragraph, such as treaties of alliance, peace and friendship, recognition, institution of diplomatic relations, and so forth.

124. *Paragraph 2.* This reflects the obvious principle that the question of territorial application is governed primarily by the terms of the treaty itself, in all cases where the treaty, expressly or by implication, makes provision as to its territorial application.

125. *Paragraph 3.* Where the treaty is silent, or no clear implication can be drawn from it (or unless, though not silent, *its application is specifically confined* to a certain particular part or to parts of the territories —or to certain territories only—of the contracting parties), then the remaining provisions of this rubric will be applicable.

Article 26. Application to metropolitan territory

126. *Paragraph 1.* There can never be any doubt that, unless a treaty otherwise specifically provides, it must apply automatically at least *to the whole of the metropolitan* territory of any contracting party.

127. "... or to all territories forming part of the metropolitan territory of each contracting party". These words have been inserted because in the case of certain States, the whole of their metropolitan territory or territories is not necessarily situated within the confines of a single frontier, and these territories may either be separated from each other by intervening territory of another State, or may be situated overseas.

128. *Paragraph 2.* This attempts to supply a definition of the term "metropolitan territory", and is intended to establish what *prima facie* distinguishes a metropolitan from a dependent territory.

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[122] Rapporteur's first (1956) and second (1957) reports (A/CN.4/101 and A/CN.4/107, respectively).

[123] First (1956) report.

[124] *I.C.J. Reports 1952*, p. 40.

[125] *Ibid.*

[126] See footnotes 122 and 123.

129. "Subject to the provisions of paragraph 3...". These words are inserted because it is necessary to deal specially with the case of federal unions and federations. This case forms the subject of *paragraph 3*. Under all federal constitutions, the constituent states, parts or provinces of the union or federation possess at least some degree of local autonomy; while in some cases, or at any rate in theory, they may have complete local autonomy in all matters not of necessity common to the union or federation as a whole and as a unit, such as defence and the conduct of foreign relations. Nevertheless, there can be no doubt that the constituent parts of a federal union or federation do form part of its metropolitan territory.

130. It naturally results from the words "Unless a treaty otherwise provides..." in paragraph 1 of this article, that it in no way prevents the insertion of the so-called "federal clause" in treaties, where there is agreement to do this.

Article 27. Application to dependent territories

131. *Paragraph 1.* If a satisfactory definition of a metropolitan territory can be established, then, in principle, it would be sufficient to define a dependent territory as any territory which was not by definition a metropolitan territory.

132. *Paragraph 2.* This states the basic rule that, in principle, and unless otherwise provided expressly or by clear implication, a treaty extends automatically to all the dependent territories of any contracting party.

133. "Subject to the provisions of paragraph 3...". The basic rule as thus stated was, however, instituted at a time (and primarily in relation to a state of affairs) when many or most dependent territories were more or less wholly dependent, and lacking in any form of self-government or autonomous local institutions. This situation is under modern conditions becoming increasingly rare, if indeed it is not near to disappearing. It is probably true to say that only a small number of the dependent territories still existing in the world are in this position, and they are progressively becoming fewer. This has led certain authorities, such as Rousseau, to propound a rule completely reversing the basic rule set out in paragraph 2 of the present article. He formulates the rule as follows:[127]

> "Except in cases where a treaty, in view of its purpose, deals exclusively with colonies, treaties concluded by a State do not extend automatically to its colonies."

According to this view, therefore, a treaty would never apply to dependent territories unless it either related specifically to certain territories in this class or else, as Rousseau goes on to make clear, unless the treaty itself provided in terms for its application to the dependent territories of the contracting parties.

134. The Rapporteur, while in general agreement with the view propounded by Rousseau, does not think it necessary or desirable to make it so categorical. It seems to him preferable to retain the basic rule as formulated in paragraph 2 of this article, but to create exceptions to it in favour of those cases where it is obvious that the constitutional position with reference to a dependent territory does not permit of any automatic application of a treaty to it without its consent, or without the completion of various formalities of such a kind that they are primarily a matter for the local institutions of the dependent territory concerned.

135. *Paragraph 3.* In this paragraph, the exceptions just referred to are set out. In the cases covered by *sub-paragraphs (a)* and *(b)*, it is clear that the government of the metropolitan territory of the State which is a party to the treaty has no constitutional power to enforce either the acceptance or the observance of the treaty by the dependent territory. In such circumstances, participation in the treaty by that State cannot of itself entail its application to the dependent territory.

136. *Sub-paragraph (c).* This contemplates the not uncommon situation where, although the dependent territory is not fully self-governing internally even in the field covered by the treaty, the constitutional relationship between it and the metropolitan government is such that the active co-operation of the local authorities and of the local institutions would be necessary for the execution of the treaty in that territory, and would be materially impossible without it; or where, according to those constitutional relationships, treaties entered into by the metropolitan government are not to be applied to the dependent territory without at least prior consultation with it. Here equally, it would be difficult, and would indeed be contrary to the rights of the dependent territories themselves, if participation in the treaty by the metropolitan government were held automatically to entail its application to the dependent territory.

137. *Paragraph 4.* This is intended to bring out the point that the determining factor involved in the cases dealt with by paragraph 3 of the article is that of the *normal constitutional position* existing in relation to the dependent territories concerned, or existing as between them and the metropolitan government; and not the possibility that the metropolitan government may, in the last resort, possess legal or physical powers of coercion which would enable it to compel the dependent territory to carry out the treaty. Such powers may indeed in a number of cases exist or be held in reserve, but they are not intended to be used except under specifically defined circumstances or, most exceptionally, in case of emergency. They are certainly not intended to be used for the purpose of enforcing the application of a treaty to a dependent territory in circumstances other or contrary to those contemplated by the constitutional position respecting that territory;[128] and a metropolitan government ought not to be placed in a position in which it must either decline altogether itself to participate in the treaty, or else, in the last resort, employ measures of coercion to enforce the acceptance and

[127] Rousseau, *op. cit.* in footnote 70 above.

[128] Especially where, as will frequently be the case in this context, this constitutional position is part of a planned development towards self-government or complete independence.

application of the treaty by what may be constitutionally highly developed dependent territories which do not wish to accept the treaty, or to whose local interests such acceptance would be contrary.

Article 28. Determination of the status of metropolitan and dependent territories

138. *Paragraph 1.* This article has been included because difficulty often arises over the question of who has the right in the last resort to determine whether a given territory is a metropolitan or a dependent territory. An attempt to define a metropolitan territory and hence inferentially a dependent territory, has been made in articles 26 and 27. Subject to that, the question must be one that depends on the interpretation of the relevant constitutional provisions and international instruments.

139. *Paragraph 2.* The opening words of this paragraph "Subject to any relevant treaty provisions, and to any international right of recourse that may exist...", are intended to indicate that such determination may, in the last resort, not be exclusively a matter for the metropolitan government to carry out, in a final and conclusive way. Subject to that, however, it seems that the determination must and indeed can only be made in the first instance by the metropolitan government. This is indicated by *sub-paragraph (a).* The point dealt with in *sub-paragraph (b)* is a connected but separate one. It is not a question of determining the status of a given territory, whether metropolitan or dependent, but of determining what is actually covered administratively or geographically by the territory concerned—in short, what are its boundaries, whether certain adjacent pieces of territory, enclaves or islands off its coasts, are include in it, etc.

140. *Paragraph 3.* It seems desirable to include a provision on these lines. States cannot, subsequent to the conclusion of a treaty, alter its territorial application by a mere *ipse dixit* to the effect that certain territories, apparently part of its metropolitan territories, are not so, or *vice versa.* Any such determination, dependent purely on a declaration by the government concerned, must either have been made and published in advance of the conclusion of the treaty, or else be specifically brought to the attention of the other parties at the time of the conclusion of the treaty.

141. *Paragraph 4.* On the other hand, a genuine alteration in the status or constitutional position of a particular territory, or in its relations with the metropolitan government, may have occurred subsequent to the conclusion of the treaty, and for this reason the words "resulting from a genuine change in the status or constitutional position, etc." are included. In such a case, this paragraph of the article would not, as such, be applicable. It would not, however, necessarily follow that the treaty itself would either become, or cease to be, applicable to the territory concerned. This would depend upon its terms and on the rules of (or on rules analogous to those of) State succession.

SUB-SECTION ii. EFFECT OF THE TREATY ON THE INTERNAL PLANE

RUBRIC (*a*). EFFECT OF TREATIES ON AND RESPECTING THE INSTITUTIONS OF THE STATE

Article 29. Relevance of the domestic aspects of treaty application

142. Neither this article nor anything in this subsection is intended to raise philosophical issues as to the manner in which a treaty produces its effects on the domestic plane, i.e. whether directly or only through the intermediary of the local law and constitution. For reasons to be explained in connexion with a later article, it is considered that, from the purely practical point of view, this question has little importance. The article contents itself with propounding the incontrovertible fact that a treaty produces its effects primarily in the international field, in which it is the duty of the parties to carry it out, and that the question of its effects in the domestic field is only relevant because that question may, in practice, affect the capacity (though not the legal obligation) of the parties to discharge that duty.

Article 30. Duties of States in relation to their laws and constitutions

143. This and the next succeeding article both represent little more than a "spelling out" on the domestic plane of certain of the general principles already dealt with in earlier parts of the present report, and reference may be made to paragraphs 32 to 48 above. It is particularly important to bear in mind that however much, on the domestic plane, the administration, the legislature and the judiciary may be separate entities, and however much on that plane they may perhaps be in conflict with one another and similarly not amenable to control one by the other, nevertheless, from the international point of view, the State is one single indivisible entity. If a treaty becomes binding upon the State by conclusion in due form, it becomes binding upon the State as a whole, and, by derivation, upon each of its several organs and institutions, each of which becomes bound, as part of the State, to play whatever part is necessary in order to make the treaty effective. It can therefore never be accepted (for instance, as a ground excusing non-performance of a treaty) that, although the administrative organs of a State were ready and willing to carry it out, the legislative organs failed to pass the necessary legislation, or that the judicial organs failed to give effect to the treaty in the courts. The point is made over and over again by the authorities, and many useful examples of this are cited in the Harvard Draft Convention on Treaties.[129] For instance, as far back as 1833, Mr. Livingston, United States Secretary of State, in a passage quoted by Wharton,[130] said:

"The Government of the United States presumes that whenever a treaty has been duly concluded and

[129] *Op. cit.* in footnote 15 above; see commentary to articles 20 and 23 of the Harvard Draft, *passim.*

[130] Wharton, *A Digest of the International Law of the United States,* 1887, p. 67.

ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations."

About the same time (1839), the French Conseil d'Etat "affirmed that the *obligation to execute treaties rests not upon a single organ or authority but upon all those, legislative, executive and judicial, whose collaboration may be necessary*"—(Rapporteur's italics).[131] The same point is made in Dana's Wheaton[132] as follows:

"If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nations, just as much as if the breach had been an affirmative act by any other department of the government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions."

144. *Rousseau equally formulates the same principle,* when he says[133] that *all the organs of the State* "being obligated to contribute towards the application of the treaty, the legislative organ—which is just as much an organ of the State as the executive and judicial organs—is thus bound to take the measures necessary... for bringing the treaty into force"; and he continues (citing the judgement of the Permanent Court of International Justice in the case of German Interests in Upper Silesia) to make the point about the lack of relevance from the international standpoint of domestic difficulties, conflicts etc., which are of interest only on the internal plane. In this passage he says:[134]

"International jurisprudence very clearly confirms the *superiority of treaties over domestic law* by providing that in case of conflict the former shall prevail over the latter irrespective of which of the two legal acts was the first to take effect. For the international judge, municipal laws are 'merely facts which express the will and constitute the activities of States'. (Permanent Court of International Justice, judgement of 25 May 1926, Case concerning certain German interests in Polish Upper Silesia (the merits), *Publications of the Court,* Series A, No. 7, p. 19)".

Equally, in the case of the Exchange of Greek and Turkish populations, the Permanent Court affirmed it as a "self-evident principle" that

"... a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."[135]

Reference may also be made to the judgement of the Permanent Court in the case of the Jurisdiction of the Courts of Danzig.[136] In another form and context, having particular reference to the case of federal States, the same position was taken up by the tribunal in the Montijo case, in which a federal government denied responsibility for the acts of a component state in relation to a treaty. The Umpire said:

"For treaty purposes the separate States are non-existent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the federal or general government. But, if it be admitted that such is the theory and the practice of the federal system, it is equally clear that the duty of addressing the general government carries with it the right to claim from the government, and from it alone, the fulfilment of the international pact."[137]

145. *Paragraph 1 of article 30.* The remarks made in paragraphs 141 to 143 above are relevant and sufficient as a commentary to this paragraph, which simply states the basic duty of every State (and by the term "State" is meant the whole State, including all of its organs) so to conduct itself in relation to its law and constitution that it is in a position to carry out its treaty obligations.

146. *Paragraph 2* is based on the view, supported by the authorities already cited, that provided the object contemplated by paragraph 1 is attained, it is immaterial by what means this is done, and it is a domestic matter for each State to decide for itself what method shall be employed. This paragraph has accordingly been expressly drafted so as to try to avoid the necessity for theoretical controversy about whether the treaty obligation operates on a monistic or dualistic basis, etc. There are in fact a number of possible positions theoretically, and, in practice, a number of possible ways in which a State can ensure that its domestic position allows it to carry out its treaty obligations, or places no obstacle in the way of their performance. Beyond that it seems unnecessary to go for present purposes.

147. *Paragraph 3.* However much it may be argued that, as a matter of principle, an international treaty ought to operate directly in the domestic field (i.e. ought to be "self-executing"), it is not possible in practice to compel States to adapt their laws and constitutions to conform with this position unless they in fact wish to do so. Moreover, even in countries where, in principle, treaties are self-executing, considerable difficulties arise in the practical application of the self-executing rule, and it is by no means always possible to avoid the necessity for some kind of special legislation or administrative or other action, as the case may be. *Paragraph 3* is merely intended to emphasize that where,

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[131] Harvard Law School, *Research in International Law,* III, *Treaties,* p. 979, citing Dalloz, *Jurisprudence général, Répertoire,* vol. 42, I, No. 131, p. 555.

[132] Wheaton, *Elements of International Law,* 8th American edition by Dana, p. 715: Dana's Note, No. 250, citing Kent, 1, pp. 165-166.

[133] *Op. cit.* in footnote 70 above.

[134] *Ibid.,* p. 418.

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

[136] *Ibid.,* No. 15, p. 26.

[137] Moore, *History and Digest of International Arbitrations,* 1898, pp. 1439, 1440.

on account of the domestic position such action is necessary in order that the treaty may be implemented, it must be taken.

148. *Paragraph 4.* This represents the negative counterpart of the affirmative rule laid down in paragraph 3, and also makes the point that the State has an obligation not merely to take such action as is necessary in order to make the treaty effective on the domestic plane, but is also under an obligation to keep this position intact so long as the treaty remains in force, i.e. not to take, subsequently to the conclusion of the treaty, any action, or pass any legislation which would prevent the continued implementation of the treaty.

149. *Paragraph 5.* A certain practice (though very far indeed from invariable) has sprung up of including in treaties specific clauses about the obligation of the parties to take any necessary legislative or other measures for the implementation of the treaty. But this is precisely because of the tendencies that have been manifested by governments from time to time to offer "*de fréquentes résistances*" (as Rousseau puts it)[138] to the logic of the principles here formulated. Such provisions are included *ex abundanti cautela,* and have a merely affirmatory or declaratory effect. Their absence —and in most cases they are absent—in no way implies their contrary.

Article 31. Position and duties of particular organs of the State

150. In general, the comments made in connexion with the immediately preceding articles (see especially paras. 141-143) apply, even more specifically, to the present article.

151. *Paragraph 1.* This propounds the principle that from the international point of view it is immaterial, and indeed, theoretically, need never even be the subject of inquiry or discussion, through what particular organ a State discharges its international treaty responsibilities. This is a purely domestic matter which is left to each State to decide for itself.

152. *Paragraph 2.* The converse of this, however, is that, while it is left to the State to take this decision, the State is correspondingly bound, in so far as it may be necessary, to take it and to secure that the organ charged with the responsibility for implementation on the internal plane duly plays its part.

153. *Paragraph 3.* This paragraph is directed to the type of case in which, for instance, a treaty is not implemented on the internal plane because when, in the course of legal proceedings, the question of implementing the treaty arises, the court decides that it is unable to give effect to the treaty for lack of the necessary domestic legislation directly binding upon it. It may be that in taking up this attitude the judge is, from the domestic point of view, fully justified. Indeed, it may be the only course which it is possible for him to follow, considered from that point of view. This, however, merely means that the State, considered as an international entity, has failed to take the steps necessary in order to secure the implementation of the treaty by its tribunals; and for this omission the State is accordingly responsible if, as a result of it, the treaty fails to be carried out. It is not possible in such a case for the State to shelter behind the doctrine that the administration is not in a position to interfere with the decision of the courts, just as it cannot plead lack of the necessary control over the legislature. This is never, in law, the point, for the obligation is the (whole) State's, not that of the administration alone. Thus, in the example given, the decision of the courts would have been different if the necessary legislative steps had been taken.

154. The legal position would be just the same if the necessary legislation existed, but the courts had failed to apply it, or had misapplied it in such a way that the treaty was not implemented. It may be that, in such circumstances, the administration as such cannot interfere with or change the decision of the courts. Nevertheless, there is a failure to carry out the treaty arising from the action of one of the organs of the State and, accordingly, the State, considered as an international entity, is responsible.

[138] *Loc. cit.* in footnote 70 above.

RUBRIC (*b*). EFFECTS OF TREATIES ON AND IN RESPECT OF PRIVATE INDIVIDUALS AND JURISTIC ENTITIES WITHIN THE STATE

Article 32. Treaties involving obligations for private individuals or juristic entities

155. This and the succeeding article have been drafted in such a way as to try and avoid any theoretical controversy about the position of private individuals and juristic entities under international law, and how far they are directly *subjects* of it.[139] That, on the other

[139] A good statement of the position about this, in so far as treaties are concerned, was given by the Permanent Court in the Jurisdiction of the Danzig Courts case (series B, No. 15), when the Court said (Report, pp. 17-18):

"The point in dispute amounts therefore to this: Does the *Beamtenabkommen,* as it stands, form part of the series of provisions governing the legal relationship between the Polish Railways Administration and the Danzig officials who have passed into its service (contract of service)? The answer to this question depends upon the intention of the contracting Parties. It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen,* being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen.*"

In commenting on this, Rousseau (*op. cit.* in footnote 70 above, pp. 438, 439) says:

"Our conclusion will quite naturally be based on this very important judicial precedent. It can indeed be said that an *international treaty is not in itself a source of national law.* It merely creates an obligation between States, a rule which States ought to follow. Individuals are not affected by rules of international law unless those rules reach them through the medium of national laws. That is the doctrine—of positivist origin—which is generally accepted today. And the Permanent Court of International Justice says that it is a 'well established principle of international law'.

"However, ... *it is always possible to stipulate the contrary* and to decide that a treaty will constitute a direct source of rights and obligations for individuals. Here the intention

hand, they may be the *objects* of rules of international law or of treaty provisions, admits of no doubt.

156. With regard to treaties that may impose duties upon individuals (which term, to avoid repetition, will herein be used as comprising—*mutatis mutandis*—juristic entities), or prohibit them from certain courses of conduct, it has to be remembered that, whether as a matter of theory and principle, an individual is or is not a subject of international law, he can never be a subject of international law in the same way as a State, assuming it to possess full, treaty-making capacity. Such a State is subject to no authority but its own and is in a position to take the necessary steps to carry out any treaty to which it has become a party. In the case of the individual, the will and authority of his State and Government is normally interposed between him and the execution of any international obligations which may be incumbent upon him either generally or by reason of a treaty. Whatever the theoretical position, his State or Government can, in practice, prevent the performance of such obligations if they exist, or alternatively place him in a position in which he may have no reasonable alternative but to take action of a kind prohibited by the rule or treaty concerned.

157. For present purposes it is not intended, neither is it necessary, to go into the question of how far a situation of this kind will absolve the individual from personal responsibility. The point is that, whether or not he has a direct obligation, and whether or not he is directly responsible for any failure to implement it, his State and Government are certainly under a duty to ensure that so far as the position under the domestic laws of the State is concerned, their nationals are free to carry out such duties as may result from a treaty—for after all, it is the State which is the party to the treaty, not the individual as such; and but for the action of his State, the individual would not have the duty in question. In the same way, it is for the State, in the execution of the treaty, to take such steps as may be necessary to compel its nationals to observe it, where this is required for its due implementation.

Article 33. Treaties involving benefits for private individuals or juristic entities

158. *Paragraph 1.* This is an easier case than the one which has just been considered. Nevertheless, the fundamental principles applicable are precisely the same, and it will be sufficient to refer to the commentary contained in the immediately preceding paragraphs.

159. *Paragraph 2.* It is generally accepted, and indeed it must be the case, that the State being the party to the treaty, it can, acting through its normal agent, namely the Government, renounce its rights under the treaty, even though these may redound to the benefit or advantage of individual persons being its nationals, or of national juristic entities. Whether, on the domestic plane, this is a proper thing for the State to do, is entirely a matter of the local law and constitution and is not of direct interest to international law. For any impropriety in this respect, the State would be answerable either administratively or judicially on the domestic, but not on the international, plane.[140]

160. The second and third sentences of paragraph 2 go together. It is obvious that an individual—including a juristic entity—can, so far as he personally is concerned, renounce any benefit or advantage accruing to him under a treaty; but this action cannot bind his State, or prevent the State from insisting on due performance, if it thinks fit. For instance, a general point of principle may be involved affecting other individuals besides the particular individual concerned, or affecting the State as a whole, and the State may consider it necessary to insist upon this in spite of the willingness of a particular individual to renounce his rights.

161. Some cases, on the other hand, have in their nature a two-fold aspect: there has been an injury not merely to some individual, but also separately to the State itself, apart from the prejudice caused to it in the person of its national. In a certain sense, a breach of treaty could be said always to have this double aspect in cases where individual rights are concerned. A good illustration (not necessarily confined to a case of treaties) is where, in reference to some maritime matter, a "flag" aspect is involved, concerning the State as such, in addition to injury caused to particular individuals, or failure to accord them the treatment provided for under some treaty. In cases of this kind, international tribunals have not infrequently awarded damages under the two separate heads of those relating to the individual concerned, and those relating to the flag and the State as such.[141]

SUB-SECTION iii. MISCELLANEOUS PARTICULAR QUESTIONS OF TREATY APPLICATION

162. This is left blank, partly because, as in the case of article 23, an exhaustive treatment of it would need a detailed study of a large number of treaty clauses of different kinds, and possibly information as to the practice of Governments respecting such clauses; partly also because many of the questions involved are likely to turn out to be governed by considerations of treaty interpretation pure and simple, and it seems best there-

of the parties is decisive as is evident from an examination of treaty practice as well as of arbitral and judicial practice." The Rapporteur does not dissent from this conclusion, although he thinks it tends to avoid the real issue that arises in such cases, namely that whatever the individual's rights before his own (or the other party's) domestic tribunals, has he a *direct international right* under the treaty, or is it the case that the international right is still vested solely in his State as the party to the treaty, which alone can take action on that plane if the right is denied?

[140] In a number of United Kingdom cases, it has been decided that the Crown not being an agent of the citizen in relation to a treaty, even where it involves benefits for individuals, the action of the executive in such a matter cannot normally be controlled by the domestic tribunals (see Rustomjee v. the Queen (1876) L.R., 1 Q.B.D. 487; 2 Q.B.D. 69; Civilian War Claimants Association v. the King, L.R. (1932) A.C. 14; Administrator of German Property v. Knoop, L.R. (1933) 1 Ch. 439).

[141] The case of the *I'm Alone* (United States v. Canada) is in point; see the present Rapporteur's article in the *British Year Book of International Law* for 1936, p. 82. The proceedings and decision of the Commissioners were published by the King's Printer, J. O. Patenaude, Ottawa, 1935.

fore to defer them until the chapter on that subject has been drafted.

DIVISION B. CONSEQUENCES OF AND REDRESS FOR BREACH OF TREATY

SECTION 1. CONSEQUENCES OF BREACH OF TREATY

Article 34. Basic principles

163. *Paragraph 1.* This requires no comment. A *justified non-performance* of a treaty obligation is clearly *not a breach of the treaty*. If, purely formally, it may be said to constitute one, no illegality in the sense of a breach of international law is thereby involved. Where international law itself excuses or justifies the breach, there can be no infraction of international law.

164. *Paragraph 2.* The second sentence is consequential upon the first and requires no comment. The first sentence itself reflects the finding of the Permanent Court of International Justice in the Chorzów Factory case (Claim for Indemnity) (Jurisdiction). In this case the Court said:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself." [142]

165. "...irrespective of its character or gravity". The character or gravity of the breach of treaty is only material on the question of the nature or extent of the reparation due. It cannot affect the question of responsibility which exists, at any rate in principle, for any breach, however trivial.

166. *Paragraph 3.* Because a breach of treaty gives rise immediately to international responsibility on the part of the State committing the breach, there arises at once an obligation for that State to discharge this responsibility. This obligation, in principle at any rate, arises forthwith and is not dependent upon the taking of any specific steps by the other party or parties, or by any international institution. There may, of course, be a question whether there has in fact been a breach, and whether the existence of the breach is duly established, but that is another matter. Once it is established, responsibility exists, and the responsibility for discharging that responsibility, so to speak, rests upon the State concerned, which then has the duty, if necessary, of taking the initiative in effecting the necessary reparation.

167. *Paragraph 4.* If the responsibility arising from the breach is not discharged, then a right at once arises for the other party or parties to take remedial action and to seek such redress as may be open to them.

Article 35. Method of discharging the responsibility arising from breach of treaty

168. *Paragraph 1.* In a number of cases, the penalties or the reparation due for breach of treaty is provided for in the treaty itself. If the treaty thus provides for penalties or reparation, then, subject to the correct interpretation of the treaty, it is probably a reasonable inference that the parties intended these particular penalties or means of reparation to exclude any others, so that in complying with the provisions concerned, the State which has committed the breach will fully discharge its responsibility.

169. In cases where the treaty is silent about the consequences of a breach, then, subject to the remaining provisions of this article, the general rules of international law relating to the method by which State responsibility must be discharged, will apply. A breach of treaty is simply one form of international wrong. In a certain sense, a breach of treaty is itself an infraction of a general rule of international law, namely the rule of law which enjoins that treaties regularly entered into must be carried out. Where there is no reason to apply any other rule, therefore, the general rules of international law concerning reparation, and the method of furnishing it, will be applicable.

170. *Paragraph 2.* Nevertheless, it seems desirable not to leave the matter entirely on this general footing and therefore to provide some specific rules for discharging responsibility arising from breach of treaty. They will vary according to the nature of the breach, and this paragraph lists the three main classes of cases into which breaches of treaty normally fall.

171. *Paragraph 3.* In this paragraph, an attempt is made, in relation to each of the three classes of cases mentioned in paragraph 2, to indicate what specific action is appropriate in order to discharge the resultant responsibility. The paragraph as a whole is based on the principle that reparation by way of payment of damages is not necessarily sufficient; and this view, which is of course well known in private law, also derives authority internationally from another part of the decision of the Permanent Court in the Chorzów Factory case, cited in paragraph 164 above. The Court said 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." [143]

The sub-heads of this paragraph attempt to work out the practical consequences of this principle in relation to each of the classes of cases mentioned in paragraph 2.

172. *Paragraph 4.* In connexion with reparation, and in particular with damages, a number of incidental questions are liable to arise, such as the question of "remoteness", of whether interest is due, etc. Subject to any specific provisions of the treaty itself, all such questions must be governed by the rules of the ordinary international law of claims.

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[142] Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 9, p. 21.

[143] *Ibid.*, p. 47.

Article 36. Consequences of breaches of treaties involving benefits for individuals

173. The rule stated in this article represents a further aspect of a position already discussed in paragraph 161 above in connexion with paragraph 2 of article 33. According to a very well-established principle of international law, it is of course always the case that an injury to the national of a State, whether resulting from a breach of a general rule of international law or of a treaty, constitutes by that very fact an injury to the State itself; and where the injury to the individual represents the sole material consequence of the breach of law or treaty, such injury will normally constitute the measure of the damages due to the State. This is, however, subject to the rule already referred to, that any additional and independent injury caused to the State as such, e.g. through violation of its jurisdictional rights or through an offence caused to its flag, must be the subject of separate compensation. Furthermore, the Permanent Court, in another phase of the Chorzów Factory case (Claim for Indemnity) (Merits), considered that even in those cases where, ostensibly, only injuries to individuals had occurred, a separate damage to the State must still be presumed to exist, the damage to the individual affording merely a convenient method of calculating the reparation due to the State in respect of the injury to its national. The text of the relevant passage is worth quoting in full:

> "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."[144]

SECTION 2. MODALITIES OF REDRESS FOR BREACHES OF TREATY

SUB-SECTION i. GENERAL STATEMENT OF AVAILABLE REMEDIES

Article 37. Action by way of redress open to the parties

174. The principal comment required on this article is to draw attention to the safeguards suggested in connexion with the taking of certain kinds of action by way of redress, and involving for the most part an offer of recourse to arbitration, or willingness to accept arbitration or judicial settlement as a condition of having recourse to the redress in question. In this connexion, it is necessary to draw a distinction between, on the one hand, the question which has been dealt with in earlier parts of this chapter, whether a non-performance of a treaty obligation in certain circumstances is justified in law and, on the other hand, the existence of any procedural conditions under which, in the circumstances, the non-performance (however justified) ought to be carried out. There can be no doubt, for instance, that if one party definitely fails to perform a treaty obligation, the other party will, subject to what has been said earlier, be justified in a corresponding or perhaps some other non-performance; or rather, more accurately, that such action on its part will not amount to an infraction of international law. Nevertheless, it may be desirable to subject the right to take such action to certain procedural conditions. These are considered in articles 38 and 39.

SUB-SECTION ii. SPECIAL PROCEDURAL CONSIDERATIONS AFFECTING CERTAIN MEANS OF REDRESS

Article 38. Case (c) *of Article 37*

175. As this case contemplates the total termination of the treaty obligation on grounds of fundamental breach, it is sufficient to refer back to the articles dealing with that matter in the Rapporteur's second (1957) report, in particular article 20 and the commentary thereon, dealing with the question of arbitration or judicial settlement.

Article 39. Cases (d), (e) *and* (f) *of Article 37*

176. *Paragraph 1.* Since counter-measures, in order to be effective, may have to be taken at very short notice, it would not be possible to make them conditional upon a prior offer or acceptance of arbitration or judicial settlement, but it can be laid down that they must be accompanied by an offer to that effect, or that an offer made by the other party must be accepted, as a condition of their continued validity.

177. *Paragraph 2.* This confers a general right on the tribunal, in the event of arbitration or judicial settlement, to suspend, if it thinks fit, any countermeasures which may already have been instituted. The only exceptions to this are those measures contemplated by sub-paragraph (*e*) of article 37. Here it would seem sufficient to provide that the measures in question can only take a blocking character pending the final outcome of the case, since in that case, the measures would merely be provisional and precautionary.

178. *Paragraph 3.* Sub-paragraphs (*a*) and (*b*) impose some general limitations on the taking of any counter-measures at all. These are believed to reflect ordinary principles of international law, but in view of the detailed provisions of article 18, it may be unnecessary to include mention of them here.

179. Sub-paragraph (*c*) provides for the cessation of the counter-measures so soon as the occasion for them is past. The same observation applies here (see paras. 55-57 and 67 above).

[144] *Ibid.*, No. 17, p. 28.

Law of treaties

[Agenda item 3]

DOCUMENT A/CN.4/121

Practice of the United Nations Secretariat in relation to certain questions raised in connexion with the articles on the law of treaties

Note by the Secretariat

[*Original text: English*]
[*23 June 1959*]

It is hoped that the International Law Commission, in elaborating the articles of a code on the law of treaties, in so far as it concerns multilateral treaties, will not leave out of account, much less specifically contradict, the practice of the largest treaty-making organization in the world. Accordingly, it must be accepted that the practice of States in concluding treaties through the medium of the United Nations treaty-making machinery in itself constitutes a development of international law, which should, therefore, be fully reflected in the draft. It is in this latter connexion that the Secretariat would present to the Commission the following observations on certain aspects of the treaty practice within the United Nations.

A. The question of signature "ad referendum"

1. The practice of signing "*ad referendum*" is not a common one; for example, only one State (Venezuela) used the term "*ad referendum*" in signing the four conventions on the Law of the Sea, and Israel used it in signing the Protocol.

2. In the experience of the United Nations Secretariat, the purpose and effect of a signature "*ad referendum*" are identical with the purpose and effect of a signature "subject to ratification".

3. The only two instances (Austria and Federal Republic of Germany) where a signature "*ad referendum*" has been followed by a formal communication relate to the GATT protocols, which provided that States might become parties by signature only. In both cases, the communications emanated from the Office of the respective permanent Observers and stated that their Governments recognized themselves bound by the signatures affixed by their plenipotentiaries.

4. In all other instances, where ratifications were required, signatures "*ad referendum*" were followed by the deposit of an instrument of ratification or acceptance.

5. In conclusion, on this aspect of the matter, it would appear that the practice of the Secretariat, namely to make no distinction between a signature "*ad referendum*" and a signature "subject to ratification", corresponds to the practice of the Member Governments. In view of the fact that divergent views are held on this question, the Secretariat would propose that the comments of Governments should be specifically sought upon it.

B. Full powers and signature "ad referendum"

Full powers have always been required for a signature "*ad referendum*" and, in the experience of the Secretariat, no State has ever taken exception to this requirement.

C. Form of full powers

On 11 July 1949, the Assistant Secretary-General in charge of the Legal Department circulated to Member Governments a letter (LEG 103/01 (1) AL) from which the following is an extract:

> "Full powers should be issued, in accordance with the constitutional procedure of each State, either by the Head of the State, the Head of the Government or the Minister of Foreign Affairs. They should clearly specify the instrument referred to and give its exact and full title and its date.
>
> "In some exceptional cases and for reasons of urgency, if, for example there is a time-limit, cabled credentials may be accepted provisionally but the cable should also originate from the Head of the State, the Head of the Government or the Minister of Foreign Affairs and should be confirmed by a letter from the Permanent Delegation or the Plenipotentiary certifying its authenticity. The text of the cable should also state the title of the agreement referred to, and whether the Plenipotentiary is authorized to sign subject to later acceptance, and should specify that ordinary credentials are being sent immediately by mail.
>
> "This is the more important now that several conventions or agreements concluded under the auspices of the United Nations have provided that States can be definitively bound by signature alone.

"It is finally suggested that in order to facilitate their examination, the credentials of the representatives should be deposited with the Legal Department of the Secretariat twenty-four hours before the ceremony of signature of an international instrument."

Since the date of this circular letter the United Nations Secretariat has accepted, as definitive full powers, cable communications emanating from the Head of the State or Government or from the Minister for Foreign Affairs for signature of agreements which provide that they are subject to ratification.

D. Initialling

The custom of initialling has never been used in the United Nations for the purposes of authenticating the text of a multilateral convention. The very purpose of initialling—that of authentication—has been supplanted, in the more institutionalized treaty-making processes of the United Nations, by such standard machinery as the recorded vote on a resolution embodying or incorporating the text, or by incorporation into a final act. No representative has ever asked to initial a text of an instrument deposited with the Secretary-General.

E. Accession

The practice of the United Nations in adopting conventions has been, in numerous instances (e.g., conventions on the Law of the Sea), to offer to States the alternative of becoming parties either by signature followed by ratification or by accession. The development of international law in this respect appears to have been for simplification of formalities and for offering to States the procedures most convenient to them. From the Secretariat's records it appears that the number of instruments of accession deposited is roughly equivalent to the number of instruments of ratification. Moreover, it seems clear that accession, at least in United Nations treaty-making practice, does not presuppose the existence of a treaty in force (i.e., "a contract already entered into"). Thus, the situation which paragraph 6 of article 34 of the first report on the Law of Treaties (A/CN.4/101) treats as exceptional is in United Nations practice a normal one.

*
* *

The Secretariat takes this opportunity to inform the Commission that a summary of practice concerning the exercise of depositary functions in respect of multilateral conventions deposited with the Secretary-General is now in the course of preparation. It is expected that this publication will be in general distribution some time in September or October 1959.

Consular intercourse and immunities

[Agenda item 2]

DOCUMENT A/CN.4/L.79

Proposals and comments submitted by Mr. Alfred Verdross regarding the draft provisional articles on consular intercourse and immunities (A/CN.4/108) [1]

[*Original text: English*]
[*13 March 1959*]

Article 1

In paragraph 1, it would be preferable to use the words "Every sovereign State" instead of "Every State".

Article 3

In paragraph 1 (4), there is no need for maintaining the class of consular agents.

Article 13

In case the majority of the members of the International Law Commission vote for the second variant, I should like to make the following comments:

The consular representatives do not represent the economic and legal interests of their States, but those of the nationals of their States. The States are represented by diplomatic representatives. The duties of consular representatives, moreover, do not cover the support of cultural relations, unless a bilateral consular agreement includes such a provision.

With regard to paragraph 8, it should be mentioned that the consular representatives shall not be entitled to register persons who are refugees either in the sense of the Convention on the Status of Refugees or according to international law.

Article 17

States are entitled to declare a diplomatic representative to be *persona non grata* without giving reasons. There should, therefore, be no provision in paragraph 2 concerning the withdrawal of the *exequatur* of a consular representative that is more rigorous than those for diplomatic representatives. There should be no legal duty to communicate the reasons for the withdrawal to the sending State.

Article 20

In paragraph 2, it would be preferable to restrict the term "consular staff". It should be somehow explained that the expression "consular staff" does not cover typists, clerks or chauffeurs of the consular representative.

Article 22

It should be expressly prohibited to fly the national flag on vehicles for mass-transportation. Furthermore, the aircraft identification marks (nationality and registration mark) should not collide with the right of consular representatives to fly their national flag.

Article 23

The words "in time of peace" should be omitted.

Article 25

An article saying that official consular mail should be kept separate from private mail would be useful. Many bilateral consular agreements contain such an article.

Article 27

An article should be considered, saying that the principle of immunity from the jurisdiction of the State of residence should not be applied in such cases as: when the sending State expressly asks for a proceeding, when the sending State agrees to a proceeding, or when the consular representative expressly or tacitly consents to a proceeding. Furthermore, it should be considered to grant immunity only for those official acts which take place in rooms belonging to the consular office.

Article 28

It should be considered not to apply the exemption from taxation to incomes derived from craft and service trade as well as from employment. I propose the following addition to paragraph 2: "The exemption shall furthermore not apply to taxes and dues on income derived from any profession or employment exercised within the State of residence".

In connexion with this article, one might envisage the adoption of an article saying that the acquisition and possession of real estate for consular use should be exempted from payment of tax on possession and ownership of real estate, as well as of tax on acquisition of real estate.

[1] For the text of the draft provisional articles on consular intercourse and immunities, see *Yearbook of the International Law Commission 1957* (United Nations publication, Sales No.: 1957.V.5, Vol. II), vol. II, p. 83.

Article 31

I propose to amend this article to read as follows: "The State of residence shall grant exemption from all obligations under its social security legislation to consular representatives of the sending State and to members of the consular staff, if they are nationals of the sending State". Reference to the domicile would complicate the article.

Article 32

I recommend to omit paragraph 5. While normally in the draft provisional articles the phrase "State of residence" is used, paragraphs 1 and 2 of this article use the term "country of residence".

Article 33

It should be mentioned in the comment that the term "jurisdiction" covers both the jurisdiction of courts of law and that of administrative authorities.

Article 37

In paragraph 2, the necessity to keep consular mail apart from private mail of honorary consuls should be clearly pointed out. It seems inappropriate to refer to article 32 without qualification. It should at least be stated that the honorary consul can be forced to appear in court and give evidence in cases which are not concerned with his official activities.

Article 38

Comment will be given orally at the session.

General Statement

In the draft provisional articles the terms "consulate" and "consular office" are used alternately. I propose always to use the same expression.

Consular intercourse and immunities

[Agenda item 2]

DOCUMENT A/CN.4/L.82

Proposals and comments submitted by Mr. Georges Scelle regarding the draft provisional articles on consular intercourse and immunities (A/CN.4/108) [1]

[Original text: French]
[14 May 1959]

Article 1

In paragraph 2 (i), insert the word "normally" before the word "includes";

(ii) add the following text at the end of the paragraph:
"; but consular relations may subsist in the case of severance of diplomatic relations and may be established in the case of the non-recognition or *de facto* recognition of the receiving State without implying *de jure* recognition".

Add the following new paragraph:
"4. Consular officers are officials of the Governments by which they are sent".

Article 8

(i) Delete the words "without giving reasons for its refusal".

(ii) Add the sentence: "If the *exequatur* is refused, the reasons for the refusal shall, as far as possible, be stated, and the *exequatur* cannot be refused systematically."

Article 13

I prefer the second variant.

Article 14

Replace the text of the article by the following:
"The receiving and the sending States may, where appropriate, if the sending State has no diplomatic mission in the receiving State, agree with each other to entrust to the consuls a mission of a diplomatic nature, such agreement to be without prejudice to the question of recognition."

Article 17

In paragraph 1, insert after the words "of that State's laws" the words: "or of the international obligations attaching to his office".

Add the following new paragraph:
"3. The withdrawal of the *exequatur* shall be regarded as an individual measure only and in no case as a measure taken for the purpose either of modifying the stipulations of the consular convention, or of obstructing the normal discharge of consular functions. Consequently, the withdrawal of the *exequatur* cannot be a wholesale measure".

[1] For the text of the draft provisional articles on consular intercourse and immunities, see *Yearbook of the International Law Commission 1957* (United Nations publication, Sales No.: 1957.V.5, Vol. II), vol. II, p. 83.

Report of the Commission to the General Assembly

DOCUMENT A/4169 *

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

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CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the statute of the Commission annexed thereto, as subsequently amended, held its eleventh session in Geneva, from 20 April to 26 June 1959. The meetings were, apart from the first two held at the European Office of the United Nations, held at the International Labour Office by courtesy of the Director-General of the International Labour Organisation. The work of the Commission during the present session is described in the present Report. Chapter II of the Report contains a first "section" of a Code on the Law of Treaties, comprising a definition of the scope of the Code and a number of articles which will be part of a first chapter of the Code, dealing with the validity of treaties. There is also a commentary on the articles. Chapter III contains the first nineteen articles of a draft on Consular Intercourse and Immunities, together with a commentary on those articles. Chapter IV deals with certain administrative and other matters.

I. Membership and attendance

2. The Commission consists of the following members:

Name	*Country*
Mr. Roberto Ago	Italy
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Milan Bartos	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. Nihat Erim	Turkey
Sir Gerald Fitzmaurice	United Kingdom of Great Britain and Northern Ireland
Mr. J. P. A. François	Netherlands
Mr. F. V. García Amador	Cuba
Mr. Shuhsi Hsu	China

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

Name	*Country*
Mr. Thanat Khoman	Thailand
Mr. Faris El-Khouri	United Arab Republic
Mr. Ahmed Matine-Daftary	Iran
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Kisaburo Yokota	Japan
Mr. Jaroslav Zourek	Czechoslovakia

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

II. Officers

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

Chairman: Sir Gerald Fitzmaurice;

First Vice-Chairman: Mr. Shuhsi Hsu;

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

Rapporteur: Mr. J. P. A. François.

5. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

III. Agenda

6. The Commission adopted an agenda for the eleventh session consisting of the following items:

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

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

CHAPTER II

LAW OF TREATIES

I. General Observations

A. HISTORICAL SUMMARY OF THE SUBJECT

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

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

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

[2] *Ibid.*, para. 61.

[3] *Ibid., Fourth Session, Supplement No. 10* (A/925).

[4] *Ibid.*, paras. 19-20.

Report for 1950 [5]

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

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

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

Report for 1951 [6]

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

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

Report for 1952 [7]

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

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

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

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

Report for 1953 [8]

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

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

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

[5] *Ibid., Fifth Session, Supplement No. 12* (A/1316).

[6] *Ibid., Sixth Session, Supplement No. 9* (A/1858).

[7] *Ibid., Seventh Session, Supplement No. 9* (A/2163).

[8] *Ibid., Eighth Session, Supplement No. 9* (A/2456).

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

[9] *Official Records of the General Assembly, Tenth Session, Supplement No. 9* (A/2934).

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

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

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

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

B. Scope and character of the present chapter

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

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

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

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

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

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

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

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

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

18. It should be mentioned that, on the recommendation of the special rapporteur, and of course without prejudice to any eventual decision to be taken by the Commission or by the General Assembly, the Commission has not at present envisaged its work on the law of treaties as taking the form of one or more international conventions or as taking the form of a treaty, but rather as a code of a general character. The reasons for and advantages of this conception, as they appeared to the special rapporteur, are stated in the following passage from paragraph 9 of the introduction to his first report:

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

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

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

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

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

[14] Depending on the character and terms of the treaty, entry into force may coincide with ratification or may take place later.

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

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

INTRODUCTORY ARTICLES

Article 1

Scope of the Code

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

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

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

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

Commentary

Paragraph 1

(1) Paragraph 1 of this article reflects in essence a decision originally taken by the Commission during its second and third sessions in 1950 and 1951.[16] The term "treaty" usually connotes a particular type of international agreement—namely, the single formal instrument which is normally subject to ratification. It is, however, abundantly clear that, whether or not the use of the term "treaty" in connexion with them is always appropriate, there are indubitably international agreements—such as exchanges of notes—which, though not consisting of a single formal instrument, and often (indeed usually) not being subject to ratification, are agreements to which the international law of treaties applies. Similarly, in the field of single instruments, very many in common and daily use—such as an "agreed minute", or a "memorandum of understanding", etc.—could not appropriately be called "single *formal* instruments"; yet they embody what are undoubtedly international agreements, subject to the rules of the law of treaties. A general code on the law of treaties must cover all such agreements, whether embodied in one instrument or in two or more related instruments, and whether the instrument is "formal" or "informal". The question whether, in order to describe in general terms all such instruments and the law relating to them, the expressions "treaties" and "the law of treaties", or else "international agreements" and "the law of international agreements" should be employed, is a question of terminology rather than of substance. This aspect of the matter is discussed in paragraphs (6) and (7) below.

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

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

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

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

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

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

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

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

[17] Series A/B, No. 41, p. 47.

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

[19] *Introduction à l'étude du droit international*, pp. 33-34.

[20] A/CN.4/63, note to article 2, p. 39.

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

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

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

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

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

> "The designation of an instrument is irrelevant not only in so far as its character as a treaty is concerned, but also in respect of the rules governing its conclusion, the conditions of its validity, its operation and interpretation, and its termination. Thus, as already stated, it does not follow from the mere fact that an instrument is described as an exchange of notes that it does not require ratification. The normal absence of the requirement of ratification in instruments of this description follows from the circumstance that as a rule they expressly dispense with ratification by providing that they shall enter into force on a specified date or on the completion of the exchange of notes, i.e., on the acceptance and confirmation by one contracting party of the document submitted and drafted—usually as the result of a joint effort—by the other party."[23]

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

Paragraph 2

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

[22] See footnote 13. This matter will be more fully considered in connexion with the articles on ratification.

[23] A/CN.4/63, p. 38, para. 3.

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

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

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

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

Paragraph 3

(9) The Code applies to all *instruments* embodying international *agreements,* but it does not apply either to all international agreements, or to all instruments. There are two possibilities:

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

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

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

[26] Series A/B, No. 53, pages 69 *et seq.*

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

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

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

Paragraph 4

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

Article 2

Meaning of an international agreement

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

(a) In a single formal instrument; or

(b) In two or more related instruments constituting an integral whole.

Commentary

Title of the article

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

Text of the article

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[33] A/CN.4/115, article 8 and the commentary thereto.

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

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

First Chapter. The validity of treaties

General articles

Article 3

Concept of validity

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

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

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

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

Article 4

General conditions of obligatory force

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

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

Commentary

(1) These two articles cover in a simplified form the material contained in articles 10-12 of the first Fitzmaurice report. It was felt in the Commission (and equally be the special rapporteur) that the latter articles did not distinguish quite sufficiently clearly between the concepts of validity and obligatory force, which are of course distinct. For instance, a treaty may be valid in every respect but may, for the time being, not be obligatory because, although in force, it is subject to a suspensive condition. A further refinement would be possible, for a treaty may be both valid and in force, yet not actually be operative. Thus a treaty might provide that it enters into force on the exchange of ratifications, but if its provisions related wholly to the existence of a state of hostilities, they would not become *operative* until hostilities occurred.

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

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

Article 5

The treaty considered as a text and as an international agreement

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

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

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

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

(a) The drawing up and authentication of the text;

(b) Provisional acceptance of the text;

(c) Final acceptance of the text as an international agreement;

(d) Entry into force of the treaty.

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

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

Commentary

Paragraphs 1-3

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

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

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

Paragraph 4

(2) The Commission feels no doubt that, as a matter of classification, the four stages mentioned in this paragraph all exist, although in practice two or more of them may be merged. Thus, in case of agreements signed on the spot, and containing a clause bringing them into force *on signature*, all *four* stages take place in one. Similarly, ratification may bring about both stages (*c*) and (*d*). In order to show, however, that the four stages are, in the abstract, distinct, the following case, a frequent one, may be noted. At an international conference: (*a*) the delegates draw up the text of a convention, which they do not sign or initial but authenticate simply by incorporating it into the final act of the conference; (*b*) the convention being subject to ratification, and also left open for signature until a certain date, some States subsequently sign it, thereby giving a *provisional assent* to it as a potential treaty (the mere act of drawing up the text did not imply even that); (*c*) they subsequently ratify, thereby giving a *final* assent, but this does not necessarily bring the convention into force, because it may be expressly provided that it will come into force only when, say, twenty ratifications have been deposited; (*d*) on the deposit of the twentieth ratification, the treaty comes into force.

PART I. FORMAL VALIDITY

(Framing, conclusion and entry into force of treaties)

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

Article 6

Drawing up and method of adoption of the text

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

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

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

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

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

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

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

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

Commentary

Paragraph 1

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

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

Paragraph 2

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

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

Paragraph 3

(4) A general exception to the necessity for authority to negotiate, duly referred to in paragraph 2 of the present article, is specified in paragraph 3. Authority to negotiate (and, as will be seen later, authority to sign) is inherent in the office and function of such persons as Heads of States and Governments, and Foreign Ministers—and also, in the special circumstances stated in the second sentence of paragraph 3, ambassadors or other heads of diplomatic missions, as regards authority to *negotiate.*[41] In the case of Foreign Ministers, the principle involved can be illustrated from the pronouncement of the Permanent Court of International Justice, already referred to (see footnote 26 above), in the Eastern Greenland dispute, in which the Court said[42] (in relation to a case in which a Foreign Minister had given an *oral* undertaking, but without producing any express authority to do so) that it considered it to be "... beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign power, *in regard to a question falling within his province,* is binding upon the country to which the Minister belongs".[43]

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

Paragraph 4

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

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

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[37] Drawn up in the Sixth Committee of the General Assembly at its third session, Paris, 1948.

[38] As for instance the International Labour Organisation.

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

[40] That is, apart from the special case mentioned in article 15, paragraph 1 (*a*).

[41] They would, however, still require specific full powers to *sign* any resulting treaty.

[42] Series A/B, No. 53, p. 71.

[43] Italics added by the Commission.

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

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

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

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

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

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

(*b*) According to a second view, a code on the law of treaties should not only deal with the matter, but should actually specify the majority by which an international conference should adopt its texts. In this connexion, it was pointed out that although most conferences had adopted their texts by a simple majority vote, there was a growing tendency to regard a two-thirds rule as preferable. A simple majority rule certainly facilitated the work of the conference; but it often led to the adoption of texts that did not command any really wide measure of support, and which consequently tended to remain unratified. Some members of the Commission considered that a code on treaty law should prescribe a two-thirds rule for the adoption of texts.

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

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

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

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

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

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

Article 7

Elements of the text

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

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

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

Commentary

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

(2) Such is the legal position intended to be reflected by paragraph 1 of article 7. But this paragraph is not of course intended to imply that a preamble, a formal conclusion, and other special clauses, should not figure in treaties, or that they will not produce their due legal effect whenever they are present. What the paragraph implies is that it is for the parties to decide whether to include these elements or not, but that failure to do so will not affect the validity of the treaty as such. As to the legal effects of such parts or provision of a treaty, this is a matter of the rules of treaty interpretation, and of other rules contained in later parts of the Code.

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

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

Article 8

Legal consequences of drawing up the text

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

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

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

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

Commentary

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

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

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

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

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

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

Article 9

Authentication of the text

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

(a) Initialling of the text on behalf of the negotiating States;

(b) Incorporation of the text in the Final Act of the conference at which it was drawn up;

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

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

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

Commentary

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

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

(3) It may be asked, is it then impossible to change an established text, should the parties have further thoughts, so long at any rate as it has not been signed? The answer is that it is not impossible, but that once a recognized procedure of authentication has been carried out in relation to a text, any subsequent alteration of it results not merely in an amended text, but in a *new* text, which will then itself require authentication or reauthentication in some way. This can best be illustrated in relation to those cases where signature is itself the method of authentication—i.e., where the text has not already been authenticated in any other way (until fairly recently signature was indeed the normal method of authentication though it no longer always is so[50]). In such a case, changes effected after signature would require the text to be re-signed or re-initialled, or a new text to be drawn up and signed; or alternatively a separate protocol registering and authenticating the changes would have to be drawn up and signed. In general, no changes could be made to the original signed text or signature copy itself, for then the parties would be on record as having signed a text different from the one which, at the actual date of signature, they did sign. If changes *are* made on the original signed text or signature copy, they would themselves require to be signed or initialled, and *dated*. The document as a whole would then stand authenticated as the actual text of the treaty. But final establishment of the text at some point there must be, and, in order to register and stabilize this text as the basis for ratification (where necessary) and entry into force, there must be an eventual authentication of it in its final form by some recognized method.

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

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

[49] The numbering is left blank as the Commission has not yet considered all the articles involved.

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

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

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

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

Continuing, Professor Brierly said that in recent years:

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

In conclusion, Professor Brierly accordingly said that

> "In the light of the developments referred to, it is thought useful to emphasize in the present draft the distinction between signature of the texts of treaties as a means of mere authentication and signature as the process, or part of the process, whereby a State or international organization accepts a treaty as obligatory; considered as a means of authentication, signature of negotiators is but one such means, though of course still that which is most common."

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

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

Article 10

Initialing and signature ad referendum, as acts authenticating the text

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

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

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

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

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

[54] See footnote 49.

Commentary

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

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

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

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

[55] Such cases are infrequent but have occurred. The intention may be inferred from the instrument as a whole or from the surrounding circumstances.

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

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

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

Article 14

Function of signature

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

Article 15

Authority to sign

1. Signature can only be effected:

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

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

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

Commentary

Article 14

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

Article 15

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

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

[57] See footnote 49.

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

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

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

(6) The second sentence of paragraph 2 recognizes a practice of fairly recent development and of considerable utility. It should render initialling and signature *ad referendum* unnecessary, save in exceptional circumstances or as deliberate acts (see para. (4) of the commentary to article 10). It goes without saying that if the promised full-powers do not in due course arrive, the signature admitted on the basis of the telegraphic authority has no effect, and must be considered null and void.

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

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

Article 16

Time and place of signature

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

Commentary

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

[58] For instance Heads of States, Heads of Governments, and Foreign Ministers would normally be competent authorities.

[59] For instance by his office—e.g., "Our Ambassador at ..., for the time being".

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

accession (as to which see later articles of the Code [61]).

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

Article 17

The right to sign

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

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

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

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

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

Commentary

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

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

[61] The Commission had not reached this part of the work at the end of the present session.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER III

CONSULAR INTERCOURSE AND IMMUNITIES

I. Introduction

21. At its first session, in 1949, the International Law Commission drew up a provisional list of fourteen topics the codification of which it considered necessary or desirable. On this list was the subject of "Consular intercourse and immunities", but the Commission did not include this subject among those to which it accorded priority.[63]

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

23. In the autumn of 1955 the special rapporteur, wishing to ascertain the views of the members of the Commission on certain points, sent them a questionnaire on the matter.

24. The subject of "Consular intercourse and immunities" was placed on the agenda for the eighth session of the Commission, which devoted two meetings to a brief exchange of views on certain points made in a paper submitted by the special rapporteur. The special rapporteur was requested to continue his work in the light of the debate.[65]

25. The topic was retained on the agenda for the Commission's fifth session. The special rapporteur submitted a report (A/CN.4/108), but in view of its work on other topics, the Commission was unable to examine this report.[66]

26. The Commission began discussion of the report towards the end of its tenth session, in 1958. After an introductory exposé by the special rapporteur, followed by an exchange of views on the subject as a whole and also on the first article, the Commission was obliged, for want of time, to defer further consideration of the report until the eleventh session.[67]

27. At the same session the Commission decided to make the draft on consular intercourse and immunities the first item on the agenda for its eleventh session (1959) with a view to completing at that session, and if possible in the course of the first five weeks, a provisional draft on which Governments would be invited to comment.[68] It had further decided that if, at the eleventh session, it could complete a first draft on consular intercourse and immunities to be sent to Governments for comments, it would not take up the subject again for the purpose of preparing a final draft in the light of those comments until its thirteenth session

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

[64] *Ibid., Tenth Session, Supplement No. 9* (A/2934), para. 34.

[65] *Ibid., Eleventh Session, Supplement No. 9* (A/3159), para. 36.

[66] *Ibid., Twelfth Session, Supplement No. 9* (A/3623), para. 20.

[67] *Ibid., Thirteenth Session, Supplement No. 9* (A/3859), para. 56.

[68] *Ibid.*, para. 57.

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

28. The Commission also decided, because of the similarity of this topic to that of diplomatic intercourse and immunities which had been debated at two previous sessions, to adopt an accelerated procedure for its work on this topic.[69] Lastly, it decided to ask all the members who might wish to propose amendments to the existing draft presented by the special rapporteur to come to the session prepared to put in their principal amendments in writing within a week, or at most ten days, of its opening.[69]

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

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

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

II. General considerations

32. Consular intercourse and immunities are governed partly by municipal law and partly by international law. Very often municipal law regulations deal with matters governed by international law, whether customary or conventional. Equally, consular conventions sometimes regulate questions which are within the province of municipal law, e.g., the form of the consular commission. In drafting a code on consular intercourse and immunities, it is necessary, as the special rapporteur has pointed out,[70] to bear in mind the distinction between those aspects of the status of consuls which are principally regulated by municipal law, and those which are regulated by international law.

33. The codification of the international law on consular intercourse and immunities involves another special problem arising from the fact that the subject is regulated partly by customary international law, and partly by a great many international conventions which today constitute the principal source of consular law. A draft which codified only the international customary law would perforce remain incomplete and have little practical value. For this reason the Commission agreed, in accordance with the special rapporteur's proposal, to base the articles which it is now drafting not only on customary international law, but also on the material furnished by international conventions, especially consular conventions.

34. A international convention admittedly establishes rules binding the contracting parties only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions, and also through the operation of the most-favoured-nation clause. The special rapporteur's analysis of these conventions revealed the existence of rules widely applied by States, and which, if incorporated in a codification, may be expected to obtain the support of many States.

35. If it should not prove possible on the basis of the two sources mentioned—conventions and customary law—to settle all controversial and obscure points, or if there remain gaps, it will be necessary to have recourse to the practice of States as evidenced by internal regulations concerning the organization of the consular service and the status of foreign consuls, in so far, of course, as these are in conformity with the fundamental principles of international law.

36. It follows from what has been said that the Commission's work on this subject is both codification and progressive development of international law in the sense in which these concepts are defined in article 15 of the Commission's Statute. The draft which the Commission is to prepare is described by the special rapporteur in his report in these words:

> "A draft set of articles prepared by that method will therefore entail the codification of general customary law, of the concordant rules to be found in most international conventions, and of any provisions adopted under the world's main legal systems which may be proposed for inclusion in the regulations."[71]

37. The choice of the form of any codification of consular intercourse and immunities is determined by the purpose and nature of the codification. The Commission had this fact in mind when (bearing in mind also its decision on the form of the draft articles on diplomatic intercourse and immunities) it approved the special rapporteur's proposal that his draft should be prepared on the assumption that it would form the basis of a convention. A final decision on this point cannot be taken until the Commission has considered the comments of Governments on the first draft.

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

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[69] *Ibid.*, para. 64.

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

[71] *Ibid.*, para. 84.

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

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

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

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

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

III. Text of draft articles 1-19 and commentary

Article 1

Definitions

For the purposes of this draft:

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

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

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

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

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

(f) The term " consul ", except in article 5, means any person duly appointed by the sending State to exercise consular functions in the receiving State as consul-general, consul, vice-consul or consular agent, and authorized to exercise those functions in conformity with article 10 or 11 of this draft;

A consul may be:

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

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

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

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

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

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

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

Commentary

This article was adopted in order to establish a consistent terminology for the articles prepared by the Commission. Certain members of the Commission expressed doubts concerning certain of these definitions, especially as to the appropriateness of using the term " consul " in a generic sense, and on the definition of " consular official." The article was adopted on a provisional basis ; when, at the next session, the Commission concludes its examination of all the articles of the draft, it will re-examine the article in the light of the texts adopted, and will decide whether the list of definitions should be simplified or, on the other hand, be augmented by yet further definitions.

CHAPTER I. CONSULAR INTERCOURSE

Article 2

Establishment of consular relations

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

Commentary

(1) The expression " consular relations " means the relations which come into existence between two States by reason of the fact that consular functions are exercised by authorities of the one State on the territory of the other. In most cases these relations are mutual, consular functions being exercised in each of the States concerned, by the authorities of the other. The establishment of these relations presupposes agreement between the States in question, and such relations are governed by international law, conventional or customary. In addition, the legal position of consuls is governed by international law, so that by reason of this fact also, a legal relationship arises between the sending State and the receiving State. Finally, the expression in question has become hallowed by long use, and this is why the Commission has retained it, although some members would have preferred another.

(2) Consular relations may be established between States which do not maintain diplomatic relations.

(3) In a number of cases where diplomatic relations exist between States, their diplomatic missions also exercise certain consular functions, usually maintaining consular sections for that purpose. The special rapporteur had accordingly submitted the following second paragraph for article 1:

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

The Commission, after studying this provision, reserved its decision on this matter until it should have finished its examination of article 25 dealing with consular functions. It has not had time to revert to this matter at its present session, and will have to take a decision at its twelfth session.

(4) No State is bound to establish consular relations with any other State unless it has previously concluded an international agreement to do so. None the less, the interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, makes it desirable that consular relations should be established.

Article 3

Establishment of a consulate

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

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

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

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

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

Commentary

(1) The first paragraph of this article lays down that the consent of the receiving State is essential for the establishment of any consulate (consulate-general, consulate, vice-consulate or consular agency) on its territory. This principle derives from the sovereign authority which every State exercises over its territory, and applies both in those cases where the consulate is established at the same time as the consular relations are established, and in those cases where the consulate is to be established later. In the former case, the consent of the receiving State to the establishment of a consulate will usually already have been given in the agreement for the establishment of consular relations; but it may also happen that this agreement is confined to the establishment of consular relations, and that the establishment of the consulate is reserved for a later agreement.

(2) An agreement on the establishment of a consulate presupposes that the States concluding it agree on the boundaries of the consular district and on the seat of the consulate. It sometimes happens in practice that the agreement on the seat of the consulate is concluded before the two States have agreed on the boundaries of the consular district.

(3) The consent of the receiving State is also necessary if the consulate desires to open a vice-consulate, an agency or an office in a town other than that in which it is itself established.

(4) Since the agreement for the establishment of a consulate is in a broad sense an international treaty, it is governed by the rules of international law relating to the revision and termination of treaties. The Commission has therefore not thought it necessary to write into this article the conditions under which an agreement for the establishment of a consulate may be amended. It has merely stated in paragraph 3, in order to protect the interests of the receiving State, that the sending State may not change the seat of the consulate, nor the consular district, without the consent of the receiving State. The silence of the article as to the powers of the receiving State must not be taken to mean that this State would always be entitled to change the consular district or the seat of the consulate unilaterally. The Commission thought, however, that in exceptional circumstances the receiving State had the right to request the sending State to change the seat of the consulate or the consular district. If the sending State refused its consent, the receiving State could denounce the agreement for the establishment of the consulate and order this to be closed.

(5) Since the powers of the consul in relation to the receiving State are limited to the consular district, the consul may exercise his functions outside his district only with the consent of the receiving State. There may, however, be exceptions to this rule. Some of the articles in the draft deal with situations in which the consul may be obliged to act outside his consular district. This is the case, for instance, as regards article 16, which deals with the occasional performance of diplomatic acts by a consul, and article 17, which governs the exercise by a consul of diplomatic functions. Both situations are covered by the words "Save as otherwise agreed" at the beginning of paragraph 4.

(6) Paragraph 5 applies both where the district of a consulate established in the receiving State is to include all or part of the territory of a third State, and where the consul is to act as head of a consulate established in the third State. A similar rule relating to the accrediting of the head of a mission to several States is contained in article 5 of the Draft Articles on Diplomatic Intercourse and Immunities.

(7) The term "sending State" means the State which the consulate represents.

(8) The term "receiving State" means the State on whose territory the activities of the consulate are exercised. In the exceptional case where the consular district embraces the whole or part of the territory of a third State, that State should for the purposes of these articles also be regarded as a receiving State.

Article 4

Carrying out of consular functions on behalf of a third State

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

Commentary

(1) Whereas article 3, paragraph 5, of the draft deals with the case where the jurisdiction of a consulate, or the exercise of the functions of a consul is to extend to the whole or part of the territory of a third State, the purpose of the present article is to regulate the case where the consul desires to exercise in his district consular functions on behalf of a third State. In the first place, such a situation may arise when a third State, not maintaining consular relations with the receiving State, nevertheless desires to afford consular protection there to its nationals. For example, the Caracas Agreement, signed on 18 July 1911, between Bolivia, Colombia, Ecuador, Peru and Venezuela, relating to the functions of the consuls of each contracting republic in the others, provided that the consuls of each of the contracting republics residing in any other of them could exercise their functions on behalf of persons belonging to any other contracting republic not having a consul in the particular place concerned (art. 6).

(2) Another case in which the exercise of consular functions on behalf of a third State meets a practical need is that of a breaking off of consular relations.

(3) The law of a considerable number of countries provides for the exercise of consular functions on behalf of a third State, but subjects it to consent by the Head of State, by the Government, or by the Foreign Minister.

(4) It is obvious that in the cases covered by the article, the consul will rarely be able to exercise all consular functions on behalf of the third State. In some cases he may confine himself to the exercise of only a few. The article contemplates both the occasional exercise of certain consular functions and the continuous exercise of such functions. In both cases the consent of the receiving State is essential.

Article 5

Classes of heads of consular posts

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

(1) Consuls-general;

(2) Consuls;

(3) Vice-consuls;

(4) Consular agents.

Commentary

(1) Whereas the classes of diplomatic agents were determined by the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818, the classes of consuls have not yet been codified. Since the institution of consuls first appeared in relations between peoples, a large variety of titles has been used. At present the practice of States, as reflected in their domestic law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in article 5 to enable the classes of heads of consular posts to be codified, thus doing for consular law what the Congress of Vienna did more than 140 years ago for diplomatic law.

(2) This enumeration of four classes in no way means that States accepting it are bound to have all four classes in practice. They will be obliged only to give their heads of consular posts one of the four titles in article 5. Consequently, those States whose domestic law does not provide for all four classes will not find themselves under any necessity to amend it.

(3) It should be emphasized that the term "consular agent" is used in this article in a technical sense differing essentially from the generic meaning given to it in some international instruments, as denoting all classes of consular officials.

(4) Under some domestic laws, consular agents are invested only with functions that are more limited than those of consuls-general and consuls, relating merely to the protection of commerce and navigation; and such consular agents are appointed, with the consent of the receiving State, not by the Government of the sending State, but locally by the consuls, and they remain under the orders of the appointing consuls. The Commission desires to draw the especial attention of Governments to this class of consular official, and to ask Governments for detailed information enabling the Commission to decide what is the function and method of appointment of consular agents according to the domestic law of different States, and to ascertain the extent to which the institution of the consular agent is in practice made use of today. This information will constitute the basis for a final decision as to this class of consular official when the Commission reverts to the subject.

(5) The domestic law of some (but not very many) States allows the exercise by vice-consuls and consular agents of gainful activities in the receiving State. Some consular conventions sanction this practice by way of exception (see, as regards consular agents, art. 2, para. 7 of the Consular Convention of 31 December 1951 between the United Kingdom and France). The special rapporteur's draft treats vice-consuls and consular agents exercising a gainful activity on the same footing as honorary consuls, whose legal position will be dealt with by chapter III of the draft.

(6) The proposed classification is in no way affected by the fact that certain domestic legal systems include heads of consular sections of diplomatic missions in their consular classifications, for the term "head of consular section of a diplomatic mission" refers only to a function, not to a new class of consular officials.

(7) It should be emphasized that the article only deals with heads of posts as such, and in no way purports to restrict the power of States to determine the titles of the consular officials and employees who work under the direction and responsibility of the head of post.

Article 6

Acquisition of consular status

A consul within the meaning of these articles is an official who is appointed by the sending State to one of the four classes enumerated in article 5, and who is recognized in that capacity by the State in whose territory he is to carry out his functions.

Commentary

(1) This article states a fundamental principle which is developed in the succeeding articles. It lays down two requirements which must be satisfied in order that a person may be considered a consul in international law:

(*a*) He must be appointed by the competent authority of the sending State as consul-general, consul, vice-consul or consular agent;

(*b*) He must be recognized in that capacity by the Government of the State in whose territory he is to carry out his functions.

(2) This provision is necessary in order to bring out the fact that the articles which the Commission is now drafting relate only to consuls who have international status, and to members of their staffs, and that they do not apply to persons who may have the title of consul, but whose activities are confined to the internal services of their State.

Article 7

Competence to appoint and recognize consuls

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

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

Commentary

(1) There is no rule of international law determining which in particular is the authority in a State competent to appoint consuls. This matter is governed by the internal law of each State. Consuls—at any rate those in the first two classes—are appointed either by the Head of State on a recommendation of the Government, or by the Government, or by the Foreign Minister. Even within a single State there may be different competent authorities according to whether the appointment of consuls-general is involved, or else that of consuls, vice-consuls and consular agents; or again, for the appointment of career consuls on the one hand, and of honorary consuls on the other.

(2) The same applies to the manner of the appointment of consuls. This matter also is governed by the internal law of each State, which determines the qualifications required for the appointment of a consul, the procedure of appointment, and the form of the documents furnished to consuls. Thus it is, for example, that in some States, although consular agents may be appointed by a central authority, this is done on the recommendation of the consul under whose orders and responsibility they are to work. Since in the past the mistaken opinion has sometimes been voiced that only Heads of State are competent to appoint consuls, and since it is even the case that concrete attitudes have been taken up on the basis of these opinions, it has seemed timely to state in this article that the competence to appoint consuls, and the method of exercise of this competence, is governed by the internal law of each State. Such a rule would put an end to all these differences of view, and would for the future prevent frictions calculated to injure good relations between States.

(3) Nor does international law determine which particular authority shall have competence to grant recognition to a consul appointed by the sending State, or the form of such recognition. The present draft provides only that, in the absence of the final recognition given by means of an exequatur (art. 10), there shall be a provisional recognition (art. 11). Internal law therefore governs the other relevant matters dealt with by the present article.

(4) Subject to article 5, which classifies heads of consular posts, every State is also free to determine the seniority of its consuls, and whether and to what extent it will make use of honorary consuls. However, as regards the appointment of a consul abroad, the views of the receiving State must also be considered. The receiving State has in fact a corresponding freedom to refuse to recognize honorary consuls, or to require in return for recognition that such a consul be appointed in a particular class, unless indeed the matter was settled when the consulate was established. It is therefore recommended that the matter should be regulated beforehand by negotiation between the States concerned. However, the point is not important enough to call for a special provision such as that contained in article 14 of the Draft Articles on Diplomatic Intercourse and Immunities.

(5) The principle underlying paragraph 1 of the present article has been codified in a different form in the 1928 Havana Convention on consuls, article 6 of which provides as follows:

> "The manner of appointment of consuls, their qualifications for appointment and their classes and categories, shall be governed by the internal law of the State concerned."

The Commission, having regard to the development of international law reflected in international conventions and in the present draft, article 8 of which relates to the consular commission, submits in the first paragraph of the present article a provision having a more limited object, and supplements this in paragraph 2 of the article by providing that the competence to grant recognition to consuls, and the form of such recognition, is governed by the internal law of the receiving State.

Article 8

Appointment of nationals of the receiving State

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

Commentary

In those cases where the sending State wishes to appoint as the head of a consular post a person who is a

national of the receiving State, or who is a national both of the sending State and of the receiving State, it can do so only with the express consent of the receiving State. This is a case in which a conflict could arise between the consular official's duties towards the sending State and his duties as a citizen of the receiving State. It should be noted that according to the terms of this article, the express consent of the receiving State is not required if the consular official is a national of a third State. The article corresponds to article 7 of the Draft Articles on Diplomatic Intercourse and Immunities.

Article 9

The consular commission

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

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

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

Commentary

(1) As a general rule, the consul is furnished with an official document known as "consular commission" (variously known in French as *lettre de provision, lettre patente* or *commission consulaire*). The instrument issued to vice-consuls and consular agents sometimes bears a different name—*brevet, décret, patente* or *licence*.

(2) For purposes of simplification article 9 uses the expression "consular commission" to describe the official documents of heads of consular offices of all classes. While it may be proper to describe differently the full powers given to consular officials not appointed by the central authorities of the State, the legal significance of these documents from the point of view of international law is the same. This *modus operandi* is all the more necessary in that the manner of appointment of consuls pertains to the domestic jurisdiction of the sending State.

(3) While the form of the consular commission remains none the less governed by municipal law, paragraph 1 of the article states the particulars which should be shown in any consular commission in order that the receiving State may be able to determine clearly the competence and legal status of the consul. The expression "as a general rule" indicates clearly that this is a provision the non-observance of which does not have the effect of nullifying the consular commission. The same paragraph specifies, in keeping with practice, that a consular commission must be made out in respect of each appointment. Accordingly, if a consul is appointed to another post, a consular commission must be made out for that case, even if the post is in the territory of the same State. On this point, too, the Commission would like to receive further information concerning prevailing practice.

(4) Some bilateral conventions specify the content or form of the consular commission (see, for example, article 3 of the Convention of 31 December 1913, between Cuba and the Netherlands, the Convention of 20 May 1948 between the Philippines and Spain, article IV of which stipulates that regular letters of appointment shall be duly signed and sealed by the Head of State). Obviously, in such cases the content or form of the consular commission must conform to the provisions of the convention in force.

(5) The consular commission, together with the exequatur, is retained by the consul. It constitutes an important document which he can make use of at any time with the authorities of his district as evidence of his official position.

(6) While the consular commission as above described constitutes the regular mode of appointment, the recent practice of States seems to an ever-increasing extent to permit less formal methods, such as notification of the consul's posting. It was therefore thought necessary to allow for this practice in article 9, paragraph 3.

(7) For the presentation of the consular commission, the diplomatic channel is prescribed by a large number of national legislations and international conventions, for example the Havana Convention of 20 February 1928 (art. 4). This seems to be the normal method of obtaining the exequatur. Nevertheless, to take account also of the circumstances and cases in which the diplomatic channel cannot be used, and where another procedure would be appropriate, the text of paragraph 2 expressly states that, as well as the diplomatic channel, some "other appropriate channel" may be used.

Article 10

The exequatur

Without prejudice to the provisions of articles 11 and 13, heads of consular posts may not enter upon their duties until they have obtained the final recognition of the Government of the State in which they are to exercise them. This recognition is given by means of an exequatur.

Commentary

(1) The exequatur is the act whereby the receiving State grants the foreign consul final recognition, and thereby confers upon him the right to exercise his consular functions. Accordingly, the exequatur invests the consul with competence vis-à-vis the receiving State. The same term also serves for describing the document containing the recognition in question.

(2) As is stipulated in article 7, competence to grant the exequatur is governed by the municipal law of the receiving State. In many States, the exequatur is granted by the Head of the State if the consular commission is signed by the Head of the sending State, and by the Minister of Foreign Affairs in other cases. In many

States the exequatur is always granted by the Minister of Foreign Affairs. In certain countries, competence to grant the exequatur is reserved to the Government.

(3) As is evident from article 7, the form of the exequatur is likewise governed by the municipal law of the receiving State. As a consequence, it varies considerably. According to the information at the Commission's disposal, the types of exequatur most frequently found in practice are the following.

Exequaturs may be granted in the form of:

(*a*) A decree by the Head of the State, signed by him and countersigned by the Minister of Foreign Affairs, the original being issued to the consul;

(*b*) A decree signed as above, but only a copy of which, certified by the Minister of Foreign Affairs, is issued to the consul;

(*c*) A transcription endorsed on the consular commission, a method which may itself have several variants;

(*d*) A notification to the sending State through the diplomatic channel.

(4) In certain conventions the term "exequatur" is used in its formal sense as referring only to the forms mentioned under (*a*) to (*c*) above. As allowance must also be made for cases in which the exequatur is granted to the consul in a simplified form, these conventions mention, besides the exequatur, other forms of final authorization for the exercise of consular functions (Consular Convention of 12 January 1948, between the United States and Costa Rica, article I), or else do not use the term "exequatur".

(5) As stated in the article on definitions, the term "exequatur" is used in this article, at least for the time being, to denote any final authorization granted by the receiving State to a foreign consul to exercise consular functions in the territory of that State, whatever the form of such authorization. The reason is that the form is not *per se* a sufficient criterion for differentiating between acts which have the same purpose and the same legal significance.

(6) Inasmuch as subsequent articles provide that the consul may obtain a provisional recognition before obtaining the exequatur (article 11), or may be allowed to act as temporary head of post in the cases referred to in article 13, the scope of the article is limited by an express reference to these two articles of the draft.

(7) The grant of the exequatur to a consul appointed as head of a consular post covers *ipso jure* the members of the consular staff working under his orders and responsibility. It is therefore not necessary for consuls who are not heads of posts to present consular commissions and obtain an exequatur. Notification by the head of a consular post to the competent authorities of the receiving State suffices to admit them to the benefits of the present articles and of the relevant agreements in force. However, if the sending State wishes in addition to obtain an exequatur for one or more consular officials with the rank of consul, there is nothing to prevent it making a request accordingly.

(8) It is universally recognized that the receiving State may refuse the exequatur to a foreign consul. This right is recognized implicitly in the article and the Commission did not consider it necessary to state it explicitly.

(9) The only question in dispute is whether a State refusing the exequatur ought to communicate the reasons for the refusal to the Government concerned. The Commission preferred, for the time being at least, not to deal with this question. The draft's silence on the point should be interpreted to mean that the question is left to the discretion of the receiving State, since, in view of the varying and contradictory practice of States, it is not possible to say that there is a rule requiring States to give the reasons for their decision in such a case.

Article 11

Provisional recognition

Pending delivery of the exequatur, the head of a consular post may be admitted on a provisional basis to the exercise of his functions and to the benefits of the present articles and of the relevant agreements in force.

Commentary

(1) The purpose of provisional recognition is to enable the consul to take up his duties before the exequatur is granted. The procedure for obtaining the exequatur takes some time, but the business handled by a consul will not normally wait. In these circumstances the institution of provisional recognition is a very useful expedient. This also explains why provisional recognition has become so prevalent, as can be seen from many consular conventions, including the Havana Convention of 1928 (art. 6, para. 2).

(2) It should be noted that the article does not prescribe a written form for provisional recognition. It may equally be granted in the form of a verbal communication to the authorities of the sending State, including the consul himself.

(3) Certain bilateral conventions go even further, and permit a kind of automatic recognition, stipulating that consuls appointed heads of posts shall be provisionally admitted as of right to the exercise of their functions and to the benefit of the provisions of the convention unless the receiving State objects. These conventions provide for the grant of provisional recognition by means of a special act only in cases where this is necessary. The majority of the Commission considered that the formula used in the article was more suitable for a multilateral convention such as is contemplated by the present draft.

(4) By virtue of this article the receiving State will be under a duty to afford assistance and protection to a consul who is recognized provisionally and to accord him the privileges and immunities conferred on heads of consular posts by the present articles and by the relevant agreements in force.

Article 12

Obligation to notify the authorities of the consular district

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

Commentary

(1) The grant of recognition, whether provisional or definitive, involves a twofold obligation for the Government of the receiving State:

(*a*) It must immediately notify the competent authorities of the consular district that the consul is authorized to assume his functions;

(*b*) It must ensure that the necessary measures are taken to enable the consul to carry out the duties of his office and to enjoy the benefits of the present articles and of the relevant agreements in force.

(2) Nevertheless, the commencement of the consul's function does not depend on the fulfilment of these obligations. Should the Government of the receiving State omit to fulfil these obligations, the consul could himself present his consular commission and his exequatur to the higher authorities of his district.

Article 13

Acting head of post

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

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

Commentary

(1) The institution of acting head of a consular post has long since become part of current practice, as witness many national regulations concerning consuls and a very large number of consular conventions. The text proposed therefore merely codifies the existing practice.

(2) The function of acting head of post in the consular service corresponds to that of *chargé d'affaires ad interim* in the diplomatic service. In view of the similarity of the institutions, the text of paragraph 1 follows very closely that of article 17 of the Draft Articles on Diplomatic Intercourse and Immunities.

(3) It should be noted that the text leaves States quite free to decide the method of appointing the acting head of post, who may be chosen from any of the consular officials attached to the particular consulate, or to another consulate of the sending State, or from the officials of a diplomatic mission of that State. Where no consular official is available to assume the direction of the consulate, one of the consular employees may be chosen as acting head of post (see the Havana Convention, art. 9). The text also makes it possible, if the sending State considers this advisable, for the acting head of post to be designated prior to the occurrence preventing the head of post from carrying out his functions.

(4) The word "temporarily" reflects the fact that the functions of acting head may not, except by agreement between the States concerned, be prolonged for so long a period that the acting head would in fact become permanent head.

(5) The question whether the consul should be regarded as unable to carry out his functions is a question of fact to be decided by the sending State. Unduly rigid regulations on this point are not desirable.

(6) The expression "competent authorities" means the authorities designated by the law or by the Government of the receiving State as responsible for the Government's relations with foreign consuls.

(7) While in charge of the consular post, the acting head has the same functions and enjoys the same privileges and immunities as the head of the consular post. The question of the precedence of acting heads of post is dealt with in article 14, paragraph 5, of this draft.

Article 14

Precedence

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

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

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

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

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

Commentary

(1) The question of the precedence of consuls, though undoubtedly of practical importance, has not as yet been regulated by international law. In many places, consuls are members of a consular corps, and the question of precedence arises quite naturally within the consular corps itself, as well as in connexion with official functions and ceremonies. In the absence of international regulations, States have been free to settle the order of precedence of consuls themselves. There would appear to be, as far as the Commission has been able to ascertain, a number of uniform practices, which the present article attempts to codify.

(2) It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls. This question will be dealt with in chapter III of the special rapporteur's draft, but the Commission will be unable to arrive at a final decision until it receives full information on state practice in the matter.

(3) Paragraph 5 establishes the precedence of acting heads of posts according to the order of precedence of the heads of posts whom they replace. This is justified by the nature of the *ad interim* function. It has undoubted practical advantages, in that the order of precedence can be established easily.

Article 15

Consular functions

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

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

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

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

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

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

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

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

Commentary

(1) The special rapporteur had prepared two variants: the first, following certain precedents, especially the Havana Convention (article 10), merely referred the matter to the law of the sending State, and provided that the functions and powers of consuls should be determined, in accordance with international law, by the States which appoint them.[72] The second variant, after stating the essential functions of a consul in a general clause, contained an enumeration of most of the functions of a consul; this enumeration was not, however, exhaustive.

(2) During the discussion two tendencies were manifested in the Commission. Some members expressed their preference for a general definition of the kind which had been adopted by the Commission for the case of diplomatic agents, in article 3 of its Draft Articles on Diplomatic Intercourse and Immunities. They pointed to the inconveniences of too detailed an enumeration, and suggested that a general definition would be more acceptable to Governments. Other members, *per contra,* preferred the special rapporteur's second variant with its detailed list of examples, but requested that it should be shortened and contain only the heads of the different functions as set out in Arabic numerals 1 to 15 in the special rapporteur's draft. They maintained that too general a definition, merely repeating the paragraph headings, would have very little practical value. They also pointed out that the functions of consuls are much more varied than those of diplomatic agents, and that it was therefore impossible to follow in this respect the Draft Articles on Diplomatic Intercourse and Immunities. Finally they suggested that Governments would be far more inclined to accept in a convention a detailed and precise definition than a general formula which might give rise to all kinds of divergencies in practice. In support of this opinion they pointed to the fact that recent consular conventions all defined consular functions in considerable detail.

(3) The Commission, in order to be able to take a decision on this question, requested the special rapporteur to draft two texts defining consular functions: one containing a general and the other a detailed and enumerative definition. After studying the two types of definitions together, the Commission, by a majority, took a number of decisions:

(*a*) It rejected a proposal to postpone a decision on the article to the next session;

(*b*) It decided to submit the two types of definitions to the Governments for comment when the Commission has completed the entire draft;

(*c*) It decided not to include the two definitions in the text of the articles on consular relations and immunities;

(*d*) It decided to include the general definition in the draft, on the understanding that the more detailed definition should appear in the commentary.

(4) The draft general definition prepared by the special rapporteur was referred, with the amendments presented by Mr. Verdross,[73] Mr. Pal[74] and Mr. Padilla Nervo,[75] to the Drafting Committee, which, on the basis of a revised proposal prepared by the special rapporteur, drafted a definition[76] which was discussed and, with some amendments, adopted at the 523rd meeting of the Commission.

(5) The text of the article first states in a general clause that the functions of consuls are determined:

(*a*) By the articles which the Commission is drafting;

(*b*) By any relevant agreements in force;

(*c*) By the sending State, subject to the law of the receiving State.

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[72] *Yearbook of the International Law Commission,* vol. II (United Nations publication, Sales No.: 1957. V. 5, vol. II), p. 91.

[73] A/CN.4/SR.513, para. 54; A/CN.4/SR.514, para. 25.

[74] A/CN.4/SR.513, para. 62.

[75] A/CN.4/SR.517, para. 2.

[76] See A/CN.4/L.84, art. 13.

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

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

(8) The word "nationals" applies to bodies corporate having the nationality of the sending State.

(9) The provision headed (*a*) is distinct from that headed (*b*) in that the former relates to the protection which the consul exercises vis-à-vis the authorities of the receiving State, while the latter covers any kind of help and assistance which the consul may extend to nationals of his State. This assistance may take many forms: e.g., information, provision of an interpreter, assistance in case of distress, repatriation, monetary help, introduction of commercial agents to commercial concerns, and assistance to nationals working in the receiving State.

(10) Paragraph 2 provides that a consul in the exercise of his functions may deal with the local authorities. It makes an exception where the present draft or the relevant agreements in force contain a provision allowing consuls also to deal with the central authorities or with authorities outside the consular district. This matter is dealt with in article 24 of the special rapporteur's draft and the Commission will consider it later.

(11) The text of the more detailed, or enumerative, definition as prepared and revised by the special rapporteur (but not discussed in detail by the Commission), together with a commentary which he has since added but which has likewise not been considered by the Commission, is reproduced below:

CONSULAR FUNCTIONS

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

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

I. Functions concerning trade and shipping

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

Commentary

This function has always been recognized by international law. In States where the sending State is represented by a diplomatic mission, the latter performs most of these functions.

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

Commentary

In the exercise of this function the consul is competent or entitled:

(*a*) To examine and stamp ships' papers;

(*b*) To take statements with regard to a ship's voyage and destination, and to incidents during the voyage (master's reports);

(*c*) To draw up manifests;

(*d*) To question masters, crews and nationals on board;

(*e*) To settle, in so far as authorized to do so by the laws of the sending State, disputes of any kind between masters, officers and seamen, especially those relating to pay and the execution of contracts between them;

(*f*) To facilitate the departure of vessels;

(*g*) To assist members of the ship's company by acting as interpreters and agents in any business they may have to transact, or in any applications they may have to make, for example, to local courts and authorities;

(*h*) To be present at all searches (other than those for customs, passport and aliens control purposes and for the purpose of inspection by the health authorities), conducted on board merchant vessels and pleasure craft;

(*i*) To be given notice of any action by the courts or the administrative authorities on board merchant vessels and pleasure craft flying the flag of the sending State, and to be present when such action is taken;

(*j*) To direct salvage operations when a vessel flying the flag of the sending State is wrecked or runs aground on the coast of the receiving State;

(*k*) To settle, in accordance with the laws of the sending State, disputes concerning general average between nationals of the State which he represents.

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

Commentary

This function consists of the following:

(*a*) Checking log-books;

(*b*) Rendering assistance to the crew;

(*c*) Giving help in the event of accident or damage to aircraft;

(*d*) Supervising compliance with the international air transport conventions to which the sending State is a party.

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

Commentary

This function is recognized in a large number of consular conventions.

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

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

Commentary

This right in no way means that the consul is authorized to interfere in the domestic affairs of the receiving State or to intercede continually with the local authorities on behalf of nationals of his State. This provision clearly limits the cases in which he may intervene to those where the rights of the sending State or of its nationals under the municipal law of

the receiving State or under international law are infringed. The term "nationals" in this context means both individuals and bodies corporate possessing the nationality of the sending State.

6. To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to courts for the office of guardian or trustee, and to supervise the guardianship of minors and the trusteeship for insane and other persons lacking full capacity who are nationals of the sending State;

Commentary

There are consular conventions which even confer upon the consul the right to appoint the guardians or trustees in the case of minors or persons lacking full capacity who are nationals of the sending State. As, however, the laws of certain countries reserve this function to the courts, the provision proposed limits the consul's powers in this matter to those of:

(*a*) Proposing the appointment of guardians or trustees;

(*b*) Submitting nominations to courts for the office of guardian or trustee;

(*c*) Supervising the guardianship or trusteeship.

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

Commentary

The scope of the functions vested in consuls by consular conventions and other international agreements for the purpose of dealing with succession questions is very varied. In order that this provision should be acceptable to as many Governments as possible, the proposed clause refers to those functions only which may be regarded as essential to the protection of the rights of heirs and legatees and their successors in title. Under this provision, in all cases in which nationals of the sending State are beneficiaries in an estate as heirs or legatees, or because they have acquired rights in the estate through heirs or legatees, and are not represented by a special agent, the consul has the right to:

(*a*) Represent the heirs and legatees, or their successors in title, without having to produce a power of attorney from the persons concerned;

(*b*) Approach the appropriate authorities of the receiving State with a view to arranging for an inventory of assets or the distribution of the estate;

(*c*) Apply to the competent courts to settle any disputes and claims concerning the estate of a deceased national.

The consul is competent to perform this function for so long as the heirs or legatees (or their successors in title) have not appointed special agents to represent them in proceedings connected with the estate.

III. Administrative functions

8. To perform and record acts of civil registration (births, marriages, deaths), without prejudice to the obligation of declarants to make whatever declarations are necessary in pursuance of the laws of the receiving State;

Commentary

These functions are determined by the laws and regulations of the sending State. They are extremely varied and include, *inter alia,* the following:

(*a*) The keeping of a register of nationals of the sending State residing in the consular district;

(*b*) The issuing of passports and other personal documents to nationals of the sending State;

(*c*) The issue of visas on the passports and other documents of persons travelling to the sending State;

(*d*) Dealing with matters relating to the nationality of the sending State;

(*e*) Supplying to interested persons in the receiving State information concerning the trade, industry, and all aspects of the national life of the sending State;

(*f*) Certifying documents indicating the origin or source of goods, invoices and like documents;

(*g*) Transmitting to the entitled persons any benefits, pensions or compensation due to them in accordance with their national laws or with international conventions, in particular under social welfare legislation;

(*h*) Receiving payment of pensions or allowances due to nationals of the sending State absent from the receiving State;

(*i*) Performing all acts relating to service in the armed forces of the sending State, to the keeping of muster-rolls for those services and to the medical inspection of conscripts who are nationals of the sending State.

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

Commentary

The consul, if so empowered by the laws of the sending State, may solemnize marriages between nationals of his State, and, under the laws of certain countries, also between the nationals of his State and those of another State. This function cannot, however, be exercised if it is contrary to the laws of the receiving State.

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

Commentary

This function, which is very often exercised nowadays, is recognized by customary international law.

IV. Notarial functions

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

Commentary

Consuls have many functions of this nature, e.g.:

(*a*) Receiving in their offices or on board vessels flying the flag of the sending State or on board aircraft of the nationality of the sending State, any statements which nationals of that State may have to make;

(*b*) Drawing up, attesting and receiving for safe custody, wills and all deeds-poll executed by nationals of the sending State;

(*c*) Drawing up, attesting and receiving for safe custody deeds, the parties to which are nationals of the sending State or nationals of the sending State and nationals of the receiving

State, provided that they do not relate to immovable property situated in the receiving State or to rights *in rem* attaching to such property.

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

Commentary

Consuls have the right to charge for these services fees determined by the laws and regulations of the sending State; this right is the subject of a subsequent article proposed by the special rapporteur (art. 26).[77]

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

Commentary

Transfers of sums of money or other valuables, especially works of art, are governed (in the absence of an international agreement) by the laws and regulations of the receiving State.

C. Other functions

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

Commentary

This function has recently become prevalent and is confirmed in a considerable number of consular conventions.

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

Commentary

This function, which enables nationals of the sending State to settle their disputes rapidly, has undeniable practical value but does not seem to be much used nowadays.

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

Commentary

This function is related to the consul's economic, commercial and cultural functions.

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

Commentary

This is a residual clause comprising all other functions which the sending State may entrust to its consul. Their performance must never conflict with the law of the receiving State.

Article 16

Occasional performance of diplomatic acts

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

Commentary

(1) This article deals with the special position of the consul in a country in which the sending State has no diplomatic mission and in which the consul is the sole official representative of his State. It has been found in practice that the consul in such circumstances will occasionally have to perform acts which normally come within the competence of diplomatic missions and which are consequently outside the scope of consular functions. Under this article, the consent, express or tacit, of the receiving State is essential for the performance of such diplomatic acts.

(2) Unlike article 17, this article is concerned only with the occasional performance of diplomatic acts. Such performance, even if repeated, does not affect the legal status of the consul, or confer any right to diplomatic privileges and immunities.

Article 17

Grant of diplomatic status to consuls

In a State where the sending State has no diplomatic mission, a consul may, with the consent of the receiving State, be entrusted with diplomatic functions, in which case he shall bear the title of consul-general-*chargé d'affaires* and shall enjoy diplomatic privileges and immunities.

Commentary

(1) This article provides for the case where the sending State wishes to entrust its consul with the performance not merely of occasional diplomatic acts, as provided for in article 16, but with diplomatic functions generally. In several countries the law makes provision for this possibility. It would seem that States are at the present day less prone than in the past to entrust consuls with diplomatic functions. But even if the practice is not now very common, the Commission considers that it should be mentioned in a general codification of consular intercourse and immunities.

(2) Consuls entrusted with diplomatic functions have in the past borne a variety of titles: commissioner and consul-general, diplomatic agent and consul-general, *chargé d'affaires*-consul-general, or consul-general-*char d'affaires*. The Commission has adopted the last-named title as being the most in keeping with the functions exercised by the consul in such cases.

(3) The consul-general-*chargé d'affaires* must, in addition to having the exequatur, at the same time be accredited by means of letters of credence. He enjoys diplomatic privileges and immunities.

(4) The question was raised in the Commission whether the proper place for article 17, and article 16 too, would not be in the Draft Articles on Diplomatic Intercourse and Immunities. Since in both cases the consular function is predominant and gives the post its basic character, the Commission took the view that both articles ought to remain in the draft on consular intercourse and immunities.

Article 18

Withdrawal of exequatur

1. Where the conduct of a consul gives serious grounds for

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

complaint, the receiving State may request the sending State to recall him or to terminate his functions, as the case may be.

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

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

Commentary

(1) It is customary to signify the revocation of the receiving State's recognition of a consul by the withdrawal of his exequatur, though the destruction or return of the document evidencing the grant of the exequatur is not required.

(2) It should be noted that, according to the terms of the article, the withdrawal of the exequatur must always be preceded by a request to the sending State for the recall of the consul or for the termination of his functions. This latter expression refers mainly to the case where the consul is a national of the receiving State, as honorary consuls often are.

(3) The right of the receiving State to make the request referred to in paragraph 1 is restricted to cases where the conduct of the consul has given serious grounds for complaint. Consequently, the withdrawal of the exequatur is an individual measure which may only be taken in consequence of such conduct. The obligation to request the recall of the consul or the termination of his functions before proceeding to withdraw the exequatur constitutes some safeguard against an arbitrary withdrawal which might cause serious prejudice to the sending State by abruptly or unjustifiably interrupting the performance of consular functions in matters where more or less daily action by the consul is absolutely essential (e.g., various trade and shipping matters, the issue of visas, attestation of signatures, translation of documents, etc.).

(4) In the event of the withdrawal of the exequatur, the consul concerned ceases to be entitled to exercise consular functions. In addition, he loses the benefits of the present articles and of relevant agreements in force. The question whether the consul continues in such circumstances to enjoy consular immunities until he leaves the country or until the lapse of a reasonable period within which to wind up his affairs will be dealt with in a separate article.

Article 19

Accommodation

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

Commentary

(1) The right to procure on the territory of the receiving State the premises necessary for a consulate derives from the agreement by which that State gives its consent to the establishment of the consulate. The reference in the text of the article to the internal law of the receiving State signifies that the sending State may only procure premises in the manner laid down by the internal law of the receiving State. The internal law may, however, contain provisions prohibiting the acquisition of the ownership of premises by aliens or by foreign States, so that the sending State may be obliged to rent premises. Even in this case, the sending State may encounter legal or practical difficulties. Hence, the Commission decided to include in the draft an article making it obligatory for the receiving State to facilitate, as far as possible, the procuring of suitable premises for the consulate of the sending State. This obligation does not extend to the residence of members of the consular staff, for such a duty would be too onerous for the receiving State.

(2) As compared with article 19 of the Draft Articles on Diplomatic Intercourse and Immunities, the wording of this article was modified so as not to impose an unduly heavy burden on receiving States which have a large number of consulates in their territory, and also to make allowance for the fact that States tend to lease rather than purchase premises when seeking accommodation for their consulates in the receiving State.

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

CHAPTER IV

OTHER DECISIONS OF THE COMMISSION

I. Planning of future work of the Commission

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

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

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

II. Co-operation with other bodies

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

46. The Commission also had before it a letter received from the Secretary of the Asian-African Legal Consultative Committee, enclosing a copy of the summary report of the Committee's second session, held at Cairo in October 1958, and inviting the Commission to send an observer to the third session to be held at Colombo from 5 to 19 November 1959. The Commission authorized the Secretary to inform the Asian-African Legal Consultative Committee that the question of diplomatic intercourse and immunities would be before the General Assembly at its fourteenth session and the Committee's report might be useful to the delegations there represented, but that it was too late for the Commission to request the necessary arrangements to be made in order to send an observer to the Committee's third session.

III. Control and limitation of documentation

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

IV. Relations between States and inter-governmental organizations

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

V. Date and place of the next session

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

VI. Representation at the fourteenth session of the General Assembly

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

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

[79] *Ibid.*, para. 71.

Check list of Commission documents referred to in this volume

Document	*Title*	*Observations and references*
A/C.N.4/101	Law of treaties: report by Sir Gerald Fitzmaurice, Special Rapporteur	See *Yearbook of the International Law Commission, 1956*, vol. II
A/CN.4/106	State responsibility: International responsibility: second report by F. V. García Amador, Special Rapporteur	*Ibid., 1957*, vol. II
A/CN.4/107	Law of treaties: second report by Sir Gerald Fitzmaurice, Special Rapporteur	*Ibid.*
A/CN.4/108	Consular intercourse and immunities: report by Jaroslav Zourek, Special Rapporteur	*Ibid.*
A/CN.4/115	Law of treaties: third report by Sir Gerald Fitzmaurice, Special Rapporteur	*Ibid., 1958*, vol. II

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