


ENGLISH RESOLUTIONS

English compilation of IDI resolutions: preliminary note

Please note the following: the Institute started publishing its resolutions in both French and English from 1957 onwards only. A comprehensive overview of these resolutions (1957 – 2017) can be found in this compilation under **Part II**.

Nevertheless, to facilitate as much as possible your research, unofficial translations of earlier resolutions have been provided in **Part I** of this compilation. Part I is based on the book by J.B. Scott, *Resolutions of the Institute of International Law dealing with the Law of Nations with an historical introduction and explanatory notes*, NY: OUP, 1916. It covers resolutions adopted by the Institute between 1875 and 1913 dealing with **public** international law only. The historical introductions as set out in Scott's book have been copied here for your convenience but please note that nearly all footnotes have been omitted (including, if any, from the resolutions). Furthermore, the text is mainly unedited. Therefore, use the text of Part I only as reference and make sure to verify its accuracy in light of the authentic French text. For this purpose, you can use the identification code as added to each of the titles of the English Resolutions in this compilation in order to find the corresponding resolution in the French compilation in the bookmarks list (which can be found when clicking on the following icon: ).

PART I

UNOFFICIAL TRANSLATIONS OF
PUBLIC LAW RESOLUTIONS (1875 –
1913) BY J.B. SCOTT

1. ARBITRAL PROCEDURE (1875-Haye-01)

At its Geneva meeting in 1874, the Institute had deliberated at length upon a draft of regulations for international courts of arbitration¹ carefully prepared with a statement of reasons by Mr. Goldschmidt.

The discussion, which was exhaustive and thoroughly scientific, had resulted in the adoption of the draft, with a few amendments accepted by the reporter. The revision of this amended draft was entrusted to a committee charged with preparing it for the following meeting.

Mr. Field was the president of this committee, and Mr. Rivier its reporter. The text upon which it agreed was discussed by the Institute in plenary session at The Hague, August 28, 1875, and was unanimously adopted, in the following form:

Draft Regulations for International Arbitral Procedure

The Institute,

desiring that recourse to arbitration for the settlement of international disputes be resorted to more and more by civilized peoples, hopes to be of service toward the realization of such progress by proposing for arbitral tribunals the following eventual regulations. It recommends them for adoption in whole or in part to States that may conclude compromis.

Article 1.

The compromis is concluded by means of a valid international treaty.

It may be:

- (a) In advance, either for all differences or for differences of a certain kind to be determined, that may arise between the contracting States.
- (b) For one difference or several differences already arisen between the contracting States.

Article 2.

The compromis gives to each contracting party the right of appealing to the arbitral tribunal that it designates for the decision of the dispute. In the absence of a designation of the number and the names of the arbitrators in the compromis, the arbitral tribunal shall settle upon this according to the provisions laid down by the compromis or by another convention.

¹ Tableau général de l'organisation, des travaux et du personnel de l'institut de droit international (Paris, 1893), p. 133.

For a translation of Mr. Goldschmidt's draft, see the appendix, p. 205.

Annuaire de l'institut de droit international, vol. 1, p. 31.

Ibid., pp. 45, 84.

Ibid., p. 126.

In the absence of any provision, each of the contracting parties chooses on its own part an arbitrator, and the two arbitrators thus named choose a third arbitrator or designate a third person who shall select him.

If the two arbitrators named by the parties cannot agree upon the choice of a third arbitrator, or if one of the parties refuses the cooperation that it owes under the compromis for the formation of the arbitral tribunal, or if the person designated refuses to make a choice, the compromis becomes of no effect.

Article 3.

If at the outset, or because they have been unable to come to an agreement upon the choice of arbitrators, the contracting parties have agreed that the arbitral tribunal should be formed by a third person designated by them, and if the designated person takes upon himself the formation of the arbitral tribunal, the steps to be followed to this end shall in the first instance be in accordance with the provisions of the compromis. In the absence of provisions, the designated third person may either himself name the arbitrators or propose a certain number of persons among whom each of the parties shall choose.

Article 4.

Sovereigns and heads of Governments without any restriction shall be eligible to be named international arbitrators, and also all persons who have the capacity to exercise the functions of arbitrator under the common law of their country.

Article 5.

If the parties have legally agreed on arbitrators individually determined, the incapacity of or a valid exception to even a single one of these arbitrators voids the entire compromis, unless the parties can come to an accord upon another competent arbitrator.

If the compromis does not carry an individual determination of the arbitrator in question, it is necessary, in case of incapacity or valid exception, to follow the course prescribed for the original choice (Articles 2, 8) .

Article 6.

The declaration of acceptance of the office of arbitrator is made in writing.

Article 7

If an arbitrator refuses the arbitral office, or if he withdraws after having accepted it, or if he dies, or if he becomes insane, or if he is legally challenged by reason of incapacity under the terms of Article 4, application of the provisions of Article 5 shall be made.

Article 8.

If the seat of the arbitral tribunal is not mentioned in the compromis or in a subsequent convention between the parties, its determination is made by the arbitrator or a majority of the arbitrators.

The arbitral tribunal is authorized to change its seat only in case the accomplishment of its functions at the place agreed upon is impossible or clearly dangerous.

Article 9.

The arbitral tribunal, if composed of several members, appoints one of them as president, taken from its number, and selects one or more secretaries.

The arbitral tribunal decides in what language or languages its deliberations and the arguments of the parties shall take place, and the documents and other instruments of proof shall be presented. It keeps a record of its deliberations.

Article 10.

All members shall be present at the deliberations of the arbitral tribunal. The tribunal may nevertheless delegate to one or several members or even commit to third persons certain investigations.

If the arbitrator is a State or its head, a municipal or other corporation, an authority, a faculty of law, a learned society, or the actual president of the municipal or other corporation or authority, faculty or company, all the arguments may take place with the consent of the parties before the commissioner named ad hoc by the arbitrator. A protocol thereof shall be drawn up.

Article 11.

No arbitrator is authorized without the consent of the parties to name a substitute.

Article 12.

If the compromis or a subsequent convention between the parties prescribes for the arbitral tribunal the procedure to be followed, or the observance of a determined and positive law of procedure, the arbitral tribunal must conform to that provision. In the absence of such a provision, the procedure to be followed shall be freely chosen by the arbitral tribunal, which is only bound to conform to the principles that it has declared to the parties that it desires to follow.

The direction of the arguments belongs to the president of the arbitral tribunal.

Article 13.

Each of the parties may appoint one or more representatives before the arbitral tribunal.

Article 14.

Exceptions based on incapacity of arbitrators should be advanced before any other. If the parties are silent, any subsequent objection is inadmissible, except in cases of incapacity originating subsequently.

The arbitrators are to decide on the exceptions based on the incompetence of the arbitral tribunal, except in the recourse referred to in Article 24, paragraph 2, and in conformity with the provisions of the compromis.

There shall be no appeal from preliminary judgments on competence, unless coupled with an appeal from the final arbitral decision.

In case doubt as to competence depends on the interpretation of a clause of the compromis, the parties are deemed to have given to the arbitrators the power to decide the question, in the absence of a stipulation to the contrary.

Article 15.

In the absence of provisions in the compromis to the contrary, the arbitral tribunal has the power :

1. To determine the forms and periods in which each party must, through its duly authorized representatives, present its conclusions, establish them in fact and in law, submit its instruments of proof to the tribunal, communicate them to the adverse party, produce the documents whose production the adverse party requires ;
2. To hold as admitted the contentions of each party which are not clearly disputed by the adverse party, as well as the alleged contents of documents which the adverse party fails to produce without sufficient reasons;
3. To order new hearings, to require from each party explanation of doubtful points;
4. To issue orders of procedure (on the conduct of the case), to cause proofs to be furnished, and, if necessary, to call upon the competent tribunal for judicial acts for which the arbitral tribunal is not qualified, particularly sworn testimony of experts and witnesses ;
5. To decide, in its free discretion, upon the interpretation of the documents produced and generally upon the worth of the instruments of proof presented by the parties.

The forms and periods mentioned under Nos. 1 and 2 of the present article shall be determined by the arbitrators in a preliminary order.

Article 16.

Neither the parties nor the arbitrators can of their own accord involve any other States or third persons whatever in the case without special authorization expressed in the compromis and the previous consent of the third party.

The voluntary intervention of a third party is admissible only with the consent of the parties that have concluded the compromis.

Article 17.

Counter-claims cannot be brought before the arbitral tribunal except so far as permitted by the compromis, or except when the two parties and the tribunal are in accord in admitting them.

Article 18.

The arbitral tribunal gives judgment according to the principles of international law, unless the compromis imposes upon it different rules or leaves the decision to the free discretion of the arbitrators.

Article 19.

The arbitral tribunal cannot refuse to give judgment under the pretext that it is not sufficiently informed either on the facts or on the legal principles that should be applied.

It must decide definitively each of the points in controversy. Nevertheless, if the compromis does not provide for a simultaneous definitive decision of all the points, the tribunal may, while deciding definitively certain points, reserve the others for a later proceeding.

The arbitral tribunal may render interlocutory or preliminary decrees.

Article 20.

The delivery of the final decision must take place within the time fixed by the compromis or by a subsequent convention. In the absence of other determination, the period of two years is considered as agreed upon, beginning from the day of the conclusion of the compromis. The day of conclusion is not included therein; nor is the time within which one or more arbitrators may have been prevented, by force majeure, from discharging their duties.

In case the arbitrators, by interlocutory decrees, order investigations, the time is increased by one year.

Article 21.

Every final or provisional decision shall be made by a majority of all the arbitrators named, even when one or more of the arbitrators refuse to take part therein.

Article 22.

If the arbitral tribunal finds that the contentions of none of the parties are established, it must declare this, and, if it is not limited in this respect by the compromis, it must lay down the real state of the law with respect to the parties in dispute.

Article 23.

The arbitral award must be reduced to writing, and contain a statement of reasons, unless that is dispensed with under the stipulations of the compromis. It should be signed by each of the members of the arbitral tribunal. If the minority refuses to sign, the signature of the majority is sufficient, with the written declaration that the minority has refused to sign.

Article 24.

The award, with the reasons, if stated, is notified to each party. The notification is effected by communication of a copy to the representative of each party, or to an empowered agent of each party appointed ad hoc.

Even if it has been communicated only to the representative or to the empowered agent of one party, the award can no longer be changed by the arbitral tribunal.

The tribunal, however, has the right, so long as the time mentioned in the compromis has not expired, to correct mere errors in writing or reckoning, even when neither of the parties makes a motion to that effect, and to complete the award on undecided disputed points on the motion of one party and after a hearing of the adverse party. An interpretation of the award as notified is not admissible unless both parties request it.

Article 25.

The award when duly pronounced decides, within the limits of its scope, the dispute between the parties.

Article 26.

Each party shall bear its own expenses and a half of the expenses of the arbitral tribunal, without regard to the decision of the arbitral tribunal on the indemnity which one or the other of the parties may be adjudged to pay.

Article 27.

The arbitral award is null in case of an invalid compromis, or in case of excess of authority, or of proved corruption of one of the arbitrators, or of essential error.

2. LAWS AND CUSTOMS OF WAR ON LAND - EXAMINATION OF THE DECLARATION OF BRUSSELS OF 1874 (1875-Haye-02)

Following a communication made by Mr. Bluntschli, who had been one of the delegates from the German Empire to the Congress of Brussels for the reform of the laws and customs of war, the Institute had appointed a committee at its session in Geneva, 1874, to study the Declaration made at that Congress by the delegates of the European States, and to submit to the Institute the committee's opinion and supplementary propositions upon this subject.

To attain this end Mr. Rolin-Jaequemyns, in February, 1875, addressed to the members of the committee, and submitted to the other members of the Institute, a questionnaire regarding the difficulties, general or special, theoretical or practical, to which an examination of the Declaration of Brussels might give rise. He then drew up a report in the form of a critical analysis of the various replies which were made to the questionnaire. To these documents were annexed a revised draft of the text of the Declaration of Brussels, by Mr. Moynier, letters from

Messrs. de Parieu and W. B. Lawrence, a memorandum by Mr. M. Bernard, and an important and extensive note by Mr. Besobrasof.

When the members of the committee had met at The Hague, they thought that it would not be opportune or even possible to enter upon an examination of all the questions in detail, but that they should propose that the Institute express a uniform appreciation of the general utility of an international regulation of the law of war, and especially of the value of the Declaration of Brussels, from the point of view of humanity and science. The result of the deliberations of the committee was the adoption by a majority of a draft of resolutions to be submitted to the Institute in plenary session. The Institute, in its turn, after deliberating in the session of August 30, 1875, adopted the draft after making several slight changes.

The text adopted is as follows :

Regulation of the Laws and Customs of War - Examination by the Institute of the Declaration of Brussels of 1874

1. It is desirable that the laws and customs of war should be regulated by a convention, declaration, or agreement, of whatever character it may be, among the different civilized States.
2. Such a regulation could not, it is true, result in the complete suppression of the evils and dangers which war produces, but it might mitigate them to a large extent, either by determining the limits which the judicial conscience of civilized peoples imposes upon the use of force, or by placing the weak under the protection of positive law.
3. The draft Declaration accepted at Brussels, upon the generous initiative of His Majesty, the Emperor of Russia, while bearing considerable resemblance to the American instructions of President Lincoln, has the double advantage over them of extending to international relations a regulation made for a single State, and of containing new provisions, conceived in a spirit at once practical, humane and progressive.

4. Compared with the law of war set forth in the most recent works, the draft of Brussels is fundamentally, and as to all matters covered by it, at the zenith of present-day science. Doubtless the elasticity or vagueness of certain expressions may give rise, from a legal point of view, to rigorous criticism; but this difficulty must be regarded as an inevitable consequence of the necessity of obtaining, above all, an agreement among the various States, and of ensuring the existence of this agreement by mutual concessions.

Then, too, nothing will prevent the revision of the Declaration when an agreement is reached upon the improvements to be made thereto, when new theory and practice have dissipated doubts, decided controversies, made possible the development of principles only the germ of which can be included in an agreement to be executed to-day.

5. If the methods by which war has been conducted up to the present are examined, the draft Declaration gives a glimpse of important progress, the results of which appear to be all the more lasting from the very fact that we refrained from formulating Utopian *vœux*, and imposing upon armies, in the name of misunderstood philanthropy, requirements which are incompatible with their security and with the pursuit of military operations.

6. The provisions of the draft Declaration relating to the occupation of enemy territory are an application of this true principle: that the mere fact of occupation does not confer any right of sovereignty, but that the cessation of local resistance and the retreat of the national government, on the one hand, and, on the other, the presence of the invading army, create for the latter and the government which it represents obligations and rights which are essentially provisional. Along this line the draft tends, above all, to lay down the limits of these rights and to determine these obligations, which are dictated by the necessity of maintaining social order and protecting the security of individual and private property during the temporary absence of any regular government. The rules drawn up in this connection are doubtless susceptible of improvements as to detail, but at present they are fundamentally more favorable to the peaceful citizens and public and private property of the occupied country than the practice thus far followed and the doctrine of most authors.

7. The draft Declaration implies a fundamental distinction among three categories of persons, viz. : regular combatants, who must be treated as such; peaceful inhabitants, who must be protected both in person and property; and irregular combatants, who, not recognizing the laws of war, do not deserve to be treated as loyal enemies. This distinction is based upon the present manner of regarding war, which is made between States and not between individuals. It in nowise hinders the most energetic national defense by the mass of the population in arms. It even adds to the eventual effectiveness of this defense, by subjecting it to requirements of order and organization which are alone compatible with the conduct of a regular war between civilized nations. It is necessary, to this end, to require for regular combatants, except as provided in Article 10, a distinctive mark, fixed, recognizable at a distance, and, besides, easily procured, in order that armies on the march may know whether they are facing the peaceful inhabitants whom they must protect, or enemies whom they must attack.

8. The provisions concerning contributions and requisitions are equally in advance of the practice generally admitted in prior wars. Article 42, in particular, by requiring that for every requisition payment must be made or a receipt given, states a principle the consequences of which will be developed in the future and by a more humane practice.

9. Reprisals are a regrettable, but inevitable exception, in certain cases, to the general principle of equity that the innocent should not suffer for the guilty. As soon as it is admitted that reprisals cannot be completely prohibited it becomes desirable that, in accordance with the original Russian draft, they should be contained in the Declaration, for the purpose of restricting them according to the following principles :

(1) The method of making reprisals and the extent thereof should not exceed the extent of the infraction committed by the enemy;

(2) They should be formally prohibited in cases where the infraction complained of may have been repaired ;

(3) They should not be made without the authority of the commander in chief;

(4) They should respect in all cases the laws of humanity and morality.

10. The Institute, without wishing to enter into a detailed examination of all the articles of the Declaration, believes it may recommend to the attention of the governments and their delegates, called upon to revise and complete the work of the Conference of Brussels, the observations and propositions presented individually by various members of the commission, among others :

(a) The various drafts of a definition of occupation in time of war, particularly the following definition: " a territory is considered as occupied from the moment when, as long as, and as completely as, the State to which it belongs is prevented, by the cessation of local resistance, from exercising publicly its sovereign authority in such territory " ;

(b) The proposition to provide that it is the duty of the military authority to notify the inhabitants of occupied territory as soon as possible that the occupation is established;

(c) The proposition to apply the general principle of restitution or indemnity in the case of stores of arms and ammunition belonging to individuals of the occupied country, as in the case of any other enemy private property;

(d) The proposition to add to the enumeration of methods which are prohibited in time of war, the destruction or laying waste by flooding, burning, etc., of a large part of the territory or permanent products of the enemy's soil, for a temporary purpose of the war ;

(e) The proposition to take measures to ensure the formal and regular character of the receipts delivered to the inhabitants of the occupied territory who have been forced to give loans or services, contributions or requisitions;

(f) The voeu that the different Powers instruct their armies in the rules of international law.

11. The Institute adheres to the following voeuoc drawn up at the Conference of Brussels :

(1) By General Arnaudeau, in favor of an agreement among the Powers to establish similarity in the methods of

restraint at present provided in their military codes, and to seek some basis for an agreement having in view uniformity in the penalties for crimes, torts and infractions against international law (criminal law of war) ;

(2) By Baron Blanc and Colonel Count Lanza, that all parts of the military regulations concerning the relations of belligerents as among themselves, should be revised for the purpose of unification by an agreement of the governments;

(3) By Colonel Brun, to sanction the following provision: "After a battle, the belligerents are required to communicate to the adverse party the list of the dead who have fallen into their power. To make this measure easy of application, it is desirable that each soldier be supplied with a mark indicating his number (his name?) and the name of his regiment, as well as the number of his company."

3. INTERNATIONAL DUTIES OF NEUTRAL STATES— RULES OF WASHINGTON (1875-Haye-04)

In 1871 the Cabinets of Washington and St. James had concluded a treaty with regard to the Alabama case which fixed the duties of neutral States, especially as regards the equipment of privateers in their ports. At the session of Geneva, 1874, the Institute placed upon its program an examination of the three rules proposed in the said treaty. Each of the members of the committee, Messrs. Calvo, Hautefeuille, Lorimer, Rolin and Woolsey, made a personal and independent investigation. Mr. Bluntschli, the reporter, after having summarized these studies, proposed a resolution which, amended and enlarged by the commission, served as a basis for the deliberations of the Institute at the session at The Hague.

These deliberations took place on the thirtieth of August, 1875, and resulted in the adoption of the following conclusions :

International Duties of Neutral States — Rules of Washington

1. A neutral State which is desirous of remaining on terms of peace and friendship with the belligerents, and of enjoying the rights of neutrality, must abstain from taking any part whatever in the war, by lending military assistance to one or both of the belligerents, and exercise vigilance to prevent its territory from becoming a center of organization or point of departure for hostile expeditions against one or both of the belligerents,

2. Consequently the neutral State cannot, in any manner whatever, put at the disposal of any of the belligerent States, or sell to them, its war vessels or military transports, nor material from its arsenals or military stores, for the purpose of assisting it in prosecuting the war. Furthermore, the neutral State is bound to exercise vigilance to prevent other persons from placing war vessels at the disposal of any of the belligerent States in its ports or in those portions of the sea subject to its jurisdiction.

3. When the neutral State is aware of enterprises or acts of this kind, incompatible with neutrality, it is bound to take the necessary measures to prevent them, and to prosecute the individuals who violate the duties of neutrality, as the guilty parties.

4. Likewise, the neutral State should not permit nor suffer one of the belligerents to use its ports or waters as a naval base of operations against the other, or permit military transports to use its ports or waters to renew or add to their military supplies or arms, or to secure recruits.

5. The mere fact that a hostile act has been committed upon neutral territory is not sufficient to make the neutral State responsible. Before it can be admitted that it has violated its duty it must be shown that there was a hostile intention (*dolus*), or manifest negligence (*culpa*),

6. Only in serious and urgent cases, and only during the existence of war, has the Power injured by a violation of neutral duties the right to consider neutrality as abandoned and to resort to force to defend itself against the State which has violated neutrality.

In cases of a minor character, or where the matter is not urgent, or after the war is over, complaints of this character should be settled exclusively by arbitration.

7. The arbitral tribunal decides *ex aequo et bono* on the questions of damages which the neutral State should, by reason of its responsibility, pay to the injured State, either for the State itself, or for its nationals (*ressortissants*).

4. TREATMENT OF PRIVATE PROPERTY IN NAVAL WARFARE (1875-Haye-03 & 1877-Zur-02)

At the session in Geneva (1874) the Institute named a committee, at the suggestion of Messrs. de Laveleye, Mancini and Bluntschli, to study the question of respect for private property at sea. This committee met the next year at The Hague, under the presidency of Mr. de Laveleye, reporter, who submitted to it a memoir upon this subject; at the same time Mr. Pierantoni presented to the committee a report upon " Maritime prizes according to the Italian school and legislation," which, being thorough, served as the basis for the study of this particular topic, which the Institute then undertook. At the session at The Hague, the Institute considered in the plenary session of August 31, 1875, the conclusions proposed by the committee and adopted the following text :

1. The principle of the inviolability of enemy private property sailing under a neutral flag should be considered henceforth as fixed in the domain of the positive law of nations.

2. It is desirable that the principle of the inviolability of enemy private property sailing under the enemy flag should be universally accepted in the following terms, taken from the declarations of Prussia, Austria and Italy in 1866, and under the reservation hereinafter stated, sub 3 :

Merchant vessels and their cargoes cannot be captured unless they carry contraband of war or unless they try to violate an effective and declared blockade.

3. It is understood that in accordance with the general principles which should govern naval war as well as land warfare, the preceding provision is not applicable to merchant vessels which, directly or indirectly, take part in or are intended to take part in hostilities.

At this same session the Institute referred to the committee of which Mr. de Laveleye was reporter, a question raised by Mr. Bluntschli in the following language : " Having regard to

the necessities of naval warfare, what should be the restrictions which should be placed upon the principle of the inviolability of enemy private property, in harmony with what has been done on the same subject in land warfare with regard to railroads and other means of military transportation ? " Mr. de Laveleye, being obliged to resign his office on account of his health, was replaced by Mr. Bulmerincq as reporter, and the latter submitted a draft and conclusions to the Institute at the session in Zurich (1877).

These conclusions were discussed in the plenary session of September 11, 1877, and adopted in the following form:

1. Neutral or enemy private property sailing under enemy or neutral flag is inviolable.
2. The following are always subject to seizure: objects intended for war or susceptible of being immediately employed therein. Belligerent governments shall in every war determine in advance what articles they will consider within the above description. Merchant vessels which have taken part in the hostilities, or are in condition to take such part immediately, or which have run a blockade which was declared and was effective, are also subject to seizure.
3. A blockade is effective when it results in preventing access to the blockaded port by means of a sufficient number of war vessels stationed there, or absent from such station only temporarily. There is a breach of the blockade when a merchant vessel, having information of the blockade, attempts by force or strategy to penetrate the line of the blockade.
4. Privateering is forbidden.
5. The right of visit may be exercised by war vessels of belligerent Powers on merchant vessels with a view to ascertaining their nationality, searching for objects susceptible of capture, or to prove a breach of blockade. The right of visit may be exercised from the moment the declaration of war is published until the conclusion of peace. It is suspended during a truce or armistice. It may be exercised within the waters of belligerents as well as upon the high seas, but not as to neutral war vessels, nor as to those which ostensibly belong to a neutral State. The commander of the vessel which makes the visit should limit himself to an examination of the ship's papers. He has no authority to make a search of the vessel if the ship's papers do not furnish ground for the suspicion of fraud, or furnish the proof thereof, or unless there are serious grounds for presuming that objects intended for war are on board.

5. COMPROMIS CLAUSE (1877-Zur-01)

In a letter written September 4, 1877, to the President of the Institute, Mr. Mancini, at that time Italian Minister of Finance, expressed the hope " that it would be possible to insert in most of the treaties of commerce and navigation now being negotiated between Italy and foreign governments a compromis clause whereby the high contracting parties would mutually bind themselves to submit to the peaceful method of arbitration the settlement of controversies which might arise concerning the interpretation and the application of the treaties."

At its Zurich meeting, the Institute saw in this important statement, an opportunity, not only of expressing a voeu in favor of the general application of the system, but also of recalling its deliberations on the subject of the procedure to be followed in courts of arbitration. Therefore,

in its session of September 12, 1877, on the motion of Mr. Bluntschli, it adopted the following resolution :

International Arbitration — Compromis Clause

The Institute of International Law urgently recommends the insertion in future international treaties of a compromis clause stipulating recourse to arbitration in case of a dispute concerning the interpretation and application of these treaties.

The Institute further proposes that, in consideration of the difficulty that the parties might have in agreeing in advance upon the procedure to be followed, the following provision be added to the compromis clause :

If the contracting States have not agreed in advance upon other provisions regarding the procedure to be followed in the court of arbitration, the regulations sanctioned by the Institute at The Hague, August 28, 1875, shall be applied.

6. REGULATION OF THE LAWS AND CUSTOMS OF WAR (1877-Zur-04)

After having adopted at the meeting at The Hague the Resolutions reproduced above regarding the Declaration of Brussels of 1874, the Institute instructed the same committee " as occasion offered to follow out the progress of regulation of the laws and customs of war." The committee did not have occasion to make any study of the subject during the following years. When war broke out in 1877 between Russia and Turkey, the Bureau, at the suggestion of Mr. Moynier, published an " Appeal to belligerents and to the press," drawn up by Messrs. Bluntschli, Moynier and Rolin-Jaequemyns, for the purpose of recalling the fact " that a law of war exists, still imperfect of course, but requiring at present that belligerents observe certain rules which are clearly determined," and of indicating such rules as should be henceforth considered part of public European law.

The Institute at its session in Zurich was called upon to pass upon the circular which the Bureau had published in its name, and at the session of September 11, 1877, it ratified unanimously the text and the publication thereof. It then went into the question as to whether there was any reason to confirm this circular by a more elaborate Declaration, which could be inserted in its minutes and made public; after deciding in favor of this plan, it appointed Messrs. Moynier and Rolin-Jaequemyns to draw up the text of this Declaration.

This text was adopted at the session of September 12, 1877, in the following form:

Application of the Law of Nations to the War of 1877 Between Russia and Turkey

The Institute of International Law, assembled for its regular meeting at Zurich, declares that it approves, and ratifies in the most complete manner, the " Appeal to belligerents and to the press" published in its name by its Bureau, on May 28, 1877.

Inspired by the idea which dictated the above act, the Institute believes it should not bring its present session to a close without raising its voice again in favor of law and humanity. The

Institute, however, is determined to limit itself to its proper sphere and will not express any collective opinion concerning the facts which have actually brought about war between Russia and Turkey, nor upon the measures to be taken for satisfying by means of treaties the legitimate interests involved in the conflict.

This assembly believes it can profitably consider positive international law, binding upon all, and not decisions arrived at as matters of policy or diplomacy, — and especially the laws of war, accurately defined by the act of May 28, their recognition and application. Even in this limited sphere it will abstain from any opinion which may not be founded upon irrefutable proof.

On both sides the belligerents accuse each other of failing to recognize the laws of war. Each day brings to us a detailed recital of new horrors. Unfortunately, even if it must be recognized that the greater number of these deeds, which are so disgraceful to our age and cause us to view the future with alarm, are only too real, the means of seeking the truth in each particular case are most often lacking.

The Institute therefore cannot consider giving itself up to an impossible inquiry, based upon a daily increasing number of impassioned charges. But it is a different question which an association of jurists, created to " promote the progress of international law," should meet and has the means to solve. That question is as to how far the belligerents have gone to assure themselves so far as possible of the recognition and observance of the laws of war by their respective armies.

Here are the unquestioned facts on this point.

Almost at the moment that the " Appeal to belligerents and to the press " appeared, an imperial ukase, dated May 12/24, 1877, ordered all the civil and military authorities of the Russian Empire to observe not only the Geneva Convention of 1864 and the Declaration of St. Petersburg of 1868, but also the principles proclaimed by the Conference of Brussels, 1874.

The same conventions and the same principles have been brought to the attention of the Russian troops by means of a sort of military catechism, in the form of questions and answers, published June 1/13, 1877, in the *Recueil militaire russe*, the official organ of the Ministry of War. This publication was issued in several thousand copies and distributed through the active army.

The Russian Government finally published on July 10/22, 1877, a " Regulation concerning prisoners of war," which sanctions the most humane rules of the law of nations as obligatory upon its armies.

In connection with these acts, which prove at least the efforts made by the Russian Government to remove any pretext for ignorance on the part of its soldiers, and to show them that the observation of the laws of war is a part of their professional duties, the Institute regrets that it is obliged to say that no official act has come from the Turkish Government for the purpose of bringing clearly to the knowledge of its troops the customary law, especially the provisions of this law formulated in the draft of the Declaration of Brussels.

Is the situation any different where the written law is concerned, that is, the Geneva Convention? Unhappily, no. The very text of this treaty has just been translated into Turkish for the first time only after the representations of several neutral Powers, signatories of the same act. It is not rash to assert that the Turkish troops are ignorant of their obligations in this regard, when the Government itself pays no attention thereto. In fact, a letter from Safvet Pasha, Minister of Foreign Affairs, to the Swiss Federal Council, dated November 16, 1876, contains the sentence: "As a signatory of the Geneva Convention Turkey agreed to respect and protect the ambulances of the Red Cross Society, at the same time that she acquired the right to form societies herself having the same purpose and governed by the same rules " ! It is well known that the convention of 1864 does not concern societies of this character.

We may also be astonished that the Porte, which was a signatory of the Geneva Convention from July 5, 1865, and which tacitly ratified it by the silence of its representatives at Brussels in 1874, waited until the end of 1876 before perceiving that the Red Cross " wounds the susceptibilities of the mussulman soldier." (Dispatch above cited, November 16.)

It is true that on June 13, 1877, the Turkish Government, after having begun by substituting by its own authority the Crescent for the Red Cross in its field hospitals, affirmed in another dispatch to the Swiss Federal Government that formal instructions had just been issued to the Ottoman troops to respect the Red Cross of the Russians.

The Institute, while gratified at this recognition of an international obligation, regrets that it is not informed as to the tenor, or the date of the instructions in question.

Neither can it refrain from noting that more than two months after the dispatch of the thirteenth of June, Germany and several other Powers which were signatories of the Geneva Convention found it necessary to remind Turkey of the observance of its contractual agreements.

It is not the sphere of the Institute to inquire whether one or the other of the belligerents considered the violation, or permission to violate, the laws of war by its troops. But outside the question of good faith there is a question of responsibility which may result either from neglecting the instruction of troops, or from the employment of savage hordes incapable of conducting a regular war. It is the duty of States which call themselves civilized and form part of the concert of Europe to reject absolutely the use of such auxiliaries. A Government which owes its victory to them makes itself an international outlaw. It would become responsible for all those evil instincts which it did not suppress, for all that barbarism against which it had not reacted.

The Institute could not therefore accept as a valid excuse one which threw upon irregular troops, Bashi-Bazouks, Circassians, Kurds or others, responsibility for the alleged cruelties. If these troops are absolutely incapable of conducting themselves like human and rational beings the mere fact of employing them is a grave infraction of the laws of war, as all authors have unanimously taught for some time. If this absolute incapacity does not exist, then the belligerent which utilizes these troops must control them.

The Institute, by calling attention to these abuses and in protesting against their continuance, is far from desirous of aggravating the disagreements and calling forth useless reprisals. Animated by an ardent love of peace and justice the Institute intends only to employ all of its influence which it owes to its organization, to its antecedents, to the special studies of its members, to indicate what it believes would prevent modern wars from presenting a

degrading spectacle of ferocity and bestiality pushed to their utmost bounds, while exhibiting at the same time the noblest examples of courage, patriotism and charity.

In this spirit the Institute expresses the following vœux:

1. That the various States mutually bind themselves by contract to observe certain laws and customs of war, as a complement to the work commenced at Brussels in 1874, and in accordance with the conclusions adopted by the Institute at The Hague in 1875 ;
2. That the laws and customs of war, to be formulated in a treaty, be by that very fact placed under the protection of all of the European States, and that the latter, with a view to enlightening opinion, develop, if possible, an organization of military attaches commissioned to follow belligerent armies and to inform their governments of serious infractions against the laws of war which they may find. An excellent example of this was given by the English Government when it published the reports of Colonel Wellesley;
3. That the various governments take such measures as are necessary to bring these laws and customs to the individual knowledge of the officers and soldiers in their service ;
4. That as an administrative measure to guarantee that special information has been given to the chiefs of corps, at least, each officer, before entering a campaign, should sign a process-verbal stating that he has read an instruction relating to the laws and customs of war, and that he has also received a copy of this instruction.

7. ORGANIZATION OF AN INTERNATIONAL PRIZE COURT (1877-Zur-03)

At the session at The Hague, the Institute, at the suggestion of Mr. Westlake, formed a committee for the purpose of studying a plan for the organization of an international prize court and named Mr. Westlake reporter thereof.

At the session at Zurich, Mr. Westlake presented a draft which he could not personally be present to defend. At the plenary session of September 12, 1877, the Institute adopted three resolutions drawn up by Messrs. Bluntschli and Rolin-Jaequemyns,* and instructed Mr. Bulmerincq to draw up after the session a report upon the question and the resolutions adopted. This report is inserted in the Annuaire.

The resolutions adopted are as follows:

Plan for Organization of an International Court of Prize

The Institute declares that the present system of courts and administration of justice in matters of prize is defective, and considers the matter of remedying this state of things by a new international institution an urgent one. It is of the opinion that there is ground for:

1. Formulating in a treaty the general principles applicable to prize matters ;

2. Replacing the courts hitherto exclusively composed of judges belonging to the belligerent State by international tribunals which would give to the interested individuals of the neutral or enemy State the broadest guaranties of an impartial decision;

3. Agreeing upon a common procedure to be adopted in prize matters.

However, the Institute believes it should declare that at present it would consider the establishment of mixed tribunals, whether of first instance or of appeal, on the basis of the draft worked out by Mr. Westlake, as a step in advance.

8. INTERNATIONAL PROTECTION OF THE SUEZ CANAL (1879-Brux-01)

At the time of the war between Russia and Turkey, the Institute thought it useful at its session in Zurich, September 13, 1877, to instruct a committee to study the methods by which the Suez Canal might regularly and finally be withdrawn from the jurisdiction of the common law of war. Sir Travers Twiss, who was named as reporter thereof, presented a memoir on the question at the session of Paris, 1878. This memoir containing no draft of resolutions, the Institute instructed the committee to prepare a draft for the following session.

At the session of Brussels, Sir Travers Twiss, in collaboration with Mr. Martens, presented a second report, following which the committee drew up a draft of resolutions, which was adopted by the Institute in plenary session on September 4, 1879, with the recommendation that they be communicated to Mr. Ferdinand de Lesseps personally and to the Compagnie universelle du canal de Suez.

1. It is of general interest to all nations that the maintenance and use of the Suez Canal for all kinds of communication shall be protected as much as possible by conventional international law.

2. For this purpose it is desirable that States unite with a view to avoiding as much as possible any measure which may damage or put in danger the canal and its appendages even in case of war.

3. If a Power should damage the works of the Compagnie universelle du canal de Suez, it shall be required as a matter of law to repair the damage caused as promptly as possible, and to restore full liberty of navigation of the canal.

9. SUBMARINE CABLES (1879-Brux-02)

At the session of Paris, in 1878, Mr. Renault had proposed the formation of a committee to study the means of protecting from destruction, both in time of peace and in time of war, submarine telegraph cables having an international importance.

This proposition was accepted by the Institute and its author was named reporter of the commission. At the Brussels session in 1879 Mr. Renault presented, on this subject, a report

to which the committee added a body of conclusions. The Institute after a deliberation in plenary session, September 5, 1879, adopted the following resolutions:

1. It would be very advantageous if the several States would agree to declare that the destruction or injury of submarine cables in the high seas is an offense against the law of nations, and to determine in a precise manner the criminal character of the acts and the applicable penalties; with regard to this latter point a degree of uniformity compatible with the diversity of criminal legislations would be sought.

The right of seizing persons who are guilty or presumed to be guilty might be granted to government ships of all nations under conditions regulated by treaties ; but the right to pass judgment upon them should be reserved to the national courts of the captured vessel.

2. A submarine telegraphic cable uniting two neutral territories is inviolable.

It is desirable, when telegraphic communications must cease by reason of a state of war, that the measures taken be only those strictly necessary to prevent use of the cable and that they be withdrawn, or that their consequences be repaired, as soon as cessation of hostilities permits.

10. LAWS AND CUSTOMS OF WAR ON LAND (1880-Oxf-02)

Motion of Mr. Rolin-Jaequemyns at the Paris Session

At the Paris session (1878) Mr. Rolin-Jaequemyns recommended to the attention of the Institute " the study of the codes and regulations which the governments of several countries have recently drawn up for their armies and in which is prescribed the observation of the laws and customs of war."

Mr. Moynier undertook this study and presented to the Institute at the Brussels session (1879) a report, to which was added a note by Mr. Hornung. After a thorough discussion of the conclusions in Mr. Moynier's report during the meetings of September 2 and 3, 1879, the Institute directed the committee which for several years had been occupied with these questions to draw up a Manual of the laws and customs of war.

This work, drawn up by Mr. Moynier, the reporter, was first communicated in proof sheets to all the members and associates of the Institute. Then it was discussed by the committee in meetings held for the purpose at Heidelberg, June 18-20, 1880, and was finally submitted to the Institute at its Oxford session September 9, 1880, with a second report of Mr. Moynier. On motion of Mr. Neumann the Manual as thus prepared was adopted as a whole in the same meeting by unanimous vote of the members present, and the Bureau was directed to communicate it to the several Governments of Europe and America, adding thereto a letter of transmittal and Mr. Moynier's last report.

The Laws of War on Land manual published by the Institute of International Law

Preface

War holds a great place in history, and it is not to be supposed that men will soon give it up — in spite of the protests which it arouses and the horror which it inspires — because it appears to be the only possible issue of disputes which threaten the existence of States, their liberty, their vital interests. But the gradual improvement in customs should be reflected in the method of conducting war. It is worthy of civilized nations to seek, as has been well said, " to restrain the destructive force of war, while recognizing its inexorable necessities."

This problem is not easy of solution ; however, some points have already been solved, and very recently the draft of Declaration of Brussels has been a solemn pronouncement of the good intentions of governments in this connection. It may be said that independently of the international laws existing on this subject, there are to-day certain principles of justice which guide the public conscience, which are manifested even by general customs, but which it would be well to fix and make obligatory. That is what the Conference of Brussels attempted, at the suggestion of His Majesty the Emperor of Russia, and it is what the Institute of International Law, in its turn, is trying to-day to contribute. The Institute attempts this although the governments have not ratified the draft issued by the Conference at Brussels, because since 1874 ideas, aided by reflection and experience, have had time to mature, and because it seems less difficult than it did then to trace rules which would be acceptable to all peoples.

The Institute, too, does not propose an international treaty, which might perhaps be premature or at least very difficult to obtain; but, being bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to the governments a Manual suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies.

Rash and extreme rules will not, furthermore, be found therein. The Institute has not sought innovations in drawing up the Manual; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable.

By so doing, it believes it is rendering a service to military men themselves. In fact, so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and to endless accusations. A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts — which battle always awakens, as much as it awakens courage and manly virtues, — it strengthens the discipline which is the strength of armies ; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.

But in order to attain this end it is not sufficient for sovereigns to promulgate new laws. It is essential, too, that they make these laws known among all people, so that when a war is declared, the men called upon to take up arms to defend the causes of the belligerent States, may be thoroughly impregnated with the special rights and duties attached to the execution of such a command.

The Institute, with a view to assisting the authorities in accomplishing this part of their task, has given its work a popular form, attaching thereto statements of the reasons therefor, from which the text of a law may be easily secured when desired.

THE LAWS OF WAR ON LAND

Part I. — General Principles

Article 1. The state of war does not admit of acts of violence, save between the armed forces of belligerent States.

Persons not forming part of a belligerent armed force should abstain from such acts.

This rule implies a distinction between the individuals who compose the " armed force " of a State and its other ressortissants. A definition of the term " armed force " is, therefore, necessary.

Article 2. The armed force of a State includes :

1. The army properly so called, including the militia;
2. The national guards, landsturm, free corps, and other bodies which fulfil the three following conditions:
 - (a) That they are under the direction of a responsible chief;
 - (b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps;
 - (c) That they carry arms openly;
3. The crews of men-of-war and other military boats;
4. The inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organize themselves.

Article 3. Every belligerent armed force is bound to conform to the laws of war.

The only legitimate end that States may have in war being to weaken the military strength of the enemy (Declaration of St. Petersburg, 1868),

Article 4. The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy.

They are to abstain especially from all needless severity, as well as from all perfidious, unjust, or tyrannical acts.

Article 5. Military conventions made between belligerents during the continuance of war, such as armistices and capitulations, must be scrupulously observed and respected.

Article 6. No invaded territory is regarded as conquered until the end of the war ; until that time the occupant exercises, in such territory, only a de facto power, essentially provisional in character.

Part II. — Application of General Principles

I.— HOSTILITIES

A. — Rules of Conduct with Regard to Individuals

(a) Inoffensive Populations

The contest being carried on by "armed forces" only (Article 1),

Article 7. It is forbidden to maltreat inoffensive populations.

(b) Means of Injuring the Enemy

As the struggle must be honorable (Article 4),

Article 8. It is forbidden :

(a) To make use of poison, in any form whatever;

(b) To make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender;

(c) To attack an enemy while concealing the distinctive signs of an armed force;

(d) To make improper use of the national flag, military insignia or uniform of the enemy, of the flag of truce and of the protective signs prescribed by the Geneva Convention (Articles 17 and 40 below) .

As needless severity should be avoided (Article 4),

Article 9. It is forbidden:

(a) To employ arms, projectiles, or materials of any kind calculated to cause superfluous suffering, or to aggravate wounds, — notably projectiles of less weight than four hundred grams which are explosive or are charged with fulminating or inflammable substances. (Declaration of St. Petersburg.)

(b) To injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves.

(c) The Sick and Wounded, and the Sanitary Service

The following provisions (Articles 10 to 18), drawn from the Geneva Convention, exempt the sick and wounded, and the personnel of the sanitary service, from many of the needless hardships to which they were formerly exposed:

Article 10. Wounded or sick soldiers should be brought in and cared for, to whatever nation they belong.

Article 11. Commanders in chief have power to deliver immediately to the enemy outposts hostile soldiers who have been wounded in an engagement, when circumstances permit and with the consent of both parties.

Article 12. Evacuations, together with the persons under whose direction they take place, shall be protected by neutrality.

Article 13. Persons employed in hospitals and ambulances — including the staff for superintendence, medical service, administration and transport of wounded, as well as the chaplains, and the members and agents of relief associations which are duly authorized to assist the regular sanitary staff, — are considered as neutral while so employed, and so long as there remain any wounded to bring in or to succor.

Article 14. The personnel designated in the preceding article should continue, after occupation by the enemy, to tend, according to their needs, the sick and wounded in the ambulance or hospital which it serves.

Article 15. When such personnel requests to withdraw, the commander of the occupying troops sets the time of departure, which however he can only delay for a short time in case of military necessity.

Article 16. Measures should be taken to assure, if possible, to neutralized persons who have fallen into the hands of the enemy, the enjoyment of fitting maintenance.

Article 17. The neutralized sanitary staff should wear a white arm-badge with a red cross, but the delivery thereof belongs exclusively to the military authority.

Article 18. The generals of the belligerent Powers should appeal to the humanity of the inhabitants, and should endeavor to induce them to assist the wounded, by pointing out to them the advantages that will result to themselves from so doing (Articles 36 and 59) . They should regard as inviolable those who respond to this appeal.

(d) The Dead

Article 19. It is forbidden to rob or mutilate the dead lying on the field of battle.

Article 20. The dead should never be buried until all articles on them which may serve to fix their identity, such as pocket-books, numbers, etc., shall have been collected.

The articles thus collected from the dead of the enemy are transmitted to its army or government.

(e) Who May Be Made Prisoners of War

Article 21. Individuals who form a part of the belligerent armed force, if they fall into the hands of the enemy, are to be treated as prisoners of war, in conformity with Articles 61 et seq.

The same rule applies to messengers openly carrying official dispatches, and to civil aeronauts charged with observing the enemy, or with the maintenance of communications between the various parts of the army or territory.

Article 22. Individuals who accompany an army, but who are not a part of the regular armed force of the State, such as correspondents, traders, sutlers, etc., and who fall into the hands of the enemy, may be detained for such length of time only as is warranted by strict military necessity.

(f) Spies

Article 23. Individuals captured as spies cannot demand to be treated as prisoners of war.

But

Article 24. Individuals may not be regarded as spies, who, belonging to the armed force of either belligerent, have penetrated, without disguise, into the zone of operations of the enemy, — nor bearers of official dispatches, carrying out their mission openly, nor aeronauts (Article 21).

In order to avoid the abuses to which accusations of espionage too often give rise in war it is important to assert emphatically that

Article 25. No person charged with espionage shall be punished until the judicial authority shall have pronounced judgment.

Moreover, it is admitted that

Article 26. A spy who succeeds in quitting the territory occupied by the enemy incurs no responsibility for his previous acts, should he afterwards fall into the hands of that enemy.

(g) Parlementaires

Article 27. A person is regarded as a parlementaire and has a right to inviolability who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag.

Article 28. He may be accompanied by a bugler or a drummer, by a color-bearer, and, if need be, by a guide and interpreter, who also are entitled to inviolability.

The necessity of this prerogative is evident. It is, moreover, frequently exercised in the interest of humanity.

But it must not be injurious to the adverse party. This is why

Article 29. The commander to whom a parlementaire is sent is not in all cases obliged to receive him.

Besides,

Article 30. The commander who receives a parlementaire has a right to take all the necessary steps to prevent the presence of the enemy within his lines from being prejudicial to him.

The parlementaire and those who accompany him should behave fairly towards the enemy receiving them (Article 4).

Article 31. If a parlementaire abuse the trust reposed in him he may be temporarily detained, and, if it be proved that he has taken advantage of his privileged position to abet a treasonable act, he forfeits his right to inviolability.

B. Rules of Conduct with Regard to Things

(a) Means of Injuring—Bombardment

Certain precautions are made necessary by the rule that a belligerent must abstain from useless severity (Article 4). In accordance with this principle

Article 32. It is forbidden:

(a) To pillage, even towns taken by assault;

(b) To destroy public or private property, if this destruction is not demanded by an imperative necessity of war;

(c) To attack and to bombard undefended places.

If it is incontestable that belligerents have the right to resort to bombardment against fortresses and other places in which the enemy is entrenched, considerations of humanity require that this means of coercion be surrounded with certain modifying influences which will restrict as far as possible the effects to the hostile armed force and its means of defense.

This is why

Article 33. The commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make every due effort to give notice thereof to the local authorities.

Article 34. In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes, hospitals and places where the sick and wounded are gathered on the condition that they are not being utilized at the time, directly or indirectly, for defense.

It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand.

(b) Sanitary Materiel

The arrangements for the relief of the wounded, which are made the subject of Articles 10 et seq., would be inadequate were not sanitary establishments also granted special protection.

Hence, in accordance with the Geneva Convention,

Article 35. Ambulances and hospitals for the use of armies are recognized as neutral and should, as such, be protected and respected by belligerents, so long as any sick or wounded are therein.

Article 36. The same rule applies to private buildings, or parts of buildings, in which sick or wounded are gathered and cared for.

Nevertheless,

Article 37. The neutrality of hospitals and ambulances ceases if they are guarded by a military force ; this does not preclude the presence of police guard.

Article 38. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property. Ambulances, on the contrary, retain all their equipment.

Article 39. In the circumstances referred to in the above paragraph, the term " ambulance " is applied to field hospitals and other temporary establishments which follow the troops on the field of battle to receive the sick and wounded.

Article 40. A distinctive and uniform flag is adopted for ambulances, hospitals, and evacuations. It bears a red cross on a white ground. It must always be accompanied by the national flag.

II.— OCCUPIED TERRITORY

A. — Definition

Article 41. Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of the occupation.

B. — Rules of Conduct with Respect to Persons

In consideration of the new relations which arise from the provisional change of government (Article 6),

Article 42. It is the duty of the occupying military authority to inform the inhabitants, at the earliest practicable moment, of the powers that it exercises, as well as of the local extent of the occupation.

Article 43. The occupant should take all due and needful measures to restore and ensure public order and public safety.

To that end

Article 44. The occupant should maintain the laws which were in force in the country in time of peace, and should not modify, suspend, or replace them, unless necessary.

Article 45. The civil functionaries and employees of every class who consent to continue to perform their duties are under the protection of the occupant.

They may always be dismissed, and they always have the right to resign their places.

They should not be summarily punished unless they fail to fulfil obligations accepted by them, and should be handed over to justice only if they violate these obligations.

Article 46. In case of urgency, the occupant may demand the cooperation of the inhabitants, in order to provide for the necessities of local administration.

As occupation does not entail upon the inhabitants a change of nationality,

Article 47. The population of the invaded district cannot be compelled to swear allegiance to the hostile Power; but inhabitants who commit acts of hostility against the occupant are punishable (Article 1).

Article 48. The inhabitants of an occupied territory who do not submit to the orders of the occupant may be compelled to do so.

The occupant, however, cannot compel the inhabitants to assist him in his works of attack or defense, or to take part in military operations against their own country (Article 4).

Besides,

Article 49. Family honor and rights, the lives of individuals, as well as their religious convictions and practice, must be respected (Article 4).

C. — Rules of Conduct with Regard to Property

(a) Public Property

Although the occupant replaces the enemy State in the government of the invaded territory, his power is not absolute. So long as the fate of this territory remains in suspense — that is, until peace — the occupant is not free to dispose of what still belongs to the enemy and is not of use in military operation. Hence the following rules:

Article 50. The occupant can only take possession of cash, funds and realizable or negotiable securities which are strictly the property of the State, depots of arms, supplies, and, in general, movable property of the State of such character as to be useful in military operations.

Article 51. Means of transportation (railways, boats, etc.) , as well as land telegraphs and landing-cables, can only be appropriated to the use of the occupant. Their destruction is

forbidden, unless it be demanded by military necessity. They are restored when peace is made in the condition in which they then are.

Article 52. The occupant can only act in the capacity of provisional administrator in respect to real property, such as buildings, forests, agricultural establishments, belonging to the enemy State (Article 6) .

It must safeguard the capital of these properties and see to their maintenance.

Article 53. The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized.

All destruction or wilful damage to institutions of this character, historic monuments, archives, works of art, or science, is formally forbidden, save when urgently demanded by military necessity.

(b) Private Property

If the powers of the occupant are limited with respect to the property of the enemy State, with greater reason are they limited with respect to the property of individuals.

Article 54. Private property, whether belonging to individuals or corporations, must be respected, and can be confiscated only under the limitations contained in the following articles.

Article 55. Means of transportation (railways, boats, etc), telegraphs, depots of arms and munitions of war, although belonging to companies or to individuals, may be seized by the occupant, but must be restored, if possible, and compensation fixed when peace is made.

Article 56. Impositions in kind (requisitions) demanded from communes or inhabitants should be in proportion to the necessities of war as generally recognized, and in proportion to the resources of the country.

Requisitions can only be made on the authority of the commander in the locality occupied.

Article 57. The occupant may collect, in the way of dues and taxes, only those already established for the benefit of the State. He employs them to defray the expenses of administration of the country, to the extent in which the legitimate government was bound.

Article 58. The occupant cannot collect extraordinary contributions of money, save as an equivalent for fines, or imposts not paid, or for payments not made in kind.

Contributions in money can be imposed only on the order and responsibility of the general in chief, or of the superior civil authority established in the occupied territory, as far as possible, in accordance with the rules of assessment and incidence of the taxes in force.

Article 59. In the apportionment of burdens relating to the quartering of troops and war contributions, account is taken of the charitable zeal displayed by the inhabitants in behalf of the wounded.

Article 60. Requisitioned articles, when they are not paid for in cash, and war contributions are evidenced by receipts. Measures should be taken to assure the bona fide character and regularity of these receipts.

III.— PRISONERS OF WAR

A. — Rules for Captivity

The confinement of prisoners of war is not in the nature of a penalty for crime (Article 21); neither is it an act of vengeance. It is a temporary detention only, entirely without penal character.

In the following provisions, therefore, regard has been had to the consideration due them as prisoners, and to the necessity of their secure detention.

Article 61. Prisoners of war are in the power of the hostile government, but not in that of the individuals or corps who captured them.

Article 62. They are subject to the laws and regulations in force in the army of the enemy.

Article 63. They must be humanely treated.

Article 64. All their personal belongings, except arms, remain their property.

Article 65. Every prisoner is bound to give, if questioned on the subject, his true name and rank. Should he fail to do so, he may be deprived of all, or a part, of the advantages accorded to prisoners of his class.

Article 66. Prisoners may be interned in a town, a fortress, a camp, or other place, under obligation not to go beyond certain fixed limits; but they may only be placed in confinement as an indispensable measure of safety.

Article 67. Any act of insubordination justifies the adoption towards them of such measure of severity as may be necessary.

Article 68. Arms may be used, after summoning, against a prisoner attempting to escape.

If he is recaptured before being able to rejoin his own army or to quit the territory of his captor, he is only liable to disciplinary punishment, or subject to a stricter surveillance.

But if, after succeeding in escaping, he is again captured, he is not liable to punishment for his previous flight.

If, however, the fugitive so recaptured or retaken has given his parole not to escape, he may be deprived of the rights of a prisoner of war.

Article 69. The government into whose hands prisoners have fallen is charged with their maintenance.

In the absence of an agreement on this point between the belligerent parties, prisoners are treated, as regards food and clothing, on the same peace footing as the troops of the

government which captured them.

Article 70. Prisoners cannot be compelled in any manner to take any part whatever in the operations of war, nor compelled to give information about their country or their army.

Article 71. They may be employed on public works which have no direct connection with the operations in the theater of war, which are not excessive and are not humiliating either to their military rank, if they belong to the army, or to their official or social position, if they do not form part thereof.

Article 72. In case of their being authorized to engage in private industries, their pay for such services may be collected by the authority in charge of them. The sums so received may be employed in bettering their condition, or may be paid to them on their release, subject to deduction, if that course be deemed expedient, of the expense of their maintenance.

B. — Termination of Captivity

The reasons justifying detention of the captured enemy exist only during the continuance of the war.

Article 73. The captivity of prisoners of war ceases, as a matter of right, at the conclusion of peace ; but their liberation is then regulated by agreement between the belligerents.

Before that time, and by virtue of the Geneva Convention,

Article 74. It also ceases as of right for wounded or sick prisoners who, after being cured, are found to be unfit for further military service.

The captor should then send them back to their country.

During the war

Article 75. Prisoners of war may be released in accordance with a cartel of exchange, agreed upon by the belligerent parties.

Even without exchange

Article 76. Prisoners may be set at liberty on parole, if the laws of their country do not forbid it.

In this case they are bound, on their personal honor, scrupulously to fulfil the engagements which they have freely contracted, and which should be clearly specified. On its part, their own government should not demand or accept from them any service incompatible with the parole given.

Article 77. A prisoner cannot be compelled to accept his liberty on parole. Similarly, the hostile government is not obliged to accede to the request of a prisoner to be set at liberty on parole.

Article 78. Any prisoner liberated on parole and recaptured bearing arms against the government to which he had given such parole may be deprived of his rights as a prisoner of war, unless since his liberation he has been included in an unconditional exchange of prisoners.

IV.— PERSONS INTERNED IN NEUTRAL TERRITORY

It is universally admitted that a neutral State cannot, without compromising its neutrality, lend aid to either belligerent, or permit them to make use of its territory. On the other hand, considerations of humanity dictate that asylum should not be refused to individuals who take refuge in neutral territory to escape death or captivity. Hence the following provisions, calculated to reconcile the opposing interests involved.

Article 79. A neutral State on whose territory troops or individuals belonging to the armed forces of the belligerents take refuge should intern them, as far as possible, at a distance from the theater of war.

It should do the same towards those who make use of its territory for military operations or services.

Article 80. The interned may be kept in camps or even confined in fortresses or other places.

The neutral State decides whether officers can be left at liberty on parole by taking an engagement not to leave the neutral territory without permission.

Article 81. In the absence of a special convention concerning the maintenance of the interned, the neutral State supplies them with the food, clothing, and relief required by humanity.

It also takes care of the materiel brought in by the interned.

When peace has been concluded, or sooner if possible, the expenses caused by the internment are repaid to the neutral State by the belligerent State to which the interned belong.

Article 82. The provisions of the Geneva Convention of August 22, 1864 (Articles 10-18, 35-40, 59 and 74 above given), are applicable to the sanitary staff, as well as to the sick and wounded, who take refuge in, or are conveyed to, neutral territory.

In particular,

Article 83. Evacuations of wounded and sick not prisoners may pass through neutral territory, provided the personnel and material accompanying them are exclusively sanitary. The neutral State through whose territory these evacuations are made is bound to take whatever measures of safety and control are necessary to secure the strict observance of the above conditions.

Part III. — Penal Sanction

If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are. Therefore

Article 84. Offenders against the laws of war are liable to the punishments specified in the penal law.

This mode of repression, however, is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless, and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains.

Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy. This necessary rigor, however, is modified to some extent by the following restrictions:

Article 85. Reprisals are formally prohibited in case the injury complained of has been repaired.

Article 86. In grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy.

They can only be resorted to with the authorization of the commander in chief.

They must conform in all cases to the laws of humanity and morality.

11. EXTRADITION (1880-Oxf-03)

As a result of the decision taken at Zurich in 1877, a report on extradition was presented by Mr. Ch. Brocher at Brussels', and another by Mr. Renault at Oxford. The deliberations of 1879 were without result; those of the next year resulted on September 9, 1880, in the adoption of the following Resolutions of Oxford.

1. Extradition is an international act in conformity with justice and the interests of States, since it tends to prevent and check effectively violations of penal law.
2. Extradition is effected in a sure and regular manner only pursuant to treaty, and it is desirable that treaties become more and more numerous.
3. Nevertheless it is not treaties alone that make extradition an act in conformity with right, and it may be effected even in the absence of any contractual tie.
4. It is desirable that in every country a law regulate the procedure on the subject as well as the conditions under which individuals demanded as offenders shall be surrendered to the governments with which no treaty exists.
5. The condition of reciprocity in this matter may be required by policy; it is not required by justice.
6. Between countries whose criminal legislations rest upon similar bases and which have mutual confidence in their judicial institutions, extradition of nationals would be a means of

assuring good administration of penal justice because it should be considered as desirable that the jurisdiction of the *forum delicti commissi* be so far as possible called upon to render judgment.

7. Even admitting the present practice which withdraws nationals from extradition, no account should be taken of a nationality acquired only since the perpetration of the act for which extradition is asked.

8. The competence of the requesting State should be supported by its own law; it should not be in contradiction with the law of the country of refuge.

9. If there are several requests for extradition for the same act, preference should be given to the State upon whose territory the offense was committed.

10. If the same person is demanded by several States by reason of different offenses, the requested State will in general have regard to the relative gravity of these offenses.

In case of doubt concerning the relative gravity of the offenses, the requested State will take into account priority of demand.

11. As a rule, it should be required that the acts to which extradition applies be punishable by the legislation of the two countries, except in cases where by reason of particular institutions or of the geographical situation of the country of refuge the actual circumstances constituting the offense cannot exist.

12. Extradition being always a grave measure ought to be applied only to offenses of some importance. Treaties should enumerate them with precision; their provisions on this subject naturally vary according to the respective situation of the contracting countries.

13. Extradition cannot take place for political acts.

14. It is for the requested State to decide whether in the circumstances the act on account of which extradition is demanded has a political character.

In considering this question it should be guided by the two following ideas:

(a) Acts combining all the characteristics of crimes at common law (murders, arsons, thefts) should not be excepted from extradition by reason only of the political purpose of their authors;

(b) In passing upon acts committed during a political rebellion, an insurrection, or a civil war, it is necessary to inquire whether they are excused by the customs of war.

15. In any case, extradition for crimes having the characters both of political and common law crime ought not to be granted unless the requesting State gives the assurance that the person surrendered shall not be tried by extraordinary courts.

16. Extradition ought not to be applied to the desertion of military persons belonging either to the land or to the sea forces, nor to purely military offenses.

The adoption of this rule does not prevent handing over sailors belonging either to the service of the State or to the merchant marine.

17. A law or treaty of extradition may be applied to acts committed before it came into force.

18. Extradition should be effected through the diplomatic channel.

19. It is desirable that the judicial authority in the country of refuge should be invoked to pass upon the request for extradition after hearing both sides.

20. The requested State should not grant extradition if, according to its public law, the judicial authority has decided that the request should not be allowed.

21. The examination should have for its object the general conditions of the extradition and the probability of the accusation.

22. The government which has obtained an extradition for a given act is bound, in the absence of a treaty to the contrary, not to allow the surrendered person to be tried or punished except for that act.

23. The government which has granted an extradition can afterwards consent to the trial of the surrendered person for acts other than that for which he was surrendered, if they are such as might support extradition.

24. The government which has a person in its power in consequence of an extradition cannot deliver him to another government without the consent of that which surrendered him to it.

25. The act issued by the judicial authority declaring extradition admissible must set out the circumstances under which extradition shall take place and the acts for which it has been granted.

26. The person extradited should be allowed to claim, as a preliminary exception before the tribunal called upon to give final judgment, the irregularity of the conditions under which his extradition has been granted.

12. INTERNATIONAL REGULATIONS CONCERNING PRIZES (1882-Turin-01&1883-Mun-03)

After having formulated its collective opinion upon the treatment of private property on the sea and upon the opportunity to create international courts of prize, the Institute, at its session at Zurich, deemed it important to study in their entirety the reforms which could be made in the present system of courts and administration of justice in prize matters. It therefore instructed its Bureau to form a committee for the purpose of considering:

1. General principles which might be formulated in treaties regarding the law to be applied in prize cases ;

2. A system for the organization of international prize courts, giving to the interested individuals of the neutral or enemy State the broadest guaranties of an impartial judgment;

3. A common procedure to be adopted for the judgment of prize cases.

Mr. Bulmerincq was named reporter of the committee, and gave himself up to an extensive piece of work, forming a real treatise upon prize matters. This work being only partly completed at the time of the session in Paris, the Institute, upon the suggestion of the reporter himself, postponed the examination thereof to a later session; it was still unable to consider it at Oxford. September 3, 1881, the committee met at Wiesbaden to discuss the Draft of international regulations for prizes, which Mr. Bulmerincq had just finished drawing up.

The Institute, in its turn, began the examination at the plenary session at Turin, September 13, 1882, and adopted the first 62 articles from the 13th to the 15th of the same month. At Munich, in the plenary sessions of September 6 and 7, 1883, the Institute adopted Articles 63 to 84.

I. — General Provisions

Article 1. The war vessels and military forces of belligerent States are alone authorized to exercise the law of prize, that is to say, the stopping, visit, search and seizure of merchant vessels during a naval war.

Article 2. Privateering is forbidden.

Article 3. The arming of privateers is still permitted as a method of reprisal against belligerents which do not respect the principle contained in Article 2. In this case it is forbidden to give commissions to foreigners.

Article 4. Private property is inviolable if both parties so treat it, and except in the cases enumerated in Section 23.

Article 5. The right to take prize does not accrue to belligerents until after the commencement of hostilities. It ceases during an armistice and with the preliminary negotiations for peace. So far as neutrals are concerned the right to take prize cannot be exercised until the belligerents have notified the neutrals that war exists.

Article 6. The right to take prize cannot be exercised as to vessels and cargoes until they have had knowledge of the existence of the war. There is no basis for the taking of prize if the master of the vessel or owner of the cargo proves that he did not have such knowledge.

Article 7. If the belligerent State which may order the merchant vessels of the enemy to leave its ports, permits them to discharge the merchandise on board before leaving, and to load with other merchandise, it should fix exactly the period granted to them for this purpose, and should make it known to the public. In this case the belligerent cannot permit the exercise of the right of seizure as prize against these vessels before the expiration of the said period.

Article 8. The right to take prize cannot be exercised except in the waters of a belligerent and on the high seas ; it cannot be exercised in neutral waters or in waters which are expressly protected from acts of war by treaty. Neither can a belligerent continue within the latter two classes of waters an attack already begun.

Article 9. Seizures made in neutral waters, or in waters protected by treaty from acts of war, are invalid. The vessels or objects captured should be returned to the neutral State or States bordering the water to be restored by the latter to the original owner. Furthermore, the State of the captor is responsible for all damages and loss.

II. — Special Provisions

1. — Stopping

Article 10. In the cases provided for in these regulations, war vessels of a belligerent State are authorized to stop any merchant vessel or private vessel which they may meet in the waters of their State, or on the high seas, and elsewhere than in neutral waters or waters withdrawn from the field of acts of war.

Article 11. The war vessel of the belligerent, in order to invite the merchant vessel to stop, shall fire a shot from a cannon, as a summons, using either blank shot, or powder only. Before, or at the same time, the war vessel shall raise its flag, and in the night time shall place a lantern above it.

Upon this signal the vessel which has been stopped shall raise its flag and heave to to await the visit. The war vessel shall then send to the vessel which has been stopped a boat manned by an officer accompanied by a sufficient number of men, of whom but two or three, with the officer, shall board the vessel which has been stopped.

Article 12. The vessel which has been stopped can never be required to send its master or any person whatever on board the war vessel to show his papers or for any other purpose.

Article 13. The merchant vessel is obliged to stop ; it is forbidden to continue on its course. If it does continue the war vessel has the right to pursue it and stop it by force.

2. — Visit

Article 14. The right of visit is exercised in belligerent waters, so far as they are not protected from acts of war by treaty, and on the high seas; it is exercised as to merchant vessels, but not as to war vessels of a neutral State, or as to other vessels ostensibly belonging to such State, or as to neutral merchant vessels convoyed by a war vessel of their State.

Article 15. The right of visit is exercised for the purpose of either verifying the nationality of a vessel which has been stopped, or for ascertaining whether the vessel is engaged in transportation which has been forbidden, or for ascertaining whether there has been a violation of a blockade.

Article 16. When neutral merchant vessels are convoyed, they shall not be visited, if the commander of the convoying vessel sends to the vessel of the belligerent which has stopped it, a list of the convoyed vessels, and a declaration signed by him showing that they do not carry any contraband of war, and showing the nationality and destination of the convoyed vessels.

Article 17. When the vessel to be visited is a mail boat, it shall not be visited if the officer of the government whose flag it flies, who is on board the ship, declares in writing that the mail ship is carrying neither dispatches nor troops for the enemy, nor contraband of war for the account of, or destined to, the enemy.

Article 18. Visit, to which every vessel not exempted therefrom by the provisions of Articles 16 and 17 should submit, begins with an examination of the papers of the vessel which has been stopped. If these papers are found to be in proper form or if there is nothing to arouse suspicion, the vessel which has been stopped may continue its voyage.

Neutral vessels destined for scientific expeditions may also continue their voyages provided they observe the laws of neutrality.

3. — Search

Article 19. If the vessel's papers are not in proper form, or if upon the visit being made there appears ground for suspicion, as provided in the following article, the officer who makes the visit is authorized to proceed to search the vessel. The vessel may not oppose this; if it nevertheless does so, search may be made by the use of force.

Article 20. There is ground for suspicion in the following cases:

1. When the vessel which has been stopped does not heave to at the invitation of the war vessel;
2. When the vessel which has been stopped opposes a visit to the secret places supposed to conceal the ship's papers or contraband of war;
3. When there are two sets of papers, or false, or altered, or secret papers, or insufficient papers, or no papers at all;
4. When the papers have been thrown into the sea or destroyed in any other fashion, especially if these acts have occurred after the vessel could discover the approach of the war vessel;
5. When the vessel which has been stopped is sailing under a false flag.

Article 21. Persons charged with making the search cannot open or break into closets, lodgings, trunks, cash boxes, casks, half casks, or other receptacles which may contain part of the cargo, nor arbitrarily examine articles forming part of the cargo which are spread about openly on the vessel.

Article 22. In the cases where there are grounds for suspicion as mentioned in Article 20, if there is no resistance to the search the officer who proceeds to make it should have the containers opened by the master and make the examination of the cargo openly on the vessel in the presence of the master.

4. — Seizure

Article 23. Seizure of a vessel or cargo, enemy or neutral, can occur only in the following cases:

1. When the result of the visit shows that the papers are not in proper form;
2. In all the cases where the grounds for suspicion mentioned in Article 20 exist;

3. When it is discovered by the visit or search that the vessel which has been stopped is transporting articles for the account of the enemy, or destined to the enemy;

4. When the vessel is taken in the act of violating a blockade ;

5. When the vessel participates in the hostilities or is intended to take part therein.

5. — Nationality of the Vessel, Cargo and Crew

Article 24. The nationality of the vessel, its cargo and crew should be shown in the ship's papers found upon the vessel which has been seized, provided however that there may always be a subsequent production before the prize courts.

Article 25. The question as to whether the conditions as to nationality are fulfilled is decided in accordance with the law of the State to which the vessel belongs.

Article 26. The legal document showing the sale of an enemy vessel made during the war must be perfect, and the vessel should be registered before it leaves the port of departure, and in accordance with the law of the country whose nationality it acquires. The new nationality cannot be acquired by a vessel which is sold during a voyage.

Article 27. The ship's papers required by international law are the following:

1. Documents relating to the ownership of the vessel;

2. Bill of lading;

3. List of the crew, with an indication of the nationality of the master and the crew;

4. Certificate of nationality, if the documents mentioned under 3 do not cover it;

5. Log-book.

Article 28. The documents listed in the preceding article should be drawn up clearly and without ambiguity in order to be adequate proof.

Article 29. If, in ascertaining whether it is a case for seizure, there is evidence as to the nationality or destination of the vessel, or as to the nature of the cargo, or as to the nationality of the master and crew, depending upon which point is at issue, and one of the ship's papers ordinarily relating to this question is lacking, the mere absence of this paper is not a ground for seizure, provided however that the ship's other papers are in perfect agreement on the point in question.

6. — Transportation Forbidden During the War

Article 30. During the war objects capable of being immediately employed for war purposes and transported by neutral or enemy national merchant vessels for the account of or destined to the enemy (contraband of war) are subject to seizure. The belligerent governments shall determine in advance, in each war, the objects which they will consider contraband.

Article 31. The contraband of war must be actually on board at the time the search is made.

Article 32. Objects necessary for the defense of the crew and ship are not considered contraband of war unless the vessel has made use thereof to resist being stopped, or to resist visit, search or seizure.

Article 33. The vessel which has been stopped because it carries contraband of war may continue its voyage if its cargo is not composed exclusively or principally of contraband of war, if the master is ready to deliver to the belligerent vessel the contraband of war, and if the commander of the cruiser believes that the unloading may take place without difficulty.

Article 34. In the same category as transportation of contraband of war (Article 30) is transportation of troops for military operations by the enemy on land and sea, as well as transportation of official correspondence of the enemy by neutral or enemy national merchant vessels.

7. — Blockade

Article 35. A blockade which has been declared and notice thereof given is effective when there exists a real danger in entering or leaving a blockaded port, because of the fact that a sufficient number of war vessels are stationed there, or are but temporarily absent from such station.

Article 36. The declaration of blockade should determine not only the limits of the blockade by latitude and longitude, and the exact moment when the blockade will begin, but also, in the proper case, the period which may be allowed merchant vessels to unload, reload and leave the port (Article 7).

Article 37. The officer in charge of the blockade should also transmit a notice of the declaration of blockade to the authorities and consuls of the blockaded place. The same formalities shall be observed when a blockade which has ceased to be effective has been reestablished and when a blockade is extended to new points.

Article 38. If the blockading vessels leave their position for any other reason than stress of weather, the blockade is considered as raised ; it should then be again declared and notice again given.

Article 39. Merchant vessels are forbidden to enter or leave the places and ports which are in a state of effective blockade.

Article 40. However, merchant vessels are permitted to enter, in case of stress of weather, the blockaded port, but only after the officer in charge of the blockade has ascertained that the force majeure continues.

Article 41. If it is evident that a merchant vessel approaching a blockaded port did not know of the existence of a blockade which has been declared and is effective, the officer in charge of the blockade shall notify the vessel of it, entering the notice in the vessel's papers on board the ship which has been so notified, making the entry at least in the certificate of nationality

and in the log-book, noting the date of the notice, and shall invite the vessel to leave the blockaded port, and authorize it to continue its voyage to an un-blockaded port.

Article 42. Ignorance of the blockade is permissible when the time which has elapsed since the declaration of the blockade is too short for the vessel which has already begun its voyage and has attempted to enter the blockaded port, to know of the blockade.

Article 43. A merchant vessel shall be seized for violation of blockade when it has attempted by force or strategy to penetrate the line of blockade, or when, after having been sent back once, it tries again to enter the same blockaded port.

Article 44. Seizure on the ground of violation of blockade shall not be justified by the fact that a merchant vessel has gone in the direction of the blockaded port, or by the character of the lading alone, or by the mere fact that the destination of the vessel is such a port. In no case can the doctrine of continuous voyage justify condemnation for violation of blockade.

8. — Formalities Which Follow Seizure

Article 45. After seizure the captor shall close the hatches and the powder magazines of the vessel which has been seized, and seal the same. He shall do the same with the cargo after it has been inventoried.

Article 46. No part of the cargo shall be sold, discharged, disarranged nor, in general, taken away, consumed or damaged.

If however the cargo consists of things which easily spoil, or if the articles are damaged, the captor shall take the most suitable measures to preserve the cargo, with the consent and in the presence of the master, as well as in the presence of a consul of the nationality of the vessel which has been seized, if there is one to be found in the neighborhood of the place of capture. The commander of the captor vessel shall, for this purpose, proceed to an inspection of the cargo.

Article 47. The captor shall draw up an inventory of the vessel which has been seized and its cargo, as well as a list of the persons found on board, and shall put upon the vessel which has been seized a sufficient crew to ensure possession of the vessel and maintenance of order thereon.

Article 48. The captor shall seize all of the ship's papers, documents and letters which may be found on the ship. These papers, documents and letters shall be gathered together in a parcel under the seals of the commander of the war vessel and of the master of the vessel which has been seized; an inventory of these papers, documents and letters shall be drawn up and the commander of the war vessel shall declare in writing in the proces-verbal that these are all the papers found upon the vessel; there shall also be added a note showing what papers were lacking at the time of seizure and the state in which the papers seized were found, especially if they appear to have been altered.

Article 49. The captor shall draw up a proces-verbal of the seizure as well as of the state of the vessel and cargo, mentioning therein the hour and day of the seizure ; in what latitude it took place ; the grounds therefor ; the name of the vessel and of the master; the number of

men in the crew; under what flag the vessel was sailing at the time it was stopped and whether there was resistance on the part of the vessel, and the nature of its resistance. The inventories of the vessel, cargo, and ship's papers, shall be added to the proces-verbal, with a note therein that the inventories have been drawn up. A copy of the proces-verbal shall be transmitted to the superior military authority of the vessel which has been captured.

Article 50. In the following cases the captor will be permitted to burn or sink the enemy vessel which has been seized, after having sent the persons found on board to the war-ship, and discharged as much as possible of the cargo, and after the commander of the captor vessel has taken charge of the ship's papers and important objects for use in judicial proceedings and settlement of claims of owners of the cargo for damages and interest:

1. When it is impossible to keep the vessel afloat, on account of its bad condition, in a rolling sea ;
2. When the vessel sails so poorly that it cannot follow the war vessel and may easily be retaken by the enemy;
3. When the approach of a superior force of the enemy arouses the fear that the vessel may be retaken ;
4. When the war vessel is unable to put a sufficient crew upon the vessel which has been seized without diminishing too greatly the crew necessary to its own safety ;
5. When the port to which it would be possible to take the vessel which has been seized is too far away.

Article 51. A proces-verbal shall be drawn up concerning the destruction of the vessel which has been seized and the grounds therefor; this proces-verbal shall be transmitted to the superior military authority and to the nearest court of inquiry, and the latter shall examine, and if necessary complete, the documents relating thereto and transmit them to the prize court.

Article 52. The only persons on board the ship which has been seized who shall be considered prisoners of war are those who form part of the military force of the enemy, and those who have assisted the enemy or are suspected of having assisted the enemy.

Article 53. The master, the supercargo, the pilot and other persons whom it will be necessary to hear in order to ascertain the facts, shall be temporarily retained on board.

These persons are not authorized to quit the vessel, after giving their depositions, except at the order of the court of inquiry.

Article 54. The persons found and kept on board shall be fed, and in case of necessity, clothed and cared for by the government of the State to which the captor vessel belongs.

The master shall furnish security for the expenses resulting therefrom, which shall be repaid according to the judgment.

Article 55. The members of the crew shall be allowed to keep their personal effects.

Article 56. The captor may not disembark in waste and uninhabited countries the members of the crew who are not needed at the inquiry and who must be sent away immediately for lack

of space upon the captor vessel or lack of provisions. But the captor is permitted to transfer the men to neutral or allied vessels which he may meet, to be disembarked in cultivated and inhabited territories.

Article 57. The captain of the captor vessel is responsible for the good treatment and entertainment of the persons found on board the vessel seized by the crew of the captor vessel and by the crew which mans the vessel seized; he should not permit even those persons who are prisoners of war to be employed at humiliating occupations.

9. — Taking the Vessel Seized into a Seaport.

Article 58. The vessel seized shall be taken to the nearest port of the captor State or to a port of an allied Power where a court of inquiry may be found to examine into the matter of the vessel seized.

Article 59. The vessel seized may not be taken to the port of a neutral Power except on account of some peril of the sea, or when the war vessel may be pursued by a superior enemy force.

Article 60. When, on account of a peril of the sea, the war vessel has taken refuge with the vessel seized in a neutral port, they must quit the port as soon as possible, after the tempest has passed. The neutral State has the right and the duty to inspect the war vessel and the vessel seized during their stay in the port.

Article 61. When the war vessel has taken refuge with the vessel seized in a neutral port, because it is pursued by a superior enemy force, the prize must be released.

Article 62. The vessel seized and the cargo shall be preserved intact so far as possible during their voyage to the port ; the cargo shall be closed and sealed, except in case the unsealing and opening of the cargo may be deemed necessary in the interest of the preservation thereof, and the master consents thereto.

10. — Organization and Procedure of the Court of Inquiry in Prize Matters in the Port of Arrival

Article 63. The court of inquiry, in the port where the seized vessel arrives, is composed of members of the magistracy. The court hears the naval officers and customs employees as experts.

Article 64. Representatives of the captor State and the State of the seized vessel are present during the sessions of the court. The captured person or persons are ordinarily represented by the consul of their respective States, or if there is not one in the port, by the consul of a friendly neutral State. In the absence of such a consul, the captured persons are represented by agents chosen by them and acting under duly executed powers of attorney.

Article 65. The officer in charge of the vessel seized delivers it, as well as its cargo and crew, to the court of inquiry, and the latter issues orders as to the vessel, its cargo and crew.

Article 66. The officer in charge of the vessel seized shall deliver to the court within twenty-four hours after the arrival of the vessel in the port:

1. The proces-verbal drawn up after the seizure (Article 49) ;
2. The papers placed in a sealed envelope after the seizure (Article 48) ;
3. The inventories of the vessel, the cargo and the papers, documents and letters found on board the vessel, which were drawn up after the seizure (Articles 47 and 48) ;
4. The list of persons found on board, drawn up after the seizure (Article 47) ;
5. A report of the voyage to the port of arrival. Article 67. At the same time the officer in charge of the vessel seized certifies that the papers are the same ones found on board the vessel seized and that they are in the condition in which they were found on board. In a case where no papers were found, the facts should be stated.

Article 68. The officer in charge of the vessel seized brings before the court for hearing at least the captain or master, the supercargo and the pilot.

Article 69. The court of inquiry, after having assured itself in the presence of the officer in charge of the vessel seized, and of the captured persons, the captain or master, the pilot and supercargo, that the seals attached to the ship, the cargo and elsewhere, are intact, then proceeds, in the presence of the same persons, to unseal and open the sealed envelope which has been delivered to it ; it records and makes a list of the papers found therein and of the persons and inventories of the vessel and cargo, using as a basis the lists and inventories drawn up after the seizure to check and complete, if necessary, the later lists and inventories; it also ascertains whether the persons are present, and verifies the result.

Article 70. The officer in charge does not leave the vessel seized before turning it over, with its cargo, to a keeper designated by the court of inquiry, or before this court has affixed its seals. After having accomplished all the acts which are prescribed, the officer in charge ceases to be responsible for the vessel, cargo and crew, and the responsibility passes to the keeper, who delivers a receipt to the officer in charge for the vessel, cargo and crew.

Article 71. The keeper appointed by the court of inquiry accepts delivery of the vessel seized, and its cargo, and takes charge of urgent repairs to the vessel, the preservation of the cargo, as well as the maintenance of the persons remaining on board.

Article 72. The vessel seized is preserved as well as possible and the captor State bears the expense thereof until final judgment. The court of inquiry, however, upon the advice of experts, places on public sale, merchandise which is subject to deterioration and the vessel if it cannot be preserved because of its bad condition, or because its actual value is not consonant with the expense which its preservation would entail. The public sale is announced both in the place where it is to take place and also, so far as the vessel seized is concerned, in the domicile of the owner of the vessel. Finally, by virtue of a decision of the court and the consent of the captor State, the court delivers the vessel, after appraisal, to a claimant who proves that he is the lawful owner, provided that he deposits with the court the amount of the appraised value. A similar deposit is made of the proceeds of a public sale.

Article 73. The court releases a captured vessel which is not suspected, retaining the cargo which is suspected, in case the regulations require the condemnation of the cargo alone.

Article 74. Objects which cannot be seized in any case are separated from the cargo ; they are delivered to the lawful owners. If all the interested parties do not consent thereto, he who receives the objects should deposit with the tribunal the appraised value thereof, as determined by experts. Under the same condition and with the consent of the parties, the court delivers the cargo to the lawful owner. The claimants bear the expenses of care and insurance of the cargo not delivered, until the final decision.

Article 75. If the court deems it necessary to discharge the cargo to preserve it, experts named and sworn by the court inventory it in the presence of the parties, and place it in a warehouse closed and sealed with the seals of the representative of the captor State, of the captured persons and of the tribunal. The objects which the experts declare liable to early deterioration are sold at public sale under order of the court.

Article 76. Proces-verbaux are drawn up concerning the taking of possession of the vessel and cargo, as well as concerning the discharge, storing, closing, sealing and delivery; the members of the court and the parties present sign these proces-verbaux.

Article 77. Of the persons found on board the vessel seized, the members of the enemy military force are immediately sent as prisoners of war to the military authorities of the same or the nearest town, and these authorities place them at the disposition of the court to be heard when demanded by it. Those who have assisted the enemy or are suspected of having assisted the enemy are delivered to the military authorities. The other persons found on board the vessel remain there under surveillance during the period fixed by the court, if and so long as the court of inquiry deems their depositions necessary. If the vessel is sold or destroyed in the port of arrival, those who would have been obliged to remain on board the vessel shall remain under arrest by the authorities until a decision of the court. When the inquiry has been concluded the captain or master and the supercargo are not set at liberty unless bond judicio sisti is furnished.

Article 78. The court of inquiry has for its principal duty the complete exposition of the facts, seeking particularly to know in what manner the vessel was stopped, how visit, and eventually search, as well as seizure were made, and whether the captor has acted in a lawful manner, and the grounds on which seizure was made. If the captor found no papers on board the vessel seized, or if those found were incomplete, the court questions the persons found on board and secures information from the owners of the vessel and cargo, or, if they are not known, by means of notices inserted in newspapers of large circulation, in which the court makes known the fact of seizure with the exact description of the vessel and cargo, and invites interested persons to prove their rights therein within a given period.

Article 79. The tribunal, after having ascertained the facts in a preliminary way, invites the captor State and the lawful claimants to be present, within a period of four weeks at least, at the further sessions of the court and to present their claims in person or through attorneys duly authorized for this purpose. The invitation comprises a succinct resumé of the facts as provisionally ascertained. In the meantime the officer in charge of the vessel seized represents the captor State, and the captain or master, or the supercargo, or the appropriate consul, represents the captured persons. The court designates trustees to take care of the interests of claimants not represented.

Article 80. The court, after having examined the journals, documents and papers sent to it by the officer in charge of the vessel seized (Article 66), immediately begins the hearing of the persons who were on board. It is obliged to hear the officer in charge of the vessel, as well as the captor, in cases where the two are not one and the same person, also the captain or master, the pilot, and the supercargo when the captain or the master himself is not charged with the supervision of the cargo.

Article 81. The representatives of the parties have the right:

1. To be present at all hearings in the case;
2. To present in writing or orally, requests relative to the communication or production of documents, as well as the argument and submission of the case for judgment, or to hasten the proceeding when the court delays in beginning or when there have been delays in the course of the examination;
3. To request a hearing of persons whom the court has not interrogated and to present questions to be put to the persons interrogated.

Article 82. The examination of the case shall not begin until the captor State and the claimants are represented. The court advises these representatives fully of all of the formalities complied with up to that time and communicates the inventories and other documents to the interested parties, in order that they may learn the contents thereof.

Article 83. When the inquiry has been concluded, the court makes this fact known and asks the parties if they desire to add anything, and what requests they still have to present. After having heard the requests of the parties and examined into the question as to whether the record of the inquiry is complete, the court submits the record thereof to the interested parties, then invites the delegate of the captor State to present, within two weeks at the longest, a final demand which is communicated to the claimants in order that they may reply thereto within the same period. After receiving the two declarations, or after the expiration of the periods fixed for their receipt, in case one or the other has not been received, the court proposes an amicable adjustment to the parties, and only when such an arrangement is unsuccessful within a period of two weeks, does the court transmit the complete record and all documents which have been submitted to it from the beginning, to the court of prize, notice of such transmission being given to the captor State and claimants.

Article 84. A proces-verbal is drawn up covering all of the formalities which have been observed in the examination. The persons interrogated sign their depositions.

13. MARINE INSURANCE (not included)

Following the decision of the Institute at Turin to study in succession matters of commercial law in which uniformity is especially desirable, and particularly the principal subjects of maritime law, Mr. Sacerdoti was instructed to consider especially marine insurance. At the session of Munich (1883) he presented a report and conclusions in detail; but the Institute, at the request of the reporter himself, limited itself to adopting three resolutions on September 7, 1883, establishing principles to serve as guides to the committee in its future studies. These resolutions were as follows : *

1. It is not expedient to draw up a model policy, complete in all details.
2. Only provisions either of a prohibitory or of a mandatory character, or those which although simply interpretative are of such importance that uniformity is desirable, shall be selected from the above-mentioned conclusions, or others, for insertion in the draft to be made and submitted at the next session.
3. The committee shall also consider the conflict of laws relating to commercial maritime law.

14. INTERNATIONAL RIVERS— THE KONGO (1883-Mun-02)

As early as the session at Paris, 1878, Mr. Moynier had called the attention of the Institute to the navigation of the Kongo and to the necessity of subjecting it to international supervision. Mr. de Laveleye, in his turn, in the *Revue de droit international*, had championed the idea of neutralization or international regulation for this river. This idea of neutralization found an opponent in Sir Travers Twiss. At the session of Munich, Mr. Moynier read to the Institute on September 4, 1883, a carefully studied memoir, which was referred during the same session to a committee. On the seventh of the same month this committee, through Mr. Arntz, its reporter, proposed the following Conclusion, which was adopted :

The Institute of International Law expresses the voeu that the principle of freedom of navigation for all nations be applied to the Kongo River and its tributaries, and that all Powers come to an agreement concerning the measures suitable for the prevention of conflicts between civilized nations in equatorial Africa.

The Institute instructs its Bureau to transmit this voeu to the different Powers, adding thereto, merely as a matter of information, the memorandum presented by one of its members, Mr. Moynier, at the session of September 4, 1883.

15. COMMUNICATION OF INTERNATIONAL TREATIES (1885-Brux-01)

At the session of Munich (1883) the Institute, at the suggestion of Mr. von Martitz, appointed a committee to study the question : " By what means may a more universal, prompt and uniform publication of treaties and conventions between the various States be secured ? "

At the session of Brussels (1885) Mr. von Martitz communicated to the meeting a memoir upon this question; this memoir appeared in the *Revue de droit international*. At the suggestion of the same member the Institute adopted in plenary session on September 11, 1885, a voeu in these terms :

The Institute of International Law expresses the voeu that the high governments of the various States may be willing to see that treaties and international acts concluded by them, the publication of which is not forbidden by reasons of State or of political expediency, may be

collected and published in special collections, either officially, or through the enterprise of competent men, encouraged and fostered by the States.

The Institute also desires that these publications be made as general and complete as possible, in order that they may furnish the science of international law with perfect and exact knowledge as to the legal relations actually in force between the different States.

The Institute instructs its Bureau to transmit this voeu to the high governments, inclosing therewith, as a matter of information, the memoir which has been presented to the Institute by one of its members.

16. MARITIME LAW AND MARINE INSURANCE (1885-Brux-05 & 06)

At the session of Brussels in 1885, Mr. Sacerdoti presented another report concerning Marine insurance, and Mr. Lyon-Caen submitted a report on Conflict of laws on the subject of maritime law. The Institute voted on these matters jointly at the session of September 11, 1885, and adopted the two drafts which accompanied the reports. Here is the text of these three documents:

I. — Resolution of September 11, 1885

The Institute of International Law, assembled in plenary session at Brussels, September 11, 1885,

Considering its decisions and previous labors, and especially:

1. The preparatory work at the session of Munich, 1883, the questionnaire and the first report drawn up by Mr. Sacerdoti ;
2. The vote taken and the principles adopted at the session of Munich;
3. The second report upon Marine insurance presented by Mr. Sacerdoti;
4. The report upon the Conflict of laws relating to maritime law, presented by Mr. Lyon-Caen;

After having examined, discussed and amended the conclusions of Messrs. Sacerdoti and Lyon-Caen at the plenary sessions of September 10 and 11, 1885, thanks the honorable authors of these works for the services which they have each rendered to the uniformity of law and to international law in these important matters, decides that the amended drafts, as above stated, shall be printed under the supervision of the Bureau and recommended to the special consideration of the governments, as well as to scientific bodies which are considering the same subjects, and more particularly to the Congress of Commercial Law which will meet shortly at Antwerp.

II. — Draft of International Regulation of Conflict of Laws Relating to Maritime Law

The law of the flag of the vessel should determine:

1. What public formalities must be complied with in transferring property;
2. Who are the creditors of the owner of the vessel who have not the right to follow the same in case it is transferred;
3. Whether the vessel may or may not be mortgaged;
4. What public formalities must be complied with in the case of maritime mortgages;
5. What debts are guaranteed by maritime liens;
6. What is the priority of liens upon the vessel;
7. What formalities must be observed by the captain who borrows on a bottomry bond in the course of the voyage ;
8. What is the extent of the responsibility of the owner of the vessel on account of the acts of the captain and crew, especially whether he may free himself by abandoning the vessel and freight;
9. What sort of damage should constitute a general damage to which the interested parties should contribute (general average) ;
10. How the amount to be contributed should be made up, in case of general average, particularly with regard to the amount to be contributed by the owner of the vessel.

III. — Draft of Uniform Law on Marine Insurance

Article 1. Any interest capable of being stated in terms of money, which a person may have in the preservation of a vessel or its cargo from the dangers of maritime navigation, may be the subject of marine insurance. For instance, insurance may be taken out to cover freight charges on merchandise, or the fares of passengers, marine profit on the loan on the bottomry bond, profit which may be made from the merchandise, and the right to a commission to be received. The salaries of sailors which may be excepted by the particular laws of each State are excepted here.

Article 2. Insurance does not cover as a matter of law the risks of war. It applies, unless there is a clause to the contrary, to the breaches of trust and misdeeds of the captain and the crew. It does not apply, however, to a breach of trust by the captain in the interest of the insured, unless there is a clause in the policy expressly extending it to this case.

Article 3. Insurance does not cover as a matter of law the risks arising from the rights of third parties.

Article 4. If the value of the interest insured has been previously estimated by experts agreed upon by the parties, the insurer cannot object to this estimate except in case of fraud.

Article 5. Insured objects can be abandoned in case of shipwreck, capture as prize, seizure by order of a Power, non-navigability from the fortune of the sea, only when the loss or deterioration of the insured objects equals three-quarters of their value, and when nothing has been heard for the periods fixed in Article 866 of the German Code of Commerce. The still further restriction of cases of abandonment is reserved for the particular laws of each State.

Article 6. In case of sale of the thing insured, the insurance runs in favor of the new owner, when he has been subrogated to the rights and obligations of the preceding owner toward the insurers, unless there is a clause to the contrary in the policy.

17. COMMUNICATION OF FOREIGN LAWS (1885-Brux-02)

At the suggestion of Messrs. Norsa and Pierantoni a committee was formed at the session of Munich (1883) for the purpose of seeking means to be submitted to governments to facilitate the communication of foreign laws and to ensure the proof of such laws before courts.

At the session of Brussels (1885) Mr. Norsa presented a report upon the methods to be submitted to governments to facilitate the communication of foreign laws ; this report was accompanied by a Draft of International Agreement consisting of twenty-two articles. The meeting was unable to support this draft in its entirety and directed Mr. Asser to draw up several propositions, which were adopted at the plenary session of September 12, 1885.

These propositions are as follows :

Propositions for an International Agreement, for the Purpose of Establishing a Permanent International Committee, to Facilitate the Communication of Foreign Laws Actually in Force to the Governments and Citizens of Every Country

The Institute utters the following vœux:

1. That the governments agree to communicate to each other laws which are now in force and those which may be promulgated in the future in the respective States, in accordance with the following provisions.

2. That among the laws thus to be communicated shall be comprised:

(a) Codes, laws and regulations which concern civil and commercial law, criminal law, civil and criminal procedure, including those concerning bankruptcy or meeting of creditors, and the Organization of the judiciary.

(b) Laws and regulations relating to domestic administrative and public law, when they may be of general interest to States and to citizens of the various nations;

(c) Treaties, conventions and international agreements, or provisions contained therein, concerning relations of civil law or economic interest, except relations of a purely political character.

(d) Laws and regulations proclaimed in accordance with the said international agreements, in whatever form they may appear, or treaties of union with several States, or special international conventions with one of them.

The committee to be established in accordance with Section 3 shall have the power to add other items to these.

3. That a permanent international committee, composed of delegates named by the governments, shall be established for the purpose of receiving the laws, etc., which may be communicated, preserving them and classifying them in systematic order.

4. That each year there shall be drawn up in French, under the direction of the permanent committee, a general table of all the laws, etc., communicated by the various States, following the classification indicated above.

18. BLOCKADE IN THE ABSENCE OF A STATE OF WAR (1887-Hei-02)

On September 11, 1885, at Brussels, the Institute, on the motion of Mr. Perels, decided upon the creation of a committee entrusted with the investigation of the question of the right of blockade in time of peace.

At the Heidelberg meeting, a report and a draft of resolutions were submitted by Mr. Perels, and also a counter-report by Mr. Geffcken, who concluded by condemning the very principle of a pacific blockade. The question was discussed on September 7, 1887, in the presence of His Royal Highness, the Grand Duke of Baden, and the following resolution was adopted :

Declaration Voted by the Institute on Blockade in the Absence of a State of War

The establishing of a blockade in the absence of a state of war should not be considered as permissible under the law of nations except under the following conditions:

1. Ships under a foreign flag shall enter freely in spite of the blockade.
2. Pacific blockade must be officially declared and notified, and maintained by a sufficient force.
3. The ships of the blockaded Power which do not respect such a blockade may be sequestered. When the blockade is over, they shall be restored to their owners together with their cargoes, but without any compensation whatsoever.

19. COMMUNICATION OF FOREIGN LAWS (1887-Hei-04)

At the session in Heidelberg (1887) the Institute reversed its decision. After formally condemning the idea, expressed in Section 3 of these Propositions, of an international committee charged with collecting, preserving and classifying systematically foreign laws, it

adopted, at the session of September 8, 1887, the following text, to replace that which had been adopted at Brussels :

The Institute utters the following vœux:

1. That the governments agree to communicate to each other laws which are in force and those which may be promulgated in the future in the respective States, in accordance with the following provisions.
2. That the laws thus to be communicated shall comprise principally:
 - (a) Codes, laws and regulations which concern civil and commercial law, criminal law, civil and criminal procedure, including those concerning bankruptcy or meeting of creditors, and the organization of the judiciary;
 - (b) Laws and regulations relating to domestic administrative and public law, when they may be of general interest to States and to citizens of the various nations;
 - (c) Treaties,, conventions and international agreements, or provisions contained therein, concerning relations of civil law or economic interest;
 - (d) Laws and regulations proclaimed in compliance with the said international agreements, in whatever form they may appear, or treaties of union with several States, or special international conventions with one of them.
3. That in each State these various documents shall be collected in a central depository, accessible to the public.

20. INTERNATIONAL REGULATIONS CONCERNING PRIZES (1887-Hei-03)

At Brussels, in 1885, the reporter being prevented from attending the session, the Institute adjourned the discussion of the draft to the following session.

This discussion was continued at Heidelberg, 1887, and brought to a happy conclusion on September 8 of the said year, by the adoption of Articles 85 to 122 (the last) of the draft.

It was also decided that the regulations adopted should be communicated to all governments with a letter expressing the vœu that " in the future, the reform may be yet more complete and that the international tribunal may become some day the only competent tribunal in prize matters."

11. — Organization and Procedure of the Court of Prize °

Article 85. The organization of the prize courts of first instance remains a matter of regulation by the legislation of each State.

Article 86. If an amicable adjustment has not been reached, the prize cases go directly from the prize court of inquiry of the captor State to the national court of prize of first instance,

which, after having examined the case, summons the interested parties, viz.: the captor State and the captured persons, who are both represented before the tribunal by attorneys in fact, who also sign the briefs presented in the case. The tribunal examines the powers of attorney, which should be properly executed.

Article 87. In case the court should not publish an invitation to the parties to appear at the end of two weeks after the receipt of the case, the latter have the right to file a complaint with the international superior court because of delay in proceeding.

Article 88. The court states :

1. Whether the seizure was legal in form and in substance ;
2. Whether it should be sustained or declared illegal, that is, whether it is necessary to adjudge the captor State to be the owner of the property seized, or whether the vessel or merchandise should be restored to the captured persons ;
3. Whether the ground on which the seizure was made is an infraction of, or in accord with, international law.

Article 89. The court in case of necessity causes the court of inquiry to complete the finding of facts and examines and decides the case even in the absence of requests and conclusions from the parties.

Article 90. The attorneys in fact, after having deposited a bond to cover the costs fixed by the court, are authorized to present to the court a brief of the motions or claims, within a period of four weeks, adding thereto the documents on which the case is based and enumerating the evidence upon which the parties depend.

Article 91. The court invites the attorneys to examine the briefs of the adverse parties and to reply thereto in writing within two weeks. The court and the attorneys having examined these replies, a day is fixed for public argument. At these arguments the president opens the session with an historical statement of the case. The parties make their replies and conclusions and the discussion of the several contentions raised takes place at the same time.

Article 92. If the court deems it necessary to produce testimony, or if one or both of the parties propose it and the court consents thereto, the latter orders the testimony to be taken within a period of two weeks. This period may be lengthened by the tribunal because of distances. After the expiration of the period fixed the court informs the parties in writing within a week of the result of this taking of testimony and fixes a new time for argument, where the procedure is similar to that above outlined. The parties may supply in their oral arguments and conclusions new evidence and facts.

Article 93. Where the representative of the captor State has presented no motion or the captured persons have made no claim, the court proceeds, after the expiration of the period for motions or claims, to decide the case according to the status of the procedure at that time. The same is true where the parties, or one of them, do not appear at the hearing of the arguments, all the periods fixed being final. No request for complete restitution will be permitted.

Article 94. A period of two weeks is fixed for the rendering of judgment, this period running from the close of the arguments. In case the court should allow this period to elapse without rendering its decision, the parties have the right to complain of the delay to the court of appeal.

Article 95. The judgment states:

1. To whom the vessel and the cargo, or the amount received from public sale, or the sum paid by the owner if the vessel or cargo has been delivered to him, should be surrendered;
2. What damages shall be given, to whom, and by whom, in case: (a) of invalid or unlawful stopping or seizure by the officers of war vessels; (b) of delay in procedure or decision of the case; and (c) of liberation of the vessel and cargo;
3. If the bonds deposited are restored, in what sum restitution shall be made, and to whom it should be made ;
4. Which of the two parties shall bear the expenses caused by the vessel, the cargo, and the court proceedings, if there is ground for reimbursing the captured persons with the expense of transportation or if they shall lose such expense because they have violated the regulations ;
5. A decision concerning the fate of the crew of the vessel captured, in case the court of inquiry has not already set them at liberty.

Article 96. The judgment shall be made public and the attorneys of the parties shall be summoned for that purpose. In case one or the other should not appear on the day fixed, the court shall draw up a proces-verbal and the judgment shall be considered to have been made public. At the request of an attorney, the court delivers copies of the judgment published. At the time of publication notice is given of the provisions relating to appeal.

Article 97. A proces-verbal is drawn up covering all the arguments, conclusions, judgment and its publication, and such proces-verbal is read to the attorneys. The proces- verbal, corrected and completed if necessary, is signed by the president and registrar.

Article 98. The execution of the judgment is undertaken by the court of inquiry under authority of the judgment.

Article 99. The judgment may be executed when the attorney of none of the parties has appealed from the decision of the court of prize within the desired period. The judgment which has been appealed from cannot be executed without giving bond.

12. — Organization and Procedure of the International Court of Prize

Article 100. At the beginning of every war each of the belligerent parties constitutes an international court of appeal in prize cases. Each of these tribunals is composed of five members designated as follows:

The belligerent State shall itself name the president and one of the members. It shall designate also three neutral States, each of which shall choose one of the three other members.

Article 101. All prize cases may, upon request of the parties made within a period of twenty days, be referred to the international court of appeal. The presentation and justification of the appeal take place at the same time and the periods run from the day the decision is pronounced by the court, not including that day.

Article 102. The appeal is addressed to the national court of prize, which notifies the adverse party, who demands from the appellant a bond for the payment of costs.

Article 103. The matter presented in justification of the appeal states, and gives the reasons for, the different objections to the points determined in the judgment of the national court of prize.

Article 104. The national court of prize, in communicating the note of appeal to the adverse party, invites it to present a reply within two weeks. At the end of this period the said court sends the documents and note of appeal with the reply to the international court of appeal. The national court may grant an extension of time for good cause.

Article 105. The procedure before the international court of appeal is, in general, that of the court of prize.

Article 106. The judgment or decision on appeal shall contain a statement of the grounds therefor, and shall be rendered on the basis of a written report of the president, and after consideration of the new proofs and facts which may have been produced during the hearing on appeal.

Article 107. Neither appeal for reversal of judgment nor request for complete relief nor requests and observations of consuls and agents of the States, will be received with regard to the procedure and decision.

Article 108. The judgment on appeal shall be pronounced in the presence of the attorneys of the parties designated for that purpose, and at their request a copy of the decision shall be given to them. The decision shall also be published in one or more newspapers.

Article 109. After the publication the national court of prize shall be called upon for the execution of the judgment.

13. — Substantive Law Concerning the Decision of Prize Cases and Cases of Recapture

A. — Prize Cases

Article 110. No merchant vessel, or any cargo belonging to an individual, enemy or neutral, no shipwrecked vessel, or vessel which has run aground or been abandoned, or any fishing vessel, may be seized as prize and condemned except by virtue of a decision of courts of prize and because of acts forbidden by the present regulations.

Article 111. Prize courts are obliged to decide in accordance with the rules of international law.

Article 112. The prize courts cannot condemn enemy or neutral prizes except on the following grounds:

1. Prohibited transportation in time of war;
2. Violation of blockade ;
3. Resistance to stopping, visit and search, or seizure;
4. Participation in the hostilities of the belligerents by private vessels.

Article 113. In order that a vessel may be condemned because of being engaged in transportation prohibited in time of war, it is necessary :

1. That the transportation be to an enemy destination;
2. That the object transported be itself prohibited, that is, contraband, or conditional contraband, of war;
3. That the contraband be seized in the very act of being transported, or that it be found on board a vessel when the latter is stopped.

Article 114. In order that a vessel may be condemned on the ground that it has violated a blockade, it is necessary:

1. That the blockade be published and effective;
2. That it has been brought to the attention of the accused vessel, and that this vessel has attempted to violate the blockade according to the provisions of the present regulations (Articles 43 and 44).

There is no ground for condemnation if a vessel has passed through the line of blockade, or into a blockaded sea, by accident, such as a tempest, or in error; but these facts must be proved by the vessel setting them up.

Article 115. Resistance of a merchant vessel to stopping, visit, search or seizure, should be proved in fact and manifested by acts; a simple protest of the resisting vessel cannot be sufficient to condemn it.

Article 116. In case where a private vessel participates in the hostilities of belligerents, it is necessary that the participation be proved and recognized as such.

Article 117. Official correspondence and contraband transported to an enemy destination shall be confiscated; troops in course of transportation to the enemy shall be made prisoners. The vessel transporting them shall not be condemned unless:

1. It offers resistance;
2. It transports enemy troops;
3. If the cargo in course of transportation to an enemy destination is composed principally of provisions for the war vessels or troops of the enemy.

Article 118. The vessel shall be condemned with its cargo :

1. In case of violation of blockade (Article 114) ;
2. In case of resistance (Articles 112 and 115) ;
3. In case of participation in the hostilities of belligerents (Article 116).

B. — Cases of Recapture

Article 119. Any private vessel taken in time of war by a war vessel of a belligerent may be subject to recapture by a war vessel of the other belligerent, whatever may be the length of time during which it has remained in the power of the enemy before being retaken.

Article 120. Any recapture should be recognized as such and passed upon by the national court of prize.

Article 121. The person recapturing the vessel is bound to restore it to the original lawful owner, unless the latter has used it for a purpose forbidden by the international regulations.

Article 122. No bounty shall be given for recaptures except in case the vessel and cargo are adjudged to belong to the original owner, who shall not himself pay more than the expenses caused by the recapture and audited by the national court of prize.

21. NAVIGATION OF INTERNATIONAL RIVERS (1887-Hei-01)

This subject was placed upon the program of the Institute between the sessions of Munich and Brussels at the suggestion of Mr. Martens and on his authority.

At the session of Brussels (meeting of September 11, 1885) the author of the proposition, who had become the reporter of the committee of investigation, presented a report setting forth his ideas. Mr. Martens then worked out a complete draft of regulations, which was transmitted to the members of the Institute in the Bureau's circular of May, 1887, and gave rise to important communications from Messrs. Engelhardt and Kamarovsky. This draft, which was discussed at the session of September 9, 1887, at Heidelberg, was adopted at that meeting with some slight modifications, in the following form :

Draft of International Regulations for the Navigation of Rivers

General Provisions

Article 1. The States bordering a navigable river are required to regulate by common agreement and in the general interest all matters relating to the navigation of that river.

Article 2. The navigable tributaries of international rivers are subject in all respects to the same regulation as the rivers to which they are tributary, in accordance with the agreement between the States bordering the river, and with the present regulations.

Article 3. Navigation of the entire length of international rivers, from the point at which they become navigable to the sea, is absolutely free and cannot be denied to any flag so far as commerce is concerned.

The boundary of the States separated by the river is marked by the thalweg, that is, the median line of the channel.

Article 4. The subjects and flags of all nations are treated upon an absolute equality in all matters. No distinction shall be made between the subjects of the riparian States and those of non-riparian States.

Article 5. The tolls for navigation collected along international rivers shall be exclusively for the expenses of improving these rivers and for the maintenance of navigation in general.

Article 6. In time of war navigation upon international rivers is free for the flags of neutral nations, except as to the observation of restrictions imposed by the force of circumstances.

Article 7. All works and structures erected in the interest of navigation, especially offices for the collection of tolls and their funds, as well as the personnel permanently attached to these establishments, are placed under the guaranty of permanent neutrality and consequently shall be protected and respected by the belligerent States.

Special Provisions

Article 8. All sailing and steam vessels, without any distinction because of nationality, are authorized to transport passengers and merchandise, or to tow vessels between all ports situated along the international rivers.

Foreign vessels, whether sea-going or for river navigation, shall not be admitted to regular coastwise trade, that is, to exclusive and continuous traffic between the ports of the same State located on the river, except by special concession of that State.

Article 9. The vessels and merchandise in transit on the international rivers are not subject to any tax in transit, whatever may be their origin or destination.

Article 10. Navigation of international rivers is free from charges incident to merely calling at a port, port dues, warehouse dues, break-bulk charges or charges because a vessel is forced to lie over ; no maritime or river toll may be collected.

Article 11. Taxes or tolls having the character of payment for the actual use of port structures, such as cranes, scales, quays and storehouses, may be collected.

Article 12. Customs duties, taxes on monopolies or consumption collected by the riparian States cannot in any manner hinder free navigation.

Article 13. Port taxes for the actual use of cranes, scales, etc., as well as pilot and lighthouse dues, maintenance and establishment of beacons and buoys, intended to cover the technical and administrative costs incurred in the interest of navigation, are fixed in the tariffs published officially in all the ports along the international rivers.

Article 14. The above-mentioned tariffs shall be drawn up by mixed commissions from the States bordering the rivers.

Article 15. The tariffs shall not provide for any differential treatment.

Article 16. The tariffs of taxes mentioned in Article 13 shall be based upon the cost of construction and maintenance of the local establishments and according to the tonnage of the vessels indicated by the ship's papers.

Article 17. The riparian States shall not have the power to collect customs duties on merchandise transported along the international rivers unless they are to be introduced into the territory of these States.

Article 18. Vessels can discharge their cargoes in whole or in part only at ports and other points on the river where there are customs houses, except in case of force majeure.

Article 19. Vessels en voyage and provided with papers in accordance with regulations cannot be arrested under any pretext by the customs authorities of the riparian States, if the two banks of the river belong to different States.

Article 20. Vessels which enter that part of an international river where both banks belong to a single State are obliged to pay the customs duties charged by the local tariff on merchandise imported into the territory of that State.

Merchandise in transit is subject only to sealing and special examination by the customs authorities.

Article 21. The riparian States shall agree among themselves upon the police regulations intended to govern the use of the river in the special interest of public order and security.

Article 22. Special admiralty courts or those of common law existing in the riparian States shall have jurisdiction, on appeal, of penalties for infraction of the police regulations established on the principle of absolute equality of treatment for all vessels, without distinction on the ground of nationality.

Article 23. Quarantine offices shall be established by the riparian States at the mouths of international rivers; supervision of vessels is exercised both when they enter and when they leave.

Supervision of the sanitation of the vessels in the course of the river navigation shall be exercised according to the special provisions established by the river commissions.

Article 24. The necessary work to ensure the navigability of international rivers shall be undertaken either directly by the States, or by the river commissions.

Article 25. Each riparian State is free to take such measures as it deems necessary to maintain and improve, at its own expense, the navigability of those parts of the international rivers subject to its sovereignty.

Article 26. In all cases, it is forbidden to undertake works which may change the disposition of the common waters or hinder navigation, and against which other riparian States have protested.

Article 27. The authorities charged with the navigation of international rivers are:

1. The authorities of the States bordering the rivers;
2. The river commission, composed of delegates of the sovereign States.

Article 28. Each riparian State preserves its sovereign rights over such parts of the international rivers as are subject to its sovereignty, within the limits established by the provisions of these regulations and of treaties or conventions.

Article 29. The river commission arrives at its decisions by majority vote. In case of equal division, the president casts the deciding vote.

However, a vote does not bind the States comprising the minority, if the delegates of these States have formally opposed the execution of the measure in advance.

Article 30. The river commission is a permanent authority over international rivers; it has the following powers :

1. It designs and causes to be executed the work necessary for the improvement and development of the navigability of the rivers;
2. It determines and puts into operation the tariffs of navigation charges and other charges mentioned in Articles 13-18;
3. It draws up the regulations of the river police;
4. It supervises the maintenance in good condition of the works and the strict observation of the provisions of these international regulations ;
5. It names the inspector in chief of navigation upon the international river.

Article 31. The inspector in chief acts as an organ of the river commission and under the direction thereof. His authority is exercised without distinction as to flag.

Article 32. The inspector in chief attends to the execution of these international regulations as well as of the special river regulations, and to the policing of navigation.

Article 33. This officer has the right, in the exercise of his functions, to require directly the assistance of the military authorities or the assistance of the local authorities along the river.

Article 34. The local inspectors and employees of toll-collecting offices and quarantine are named by each State along the river; but they exercise their powers under the orders of the inspector in chief, and have, like him, an international character.

Article 35. Two or more riparian States may agree in the nomination of the same delegate to the river commission and the nomination of the same local inspector, or employees of toll-collecting offices, employees of quarantine, court judges, etc.

Article 36. The inspector in chief in the first instance assesses the fines incurred because of violation of the police and navigation regulations.

Article 37. Appeal from his decisions may be brought either before an admiralty court established for that purpose, or a local court especially designated by each riparian State, or before the river commission.

Article 38. Each riparian State names engineers who are commissioned to take care of the maintenance and improvement of that section of the river subject to its sovereignty.

Article 39. The Powers shall fix by common agreement the method of measuring and gauging to determine the capacity of river and sea-going ships, to be of binding force upon all nations.

Article 40. In case of war between the riparian States, the property afloat upon an international river shall, without distinction between neutral and enemy property, be treated in accordance with the rules governing the protection of enemy property on land in case of war.

22. MARINE COLLISIONS (1888-Lau-05 & 06)

The question of conflict of laws and uniformity of legislation on the subject of marine collisions was put upon the program of the Institute by authority of a decision reached at Heidelberg in the session of September 7, 1887. The authors of the proposition, Messrs. Lyon-Caen and Sacerdoti, were at the same time named reporters, the former for the conflict of laws and the latter for uniform legislation.

The first report by Mr. Lyon-Caen, explaining and justifying this proposition, was read at Heidelberg. A second report by Mr. Lyon-Caen, followed by a draft of international regulations covering conflicts of law on the subject of marine collisions, and on the other hand a report and a draft of a uniform law covering marine collisions presented by Mr. Sacerdoti, were communicated to the Institute in anticipation of the session of Lausanne. A learned discussion of the two drafts took place in the two plenary sessions of September 4, 1888, and the Institute adopted them in the following form:

Draft of Uniform Law for Marine Collisions

Article 1. If the collision was caused by a mistake all the damages are borne by the vessel on which the mistake occurred.

Article 2. If mistake was made on both vessels, no' indemnity can be claimed for the damage caused to one of the vessels, or to both, unless it be shown by the parties interested that the principal cause of the disaster should be charged more especially to one of the vessels; and in that case, the courts shall decide to what extent damages should be assessed against one in favor of the other.

In all cases where the cause is a mutual mistake, the two vessels are jointly responsible for the damage suffered by the cargo and persons. The vessel which, has to pay the entire amount of the damage shall have the right to have recourse against the other for reimbursement of one-half of the sum advanced. When the tribunals, according to the proof offered, shall have fixed other bases for contribution to the amount of damages, the recourse shall be in accordance with the rules set up by these courts.

Article 3. When the vessel is under the direction of a harbor pilot as required by law and the members of the crew have fulfilled the obligations falling upon them, the vessel is not liable for the damage resulting from a collision caused by the mistake of the pilot.

Article 4. If the collision resulted in the death or injury of human beings, the damages allowed on account of such death or injury are deducted first, as a matter of preference, from the amount recovered.

Article 5. All suits for damages arising from collisions are barred unless suit is brought within a year after the collision and within a month after the interested parties learn of the event.

Article 6. Suit may be brought by the captain for the account of all interested parties.

Article 7. The vessel causing the collision may be seized in any port, even at a port where it may have put in for any urgent reason, during the entire time suit is pending and until the judgment rendered against it can be executed, unless it furnishes a sufficient bond, to be fixed by the court.

Article 8. The following shall have jurisdiction of the suit for damages : the judge of the domicile of the defendant, the judge of the port nearest the scene of the disaster, the judge of the port of destination of the vessel causing the collision, the judge of the port where the latter vessel may first call, the judge of the place where the vessel may be seized.

Draft of International Regulations Concerning Conflict of Laws on the Subject of Marine Collisions

Article 1. In case of a collision on the interior waters of a country between vessels whether of the same nationality or of different nationalities, the law of that country shall be applied in determining which shall pay the damages caused to the vessels, persons and cargoes, within what periods claims should be presented, what formalities should be observed by the interested parties for the preservation of their rights and which are the competent tribunals to take jurisdiction thereof.

The above is likewise applicable when the collision occurs in territorial waters.

Article 2. In the case of collision on the high seas between vessels of the same nationality, the law of the flag of the vessels shall be applied in the case of all questions arising out of the collision.

If the collision occurred on the high seas between vessels of different nationalities, the law of the flag of each vessel shall determine which shall pay the damages. However, the claimant cannot make a demand which would not be supported by the law of his flag.

Claims should be presented within the periods prescribed by the law of the flag of the claimant and after the fulfilment of the formalities required by it. Claims may be brought before a competent tribunal either in accordance with the law of the flag of the claimant, or of the flag of the defendant.

23. OCCUPATION OF TERRITORIES (1888-Lau-02)

At the suggestion of Mr. von Martitz, made at the session in Brussels, September 12, 1885, the Institute placed upon its program the following topic : " Examination of the theory of the Conference of Berlin concerning the occupation of territories." At Heidelberg, in 1887, the Institute contented itself with noting a report, followed by conclusions, submitted by Mr. von Martitz.

In spite of the absence of Mr. von Martitz, the meeting at Lausanne, 1888, did not think it could longer delay the examination of the conclusions proposed by him. But the Bureau had also communicated at the session of Heidelberg a " Draft of international declaration having in view the determination of the rules to be followed in the occupation of territories," of which the author was Mr. Engelhardt. After having noted the written observations presented in the name of Mr. Westlake, and discussed and rejected Articles 1 and 2 of the conclusions of Mr. von Martitz, the meeting at Lausanne took as the basis of its final deliberations the draft of Mr. Engelhardt.

Conclusions, the text of which follows, were adopted in the plenary session of September 7, 1888.

It should be noted here, incidentally, that certain articles in Mr. Engelhardt's draft, although not comprised in the text adopted, were formally reserved to be the subject of special study. A new committee (the sixth) was formed to deal with the question of the slave trade and the supervision of slave ships, to which these articles related. For the action taken by the Institute upon this special question, see the title " Maritime slave trade."

Draft of International Declaration Regarding Occupation of Territories

Article 1. Occupation of territory by sovereign right cannot be recognized as effective unless it complies with the following conditions:

- (a) Taking possession in the government's name of a territory within certain limits;
- (b) Official notification of taking possession. Taking possession is accomplished by the establishment of a responsible local power, provided with sufficient means to maintain order

and assure the regular exercise of its authority within the limits of the occupied territory. These means may be taken over from the institutions existing within the occupied territory.

Notification of taking possession is given, either by publication in the form which is customary in each State for the notification of official acts, or through the diplomatic channel. It should contain an approximate statement of the limits of the occupied territory.

Article 2. The rules set forth in the above article are applicable in the case where a Power, without assuming the entire sovereignty over a territory, and while maintaining, with or without restrictions, the local administrative autonomy, places the said territory under its protection (protectorat).

Article 3. If taking possession gives rise to claims based upon prior titles, and if the ordinary diplomatic procedure cannot bring about an agreement between the interested parties, the latter may resort either to good offices, mediation, or the arbitration of one or more third Powers.

Article 4. Wars of extermination against the native tribes, all useless hardships, all torture, even by way of reprisal, are forbidden.

Article 5. In the territories referred to by the present declaration the authorities shall respect, or cause to be respected, all rights, especially that of private property, both domestic and foreign, individual and collective.

Article 6. The said authorities are bound to care for the preservation of the native populations, their education and the improvement of their moral and material well-being.

They shall favor and protect, without distinction because of nationality, all the private institutions and enterprises created and organized for the above purposes, provided that the political interests of the occupying or protecting State shall not be compromised or threatened by the action or tendencies of these institutions and enterprises.

Article 7. Freedom of conscience is guaranteed to the natives as it is to nationals and foreigners.

Freedom of worship shall not be restricted or hindered in any way.

However, practices contrary to the laws of morality and humanity shall be forbidden.

Article 8. The authorities shall provide for the abolition of slavery. Purchase or employment of slaves for domestic service by others than natives shall be immediately forbidden.

Article 9. Slave trade shall be forbidden within all of the territories covered by the present declaration.

Markets for the sale of slaves shall not exist within these territories, nor may slaves be transported over these territories for purposes of sale; and the most rigorous measures shall be taken against those who conduct, or are interested in, this traffic.

The introduction of, and domestic traffic in, pillories and other instruments of punishment used by slave-owners shall be stopped.

Article 10. The sale of strong drinks shall be regulated and controlled so as to save the native populations from the evils resulting from the abuse thereof.

24. ADMISSION AND EXPULSION OF ALIENS (1888-Lau-01)

In 1885, Mr. Brusa had called the attention of the committee on penal law to the advantage of investigating the question of the expulsion of aliens at the same time as that of extradition. The Institute, sharing his view, appointed, at its Brussels meeting, a new committee for the investigation of this second question.

Mr. von Martitz was appointed its reporter ; but reasons of expediency obliged the Institute to defer the discussion of the subject for some time.

Admission and Expulsion of Aliens

At the Lausanne meeting (1888), the reporter, being prevented by other work, the secretary general, Mr. Rolin-Jaequemyns, under Article 18 of the constitution, presented a report in his stead, followed by conclusions which, with some remarks of Mr. von Martitz, were referred for immediate investigation to a committee presided over by Mr. Rivier. The committee drew up a Preliminary Draft Declaration, which, after consideration in plenary session on September 8, 1888, was adopted as follows, with postponement to another meeting of the consideration of special rules for ordinary cases of expulsion.

Draft International Declaration on the Right of Expelling Aliens

The Institute of International Law,

Considering that the expulsion as well as the admission of aliens is a question of policy which no State may renounce, but which, according to circumstances, is sometimes forgotten and at other times suddenly demands attention;

Considering that it may be well to formulate in a general way some stable principles which, while leaving to the governments the means of accomplishing their difficult task, shall at the same time guarantee, as far as possible, the security of States, the right and the liberty of individuals ;

Considering that the voeu to see these principles recognized and sanctioned can involve no estimate of past acts of expulsion ;

Is of the opinion that the expulsion and admission of aliens should be subject to certain rules, and suggests, while waiting for a complete draft which could be discussed at a later date, the following provisions:

Article 1. In principle, every sovereign State may regulate the admission and expulsion of aliens in such manner as it thinks best; but it is in keeping with public faith that aliens be previously advised of the general rules which the State intends to follow in the exercise of this right.

Article 2. Except in cases of extreme necessity, such as war or serious disturbances, a distinction should be made between ordinary expulsion, applying to specific individuals, and extraordinary expulsion, applying to classes of individuals.

Article 3. Expulsion under pressure of necessity shall be only temporary. It shall not exceed the duration of the war or a period determined upon in advance, at the expiration of which it may be at once converted into ordinary or extraordinary expulsion.

Article 4. Extraordinary expulsion shall be accomplished by a special law or at least by an ordinance previously promulgated. The general ordinance, before being carried out, should be made public a reasonable time before-hand.

Article 5. In ordinary expulsion, those individuals who are residents or who have a commercial establishment must, from the standpoint of guaranties, be distinguished from those who have neither.

Article 6. A decision decreeing ordinary expulsion and stating the provisions on which it is based must be made known to the party interested before being put into execution.

25. COMPETENCE OF COURTS IN SUITS AGAINST FOREIGN STATES OR SOVEREIGNS (1891-Ham-01)

The question was put on the order of the day at the close of the session at Lausanne on the motion of Mr. von Bar, who was appointed reporter of the committee with Mr. Westlake. 3 The question resulted in works by the two reporters and by Messrs. Gabba and Hartmann. 4

The Institute deliberated September 8 and 11, 1891, in plenary session on the Draft International Regulations presented by Mr. von Bar, and adopted it in the latter meeting. 5 This text was revised by the drafting committee after its reconstitution in September, 1892.

Draft International Regulations on the Competence of Courts in Suits Against Foreign States, Sovereigns, or Heads of States

Article 1. Movable property, including horses, carriages, wagons, and vessels, belonging to a foreign sovereign or head of State, and intended directly or indirectly for the actual use of that sovereign or head of State or of persons accompanying him in his service, is exempt from seizure.

Article 2. Likewise exempt from any seizure are movable property and immovable property belonging to a foreign State and intended, with the express or tacit approval of the State in whose territory it is, for the service of the foreign State.

Article 3. Nevertheless a creditor for whose benefit something belonging to a foreign State, sovereign, or head of State is expressly pledged or hypothecated by that State, sovereign, or head of State, can, when the occasion arises, retain it or have it seized.

Article 4. The only actions cognizable against a foreign State are:

1. Real actions, including possessory actions relating to real or personal property within the territory ;
2. Actions based upon the capacity of the foreign State as an heir or legatee of a ressortissant of the territory or as entitled to an inheritance taking effect in the territory;
3. Actions relating to a commercial or industrial establishment or a railroad, when exploited by the foreign State on the territory;
4. Actions for which the foreign State has expressly admitted the competence of the tribunal. The foreign State which itself lays a complaint before a court is deemed to have admitted the competence of this court as regards judgment for costs of the suit and as regards a counter-claim arising out of the same affair; likewise, a foreign State which, when making answer to an action brought against it, does not take exception to the jurisdiction of the court, is deemed to have admitted it to be competent to hear the case;
5. Actions arising out of contracts entered into by a foreign State on the territory, if the complete execution on the same territory may be required of it according to an express clause or according to the very nature of the action ;
6. Actions in damages founded on a tort or quasi-tort committed on the territory.

Article 5. Actions brought for acts of sovereignty are not cognizable, nor acts arising out of a contract of the plaintiff as an official of the State, nor actions concerning the debts of the foreign State contracted through public subscription.

Article 6. Actions brought against foreign sovereigns or heads of States are subject to the rules laid down in Articles 4 and 5.

Article 7. Nevertheless, actions resulting from obligations contracted before the accession of the sovereign or the appointment of the head of State are governed by the ordinary rules of competence.

Article 8. The summons, both for sovereigns or heads of States and for States themselves, are made through the diplomatic channel.

Article 9. It is desirable that in each State the laws of procedure accord sufficient time so that in cases of action brought or seizure demanded or effected against a sovereign or head of State or a foreign State, a report may be made to the government of the country in which the action has been brought or the seizure demanded or effected.

26. COMMUNICATION OF INTERNATIONAL TREATIES (1891-Ham-03)

At the session of Heidelberg (1887) Mr. von Martitz presented a " Draft of Conclusions " with regard to rules to be followed in the publication of treaties; but the meeting did not have time to begin the examination of this item of its program. This was likewise the case at the session of Lausanne (1888).

At Hamburg (1891) when the question was brought up for discussion, the unanimous opinion that the best method of reaching the desired result was to form an international union of which all the interested States should be members, showed itself from the first. Two recent events encouraged this view: (1) the formation at Brussels, in fulfilment of the international convention of July 5, 1890, of an institution created at common expense by fifty-one States, for the purpose of publishing the customs tariffs of all countries in the world: (2) a letter addressed to the Institute, August 27, 1891, by the Department of Justice and Police of the Swiss Federation, informing the Institute that should the latter express the wish, the Swiss Federal Council, recognizing the service which such an international union could render by the publication of treaties, would be disposed to take the initiative in diplomatic negotiations for its creation. 4 Consequently, the Institute, at the session of September 12, 1891, adopted the following draft of resolution: °

The Institute utters the voeu that an International Union may be formed, by means of a treaty to which all civilized States should be invited to adhere, for the purpose of securing in as universal, prompt and uniform a manner as possible, the publication of the treaties and conventions between the States which are members of the Union.

27. MARITIME SLAVE TRADE (1891-Ham-02)

In 1885, at the session of Brussels, the Institute placed upon its program, at the suggestion of Mr. von Martitz, a question intended to produce an examination of the theory of the Conference of Berlin on the subject of the occupation of territories. The action taken upon this general question has been noted, 8 under the title " Occupation of territories." But Mr. Ed. Engelhardt, while studying the general question concurrently with the reporter, had inserted in his draft of conclusions provisions regarding the suppression of the slave trade and the regulation of slave ships. The Institute, at its session in Lausanne, 1888, decided that these provisions deserved a separate examination and formed a new committee to study them, with Mr. Engelhardt as reporter.

In the meantime the International Conference which met at Brussels in 1889 and 1890 adopted a General Act consisting of 100 articles, forming a complete code for the suppression of the slave trade both on land and on sea. Immediately after the signature of this Act (July 2, 1890), Mr. Engelhardt addressed a report to the Institute concerning the articles regarding maritime slave trade, in which he stated that the supervision provided for therein was not uniform in character, and that there might be ground for arranging it in a more complete

manner, especially by organizing mixed courts of prize ; 2 in contemplation of the session at Hamburg, he therefore drew up a draft of " Resolutions concerning the supervision of maritime slave trade." 3 Family reasons having prevented the reporter from being present at Hamburg, the discussion of these resolutions was postponed to another session. But, as one of the great Powers represented at the Conference of Brussels had refused to ratify the Act signed by its plenipotentiaries in 1890, and therefore to a certain extent rendered, useless the results of the International Conference, the Institute, while deciding to continue the committee in charge of the project of Mr. Engelhardt, adopted at the suggestion of Mr. Rolin-Jaequemyns, in the plenary session of September 12, 1891,* the following " Voeu with the reasons therefor " :

Voeu of the Institute, with the Reasons Therefor, Looking to the Complete Ratification of the General Act of Brussels

The Institute of International Law, considering the preparatory work of the sixth committee, formed at Lausanne in 1888 and having as its purpose a study of Maritime slave trade and supervision of slave ships;

Considering the memoir and conclusions of Mr. Engelhardt, reporter of that committee;

Considering the General Act of the Conference of Brussels, July 2, 1890, and especially Articles 20 to 61, having for their purpose the suppression of the maritime slave trade ;

Considering that this Act, which was agreed to after long and mature deliberations by the representatives of seventeen Powers, among which were all the maritime Powers of Europe and the United States of America, marks considerable progress in public international law, since it gives the sanction of common consent of the high contracting Powers to a collection of rules intended for the suppression, both upon land and upon sea, of this most infamous traffic, and for the civilization of an entire continent;

Considering that the part of this Act which concerns the suppression of the slave trade upon the sea justly takes into consideration the humanitarian purpose to be attained and the precautions which must be taken in order that the right of supervision over the slave ships conferred upon the cruisers of the signatory Powers, may not be exercised in a manner unnecessarily vexatious or offensive to the sovereignty or the dignity of any of the contracting parties ;

Considering that to this end the Conference first clearly distinguished between the Powers already bound together by special conventions for the suppression of the slave trade and those which are free from all engagements upon this subject;

Considering that as a result the provisions of these special conditions regarding the reciprocal right to visit vessels at sea, are strictly limited to the Powers which have formally adhered thereto;

Considering that, far from extending these special provisions to the Powers not parties thereto, the General Act of Brussels limits in a general manner any international exercise of maritime supervision of the slave trade to a zone extending along the eastern coast of Africa and to vessels of less than 500 tons; that the purpose of these restrictions is to render

practically impossible any interference with the commercial relations between the ports of Europe or America and the rest of the world as a result of the prosecution of the slave trade;

Considering that, in so far as the Powers which are free from all conventional bonds are concerned, the provisions of the General Act of Brussels put a most happy and conciliatory end to the difference in views which has existed between France and England up to this time with regard to the right to visit suspicious vessels ; that, considering the traditions of the former of these Powers, the Act of Brussels has in no wise restored the right of visit in a way to prejudice it. In short, this Act implies simply an agreement of all the Powers :

1. Upon certain uniform rules which each one of them will apply as a sovereign within its own jurisdiction, concerning the granting of a flag to native vessels, the list of the crew, and the manifest of negro passengers ;
2. Upon a restricted right of international control, restricted as to the zone and tonnage, within the limits above mentioned and consisting in fact of a verification of the flag;

Considering that this supervision, being limited to an actual verification by naval officers of certain papers, clearly specified, is intended to prevent native vessels, the only ones which now carry on the slave trade, from fraudulently flying the flag of one of the signatory Powers;

Considering that as to ships which are seized, arrest, inquiry and judgment cannot take place unless, as a result of the performance of this supervision, " the cruiser is convinced that an act of trading in slaves has been committed on board during the journey, or that irrefutable proof exists for charging the captain or the owner with misuse of flag, or fraud, or participation in the slave trade " (Article 69 of the Act) ;

Considering that, under these conditions, it is highly desirable that the Act of the Conference of Brussels should be put into execution, so as to permit not only the more effective suppression of the slave trade upon the sea, but so as not to delay longer the organization of an entire group of institutions and measures intended to prevent, directly or indirectly, slave trade on land ; that, furthermore, by Article 97 of the Act the Powers reserve the right " to introduce in the future by common agreement modifications or improvements the value of which may be demonstrated by experience " ;

For these reasons, and while reserving the right to examine in the future, at the proper time, these modifications or improvements, the Institute expresses the voeu that the General Act of Brussels may be ratified as soon as possible by all the Powers the plenipotentiaries of which signed it.

28. COMMUNICATION OF INTERNATIONAL TREATIES (1892-Gen-02)

Mr. von Martitz and Mr. Rolin-Jaequemyns, the latter since replaced at his own request by Mr. Martens, were instructed to make use of the preparatory work already performed, and to consult other members of the ninth committee in drafting as soon as possible a " Draft convention " and " Regulations for its execution " for the above purpose.

This twofold draft, especially worked out by Mr. Martens, was presented to the Institute at the session of Geneva and adopted, September 7, 1892, in the form given below.

Immediately after the session, and in reply to the letter of August 27, 1891, the two texts adopted by the Institute were communicated through the Bureau to the Federal Council of the Swiss Confederation, in order to serve as a starting point for diplomatic negotiations for the purpose of creating the International Union in question.

Draft of Convention Concerning the Creation of an International Union for the Publication of the Treaties Concluded by the Powers Which May Accede Thereto

His Majesty, the German Emperor, etc., etc., etc. . . . animated by the desire to facilitate, as far as possible, the exact and prompt communication of all treaties, conventions and international arrangements of whatever character concluded between them, or by the contracting governments with other non-contracting States, have decided to conclude the present convention in order to ensure the publication of the international acts above mentioned, and have named, etc.,

Who, after communication of their full powers, found in good and due form, have agreed upon the following articles:

Article 1. An association bearing the name of " International Union for the Publication of Treaties among States " is hereby formed by the agreement of the governments of . . . and of all governments which shall, in the future, accede to the present convention.

Article 2. This Union has for its purpose the publication, at common expense, and the prompt and correct communication of international agreements of whatever character, form, or scope, concluded by the different contracting States.

Article 3. To this end there shall be created at Berne an International Bureau charged with the publication of the treaties and conventions between States.

A special set of rules, determining the operation of this Bureau, is annexed to the present convention and shall have the same binding force as it.

Article 4. The International Bureau shall publish a collection entitled *Becueil international des traites* (International collection of treaties). This publication shall be recognized as the official organ of the International Union for the Publication of Treaties among States, and shall be proof thereof before all of the tribunals of the contracting Powers.

Article 5. The contracting Parties agree to communicate to the International Bureau as soon as possible, for publication in the *Recueil international des traites et conventions*, the following documents:

1. All treaties, conventions, declarations or other international acts of binding force upon the States signatory to the present convention, and which may be published in the different countries; international acts concluded by the contracting Powers with States which have not adhered to the present International Union are not excluded from this communication ;

2. All domestic laws, ordinances, or regulations published by the contracting governments in their respective countries in compliance with treaties or conventions signed in their names and ratified;

3. Proces-verbaux of international congresses or conferences which shall be transmitted to the International Bureau by the Power upon the territory of which these congresses or conferences shall take place;

4. Circulars or instructions which the said governments shall address to their diplomatic or consular agents for the purpose of ensuring the uniform execution of international agreements entered into by them, provided that each government shall determine for itself the propriety of communicating to the International Bureau any particular circular or instruction.

Article 6. All the documents mentioned in the preceding article shall be communicated to the International Bureau in their original text and accompanied by a French translation where necessary.

Article 7. All the documents officially communicated by virtue of Article 5, to the International Bureau, shall be published in the *Recueil international des traites* according to the authentic text in the original language, without the slightest change in the act thus communicated.

International acts not concluded in French shall be published with a French translation expressly recognized by the contracting Parties as in conformity with the authentic text of the treaty or convention and as of binding effect upon them.

Every exception from this general rule should be stated formally and mentioned at the head of the act when published.

Article 8. All international acts shall be published by the International Bureau without comment.

Article 9. The contracting or adhering States agree to communicate to the International Bureau all international acts (Article 5, Section 1) within two months after they go into effect; all other acts enumerated in Article 5 (Sections 2, 3 and 4) within one month after their publication or effective date.

Article 10. The present convention shall remain in force for five years from the exchange of ratifications.

Article 11. Upon the request of a contracting or adhering government a new international conference may be called after the expiration of five years, in order to introduce such improvements or modifications as may be deemed useful or necessary.

Article 12. If no such request as is provided for in the preceding article is made twelve months before the expiration of the first five years, the present convention shall remain in force for the ensuing five years, and thus continue for five-year periods.

In faith whereof, etc. . . .

DRAFT REGULATIONS FOR THE EXECUTION OF THE CONVENTION ESTABLISHING AN INTERNATIONAL BUREAU FOR THE PUBLICATION OF TREATIES AMONG STATES

I. — Organization of the International Bureau

Article 1. The International Bureau shall be organized under the supervision of the government of the Swiss Confederation under the conditions provided in the following articles.

Article 2. The personnel of the International Bureau shall be named by the Swiss Federal Government, which shall communicate to the contracting or adhering States the measures taken for the regular operation of the institution.

Article 3. The Swiss Federal Government shall supervise the regular operation of the International Bureau. It shall advance the necessary funds for the first installation of the International Bureau, shall supervise the expenditures, and provide for an annual accounting.

Article 4. An annual report of the work and financial management of the International Bureau shall be presented each year to the interested governments.

Article 5. The International Bureau has the right to correspond directly with all the interested governments and to request all information necessary to insure the prompt and accurate publication of the documents communicated to it in pursuance of Article 5 of the convention.

The International Bureau shall, within the limits of its ability and the means at its disposition, reply to the requests on the part of the public for information and explanations.

II. — Recueil International des Traités

Article 6. One volume at least of the Recueil international des traites shall be published each year.

Article 7. Each volume shall contain a chronological table of contents in addition to the text of the documents communicated by the contracting or adhering governments.

Article 8. Each government shall receive copies of the Recueil international des traites in proportion to its contribution.

III. — Budget — Division of Expenses of the International Bureau

Article 9. The budget of the International Bureau is set approximately at 100,000 francs.

Article 10. This budget shall be maintained by a proportional contribution from the contracting or adhering States and from the returns from the subscriptions to the Recueil of the Union in addition to the shares of the various States.

Article 11. With a view to determining equitably the shares to be contributed by the contracting or adhering States, the latter are divided into six classes, each contributing in proportion to a certain number of units, viz.:

First class 25 units

Second class 20 "

Third class 15 "

Fourth class 10 "

Fifth class 5 "

Sixth class 3 "

Article 12. Each of the coefficients above given shall be multiplied by the number of States in the corresponding class, and the sum of the products thus obtained shall furnish the number of units by which the total expense shall be divided. The quotient gives the unit of expense, and to obtain the amount of the contribution of each State to the expenses of the International Bureau it is sufficient to multiply this unit by the coefficient of the class to which this State belongs.

29. EXTRADITION (1892-Gen-03)

In 1885 at Brussels, Mr. Alberic Rolin submitted to the Institute some criticisms with a view to the revision of some of these resolutions ; discussion of these observations was deferred to the following session. At Heidelberg the Institute at its meeting of September 9, 1885, discussed at length the amendments proposed by Mr. Alberic Rolin and without taking any position with respect to their merits unanimously voted that the entire question of the conflict of laws regarding extradition be referred to the committee on the conflict of penal laws.

At Lausanne, where Mr. Rolin was unable to be present, but where Mr. Lammasch had on his part formulated several amendments, the Institute on motion of Mr. Renault, reporter of the committee, adopted a motion " asking Mr. Alberic Rolin to investigate the questions raised by extradition for political acts (Articles 13 and 14 of the Resolutions of Oxford) and Mr. Lammasch on the subject of the rights of the person extradited in the requesting country (Article 26 of the same Resolutions.) "

These two members stated their conclusions in papers submitted to the Institute at its Hamburg session in 1891. Mr. Lammasch not having been able to attend that session nor the one at Geneva in 1892, the examination of his conclusions respecting Article 26 has not yet been taken up by the Institute in plenary session. The conclusions presented by Mr. Alberic Rolin relative to Articles 13 and 14 were the subject of preliminary discussion at Hamburg,

where on September 10, 1891, the Institute passed a motion to examine them at the following meeting. At Geneva Mr. Alberic Rolin presented a new report accompanied by propositions with supporting reasons. After deliberation in the plenary session of September 8, 1892, the following four articles proposed by Mr. Rolin were adopted, the first three to take the place of Article 13 of the Resolutions of Oxford, and the fourth to take the place of Article 14:

Article 1. Extradition is inadmissible for purely political crimes or offenses.

Article 2. Nor can it be admitted for unlawful acts of a mixed character or connected with political crimes or offenses, also called relative political offenses, unless in the case of crimes of great gravity from the point of view of morality and of the common law, such as murder, man- slaughter, poisoning, mutilation, grave wounds inflicted wil- fully with premeditation, attempts at crimes of that kind, outrages to property by arson, explosion or flooding, and serious thefts, especially when committed with weapons and violence.

Article 3. So far as concerns acts committed in the course of an insurrection or of a civil war by one of the parties engaged in the struggle and in the interest of its cause, they cannot give occasion to extradition unless they are acts of odious barbarity or vandalism forbidden by the laws of war, and then only when the civil war is at an end.

Article 4. Criminal acts directed against the bases of all social organization, and not only against a certain State or a certain form of government, are not considered political offenses in the application of the preceding rules.

30. ADMISSION AND EXPULSION OF ALIENS (1892-Gen-01)

At Hamburg, Mr. von Bar, the reporter, presented, with a report, Draft international regulations on the admission and expulsion of aliens. At the same time another Draft, that of Mr. Feraud-Giraud, member of the committee/ and some remarks by Mr. Westlake on the work of Mr. von Bar were referred to the Institute. In plenary session on the 8th of September, 1891, the assembly, as much for reasons of principle as for considerations of expediency, showed some hesitation in undertaking an exhaustive study of Mr. von Bar's draft at this session, and on the 12th of the same month, on the advice of the committee, deferred the debate to another meeting.

At the Geneva meeting, there was no further objection to the discussion of Mr. von Bar's draft, further amended according to the advice of many members of the committee, and it resulted, in the meeting of September 9, 1892, in the adoption of the following text.

International Regulations on the Admission and Expulsion of Aliens

The Institute of International Law,

Considering that, for each State, the right of admitting or not admitting aliens to its territory, or of admitting them only conditionally, or of expelling them, is a logical and necessary consequence of its sovereignty and its independence ;

Considering, however, that humanity and justice require States not to exercise this right except with due regard, so far as is compatible with their own safety, for the right and the liberty of aliens who wish to enter their said territory or who are already there ;

Considering that, from this international standpoint, it may be well to formulate, in a general way and for future application, some stable principles, the acceptance of which would not, however, imply any criticism of past acts ;

Proposes, in the admission and expulsion of aliens, the observance of the following rules:

Chapter I. — Preliminary Provisions

Article 1. In the meaning of the present Regulations, all those are considered aliens who have no actual right of nationality in a State, without distinction as to whether they are simply passing through, or are resident or domiciled, or whether they are refugees or have entered the country of their own free-will.

Article 2. In principle, a State must not forbid entrance to or sojourn in its territory either to its subjects, or to those who, after having lost their nationality in the said State, have acquired no other.

Article 3. It is desirable that the admission and expulsion of aliens be regulated by law.

Chapter II. — Conditions Governing the Admission of Aliens

Article 4. Cases of reprisal and retorsion are not subject to the following rules. However, aliens domiciled in a country with the express authority of the government, may not be expelled on the ground of reprisal or retorsion.

Article 5. Colonies where European civilization is not yet dominant are also excepted from the following rules.

Article 6. Free entrance of aliens to the territory of a civilized State, may not be generally and permanently forbidden except in the public interest and for very serious reasons, for example, because of fundamental differences in customs or civilization, or because of a dangerous organization or gathering of aliens who come in great numbers.

Article 7. The protection of national labor is not, in itself, a sufficient reason for non-admission.

Article 8. In time of war, internal dissension, or epidemic, the State shall have the right of temporarily restricting or prohibiting the entrance of aliens.

Article 9. Each State shall determine by law or by regulations, published a reasonable time before being put in force, rules for the admission or passage of aliens.

Article 10. The entrance or sojourn of aliens may not be made subject to the collection of excessive taxes.

Article 11. All essential changes in the conditions for admission and sojourn of aliens, including changes in the taxes which concern them, must be communicated as soon as possible to the governments of the States whose ressortissants are interested therein.

Article 12. Entrance to a country may be forbidden to any alien individual in a condition of vagabondage or beggary, or suffering from a malady liable to endanger the public health, or strongly suspected of serious offenses committed abroad against the life or health of human beings or against public property or faith, as well as to aliens who have been convicted of the said offenses.

Article 13. A State may, under exceptional circumstances, admit aliens temporarily only and with the understanding that they are forbidden to make their residence in the country, provided that, as far as possible, the prohibition shall be notified to each individual in writing.

The prohibition ceases to have effect if not repeated periodically at intervals not exceeding two years.

Chapter III. — Conditions Governing the Expulsion of Aliens

I. — General Rules

Article 14. Expulsion shall never be ordered for private interests, to prevent lawful competition, nor to stop just claims or actions and suits regularly brought before competent courts or authorities.

Article 15. Expulsion and extradition are independent of each other ; a refusal to extradite does not involve renunciation of the right of expulsion.

Article 16. An expelled person who has taken refuge in a country to escape from criminal procedure, may not be given up, in an indirect way, to the prosecuting State, unless the conditions imposed with regard to extradition have been duly observed.

Article 17. Expulsion, since it is not a penalty, should be carried out with all possible consideration, and with due regard for the particular condition of the individual.

Article 18. An alien may be ordered to live in a certain place or not to leave a certain place, under penalty of expulsion for infringing the order.

Article 19. Expulsions, whether individual or extraordinary, must be notified, as soon as possible, to the governments whose ressortissants they concern.

Article 20. Periodically account shall be rendered, either to the national representative, or by means of an official publication, of all expulsions, including those that have been reversed or revoked.

Article 21. Every expelled individual who considers himself a native or who holds that his expulsion is contrary either to a law or to an international treaty which forbids or expressly excludes it, has the right of appeal to a high judicial or administrative court, whose judgments are entirely independent of the government.

But, notwithstanding the right of appeal, expulsion may be carried out provisionally.

Article 22. The State may ensure execution of orders of expulsion by subjecting the expelled persons who infringe them to prosecution in the courts and to sentence at the expiration of which the condemned shall be escorted under public guard to the frontier.

II. — On Various Kinds of Expulsion

Article 23. Definitive extraordinary (or en masse) expulsion applies to classes of individuals; when it has been ordered, those who have been expelled shall not be at liberty to return to the country upon the expiration of a period to be determined beforehand.

Article 24. Temporary extraordinary (or en masse) expulsion applies to classes of individuals, as the result of war or serious disturbances arising in the country; it is effective only during the war or for a fixed period.

Article 25. Ordinary expulsion is purely individual.

Article 26. Definitive extraordinary expulsion requires a special law, or at least a special decree of the sovereign power. The law or the decree, before being put into execution, shall be published a reasonable time in advance.

Article 27. Temporary extraordinary expulsion may, at the end of the war or of the fixed period, be converted into ordinary expulsion or definitive extraordinary expulsion.

The period originally determined upon may be extended once.

III. — Individuals Who May be Expelled

Article 28. The following may be expelled :

1. Aliens who have entered the country by fraud, in violation of the regulations governing the admission of aliens; but, if there is no other reason for expulsion, they may no longer be expelled after having resided six months in the country;
2. Aliens who have taken up their domicile or their residence within the boundaries of the country, in violation of a formal prohibition;
3. Aliens who, at the time that they crossed the frontier, were suffering from diseases liable to endanger the public health;
4. Aliens in a state of beggary or vagrancy, or who are a burden on the public;
5. Aliens found guilty by the courts of their own country of offenses of a certain degree of seriousness ;
6. Aliens condemned abroad or threatened with prosecution for serious offenses which, according to the laws of the country or in accordance with extradition treaties concluded by the State with other States, might give rise to their extradition ;

7. Those aliens who are guilty of instigating the commission of serious offenses against public safety, even though the acts of instigation, as such, are not punishable under the law of the land and though the offenses were only to be committed abroad;

8. Those aliens who, in the territory of a State, are guilty or strongly suspected of attacks, through the press or otherwise, upon a foreign State or sovereign, or upon the institutions of a foreign State, provided that these acts be punishable under the laws of the expelling State, if committed by natives abroad and directed against that State itself;

9. Aliens who, during their stay in the territory of a State, are guilty of attacks or outrages published in the foreign press against the State, the nation, or the sovereign;

10. Aliens who, in time of war or when war is impending, endanger the safety of the State by their conduct.

Article 29. Alien refractory conscripts and deserters may be forbidden to sojourn or to travel in a zone adjacent to the country whence they come, without prejudice to more severe provisions of international treaties.

IV. — Formalities of Expulsion

Article 30. The act decreeing expulsion shall be notified to the expelled individual. The reasons on which it is based must be stated in fact and in law.

Article 31. If the person expelled has the right of appeal to a high court, judicial or administrative, he shall be informed, by the act itself, of this circumstance and of the period within which the appeal must be made.

Article 32. The act shall also mention the period within which the alien must quit the country. This period shall not be less than one full day. If the expelled is at liberty, no compulsion shall be used against him during this period.

Article 33. An alien who has been ordered to quit the country shall be required to designate the frontier by which he intends to leave ; he shall receive a route ticket, giving his itinerary and the length of his stay in each place. In the event of infringement, he shall be escorted to the frontier under public guard.

V. — Appeal

Article 34. It is desirable that, in cases of ordinary expulsion, even outside of those cases where the person is declared by law exempt from expulsion, the expelled person be given a right of appeal to a high judicial or administrative court, independent of the government.

Article 35. The court shall render judgment only upon the legality of the expulsion; it shall not pass upon the conduct of the person, nor the circumstances which have appeared to the government to render expulsion necessary.

Article 36. In the case mentioned in No. 10 of Article 28, there shall be no appeal.

Article 37. Expulsion may be provisionally carried out, notwithstanding the right of appeal.

Article 38. In so far as an expulsion shall be in conformity with the principles of international law stated in these regulations, the government which has ordered it shall be free from all diplomatic claims.

Article 39. A government may always revoke the expulsion or temporarily suspend its effects.

VI. — Expulsion of Resident Aliens in Particular

Article 40. Aliens resident in the country may not be expelled except under Provisions 7-10 of Article 28 and, under No. 6 of the said article, unless the sentences that have been passed upon them abroad have not yet been fully served or remitted, or unless the sentence pronounced by a foreign court is subsequent to their establishment in the country.

Article 41. The expulsion of aliens, domiciled, resident, or engaged in business, shall not be ordered except in such a way as not to betray the confidence that they have reposed in the laws of the State. It shall allow them liberty to use, either directly, if possible, or through the intervention of a third person to be chosen by them, every lawful means to settle up their business and their interests, both assets and liabilities, in the country.

31. EXTRADITION— REVISION OF THE FINAL ARTICLE OF THE OXFORD RESOLUTIONS (1894-Paris-04)

The Institute having decided to submit to revision Article 26 of the resolutions voted at Oxford, September 9, 1880, Mr. Lammasch was appointed reporter. At the Paris session of 1894 Messrs. Lammasch and Renault presented a report, followed by a supplementary report of Mr. Lammasch and a communication from Mr. Kleen. The discussion in plenary session took place March 27, 1894, and terminated in the following resolution:

The person extradited shall have the right to invoke the prescriptions of treaties, laws of the requesting country relative to extradition, and the very instrument of extradition, and, when the case arises, to claim that they have been violated.

32. INTERNATIONAL UNION FOR THE SUPPRESSION OF THE MARITIME SLAVE TRADE (1894-Paris-01)

In investigating the question of territorial occupation entered on the program of the Brussels meeting of 1885, Mr. Engelhardt had considered provisions concerning the slave trade. The Institute, at the meeting at Lausanne in 1888, appointed a committee to investigate this subject.

After the adoption of the General Act of the Brussels Conference of July 2, 1890, difficulties arose concerning the ratification by certain Powers of the provisions relating to the slave trade, and the Institute, in its meeting held at Hamburg, September 12, 1891, expressed a voeu

aiming at the ratification of the Act of Brussels in its entirety. The first report of Mr. Engelhardt was presented at the same meeting at Hamburg. It was accompanied by a first-draft of resolutions on the supervision of maritime slave trade. At the Paris meeting in 1894, Mr. Engelhardt, with the concurrence of Mr. Martens, presented a further memoir and a new preliminary draft. The discussion in plenary session took place March 30, 1894. 9 It resulted in the following resolution :

Draft Regulations on the Supervision of Slave Ships

Considering the proces-verbal of the meeting of the Institute under date of September 7, 1888, recording the creation of a special committee to investigate the question of the slave trade and the regulation of the supervision of slave ships;

Considering the General Act of the Brussels Conference of July 2, 1890, especially Articles 21 and 23, which restrict repressive action with respect to maritime slave trade to a definite portion of the Indian Ocean, and to ships of less than 500 tons burden;

Considering the reports and conclusions presented October 1890 and 1893 by Mr. Ed. Engelhardt, reporter of the said committee of the Institute ; *

Considering the Resolution of September 12, 1891, in which the Institute, though formulating a voeu that the General Act of Brussels receive as soon as possible the ratification of the governments which cooperated in drawing it up, reserved the right of considering at some later date and in due time what modifications or improvements might be introduced in this act;

The Institute of International Law, assembled at Paris, March 30, 1894, expresses the opinion that it would be well to adopt a single system of supervision and repression of the slave trade under the double restriction imposed by Articles 21 and 23 of the General Act of Brussels, and that to this end it would be desirable for all naval Powers to come to an agreement on the basis of the following provisions :

Article 1. If the presumed nationality of a merchant ship, judging from the flag which it flies, can seriously be questioned, in consequence either of positive information, or of material indications which suggest that the ship does not belong to the nation whose flag it flies, a foreign war-ship that encounters it may proceed to verify the pretended nationality.

Article 2. This verification shall consist in an examination of the documents authorizing the flying of the flag, which documents shall conform to a single and absolutely obligatory type.

Native ships (boutres, dhows) may be required to have, in addition to documents establishing nationality, a muster-roll and a manifest of passengers.

Article 3. All search on any other grounds than that of nationality is forbidden, without prejudice to the provisions of Article 2, paragraph 2.

Article 4. When, in consequence of the verification provided for in Article 2 above, the ship shall be suspected of fraud, it shall be taken before the nearest authority of the nation whose flag it has been flying.

This authority shall proceed to a preliminary investigation in the presence of the capturing officer.

33. DEFINITION AND STATUS OF THE TERRITORIAL SEA (1894-Paris-02)

The question was placed on the order of the day of the session of Lausanne in 1888. Messrs. Renault and Barclay were appointed reporters. At the Hamburg session in 1891, Mr. Renault made a report on the subject. To this report was added a note by Mr. Aubert.

The first exchange of views in plenary session took place September 8 and 10, 1891. At the Geneva session in 1892 there were presented: a report by Mr. Barclay, a communication from Mr. Kleen, a communication from Mr. Aubert, and modified conclusions by Messrs. Barclay, Desjardins, Feraud-Giraud, Harburger, Hartmann, Olivart, Perels and Edouard Rolin. These documents led to an exchange of views in plenary session September 10, 1892. At the Paris session in 1894 Mr. Barclay presented a new report. The discussion in plenary session took place March 28, 29 and 31, 1894, and resulted in the adoption of the following resolutions :

Rules on the Definition and Regime of the Territorial Sea

The Institute,

Considering that there is no reason to confound in a single zone the distance necessary for the exercise of sovereignty and for the protection of coastwise fishing and that which is necessary to guarantee the neutrality of non-belligerents in time of war ;

That the distance most generally adopted of three miles from low-water mark has been recognized as insufficient for the protection of coastwise fishing ;

That this distance moreover does not correspond to the actual range of guns placed on the coast;

Has adopted the following provisions :

Article 1. The State has a right of sovereignty over a zone of the sea washing the coast, subject to the right of innocent passage reserved in Article 5.

This zone bears the name of territorial sea.

Article 2. The territorial sea extends six marine miles (60 to a degree of latitude) from the low- water mark along the full extent of the coasts.

Article 3. For bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is twelve marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth.

Article 4. In case of war a neutral littoral State has the right to fix, by declaration of neutrality or by special notification, its neutral zone beyond six miles up to the range of coast artillery.

Article 5. All ships without distinction have the right of innocent passage through the territorial sea, saving to belligerents the right of regulating such passage and, for the purpose of defense, of forbidding it to any ship, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea.

Article 6. Crimes and offenses committed on board foreign ships passing through the territorial sea by persons on board of them, against persons or things on board the same ships, are as such outside the jurisdiction of the littoral State, unless they involve a violation of the rights or interests of the littoral State or of its ressortissants not forming part of the crew or passengers.

Article 7. Ships which pass through territorial waters shall conform to the special regulations decreed by the littoral State in the interest and for the security of navigation or as matter of maritime police.

Article 8. Ships of all nationalities are subject to the jurisdiction of the littoral State by reason of the simple fact that they are in the territorial waters, unless they are only passing through them.

The littoral State has the right to continue on the high sea a pursuit commenced in the territorial sea, and to seize and pass judgment on the ship which has committed a breach of law within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State whose flag the ship flies. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue ceases as soon as the ship has entered a port of its own country or of a third Power.

Article 9. The peculiar situation of ships of war and the ships assimilated to them is reserved.

Article 10. The provisions of the preceding articles apply to straits whose breadth does not exceed twelve miles, subject to the following modifications and distinctions:

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.
2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State always form part of the territorial sea of such State, whatever the distance between the coasts.
3. Straits which serve as a passage from one open sea to another open sea can never be closed.

Article 11. The regime of straits actually governed by special conventions or usages remains reserved.

34. PROTECTION OF LITERARY AND ARTISTIC PROPERTY— REVISION OF THE CONVENTION OF BERNE (1895-Cam-05)

The question was entered on the program at the meeting at Hamburg in 1891, on the motion of Mr. d'Orelli, who was appointed reporter, and who was succeeded by Mr. Roguin. At the meeting at Paris in 1894, Mr. Roguin made a preliminary statement. 2 At the Cambridge meeting in 1895, Messrs. Roguin and Renault presented a report. The discussion in plenary session took place April 10, 12 and 14, 1895. It resulted in the following resolutions :

The Institute of International Law has the honor to recommend the following changes to the next diplomatic conference entrusted with the revision of the Convention of Berne of September 9, 1886, creating an International Union for the protection of works of literature and art.

Article 2. Paragraph 2 to read as follows: " The enjoyment of these rights and the power to enforce them under the law shall be subject only to the fulfilment of the conditions and formalities prescribed by the legislation of the country where the work originates."

The second part of paragraph 3 to be omitted from the words " or if the publication shall have been simultaneously effected in several countries of the Union, that one of them whose legislation grants the shortest term of protection." Thus, the duration of the period of protection shall be always that provided by law in the country where protection is claimed.

Article 5. To increase from ten to twenty years the minimum duration of the period of protection for translations.

Article 7. To insert in the text itself of the convention the explanation of the procès-verbal declaring that the provision of the first paragraph of Article 7 shall apply only to writings on the politics of the day, and not to essays or studies treating of questions of politics or social economics of a more general import, these last remaining subject to common law.

To say expressly that articles of science and art are subject to the rule of Article 7, paragraph 1, of the convention of 1886.

To state expressly that romans-feuilletons are subject to the same rules as literary works published in volumes.

To enact expressly that political articles, news of the day.

and miscellaneous news items may be reprinted on the sole condition that the exact source be stated.

Article 9. 1 To word paragraph 3 as follows: "The stipulations of Article 2 likewise apply to the public performance of unpublished musical works or of published works, without its being necessary for the composer to state expressly on the title-page or at the beginning of the work that he forbids the public performance of it, subject to the provisions of the law of the country whence it emanates."

Article 10. 1 To omit the second paragraph.

In the first paragraph, to add after . . . adaptations . . . the words : dramatization of a novel or vice versa.

To add a final paragraph, worded thus:

" The public performance of musical compositions by mechanical instruments shall be governed by the same rules as public performance by any other means."

Article 14. To insert a provision to allow, within strictly determined time-limits, the sale of reproductions finished or in preparation before the treaty goes into effect.
To this end they shall bear stamps or other distinctive marks.

To insert in the convention a provision forbidding the reproduction by photography of a protected work of literature or art.

35. PENAL SANCTION TO BE GIVEN TO THE GENEVA CONVENTION OF AUGUST 22, 1864 (1895-Cam-03)

The question was entered on the program at the meeting at Paris in 1894, on the motion of Mr. Moynier, who, with Mr. Engelhardt, was appointed reporter. At the Cambridge meeting in 1895, Messrs. Moynier and Engelhardt presented their report together with a draft convention supplementary to the Geneva Convention and a draft resolution. To these Mr. Engelhardt added a further note.

The discussion in plenary session took place August 9 and 12, 1895. It resulted in the adoption of the following resolutions:

I. — Draft Convention Supplementary to the Convention of August 22, 1864

The Governments of desiring mutually to bear witness to their earnest desire to assure the observance of the Geneva Convention of August 22, 1864, by the persons and within the territories subject to their authority, have agreed upon the following articles :

Article 1. Each of the contracting Parties shall undertake to elaborate a penal law covering all possible infractions of the Geneva Convention.

Article 2. Within a period of three years, these laws shall be promulgated and notified to the Swiss Federal Council, which shall communicate them through diplomatic channels to the signatory Powers of the Geneva Convention.

The changes which any of the contracting States shall later make in its penal code shall also be notified to the Swiss Federal Council.

Article 3. A belligerent State which shall make complaint of a violation of the Geneva Convention by the ressortissants of another belligerent State shall have the right to request, through the mediation of a neutral State, that an inquiry be instituted. The accused State shall be obliged to have its authorities institute this inquiry, to make known the result to the neutral State which has acted as intermediary, and, if necessary, to cause the guilty to be punished under the criminal laws.

Article 4. The States signatory to the Geneva Convention which shall not have subscribed in the first instance to the present act, may do so at any time by a notification in the form prescribed for adhering to the Convention itself, addressed to all the States that are already signatories.

II. — Voeu Uttered by the Institute

In order to give to a belligerent State whose ressortissants are accused of having violated the Geneva Convention, every opportunity to prove its impartiality and the innocence of the accused, the Institute of International Law utters the voeu that the Powers signatory to the Geneva Convention recognize the existence and the authority of an International Red Cross committee, whose members may, at the request of the accused belligerent State, be delegated by it to take part in an inquiry at the seat of war, under the auspices of the competent national authorities.

36. DIPLOMATIC IMMUNITIES (1895-Cam-01)

At the meeting at Lausanne in 1888, on the motion of Messrs. Engelhardt, Lehr and Rolin-Jaequemyns, the question of diplomatic and consular immunities was entered on the program. Mr. Lehr was appointed reporter on diplomatic immunities, and Mr. Engelhardt on consular immunities.

At the meeting in Hamburg in 1891, Mr. Lehr submitted a statement summarizing the principles underlying diplomatic immunities, and later a supplementary report. In the discussion, in plenary session, which took place September 1, 1894, the Institute adopted the general principle and the provisions concerning inviolability. At the meeting at Cambridge in 1895, the discussion was resumed in the sessions of August 12 and 13. It resulted in the adoption on the latter date of the following regulations :

Regulations on Diplomatic Immunities Adopted by the Institute at the Session of August 13, 1895

Article 1. The persons of public ministers shall be inviolable. They shall enjoy, in addition, "exterritoriality," in the sense and to the degree indicated hereafter, and a certain number of immunities.

Section I. — Inviolability

Article 2. The privilege of inviolability is extended to :

1. All classes of public ministers who regularly represent their sovereign or their country;
2. All persons included in the official personnel of a diplomatic mission;
3. All persons included in its unofficial personnel, with this exception, that if they belong to the country where the mission is located, they shall enjoy this privilege only when in the diplomatic residence.

Article 3. The government to which the minister is accredited shall be required to refrain from all offense, injury, or violence toward the persons enjoying this privilege, to show them due respect and to protect them, by unusually severe penalties, from all offense, injury, or violence on the part of the inhabitants of the country, so that they may attend to all their duties with perfect freedom.

Article 4. This privilege shall apply to everything necessary to the accomplishment of the said duties ; especially to personal effects, papers, archives, and correspondence.

Article 5. It shall continue to be effective as long as the minister or diplomatic official remains, in his official capacity, in the country to which he has been sent.

It shall hold good, even in time of war between the two Powers, for as long a time as is necessary for the minister to leave the country with his staff and his effects.

Article 6. Inviolability may not be invoked :

1. In the case of lawful defense on the part of individuals against acts committed by persons who enjoy the privilege;
2. In case of risks run by the said persons, voluntarily or unnecessarily;
3. In case of reprehensible acts committed by them, compelling the State to which the minister is accredited to take defensive or precautionary measures ; but, except in cases of extreme necessity, this State must confine itself to making the facts known to the government of the said minister, to requesting the punishment or the recall of the guilty official, and, if necessary, to surrounding his house to prevent illegal communications or public expressions of opinion.

Section II. — Exterritoriality

Article 7. A public minister abroad, functionaries officially connected with his mission, and the members of their families living with them shall retain their original residence and remain subject to the laws of this residence, in so far as the laws and jurisdiction of the residence apply.

Succession to their estate is governed by the laws of the said residence, and local authorities shall not have the right to interfere, unless so requested by the head of the mission.

Article 8. The acts which a public minister or his representative performs personally, or in which he intervenes in his official capacity and according to the law of his country, with regard to his nationals, shall be valid, provided that the said law shall have been observed, and notwithstanding the *lex loci*, as would be the case with acts of the same kind performed or occurring in the minister's own country.

Acts in which the minister or his representative intervenes, even in his official capacity, shall conform to the *lex loci*: 1. If they concern a person who does not belong to the country which the minister represents or who, for some reason, is subject to the jurisdiction of the country; 2. If they are to be effective in the country where the mission is stationed, and are such that they could not be validly performed outside the country or in any other manner. The same law

governs the acts done in the diplomatic residence, but in which the minister or his agents are not entitled to intervene in their official capacities.

Article 9. The minister's residence is exempt from military quarterings and from the taxes which are substituted therefor.

No officer of the public authority, administrative or judicial, may enter therein in the performance of his duty except with the express consent of the minister.

Article 10. The minister may have a chapel of his own religion in his house, but upon condition that he refrain from all external manifestation of it in a country where the public exercise of that religion is not permitted.

Section III

A. — Tax Immunities

Article 11. A public minister abroad, the functionaries officially connected with his mission and the members of their families living with them shall be exempt from paying:

1. Direct personal taxes and sumptuary taxes;
2. General taxes on wealth, either on the principal or on the income;
3. War-taxes ;
4. Customs duties on articles for their personal use.

Each government shall have the right to indicate what proofs are required in order to secure these exemptions from taxes.

• B. — Legal Immunities

Article 12. A public minister abroad, the functionaries officially connected with his mission and the members of their families living with them are exempt from the jurisdiction of all courts, civil or criminal, of the State to which they are accredited; in principle, they shall be under the jurisdiction, civil or criminal, only of the courts of their own country. The plaintiff may appeal to the court in the capital of the minister's country, subject to the right of the minister to prove that he has another residence in his country.

Article 13. With regard to crimes, the persons mentioned in the preceding article shall remain subject to their national criminal law, as if the crimes had been committed in their own country.

Article 14. Immunity continues after retirement from office in so far as acts connected with the exercise of the said duties are concerned. As regards acts not connected therewith, immunity may not be claimed except for so long as the individual remains in office.

Article 15. Persons belonging by their nationality to the country to whose government they are accredited, may not take advantage of the benefits of immunity.

Article 16. Legal immunity may not be invoked:

1. In case of proceedings instituted as a result of engagements contracted by the exempt person, not in his official capacity, but in the exercise of a profession carried on by him in the country concurrently with his diplomatic duties ;
2. With regard to realty actions, including possessory actions relating to property, real or personal, which is in the country.

Legal immunity remains effective even in case of offenses endangering public order or safety or of a crime attacking the safety of the State, without prejudice to the right of the territorial government to take such conservatory measures as shall be deemed advisable (Article 6, Section 3) .

Article 17. Persons enjoying legal immunity may refuse to appear as witnesses before a territorial court, on condition that, if they are so requested through diplomatic channels, they shall give their testimony, in the diplomatic residence, to a magistrate of the country sent to them for that purpose.

37. CONSULAR IMMUNITIES (1896-Ven-01)

At the meeting at Lausanne in 1888, on the motion of Messrs. Engelhardt, Lehr and Rolin-Jaequemyns, the question of diplomatic and consular immunities was entered on the program. Mr. Engelhardt, having been appointed reporter on the question of consular immunities, made at the time of the session of Lausanne in 1888 a communication accompanied by proposals concerning consular archives. At the session of Hamburg in 1891 he communicated to the Institute three memoirs. At the Geneva session in 1892 a fourth memoir was communicated by him. At the Venice session in 1896 he made a new report accompanied by draft regulations. The discussion in plenary session took place September 25 and 26 * and resulted in the adoption on the latter date of the following resolutions :

Preliminary Part

Article 1. The title of consul belongs only to agents of the foreign service who, being ressortissants of the State they represent, exercise no functions other than those of consul (consules missi).

Hereafter the following shall be designated consular agents :

- (a) Consuls who are nationals, that is ressortissants of the sending State, but who exercise other functions or have some other calling;
- (b) Consuls who by nationality belong either to the State in which they are commissioned or to some State other than the sending State, without regard to whether they exercise or do not exercise other functions or callings.

Article 2. Consuls and consular agents are subject to the territorial laws and jurisdiction, save for the exceptions specified under Parts I and II below.

Article 3. To entitle consuls or consular agents to be admitted and recognized as such, they must present their commissions, on the production of which they will receive the exequatur.

On the presentation of the exequatur, the superior authority of the district in which the said agents are directed to reside will give the necessary orders to the other local authorities in order that they may be protected in the exercise of their functions and that the immunities, exemptions, and privileges conferred by these regulations may be guaranteed to them.

In case the territorial government should deem it advisable to withdraw the exequatur from a consul, it should previously so inform the government to which the consul belongs.

Part I. — Consuls

Article 4. Consuls enjoy personal immunity under the conditions and within the limits specified in Articles 5, 6, 7 and 8, below.

Article 5. They are not amenable to the local courts for acts which they perform in their official capacity and within the limits of their powers. The exceptions to this rule should be provided and defined by treaty.

If an individual considers himself injured by the act of a consul done in the discharge of his duties, he shall address his complaint to the territorial government, which will take it up, if there is reason to do so, through the diplomatic channel.

Article 6. Except as specified in Article 5 above, consuls are amenable to the courts of the country in which they exercise their functions as regards both civil and criminal matters.

Nevertheless, every proceeding directed against a consul is suspended until his government, duly notified through the diplomatic channel, has been able to confer with the government of the receiving State on a fitting settlement of the incident.

This previous notice is not necessary:

1. In case of a flagrant offense or of a crime ;
2. In suits in rem, including suits for possession, whether relating to personal property or to real estate situated in the country;
3. When the consul himself has begun the litigation or accepted suit in the local courts.

Article 7. In no case may consuls be arrested or detained, except for grave infractions of the law.

Article 8. They are not bound to appear as witnesses before the local tribunals. Their testimony should be taken at their residence by a magistrate appointed ad hoc.

In exceptional cases, where the appearance of the consul in person before the magistrate exercising civil or criminal jurisdiction is deemed indispensable and the consul refuses to

accede to the invitation addressed to him to appear before the competent judge, the territorial government should have recourse to the diplomatic channel.

Article 9. The official residence of consuls and the premises occupied by their office and archives are inviolable.

No administrative or judicial officer may invade them under any pretext whatsoever.

If a fugitive from justice takes refuge in the consulate, the consul is bound to hand him over on the simple demand of the authorities.

Article 10. In order especially to ensure the inviolability of the consular archives, the foreign agent shall transmit through the medium of the diplomatic mission to the authorities of the country a statement describing the several premises composing the office of the consulate. This should be done at the time the consul enters upon his duties and whenever the office is transferred from one building to another or any important change is made in the arrangement of the office.

The above-mentioned statement shall be verified each time by the receiving State.

Article 11. Consuls should refrain from placing in the archives and in the rooms of their office documents and objects not connected with their service.

The offices of the consulate, if distinct from the rooms serving as the abode of the consul, may be installed in the same building.

Article 12. If the consul, when ordered by the judicial authority to hand over documents in his possession, refuses to deliver them, the administrative authority shall have recourse to the territorial government, which will take the matter up, if there be occasion, through the diplomatic channel.

Article 13. Consuls are excused from paying: (1) direct personal taxes and sumptuary taxes; (2) general taxes on wealth, either on capital or income; (3) war taxes.

Article 14. Consuls may place above the outer door of the consulate the arms of their country, with the inscription: " Consulate of ."

They may display the flag of their country upon the consular building on public occasions unless they reside in the city where their government is represented by a diplomatic mission.

They are likewise authorized to raise this flag upon the boat they use in the exercise of their functions.

Article 15. Consuls are permitted to correspond with their government and with the political mission of their country by telegraphic dispatches in cipher or by means of messengers provided with a passport ad hoc.

It is likewise permissible for them to entrust their official correspondence to the captains of vessels of their nationality at anchor in the port of their residence.

In case of an epidemic, the disinfection of letters intended for consuls takes place in the presence of a consular delegate.

Article 16. In case of the decease or the unlooked-for disability of the consul, the consular officer of next highest rank shall be deemed to have the right to carry on the business of the consulate, on condition that he produce in due time before the local authority the official document confirming him in his provisional incumbency.

To this end it is the duty of the consul to present to the local authority the officer designated contingently to replace him *ad interim*.

This officer shall, during his incumbency, enjoy the immunities and privileges accorded to consuls by these regulations.

Article 17. There is no distinction, as regards immunities, between consuls general, consuls and vice consuls.

It is understood that agents of this last category, in so far as they are in charge of vice consulates, must satisfy the conditions as to nationality and the other conditions mentioned in the first paragraph of Article 1 of these regulations.

In official ceremonies to which they are invited, consuls general, consuls and vice consuls take precedence according to their rank, and in each rank, according to the date of their entrance upon the discharge of their functions.

Part II. — Consular Agents

Article 18. When civil or criminal suits are brought against consular agents, the local courts shall be competent to take cognizance of them directly, unless it be established that the said agents have acted in their official capacity.

Article 19. Consular agents are exempt from taxes falling specially on the building or part of the building occupied by their consular office.

With this exception, they pay both national and local taxes.

Article 20. Articles 10, 11 paragraph 1, 12 and 14 apply to consular agents, with this difference as regards Article 14, that the coat of arms placed over the outer door of their office shall bear the inscription: " Consular Agency of ."

The office of consular agents, including the place in which their archives are kept, must always be separate from their personal business offices.

Article 21. Consular agents may correspond directly, upon official business, with the administrative and judicial authorities of their respective districts.

Voeu Adopted by the Institute in the Same Session

The Institute, having adopted the Regulations on immunities of consuls, expresses the wish that governments whose functionaries may be benefited by them will exercise the greatest

care in the choice of such functionaries, to the end that they may be worthy in all respects of the immunities above specified.

38. INTERNATIONAL REGULATION OF CONTRABAND OF WAR (1896-Ven-05)

The question was entered on the program at the meeting at Geneva in 1892 on the motion of Mr. Kleen, who, with Mr. Brusa, was appointed reporter. The originator of this proposition published a preliminary memoir with a first-draft entitled : On contraband of war and traffic forbidden to neutrals. At the Paris meeting of 1894, notes of General den Beer Poortugael and Mr. Lardy were presented; the reporters also made a report with the first-draft of the committee. A new first-draft was submitted by the reporters at the Cambridge meeting in 1895. It was accompanied by remarks submitted by General den Beer Poortugael and new proposals made by Mr. Perels. At the Venice meeting in 1896, a final report with a compromise project was presented by Messrs. Kleen and Brusa. The discussion in plenary session took place September 29, 1896, and it resulted in the adoption of the following resolutions :

A. — Contraband

Section 1. The following articles are contraband of war: 1. arms of all kinds; 2. munitions of war and explosives; 3. military materiel (articles of equipment, gun-mountings, uniforms, etc.) ; 4. vessels fitted out for war; 5. instruments designed exclusively for the immediate manufacture of munitions of war; when these various articles are transported by sea for the account of or addressed to a belligerent.

An enemy destination is presumed when the shipment goes to one of the enemy's ports, or to a neutral port which, according to incontestable proofs and indisputable facts, is only an intervening point, with ultimate enemy destination in the same commercial transaction.

Section 2. In the term munitions of war, shall be included articles which, to be used directly in war, need only to be assembled or combined.

Section 3. An article shall not be considered contraband simply because it is intended to be used to aid or to favor an enemy, nor because it could be useful to an enemy or used by him for military purposes, nor because it is meant for his use.

Section 4. Are and shall remain abolished those so-called classes of contraband designated under the names, either of conditional contraband, articles (*usus ancipitis*) which may be used by a belligerent for military purposes, but the use of which is essentially peaceful, or of accidental contraband, when the said articles are not used specially for military purposes except in certain circumstances.

Section 5. Nevertheless, the belligerent has the right, if he wishes and subject to his paying a just indemnity, of sequestration or preemption with regard to articles which are bound for a port of his adversary and which may be used either for purposes of peace or of war.

B. — Transport Service

Section 6. To attack or to hinder the transportation of the following diplomats or diplomatic messengers is forbidden: 1. neutrals; 2. those accredited to neutral governments; 3. those sailing under a neutral flag between neutral ports or between a neutral and a belligerent port.

On the other hand, transportation of diplomats of the enemy accredited to his ally is, except for regular and ordinary traffic, forbidden: 1. on belligerent territory and waters; 2. between their possessions; 3. between belligerent allies.

Section 7. The transportation of an enemy's troops, soldiers, or agents of war is forbidden: 1. in belligerent waters; 2. between their authorities, ports, possessions, armies, or fleets ; 3. when the transportation is on account of or by order or mandate of an enemy, or to bring him either agents with a commission for war operations, or soldiers already in his service or auxiliary troops or those recruited in violation of neutrality, — between neutral ports, between those of a neutral and those of a belligerent, from a neutral point to the army or the fleet of a belligerent.

The prohibition shall not extend to the transportation of individuals who are not yet in the military service of a belligerent, even though they have the intention of entering it, or those who make the journey as simple travelers without evident connection with military service.

Section 8. The transportation of dispatches (official communications between official authorities) between two authorities of an enemy, who are on territory or a ship belonging to or occupied by him, except regular and ordinary traffic, is forbidden.

This prohibition shall not extend to transportation either between neutral ports, or emanating from or destined for some neutral territory or authority.

C. — General Provisions

Section 9. In the event of unjustifiable seizure or repression because of contraband or transportation, the captor's State shall be liable to damages and responsible for the restoration of the articles.

Section 10. Transportation under way before the declaration of war and without necessary knowledge of its imminence shall not be punishable.

39. RULES ON BOMBARDMENT OF OPEN TOWNS BY NAVAL FORCES (1896-Ven-04)

The question was put on the order of the day at the Cambridge session in 1894 on the motion of Mr. Holland, who was appointed reporter with General den Beer Poortugael.

At the session of Venice in 1896 Messrs. Holland and den Beer Poortugael made a report accompanied by proposals.

The discussion in plenary session took place in the meeting of September 29, 1896, 3 and resulted in the adoption on that date of the following resolutions :

Article 1. There is no difference between the rules of the law of war regarding bombardment by military land forces and by naval forces.

Article 2. Consequently the general principles laid down in Article 32 1 of the Manual of the Institute are applicable to the latter; that is to say, that it is forbidden: (a) to destroy public or private property if this destruction is not demanded by an imperative necessity of war; (b) to attack and to bombard places that are not defended.

Article 3. The rules laid down in Articles 33 and 34 of the Manual are equally applicable to naval bombardments.

Article 4. In virtue of the general principles above, the bombardment by a naval force of an open town, that is to say, one which is not defended by fortifications or by other means of attack or of resistance for immediate defense, or by detached forts situated near by, for example, at a maximum distance of from four to ten kilometers, is inadmissible except in the following cases :

1. For the purpose of obtaining by requisitions or contributions what is necessary for the fleet.

These requisitions or contributions must not exceed the limits prescribed by Articles 56 and 58 of the Manual of the Institute.

2. For the purpose of destroying dockyards, military establishments, depots of war munitions, or war vessels in a port.

Further, an open town which defends itself against the entrance of troops or of marines that have been landed may be bombarded for the purpose of covering the disembarkation of the soldiers and the marines, if the open town attempts to prevent it, and, as an auxiliary measure of war, to facilitate the assault made by the troops and marines that have been landed, if the town defends itself.

Bombardments of which the object is only to exact a ransom are specially forbidden, and, a fortiori, those which are intended only to bring about the submission of the country by the destruction, without other reason, of the peaceful inhabitants or their property.

Article 5. An open town can not be exposed to a bombardment for the mere reason:

1. That it is the capital of a State or the seat of the Government (but naturally these circumstances do not guarantee it in any way against a bombardment) .

2. That it is at the time occupied by troops, or that it is ordinarily the garrison of troops of different arms intended to join the army in time of war.

40. CONFLICT OF LAWS ON THE SUBJECTS OF NATIONALITY AND EXPATRIATION (1896-Ven-02)

This question was put upon the order of the day by the Institute at the Hamburg session in 1891 on the motion of Mr. von Martitz. Messrs. Catellani and Weiss were appointed reporters. At the Paris session in 1894, Mr. Weiss made a preliminary report. At the Cambridge session in 1895, Mr. Weiss presented a report and conclusions. In the plenary session of August 14, 1895, the Institute agreed upon several general principles.*

At the Venice session in 1896, a supplementary report and draft resolutions were offered by Messrs. Catellani and Weiss. The discussion in plenary session took place September 26 and 28, which resulted in the following resolutions adopted September 29 :

Resolutions Adopted by the Institute of International Law

The Institute of International Law recommends to the various governments, both in the making of domestic laws and in the conclusion of diplomatic conventions, the following principles:

Article 1. A legitimate child follows the nationality with which its father was clothed on the day of its birth, or on the day when the father died.

Article 2. An illegitimate child which, during its minority, is acknowledged by its father only, or simultaneously by its father and its mother, or whose parentage is settled by the same judgment with regard to both, follows the nationality of its father on the day of its birth; if it has been acknowledged only by its mother, it takes the nationality of the latter, and retains it even when its father recognizes it later.

Article 3. A child born upon the territory of a State, of an alien father who was himself born there, is clothed with the nationality of that State provided that in the interval between the two births the family to which it belongs has had its principal abode there and unless the child has elected for the nationality of its father in the year of its majority as fixed by the national law of its father or by the law of the territory where it was born.

In cases of illegitimate births not followed by acknowledgment on the part of the respective parents, the preceding rule also applies by analogy.

It does not apply to the children of diplomatic agents or of consuls (missi) regularly accredited in the country where they are born; these children are deemed to be born in the country of their father.

Article 4. Unless the contrary has been expressly reserved at the time of naturalization, the change of nationality of the father of a family carries with it that of his wife, if not separated from her, and of his minor children, saving the right of the wife to recover her former nationality by a simple declaration, and saving also the right of option of the children for their former nationality, either in the year following their majority, or beginning with their emancipation, with the consent of their legal assistant.

Article 5. No one can be allowed to obtain naturalization in a foreign country unless he proves that his country of origin releases him from his allegiance, or at least that he has acquainted the government of his country of origin with his wish, and that he has satisfied the military law for the period of active service provided by the laws of that country.

Article 6. No one can lose his nationality or renounce it unless he shows that he has fulfilled the conditions required to obtain his admission into another State. Denationalization can never be imposed as a penalty.

41. USE OF THE NATIONAL FLAG FOR MERCHANT SHIPS (1896-Ven-03)

At the meeting at Hamburg in 1891, the question, on the motion of Mr. Asser, was entered on the program in these words: "Would it be useful and possible to lay down uniform rules governing the conditions under which, in every country, merchant ships shall have the right to fly the national flag ? If so, what should these rules be? " At the meeting at Venice in 1896, Mr. Asser and Lord Reay presented their report together with a draft of resolutions. The discussion in plenary session took place September 30, 1896, and resulted in the adoption on that date of the following draft rules :

Section I. — Acquisition of the Right to the Flag of a State

Article 1. The ship should be inscribed on the register kept for this purpose by authorized officials, in conformity with the laws of the State.

Article 2. To be inscribed on this register, more than half the ship must be the property:

1. Of nationals; or
2. Of a company under a collective name or a commandite, of which more than half the members personally responsible are nationals; or
3. Of a national stock company (joint-stock or commandite), two-thirds at least of the directors of which are nationals; the same rule applies to associations and other legal persons owning ships.

Article 3. The concern (whether an individual ship-owner, a company or corporation) must have its head-quarters in the State whose flag the ship must fly and in which it must be registered.

Article 4. Each State shall determine the conditions to be fulfilled in order to be appointed captain or first officer of a merchant ship: but the nationality of the captain or that of the members of the crew shall not be a condition of acquiring or forfeiting the right to the national flag.

Section II. — Forfeiture of the Right to the Flag of a State

Article 5. Failure to comply with one of the conditions under which this right may be acquired does not entail forfeiture of this right until after the ship has been erased from the register.

Such erasure is made at the request of the owners or of the management of the ship, or by the authority intrusted with the register, except as provided for by Articles 7 and 8 below.

Article 6. The owner or the management which shall have neglected to send the necessary notification to this authority shall be liable to a fine.

Article 7. If the change in ownership of a share in the ship causes the forfeiture of the right to the flag, the owners shall be granted a suitable length of time, in order to take the measures necessary for the ship to retain its former nationality, or to acquire another.

Article 8. If, after the expiration of this period, those interested have not taken the measures necessary to attain one of these two ends, the ship shall be erased from the register, and the person responsible for the loss of nationality or his heirs, if the loss of nationality is due to his death, shall be liable to a fine.

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Section III. — Temporary Acquisition of the Right to the Flag

Article 9. Temporary acquisition of the right to a flag occurs in two cases :

1. When a ship, built abroad, cannot definitely acquire the right to a flag until after its arrival in one of the ports of the owner's State;

2. When a ship changes owners while in a foreign port. Article 10. In each of these two cases, the consuls and consular agents residing in the country in which the ship is, shall be charged with the giving of a provisional certificate, if the essential conditions imposed by law for acquiring the nationality of the ship be fulfilled ; this certificate shall be valid only during a period to be determined by law.

42. EMIGRATION FROM THE POINT OF VIEW OF INTERNATIONAL LAW (1897-Copen-01&02)

The question was entered upon the program at the meeting at Venice in 1896, on the motion of Mr. Olivi, who, with Mr. Heimburger, was appointed reporter. At the meeting at Copenhagen in 1897, Messrs. Olivi and Heimburger presented a report with a draft of regulations. The discussion took place in plenary session the 27th of August and the 1st of September, 1897. It resulted in the adoption on the latter date of the following principles and voeu:

I. — Principles Recommended for a Draft Convention *

Article 1. The contracting States recognize liberty of emigration and immigration for individuals, singly or in numbers, without distinction of nationality.

This liberty cannot be restricted except by duly published decisions of governments and within the strict limits of the necessities of a social and political nature.

The said decisions shall be notified without delay through diplomatic channels to the States interested.

Article 2. Emigration shall be forbidden to those whom the laws of the State of immigration forbid to immigrate.

Article 3. The contracting States from which there is considerable regular emigration shall organize a central bureau of emigration, from which shall proceed all measures for the regulation and control of emigration, and with which shall be connected an information service entrusted with publications relative to the interests of emigrants and freely accessible upon request to all those who intend to emigrate, without distinction of nationality.

Article 4. The governments agree to publish regularly all information concerning emigrants from the moral, hygienic, and economic points of view, taking care that they shall be fully informed of the situation before concluding the emigration contract.

They agree also to punish severely all dissemination of false reports concerning emigration.

Article 5. Each State shall forbid persons or societies authorized to act as emigration agencies to conclude contracts by which they engage to furnish a certain number of persons to any enterprise whatever or to a foreign government, unless a special authorization is given in each case.

Article 6. All persons authorized to act as emigration agents shall be jointly responsible to the authorities and to the emigrants, their successors and assigns, for all the acts of their administration and that of their officers or representatives, within the country as well as abroad.

Article 7. The emigration bureaus or the naval authorities of the port of departure shall in good time inform the consuls of the country of emigration stationed in the ports to which the ships are bound, of the fact that there are emigrants aboard, and at the same time furnish them with all necessary information.

Article 8. The contracting States engage to see to the protection of immigrants and to placing them through the bureaus of immigration.

Article 9. The governments may authorize the said bureaus, as well as those mentioned in Article 4, as established in the various States, to communicate freely and directly with each other in all that concerns their respective affairs.

Article 10. All the contracting States shall endeavor to come to an understanding in order to insert in their penal codes the provisions necessary to ensure punishment for infraction of the rules in force concerning emigration.

II. — Voeu. Relative to the Subject of Emigration

Considering the extraordinary importance of emigration, which has greatly increased in our day, and in order the better to ensure complete and effective protection for the interests of emigrants and of immigrants from the moral, hygienic, and economic points of view, the Institute sets forth in the form of vœux, the following propositions, the adoption of which it recommends to the States :

1. That emigration be forbidden:

(a) To minors and lunatics, without the consent of those who exercise the authority of father or guardian over them;

(b) To persons unable to work on account of advanced age or illness, unless their support is sufficiently guaranteed at their place of destination;

(c) To persons afflicted with contagious diseases of a kind to endanger the health of their fellow passengers or the public health of the country to which they are going.

2. That no one be allowed to undertake the making of contracts with or the transporting of emigrants without the authority of the government in which these operations are to be carried on.

3. That the agents and representatives of emigration agencies may not obtain the said authority except under the following conditions:

(a) That they have attained their majority;

(b) That they are citizens of the State from which they request the authority ;

(c) That they enjoy civil and political rights;

(d) That they have a legal residence in the State from whose authorities the authorization is requested;

(e) That they are moral and enjoy a good reputation;

(f) That they have never been found guilty of crime or serious offense, nor of infraction of the regulations governing emigration.

4. That the granting of authorization be dependent, in every case, upon the previous deposit of security, the amount of which shall be determined by the States, in order to guarantee the claims that the authorities or the emigrants may bring according to the provisions of the law, as well as for the fines imposed for infractions under the laws and regulations in force.

5. That the said security be not restored to the interested parties until after a reasonable length of time.

6. That the States take severe measures and exercise strict surveillance to prevent, in any case, persons and societies authorized to act as emigration agents from urging the inhabitants of the country to emigrate, taking advantage of their ignorance and good faith to persuade them to make emigration contracts.

7. That under pain of nullification, the emigration contract be made in writing and subject to the control of local public authority designated by the law of each State.

8. That the price of transportation shall be always a sum of money to be paid in full before departure and may never be contracted in personal prestations, under penalty of nullification of any agreement to the contrary.

9. That the entire and immediate restoration of the price of transportation really paid be declared obligatory, when the emigrants shall be prevented from departing by reason of force majeure or important circumstances arising after the concluding of the contract, under penalty of nullification of any agreement to the contrary.

10. That the ships intended for the transportation of the emigrants be provided with suitable arrangements, making possible a complete and strict separation of the sexes, be well ventilated, and provided with medical attendance on board.

11. That the emigrants, even in case of free transportation by sea, have the right always to wholesome food and lodging, sufficient and suitable, as well as to medical attention throughout the entire voyage and also in the event of its interruption for any cause whatever beyond their control.

12. That the emigration agencies or agents ensure, at their expense, before the departure of the emigrants and in their interest, the price of transportation and provisions, and all losses and all injuries resulting from the total or partial non-performance of the transportation contract.

13. That the States, by joint rules, provide for the rapid and economical settlement of disputes between emigrants and emigration agencies or agents and institute, if they think best, an arbitration commission which shall render a definitive judgment upon every claim, without prejudice to the right of the parties to bring their suit before the regular courts or before arbitrators voluntarily chosen by them.

14. That the States ensure full liberty of action to protective associations which, while not regarding emigration as a matter of speculation, shall assist the emigrants from charitable motives only.

43. PRIZES— HARMONIZING OF THE DRAFT REGULATIONS ON PRIZES OF 1887 WITH THE DRAFT REGULATIONS ON CONTRABAND OF WAR ADOPTED IN 1896 (not included)

In consequence of the adoption of the regulations on contraband of war, various changes had to be made in the international regulations on prizes. Messrs. Kleen and Brusa submitted to the Institute at its Copenhagen meeting in 1897 some proposals on this subject and they resulted in the adoption of the following amendments to be inserted in the international prize regulations.

First Text of Prize Regulations

Article 30. During the war objects capable of being immediately employed for war purposes and transported by neutral or enemy national merchant vessels for the account of or destined to the enemy (contraband of war) are subject to seizure.

The belligerent governments shall determine in advance, in each war, the objects which they will consider contraband.

New text

Article 30. During war, those objects, which, made expressly for war, of immediate and special use therein in their existing state, and transported by sea for the account of or destined to a belligerent, come under the category of contraband of war, are subject to seizure.

First Text of Prize Regulations

Article 34. In the same category as transportation of contraband of war (Article 30) is transportation of troops for military operations by the enemy on land and sea, as well as transportation of official correspondence of the enemy by neutral or enemy national merchant vessels.

New text

Article 34. Illegal transportation of agents, soldiers and dispatches for a belligerent, hitherto in the same category as the carrying of contraband, shall be treated as prohibited transport service, according to the second part of the international regulations on contraband of war.

First Text of Prize Regulations

Article 113. In order that a vessel may be condemned because of being engaged in transportation prohibited in time of war, it is necessary:

1. That the transportation be to an enemy destination;
2. That the object transported be itself prohibited, that is, contraband, or conditional contraband, of war;
3. That the contraband be seized in the very act of ported be itself prohibited; or that it be found on board a vessel when the latter is stopped.

New text

Article 113. In order that a vessel may be condemned because of being engaged in transportation prohibited in time of war, it is necessary:

1. That the shipment of contraband be destined for a belligerent;
2. That the forbidden transport be for him;
3. That the object transported be itself prohibited;
4. That the ship be caught in the act.

First Text of Prize Regulations

Article 117. Official correspondence and contraband transported to an enemy destination shall be confiscated; troops in course of transportation to the enemy shall be made prisoners. The vessel transporting them shall not be condemned unless :

1. It offers resistance;
2. It transports enemy troops ;
3. If the cargo in course of transportation to an enemy destination is composed principally of provisions for the war vessels or troops of the enemy.

New text

Article 117. Contraband, as well as every article illegally transported, shall be confiscated, and the persons and troops illegally transported shall be made prisoners. The vessel transporting them shall not be condemned unless:

1. It offers resistance;
2. It transports illegally agents, soldiers or dispatches for a belligerent.

44. STATUS OF SHIPS AND THEIR CREWS IN FOREIGN PORTS IN TIME OF PEACE AND IN TIME OF WAR (1898-Haye-01)

At the meeting at Paris in 1894, Mr. Feraud-Giraud introduced the question and, with Mr. Lyon-Caen, was appointed reporter.

At the meeting in Venice in 1896, Mr. Feraud-Giraud, in collaboration with Mr. Kleen, made a report accompanied by a draft of regulations in fifty-one articles, including preliminary provisions, rules for a time of peace and rules for a state of war. 1 The question came up for discussion at the meeting in Copenhagen in 1897, and a text containing the preliminary provisions and the first part (state of peace) was adopted subject to revision. At the meeting at The Hague in 1898, Messrs. Feraud-Giraud and Kleen, who had not been present at the meeting in Copenhagen, made further remarks to the Institute concerning the draft as a whole. The discussion took place in plenary session August 20, 22 and 23, 1898, and resulted in the adoption on the last-mentioned date of the following regulations :

Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports

Preliminary Provisions

Article 1. The provisions of the present regulations are applicable not only to ports, but also to inlets and inclosed or open roadsteads, to bays and harbors which can be assimilated to these inlets and roadsteads.

Article 2. The said ports, harbors, inlets, roadsteads and bays are not only under the right of sovereignty of the States whose territory they border, but are also part of the territory of these States.

Article 3. As a general rule, access to the ports and other portions of the sea specified in Article 1, is presumed to be free to foreign ships.

By exception, for reasons of which it is sole judge, a State may declare its ports or some of them closed — even when treaties guarantee, in a general way, free access, — when the safety of the State or the interest of the public health justifies the order.

Entrance to the ports may also be refused to a particular nation, as an act of just reprisal.

Article 4. Exclusively military ports or those where arsenals intended for the construction and armament of the naval forces of the country are located are to be considered as regularly closed and access to them rightfully forbidden to ships, without distinction of flag.

Article 5. The State as sovereign has the right:

To regulate the conditions of entrance and of sojourn to which those who frequent the part of the coast mentioned in Article 1 must conform ;

To reserve to its nationals certain branches of commerce, industry or navigation ;

To establish, under penal sanctions, regulations concerning navigation, order, safety, public health and police in its various departments;

To impose fiscal charges of various kinds, especially customs duties, and to enforce obedience to the measures necessary to ensure the collecting of such taxes.

Article 6. When necessity compels putting into port, entrance to a port may not be refused to a ship in distress, even when such port is closed in conformity with Article 3 or Article 4.

The ship seeking port shall conform strictly to the conditions which shall be imposed upon it by the local authority; but these conditions shall not be such as to prevent by their extreme severity the exercise of the right of putting into port when compelled by necessity.

The authorities of a country owe help and relief to foreign vessels shipwrecked on their coasts; they must ensure respect for private property, send word to the consulate of the shipwrecked, and assist the agents of this consulate in what they do when they intervene.

It is to be hoped that States will require reimbursement only for necessary expenses.

Article 7. The status established by the principles recognized by public international law differs essentially according to whether it is applied to war-ships or to merchant ships, in peace or in war.

Part I. — In Peace

Section I.— The Navy

Article 8. Considered as war-ships, and as such subject to this regulation, are all ships under the command of an officer in active service in the navy of the State, manned by a naval crew, and authorized to carry the ensign and the pennant of the navy.

The build of the ship, the purpose for which it was formerly used, the number of individuals which compose its crew cannot change this character.

Assimilated to war-ships are foreign ships which are expressly at the service of the heads of the State or their official representatives. The small boats which belong to these ships have the same status.

Article 9. In cases where privateering may be legally carried on, those privateers shall also be assimilated to warships, which during the war shall be bearers of commissions regularly conferred by the belligerent State upon the nationality to which they belong.

Article 10. Unless there are treaties, laws, regulations or special prohibitions to the contrary, ports are open to foreign war-ships, on condition of their strict observance, both upon entrance and during their stay, of the conditions upon which they are admitted.

Article 11. The commander of a foreign war-ship who intends to anchor in a roadstead or in a port, shall ask permission to do so from the local authorities, telling his reasons, and shall not enter until after he has received an answer in the affirmative.

Good reasons, of which the authority of the country is the sovereign judge, may prompt a refusal of admission or a request to depart.

Article 12. A foreign war-ship which enters a port, shall conform to the formalities sanctioned by custom in default of a treaty.

Article 13. Foreign war-ships admitted to ports must respect local laws and regulations, especially those concerning navigation, anchorage and public health.

In case of serious and continued infraction, the commanding officer, if courteous official warning has had no effect, may be requested and, if necessary, compelled to put to sea.

The same regulation shall apply if the local authorities consider that the presence of his ship is a cause of disorder or of danger to the safety of the State.

But, except in cases of extreme necessity, these severe measures shall not be adopted except upon order of the central government of the country.

Article 14. With regard to customs duties, as a general rule, all foreign war-ships shall be exempt from inspection on board by customs officers; the latter shall merely keep the vessels under observation.

Article 15. War-ships in a foreign port shall remain subject to the Power to which they belong, the local government having no right to exercise authority or jurisdiction over those on board, nor to interfere in what happens on board, except in the case provided for in Article 16.

Necessary official relations between the commanders and officers on board these ships and the authorities on land are carried on through administrative and, if necessary, through diplomatic channels.

Article 16. Crimes and offenses committed on board these ships or on the boats belonging to them, whether by members of the crew, or by any others on board, shall come under the jurisdiction of the courts of the nation to which the ship belongs and shall be judged according to the laws of that nation, whatever be the nationality of the perpetrators or the victims.

Whenever the commander shall deliver the delinquent over to the local authorities, the latter shall regain the jurisdiction which under ordinary circumstances would belong to them.

Article 17. When disorders shall occur on board a ship and the commander, powerless to quell them, shall request the cooperation of the local authority to help him, if the latter shall grant it, he shall immediately advise the central authority, who shall communicate this information to the local representative of the government to which the ship belongs and together they shall agree upon the measures to be taken.

If order outside the ship shall be endangered, the local authority shall take the necessary measures within his waters to remedy the situation, provided that he give notice as stipulated above, and under the conditions there indicated.

In case of extreme necessity, the local authority shall himself attend to the matter.

Article 18. If people from on board shall commit violations of the law of the country on land, they may be arrested by officers of the authority of the country and given up to local justice.

Notice of the arrest shall be sent to the commander of the ship, who cannot require them to be given up.

If the delinquents, not having been arrested, shall return on board, the local authority cannot take them thence, but may require only that they be handed over to their national courts and that it be informed of the result of the proceedings.

If the persons accused of misdemeanor or crime committed on land are on duty, whether individually or collectively, in virtue of a concession, express or tacit, of the local authority, they shall, after their arrest, upon the request of the commander, be delivered over to him with the proces- verbaux stating the facts, and with the request, if necessary, that they be brought before their competent national authority, and that the local authority be informed of the result of the proceedings.

Article 19. The commander shall not grant asylum to persons prosecuted or condemned for misdemeanors or crimes under common law, nor to deserters belonging to the army or navy of the country or to another ship.

If he shall receive political refugees on board, it must be clearly established that they are such, and he must admit them under such conditions that the act does not constitute on his part assistance given to one of the parties in dispute to the prejudice of the other.

He may not land these refugees in another part of the country from which he has taken them on board, nor so near to that country that they may easily return thither.

Article 20. Persons who shall take refuge on board, unknown to the commander, may be delivered up or forced to leave.

Article 21. Whatever shall be the status of persons on board a war-ship, even when they have been wrongly received, if the commander refuses to give them up, force may not be resorted to to ensure their recapture, or visit and search exercised to that end.

The same rule shall apply to the recovery of goods on board which are the subject of claims.

In the cases provided for by this article, the local authority which wishes to secure extradition of persons or return of goods, must apply to the central authority of the State, in order that the necessary diplomatic steps to this end may be taken.

Article 22. Deserters from the ship arrested on land shall be returned to the authority on board.

If the ship shall have left, they shall be put at the disposition of the representatives of that authority and held at the expense of the State in whose service they are, for a period of two months at most, at the expiration of which time the man shall be set at liberty and may not be rearrested for the same offense.

The refusal of the local authority to put deserting sailors under arrest, at the request of the officers on board, may be cause for just diplomatic claims, but in no such case are these officers authorized to act directly toward this end through men of their crew or, at their direct request, through local officers.

Article 23. Obligations personally contracted as private individuals by men on board toward persons not members of the crew are binding upon them as upon all other foreigners; disputes which may arise on this subject are cognizable in the competent courts, and subject to the laws applicable according to the rules of common law, but those regularly carried on the muster-roll are not subject to personal restraint, such as arrest, which would remove them from service on board.

Article 24. Ships set apart by the State exclusively for the postal service, can claim only those privileges which are accorded them by conventions and custom.

Section II. — Merchant Marine

Article 25. Foreign merchant ships in a port shall be under the protection of the authority of the country. They shall be subject, as a general rule and except for the formal derogations sanctioned by the following articles, to the police and inspection regulations and to all the regulations in force in the port in which they are received.

Article 26. They shall pay the duties, tolls, dues and taxes lawfully claimed, submitting to the law of the land for assuring their collection, without its being necessary in the regular and normal carrying out of these formalities, for the local agents to have recourse to the intervention of consuls or other agents of the nation to which the ship belongs.

The captain, in carrying out the formalities which he is bound to fulfil, shall have the assistance of the commissioned agents in countries in which by law such agents exclusively exercise this right.

Article 27. Consuls, vice consuls and consular agents may go themselves or send representatives on board the ships of their nation, after they have been admitted to pratique, to question the captain and the crew, examine the ship's papers, receive declarations of their voyage, their destination, and the incidents of the crossing, draw up manifests, and facilitate the dispatch of the ship; finally, to accompany the men on board to the courts and administration offices of the country, to act as interpreters and agents in the business which they have to transact, or the requests which they have to make; except in cases provided for by the commercial laws of the country in which they are, to the stipulations of which they are bound strictly to submit, nor is the present provision to be considered as in the least in derogation thereof.

Article 28. The rules to which foreign ships in an open port are subject, shall be the same in principle, barring the exceptions which may result from treaties, for all ships without distinction of nationality.

Article 29. Ships of every nationality, by the mere fact that they are in a port or in a portion of the sea under the same rule, shall be subject to the jurisdiction of the country, and there is no distinction between acts committed on board and those committed on land.

Misdemeanors committed on a merchant ship at sea shall not come under the cognizance of the authority of the port at which they land ; but, in case of the flight of a ship to protect persons on board from actions against them because of acts committed in a port, it may be pursued on the high seas as provided in Article 8, section 2, of the rules adopted by the Institute governing territorial waters.

Article 30. Acts committed on board ships in a port, which are mere infractions of discipline and the professional duties of a sailor are excepted and come only under the national jurisdiction of the vessel. The local authority shall refrain from interfering, unless his cooperation shall be regularly requested, or unless the act shall be such as to endanger the peace of the port. Even in this last case, local courts may take cognizance only if the act, besides being an infraction of discipline, is at the same time a misdemeanor under the common law.

Article 31. When proceedings shall be directed against a man on board by the authority of the country, notice of it shall immediately be given to the consular authority of the foreign country in whose district the ship is.

When the local authority is competent, it may undertake on board the ship investigations, verifications, and examinations, and make arrests, in conformity with the provisions of its law.

If an agent of the nation to which the ship belongs is in the neighborhood, he shall be notified in advance of the visit which is to take place on board, and of the hour when it is to occur, and he shall be invited to take part, if he thinks it advisable, personally or through a representative

provided with the proof of his authority ; but his absence shall not in any way whatever prevent judicial proceedings.

Article 32. All disputes between members of the crew, or between them and their captain, or between captains of different vessels, of one nation in the same port, over the hiring of seamen or like questions, shall be settled without the interference of the local authorities.

In applying this rule, persons engaged in the fitting-out of the vessel and carried on the muster-roll, whatever their true nationality, are assimilated to persons belonging to the nationality of the ship.

Article 33. Disputes of a civil nature between persons not on board the ship and captains or members of the crew, are judged according to the common-law rules of competence, and are not reserved exclusively for the authorities of the ship's nationality.

Disputes which may arise concerning the settlement of disbursements and charges in a port against a foreign ship which has entered it, whether voluntarily or through necessity, are under the jurisdiction of the territorial judge and shall be adjusted by application of the provisions of the law that he administers.

Competence with regard to actions arising out of the collision of two foreign ships shall be governed by the Resolutions adopted by the Institute on disputes arising out of collisions at sea.

Article 34. Captains of merchant ships in a foreign port shall not take on board any individual, even if he is one of their nationals, who shall seek refuge on such ships to escape from the consequences of violating the laws to which he was subject through residence.

If a person, on board under these conditions, is claimed by the territorial authority, he shall be given up to this authority; in default of which, this authority has the right, after having previously notified the consul, to proceed through its agents to the arrest of such person on the ship.

Article 35. With regard to deserters from merchant ships, the provisions of Article 22 shall be conformed with.

Deserters belonging to the nationality of the country where the ship is shall, however, not be given up to the authorities on board by the local authorities.

Article 36. Foreign ships anchored in a port are subject to arrest and seizure as the result of a court decision in the matter of a commercial transaction or of debt, according to the law of the land.

It is, however, to be hoped that the law will forbid the seizure of a foreign ship anchored in a port, when it is ready to sail, unless for debts contracted for the voyage about to be made; and even in this case, security for the debts shall permit its release.

The officers of the court and those entrusted with the execution of decisions shall be authorized to serve all notices and to carry out all executions on foreign ships, in conformity with the laws of procedure applicable to national ships, without being obliged to have

recourse to the intervention of the consuls or commercial agents, even when present, of the nation to which the ship belongs.

Article 37. Public officials, registrars of births, deaths and marriages, notaries and others, requested to perform acts in connection with their duties or offices, on board foreign vessels at anchor in port must comply; and their acts, accepted in the form and under the conditions prescribed by local law, shall have the same effect and the same force as if they had been performed by the public officials on land within their territorial district.

Part II. — Coercive Measures and a State of War

Article 38. An embargo put upon foreign ships anchored in a port can not be justified except as a measure of retorsion or reprisal.

It may not be exercised except directly in the name of the State and by its officers.

As far as possible, the reasons which have prompted it and its probable duration shall be made known to those who are the subject of the measure.

The embargo shall be raised as soon as the satisfaction asked for has been accorded. In default of satisfaction, the ship on which the embargo rests may be sold, and the proceeds of the sale shall go to the State that imposed the embargo.

Article 39. The right of angary shall be abolished, both in time of peace and in time of war, where neutral ships are concerned.

Article 40. War-ships which, at the beginning of hostilities or at the time of the declaration of war, shall be in an enemy port, shall not be subject to seizure, during a period to be fixed by the authorities. During this period, they may discharge their cargo and take on another.

Article 41. Merchant ships compelled by force majeure to take refuge in an enemy port, may not be captured therein. They shall be required, during their stay, to conform exactly to the stipulations of the local authority, and to put to sea again within the period that shall be indicated to them.

If a war-ship shall have been thus compelled to seek refuge in an enemy port, it may be courteously received and provided with the means to put to sea again; if not, it shall be regularly captured.

Article 42. Granting of asylum to belligerents in neutral ports, although depending upon the pleasure of the sovereign State and not required of it, shall be presumed, unless previous notification to the contrary has been given.

With regard to war-ships, however, it shall be limited to cases of real distress, in consequence of : 1. defeat, sickness, or insufficient crew; 2. perils of the sea; 3. lack of the means of subsistence or locomotion (water, coal, provisions) ; 4. need of repairs.

A belligerent ship taking refuge in a neutral port from pursuit by the enemy, or after having been defeated by him, or because it has not a sufficient crew to remain at sea, shall remain therein until the end of the war. The same rule shall apply if it is carrying sick or wounded,

and after having landed them, is in condition to go into action. The sick and wounded, though received and cared for, shall, after they have recovered, be also interned, unless considered unfit for military service.

Refuge from the perils of the sea shall be granted to war-ships of belligerents only so long as the danger lasts.

No greater quantity of water, coal, food or other analogous supplies shall be furnished them than is necessary to enable them to reach their nearest national port. Repairs shall not be allowed except so far as necessary to enable them to put to sea. Immediately thereafter the ship shall leave the port and neutral waters.

If two enemy ships shall be ready to leave a neutral port simultaneously, the local authorities shall set a sufficient interval, twenty-four hours at least, between their sailings.

The right of leaving first shall belong to the ship which entered first, or, if it does not want to use this right, to the other, on condition that the latter requests it of the local authorities, which shall give the permission if the adversary, duly advised, shall insist upon remaining. If, upon the departure of a belligerent ship, one or more enemy ships are signaled, the departing ship shall be warned and may be readmitted to the port, there to await the entrance or the disappearance of the others. To engage an enemy ship within the port or in neutral waters is forbidden.

Belligerent ships in a neutral port shall keep the peace, obey the orders of the authorities, refrain from all hostilities, shall not take on reinforcements or recruit their military forces, shall refrain from all espionage and shall not use the port as a base of operations.

The neutral authorities shall see that the provisions of this article are respected, using force if necessary.

The neutral State may require an indemnity from the belligerent whose lawfully interned forces, or whose sick and wounded, it has supported, or whose ships have, either inadvertently or by violation of the order of the port, caused expense or damage.

Article 43. An attack, begun on the high seas and pursued in a neutral port or roadstead where a ship has taken refuge, is a violation of neutral territory. It must be checked by the territorial power, by the use of force if necessary, and may be grounds for an indemnity.

Article 44. In regard to belligerents bringing a prize into a neutral port, the Institute refers to the rules laid down in its Regulations for naval prizes.

Article 45. Freedom of commerce is ensured to neutrals. Belligerents may not, as such, forbid or prevent their entering ports, either of neutral nations, or of belligerents, with the exception of those ports regularly blockaded.

Consequently, neutrals may leave an enemy port to go to a neutral port or to another enemy port. They are free to carry into belligerent ports all goods not comprised in the list of articles considered contraband of war.

Article 46. Neutral ships admitted into belligerent ports shall submit to all visits necessary to ascertain the character of the personnel and the nature of the goods on board, and to all

measures taken in the interest of the safety of the State to which the port belongs. In case of resistance, the execution of these measures may, if necessary, be secured by the use of force.

45. APPLICATION OF THE PRINCIPLES OF THE GENEVA CONVENTION TO NAVAL WAR- FARE (1900-Neu-03)

The question was introduced at the meeting at Copenhagen in 1897 by Messrs. Renault and Westlake, who agreed to make a report upon the subject. At the Neuchatel meeting in 1900, the reporters, after having stated the fact of the adhesion of twenty-six Powers to the Convention signed at The Hague, July 26, 1899, expressed regret that the contingency contemplated by Article 10 of the Convention had not been provided for, on account of reservations made by certain of the Powers. After the discussion, which took place September 7, 1900, the Institute adopted the following resolution :

The Institute utters a voeu in favor of concluding a complementary convention containing the provision of Article 10 of the Hague Convention.

46. RIGHTS AND DUTIES OF FOREIGN POWERS AS REGARDS THE ESTABLISHED AND RECOGNIZED GOVERNMENTS IN CASE OF INSURRECTION (1900-Neu-02)

The question was entered on the program at the meeting at Venice in 1897, on the motion of Mr. Desjardins and Marquis de Olivart, who accepted the office of reporters. At the meeting at The Hague in 1898, Mr. Desjardins, in collaboration with the Marquis de Olivart, offered a report and a draft of regulations in eleven articles. At the meeting at Neuchatel in 1900, the discussion in plenary session took place on the 7th and 8th of September, and resulted in the adoption on the latter date of the following conclusions :*

Article 1. International law imposes upon third Powers, in case of insurrection or civil war, certain obligations towards established and recognized governments, which are struggling with an insurrection.

Chapter I. — Duties of Foreign Powers Toward the Government Which Is Fighting the Insurrection

Article 2. Section 1. Every third Power, at peace with an independent nation, is bound not to interfere with the measures which this nation takes for the reestablishing of internal peace.

Section 2. It is bound not to furnish to the insurgents either arms, munitions, military goods, or financial aid.

Section 3. It is especially forbidden for any third Power to allow a hostile military expedition against an established and recognized government to be organized within its domain.

Article 8. One may not, in principle, consider it a grievance against the State within whose territory an insurrection has broken out, that in its armed defense against this insurrection, it applies the same repressive measures to all those who take an active part in the civil war, whatever be their nationality. Unusually cruel punishments are excepted and those punishments which evidently exceed the bounds of necessity.

Chapter II. — On the Recognition of Insurgents as Belligerents

Article 4. Section 1. The government of a country where a civil war has broken out may recognize the insurgents as belligerents either explicitly by a categorical declaration, or implicitly by a series of acts which leaves no doubt as to its intentions.

Section 2. The simple fact of applying, for humanitarian reasons, certain laws of war to the insurgents, does not in itself constitute a recognition of a state of belligerency.

Section 3. A government which has recognized its revolting nationals either explicitly or implicitly as belligerents, becomes powerless to criticise the recognition accorded by a third Power.

Article 5. Section 1. A third Power is not bound to recognize insurgents as belligerents merely because they are recognized as such by the government of the country in which a civil war has broken out.

Section 2. As long as it has not itself recognized the belligerency, it is not required to respect blockades established by the insurgents along those portions of the seacoast occupied by the regular government.

Article 6. A government which has recognized its revolting nationals as belligerents cannot consider it a cause of complaint against a third Power that it receives those armed insurgents who take refuge on its territory kindly, disarming them and interning them until the end of hostilities.

Consequently, it is powerless to object if its own soldiers, refugees in the same territory, are disarmed and interned. It is, moreover, liable to indemnity only for the support of its own troops.

Article 7. If the belligerency is recognized by third Powers, such recognition entails all the usual consequences of neutrality.

Article 8. Third Powers cannot recognize the character of belligerent in a revolutionary party:

Section 1. If it has not acquired a distinct territorial existence through the possession of a definite portion of the national territory ;

Section 2. If it has not the elements of a regular government exercising in fact the manifest rights of sovereignty over this portion of the territory;

Section 3. If the fight is not carried on in its name by organized troops, subject to military discipline and conforming to the laws and customs of war.

Article 9. A third Power may, after having recognized the insurgents as belligerents, withdraw such recognition even when the situation of the parties in the struggle has not been changed. Such retraction has, however, no retroactive effect.

47. REGULATIONS RESPECTING THE RESPONSIBILITY OF STATES BY REASON OF DAMAGES SUFFERED BY ALIENS IN CASE OF RIOT, INSURRECTION OR CIVIL WAR (1900-Neu-01)

The question was placed on the program at the Hamburg session of 1891. Messrs. Jellinek and Brusa were appointed reporters. At the session at The Hague in 1898 Mr. Brusa communicated to the Institute his report with draft resolutions. 2 At the session of Neuchatel in 1900 new theses were presented by Messrs. Brusa and von Bar. 3 The discussion took place September 10, 1900, 4 and resulted in the following resolutions : s

1. Independently of the cases in which indemnities may be due to aliens by virtue of the general laws of the country, aliens have a right to compensation when they are injured in their person or their property in the course of a riot, of an insurrection, or of a civil war:

(a) When the act from which they have suffered is directed against aliens as such in general, or against them as ressortissants of a particular State, or

(b) When the act from which they have suffered consists in closing a port without previous and timely notification, or in detaining foreign ships in a port, or

(c) When the injury is the result of an illegal act committed by a government agent, or

(d) When the obligation to compensate is well founded on the general principles of the law of war.

2. The obligation is equally well founded when the injury has been committed (No. 1, a and d) on the territory of an insurrectionary government, either by this government itself, or by one of its functionaries.

On the other hand, certain demands for indemnity may be set aside when they rest on acts occurring after the government of the State to which the injured person belongs has recognized the insurrectionary government as a belligerent Power, and when the injured person has continued to keep his domicile or his habitation on the territory of the insurrectionary government.

As long as the latter is considered as a belligerent Power by the government of the person alleged to be injured, the demands may only be addressed, in the case of paragraph 1 of Article 2, to the insurrectionary government and not to the legitimate government.

3. The obligation to compensate disappears when the injured persons themselves have caused the event which has brought on the injury. Notably no obligation exists to indemnify those who have returned to the country in contravention of a decree of expulsion, nor those who betake themselves to a country or seek to engage in commerce or industry there, when they

know, or ought to know, that troubles have broken out there, nor those who establish themselves or sojourn in a country which offers no security on account of the presence of savage tribes, unless the government of the country has given express assurances to the immigrants.

4. The government of a federal State composed of a certain number of small States, which it represents from an international point of view, may not plead, in order to avoid the responsibility resting upon it, the fact that the constitution of the federal State does not give it the right to control the member States, nor the right to exact from them the discharge of their obligations.

5. The stipulations mutually exempting States from the duty of giving their diplomatic protection ought not to cover the cases of denial of justice or of evident violation of justice or international law.

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1. The Institute of International Law expresses the voeu that States avoid inserting in treaties clauses of reciprocal absence of responsibility. It believes that these clauses are wrong in excusing States from accomplishing their duty of protection of their nationals abroad and their duty of protection of aliens in their territory. It believes that States which, in consequence of extraordinary circumstances, do not feel themselves in a position to ensure in a sufficiently efficacious manner the protection of aliens on their territory can only withdraw themselves from the consequences of this state of things by temporarily forbidding aliens access to that territory.

2. Recourse to international commissions of inquiry and to international tribunals is in general recommended for all differences that may arise from injuries suffered by aliens during a riot, an insurrection, or a civil war.

48. SUBMARINE CABLES IN TIME OF WAR (1902-Brux-01)

In 1902 Mr. von Bar proposed to the Institute new theses concerning submarine cables in time of war. They were accompanied by a report made by the author of these theses. Mr. Louis Renault, co-reporter, in his turn stated his opinion on the proposals of Mr. von Bar. New theses were likewise proposed by Messrs. Holland and Perels and some remarks were made by General den Beer Poortugael. 1 The discussion took place in plenary session September 22 and 28, 1902. The Institute adopted the following rules :

1. A submarine cable connecting two neutral territories is inviolable.

2. A cable connecting the territories of two belligerents or two parts of the territory of one of the belligerents may be cut anywhere except in the territorial sea and in the neutralized waters appertaining to a neutral territory (" neutralized " by treaty or by declaration in accordance with Article 4 of the Paris resolutions of 1894).

3. A cable connecting a neutral territory with the territory of one of the belligerents can in no case be cut in the territorial sea or in the neutralized waters appertaining to a neutral territory.

On the high sea such a cable can only be cut if there is an effective blockade and within the limits of the line of blockade, subject to the repair of the cable within the briefest possible time. Such a cable can always be cut in the territory and in the territorial sea appertaining to enemy territory up to the distance of three marine miles from low-water mark.

4. It is understood that the liberty of the neutral State to transmit dispatches does not imply the right to make use or permit use thereof manifestly for the purpose of lending assistance to one of the belligerents.

5. In applying the preceding rules, no difference is to be made between State cables and cables owned by individuals, nor between cables which are enemy property and those which are neutral property.

49. INTERNATIONAL TRIBUNALS— THE HAGUE COURT OF ARBITRATION (1904-Edim-01)

Concerning the Constitution of One or More International Tribunals Charged with Interpreting the Conventions of International Unions

The question was raised before the Institute in the meeting at Cambridge in 1895, on the occasion of the general plan of revision of the Convention of Berne of September 9, 1886, relative to the protection of literary and artistic works. At the meeting in Copenhagen in 1897, Messrs. Roguin and Darras presented a report accompanied by proposals. At the meeting at Brussels in 1902, Mr. de Seigneux formulated a new project contemplating the creation of international tribunals for each of the international unions. After a short discussion, the question was postponed until the next meeting. At the meeting in Edinburgh in 1904, the discussion was resumed and resulted in the adoption of the following resolution proposed by Mr. Harburger:

The Institute of International Law holds that in case of divergent interpretations of international conventions the governments should have recourse to the intervention of the Permanent Court of Arbitration at The Hague.

50. OPENING OF HOSTILITIES (1906-Gand-02)

The subject of declarations of war was placed on the order of the day by the Council in 1904. 7 At the Edinburgh session in that year Mr. Alberic Rolin made a preliminary report. 8 After further study in committee, in which the reporter had the assistance of Messrs. Renault, Holland, Kleen, Merignhac, Dupuis, and Strisower, 9 Mr. Rolin made his final report 10 in 1906 with draft resolutions. 11 The Institute considered this report in the plenary session of September 19 and 20, 1906, 12 and after a thorough discussion adopted the following resolutions and voeu :

Resolutions

1. It is in accordance with the requirements of international law, and with the spirit of fairness which nations owe to one another in their mutual relations, as well as in the common interest of all States, that hostilities must not commence without previous and explicit warning.

2. This warning may take place either under the form of a declaration of war pure and simple, or under that of an ultimatum, duly notified to the adversary by the State about to commence war.

3. Hostilities shall not commence before the expiration of a delay sufficient to make it certain that the rule of previous and explicit notice cannot be considered as evaded.

VCEU

The Institute of International Law utters the voeu that the States be actuated by the preceding principles in their conduct and for the conclusion of international conventions.

51. INTERNATIONAL REGULATION OF WIRELESS TELEGRAPHY (1906-Gand-01)

This subject was added by the Council * to that of the legal status of air-ships upon which Messrs. Fauchille and Nys, as reporters, had presented reports, the two subjects having the same fundamental difficulty, that of the nature of the air and the rights of States to the atmosphere. Accordingly, Mr. Fauchille presented to the Institute, at the request of the Council, draft regulations and a report on the status of wireless telegraphy 2 at its Ghent session in 1906. The Institute considered the draft in the meetings of September 22 and 24/ and adopted the following text:

Article 1. The air is free. States have over it, in time of peace and in time of war, only the rights necessary for their preservation.

Article 2. In the absence of special provisions, the rules applicable to ordinary telegraphic correspondence are applicable to wireless telegraphic correspondence.

Part I. — Time of Peace

Article 3. Each State has the right, in the measure necessary to its security, to prevent, above its territory and its territorial waters, and as high as need be, the passage of Hertzian waves whether they issue from a government apparatus or from a private apparatus situated on land, on a vessel, or on a balloon.

Article 4. In case of prohibition of correspondence by wireless telegraphy, the government must immediately notify the other governments of the prohibition which it decrees.

Part II. — Time of War

Article 5. The rules accepted for time of peace are, in principle, applicable to time of war.

Article 6. On the high sea, in the zone corresponding to the sphere of action of their military operations, belligerents may prevent the emission of waves even by a neutral subject.

Article 7. Individuals are not considered as war spies, but should be treated as prisoners of war if captured when, in spite of the prohibition of the belligerent, they transmit or receive wireless dispatches between the different parts of an army or of a belligerent territory. The contrary should be the case if the correspondence is had under false pretenses.

The bearers of dispatches sent by wireless telegraphy are assimilated to spies when they employ dissimulation or ruse.

Neutral vessels and balloons which, through their communication with the enemy, can be considered as placed at its service may be confiscated as well as their dispatches and apparatus. Neutral subjects, vessels, and balloons, if it is not established that their correspondence was intended to furnish the adversary with information relating to the conduct of hostilities, may be removed from the zone of operations and their apparatus seized and sequestered.

Article 8. A neutral State is not obliged to oppose the passage above its territory of Hertzian waves destined for a country at war.

Article 9. A neutral State has the right and the duty to close or take under its administration an establishment of a belligerent State which it had authorized to operate upon its territory.

Article 10. Every prohibition of communicating by wireless telegraphy formulated by belligerents should be immediately brought by them to the notice of the neutral governments.

52. SUBMARINE MINES (1911-Mad-03)

The question of the international regulation of the use of automatic torpedoes in the open sea was placed on the order of the day in the Edinburgh session, 1904, at the instance of Mr. Kebedgy, who was appointed reporter.

It was later modified by the Bureau of the Institute to read " International regulation of the use of submarine mines and automatic torpedoes." Mr. Kebedgy, who was assisted by Messrs. Brusa, Dupuis, Engelhardt, Kaufmann, Politis and Alberic Bolin, made his report, accompanied by proposals to the Ghent session in 1906. The Institute discussed the subject in plenary session September 25, 1906, and tentative resolutions were adopted to be discussed at a subsequent session. In 1908 Mr. Edouard Rolin, who had been associated with Mr. Kebedgy as reporter, filed an amended project, 6 which had been harmonized with the deliberations of the Second Hague Peace Conference. This project, after being discussed by the Institute in the sessions of September 29 and 30, 1908, 7 was recommitted, conformably to the wishes of its author. At Paris in 1910 the Institute had before it a further report 8 by Mr. Rolin, which it discussed in the meetings of March 31, April 1 and April 2, 9 with the result that the first five articles below were adopted. The remaining articles were adopted, after discussion, in the following meeting at Madrid in the session of April 17, 1911.

Article 1. It is forbidden to place anchored or unanchored automatic contact mines in the open sea, the question of mines under electric control being reserved.

Article 2. Belligerents may lay mines in their own and in the enemy's territorial waters.

But it is forbidden even in these territorial waters : (1) to lay unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them; (2) to lay anchored contact mines which do not become harmless as soon as they have broken loose from their moorings.

Article 3. It is forbidden to make use, either in territorial waters or on the high sea, of torpedoes which do not become harmless when they have missed their mark.

Article 4. A belligerent is allowed to lay mines off the coasts and ports of the enemy only for naval and military purposes. He is forbidden to lay them there in order to establish or maintain a commercial blockade.

Article 5. When anchored or unanchored automatic contact mines are used, all precautions must be taken for the security of peaceful navigation.

Belligerents shall, in especial, provide that the mines become harmless within a limited time.

In case the mines cease to be under their observation, the belligerents shall, as soon as military exigencies permit, notify the danger zones to mariners and also to the governments through the diplomatic channel.

Article 6. A neutral State may lay mines in its territorial waters for the defense of its neutrality. It should, in this case, observe the same rules and take the same precautions as are imposed on belligerents.

The neutral State should inform ship-owners, by a notice issued in advance, where automatic contact mines will be laid. This notice must be communicated at once to the governments through the diplomatic channel.

Article 7. The question of the laying of mines in straits is reserved, both as concerns neutrals and belligerents.

Article 8. At the close of the war the belligerent and neutral States shall do their utmost to remove the mines which they have laid, each Power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coasts of the other, their position shall be notified to the other party by the State which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

The belligerent and neutral States whose duty it is to remove the mines after the war must make known the date at which the removal of the mines is complete.

Article 9. A violation of one of the preceding rules entails responsibility therefor on the part of the State at fault.

The State which has laid the mine is presumed to be at fault unless the contrary is proved.

An action may be brought against the guilty State, even by individuals, before the competent international tribunal.

53. TEXT OF RESOLUTIONS ADOPTED ON THE SUBJECT OF INTERNATIONAL REGULATION OF THE USE OF INTERNATIONAL STREAMS (1911-Mad-01)

At the Paris session, in the meeting of April 1, 1910, Messrs. von Bar and Harburger proposed the question : " Determination of the rules of international law concerning international streams from the point of view of the exploitation of their motive power." The motion was adopted, and Mr. von Bar was designated as reporter. Mr. von Bar's reports and project were considered by the Institute at Madrid in the meetings of April 19 and 20, 1912 and the rules below were adopted:

Statement of Reasons

States bordering on the same streams are in a condition of permanent physical dependence upon each other, which excludes the idea of complete autonomy for either along that portion of the natural course coming under its sovereignty.

International law having already considered the right of navigation on international rivers, the utilization of the water for manufacturing, agriculture, etc., has failed to contemplate all that this right entails.

It appears opportune, therefore, to supply this deficiency by stating the rules of law which arise from the unquestionable interdependence existing between States bordering on the same streams and between States whose territories are traversed by the same streams.

The right of navigation, in so far as it has already been regulated, or shall be regulated by international law, excepted:

The Institute of International Law is of the opinion that the following rules should be observed from the point of view of the utilization (in any way whatever) of international streams:

Rules

I. When a stream forms the frontier of two States, neither of these States may, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc., to make alterations therein detrimental to the bank of the other State. On the other hand, neither State may, on its own territory, utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization by the other State or by individuals, corporations, etc., thereof.

The foregoing provisions are likewise applicable to a lake lying between the territories of more than two States.

II. When a stream traverses successively the territories of two or more States:

1. The point where this stream crosses the frontiers of two States, whether naturally, or since time immemorial, may not be changed by establishments of one of the States without the consent of the other.
2. All alterations injurious to the water, the emptying therein of injurious matter (from factories, etc.), is forbidden.
3. No establishment (especially factories utilizing hydraulic power) may take so much water that the constitution, otherwise called the utilizable or essential character of the stream, shall, when it reaches the territory downstream, be seriously modified.
4. The right of navigation by virtue of a title recognized in international law may not be violated in any way whatever.
5. A State situated downstream may not erect or allow to be erected within its territory constructions or establishments which would subject the other State to the danger of inundation.
6. The foregoing rules are applicable likewise to cases where streams flow from a lake situated in one State, through the territory of another State, or the territories of other States.
7. It is recommended that the interested States appoint permanent joint commissions, which shall render decisions, or at least shall give their opinion, when from the building of new establishments or the making of alterations in existing establishments serious consequences might result in that part of the stream situated in the territory of the other State.

54. THE LEGAL STATUS OF AIRCRAFT (1911-Mad-02)

The question of the legal status of aircraft was placed on the calendar at the Neuchatel session in 1900 on the motion of Mr. Fauchille, who was named reporter with Mr. Nys. At the Brussels session in 1902 Mr. Fauchille presented a report accompanied by draft resolutions in 32 articles, and Mr. Nys presented a second report containing observations on Mr. Fauchille's project. At the close of the session Messrs. Fauchille and Nys proposed that the Institute limit the discussion to certain questions of principle. The Institute, on April 1, 1910, during its Paris session, on Mr. Fauchille's request, created a committee to study the question with him. The report was accompanied by a new text, which was discussed at Madrid in the meetings of April 18, 19, 20 and 21, 1911. The articles adopted follow:

1. Time of Peace

1. Aircraft are distinguished as public aircraft and private aircraft.

2. Every aircraft must have a nationality, and one only. This nationality will be that of the country in which the aircraft has been registered. Every aircraft must bear special marks of identification.

The State in which registration is applied for determines to what persons and under what conditions registration will be granted, suspended, or withdrawn.

The State registering an aircraft belonging to an alien cannot, however, claim to protect such aircraft in the territory of the owner's State as against any laws of that State forbidding its nationals to have their aircraft registered in foreign States.

3. International aerial circulation is free, saving the right of subjacent States to take certain measures, to be determined, to ensure their own security and that of the persons and property of their inhabitants.

2. Time of War

1. Aerial war is allowed, but on the condition that it does not present for the persons or property of the peace-able population greater dangers than land or sea warfare.

55. EFFECT OF WAR ON TREATIES (1912-Christ-02)

The Council of the Institute, having selected as a subject for investigation the effects of war on international obligations and private contracts, appointed Mr. Politis reporter. Mr. Politis made a preliminary report in 1910. His final report dealt only with treaties, as some members of his committee had desired that private contracts form the subject of separate study. In 1912, at Christiania, the Institute discussed the project in the meetings of August 29, 30 and 31, 3 and voted the following regulations:

Text of the Regulations Regarding the Effect of War on Treaties *

Chapter I

Treaties Between Belligerent States

Article 1. The opening and the carrying on of hostilities shall have no effect upon the existence of treaties, conventions and agreements, whatever be their title and subject, concluded between themselves by belligerent States. The same is true of the special obligations arising from the said treaties, conventions and agreements.

Article 2. War, however, automatically terminates:

1. Agreements of international associations, treaties of protection, control, alliance, guaranty; treaties concerning subsidies, treaties establishing a right of security or a sphere of influence, and, generally, treaties of a political nature ;

2. All treaties, the application or the interpretation of which shall have been the direct cause of the war, in consequence of the official acts of either of the governments before the opening of hostilities.

Article 3. In applying the rule set forth in Article 2, account must be taken of the contents of the treaty. If, in the same act, occur clauses of different kinds, only those shall be considered annulled which come under the categories enumerated in Article 2. When, however, the treaty is of the character of an indivisible act, it terminates as a whole.

Article 4. The treaties which remain in force and the carrying out of which is still, in spite of hostilities, practically possible, shall be observed as in the past. Belligerent States may not disregard them except to the degree and for the time required by the necessities of war.

Article 5. Treaties which have been concluded for the contingency of war are not covered by Articles 2, 3 and 4.

Article 6. Aside from the responsibility that would be incurred by the violation of these rules, they should serve to interpret the silence of and to supply the omissions in a treaty of peace. In default of a formal clause to the contrary in a peace treaty, it shall be decided:

1. That treaties affected by the war are definitively annulled ;
2. That treaties not affected by the war, whether suspended or not during the progress of hostilities, are tacitly confirmed ;
3. That treaties the clauses of which conflict with the contents of the peace treaty are nevertheless implicitly abrogated ;
4. That the abrogation of a treaty, express or tacit, has no retroactive effect.

Chapter II

Treaties Between Belligerent States and a Third State

Article 7. The provisions of Articles 1 to 6 shall apply, in the relations between belligerent States, to treaties concluded between them and a third State, with the following reservations.

Article 8. When the obligations which bind belligerent States in their relations with each other have the same object as their contracts with a third State, they shall be carried out in the interest of the latter. Thus collective treaties of guaranty shall remain in force in spite of war between two of the contracting States.

Article 9. Collective agreements shall remain in force in the relations of each of the belligerent States with the third contracting State.

They may not be altered by a treaty of peace to the detriment of the third contracting State, without the participation or the consent of the latter.

Article 10. Treaties concluded between a belligerent State and a third State are not affected by the war.

Article 11. In default of a formal clause to the contrary or of a provision leaving no doubt as to the intention of the parties, collective treaties relating to the law of war apply only if the belligerents are all contracting parties.

56. THE LAWS OF NAVAL WAR GOVERNING THE RELATIONS BETWEEN BELLIGERENTS (1913-Oxf-02)

The Institute, having appointed on April 1, 1910, a committee of nine to investigate subjects that ought to be considered by the approaching Third Hague Conference, this committee met in Paris in October, 1911, and as one result unanimously declared it desirable that the preparation of regulations concerning the laws and customs of war at sea with respect to the relations between belligerents be the first business on the program of the next Hague Conference. A special committee, with Mr. Fauchille as reporter, was at the same time designated to prepare a draft manual analogous to the Oxford Manual of land warfare. Mr. Fauchille's reports were considered by the Institute at its Christiania session in 1912 (Meetings of August 27 and 28).² On the latter date the Institute increased the number of members on the committee to eleven and agreed on several guiding rules for the completion of the manual. Further reports were made by Mr. Fauchille, and the Institute at its Oxford session in 1913, 4 after five days' deliberation, unanimously, save for one member not voting, adopted the text below :

Manual Adopted by the Institute of International Law

Preamble

The Institute of International Law, at its Christiania session, declared itself in favor of firmly upholding its former Resolutions on the abolition of capture and of confiscation of enemy private property in naval warfare. But at the same time being aware that this principle is not yet accepted, and deeming that, for so long as it shall not be, regulation of the right of capture is indispensable, it entrusted a commission with the task of drawing up stipulations providing for either contingency. In pursuance of this latter action, the Institute, at its Oxford session, on August 9, 1913, adopted the following Manual, based on the right of capture.²

² Definitions: Capture is the act by which the commander of a war-ship substitutes his authority for that of the captain of the enemy ship, subject to the subsequent judgment of the prize court as to the ultimate fate of the ship and its cargo.

Seizure, when applied to a ship, is the act by which a, war-ship takes possession of the vessel detained, with or without the consent of the captain of the latter. Seizure differs from capture in that the ultimate fate of the vessel may not be involved as a result of its condemnation.

Applied to goods alone, seizure is the act by which the war-ship, with or without the consent of the captain of the vessel detained, takes possession of the goods and holds them or disposes of them subject to the subsequent judgment of the prize court.

Confiscation is the act by which the prize court renders valid the capture of a vessel or the seizure of its goods.

The word prize is a general expression applying to a captured ship or to seized goods.

Section I. — On Localities Where Hostilities May Take Place

Article 1. Rules peculiar to naval warfare are applicable only on the high seas and in the territorial waters of the belligerents, exclusive of those waters which, from the standpoint of navigation, ought not to be considered as maritime.

Section II. — On the Armed Force or Belligerent States

Article 2. War-ships. Constituting part of the armed force of a belligerent State and, therefore, subject as such to the laws of naval warfare are:

1. All ships belonging to the State which, under the direction of a military commander and manned by a military crew, carry legally the ensign and the pendant of the national navy.
2. Ships converted by the State into war-ships in conformity with Articles 3-6.

Article 3. Conversion of public and private vessels into war-ships. A vessel converted into a war-ship cannot have the rights and duties accruing to such vessels, unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies.

Article 4. Vessels converted into war-ships must bear the exterior marks which distinguish the war-ships of their nationality.

Article 5. The commander must be in the service of the State and duly commissioned by the competent authorities ; his name must appear on the list of officers of the fighting fleet.

Article 6. The crew must be subject to the rules of military discipline.

Article 7. Every vessel converted into a war-ship must observe in its operations the laws and customs of war.

Article 8. The belligerent who converts a vessel into a war-ship must, as soon as possible, announce such conversion in the list of war-ships.

Article 9. The conversion of a vessel into a war-ship may be accomplished by a belligerent only in its own waters, in those of an allied State also a belligerent, in those of the adversary, or, lastly, in those of a territory occupied by the troops of one of these States.

Article 10. Conversion of war-ships into public or private vessels. A war-ship may not, while hostilities last, be converted into a public or a private vessel.

By public ships are meant all ships other than war-ships which, belonging to the State or to individuals, are set apart for public service and are under the orders of an officer duly commissioned by the State.

Article 11. Belligerent personnel. Constituting part of the armed force of a belligerent State and, therefore, in so far as they carry on operations at sea, subject as such to the laws of naval warfare, are:

1. The personnel of the ships mentioned in Article 2;
2. The troops of the naval forces, active or reserve ;
3. The militarized personnel on the seacoasts;
4. The regular forces, other than naval forces, or those regularly organized in conformity with Article 1 of the Hague Regulations of October 18, 1907, concerning the laws and customs of war on land.

Article 12. Privateering, private vessels, public vessels not war-ships. Privateering is forbidden.

Apart from the conditions laid down in Articles 3 and following, neither public nor private vessels, nor their personnel, may commit acts of hostility against the enemy.

Both may, however, use force to defend themselves against the attack of an enemy vessel.

Article 13. Population of unoccupied territory. The inhabitants of a territory which has not been occupied who, upon the approach of the enemy, spontaneously arm vessels to fight him, without having had time to convert them into war-ships in conformity with Articles 3 and following, shall be considered as belligerents, if they act openly and if they respect the laws and usages of war.

Section III. — On Means of Injuring the Enemy

Article 14. Principle. The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 15. Treacherous and barbarous methods. Ruses of war are considered permissible. Methods, however, which involve treachery are forbidden.

Thus it is forbidden:

1. To kill or wound treacherously individuals belonging to the opposite side ;
2. To make improper use of a flag of truce, to make use of false flags, uniforms, or insignia, of whatever kind, especially those of the enemy, as well as of the distinctive badges of the medical corps indicated in Articles 41 and 42.

Article 16. In addition to the prohibitions which shall be established by special conventions, it is forbidden:

1. To employ poison or poisoned weapons, or projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases;

2. To employ arms, projectiles, or materials calculated to cause unnecessary suffering. Entering especially into this category are explosive projectiles or those charged with fulminating or inflammable materials, less than 400 grams in weight, and bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not cover the core entirely or is pierced with incisions.

Article 17. It is also forbidden:

1. To kill or to wound an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion ;
2. To sink a ship which has surrendered, before having taken off the crew;
3. To declare that no quarter will be given.

Article 18. Pillage and devastation are forbidden.

It is forbidden to destroy enemy property, except in the cases where such destruction is imperatively required by the necessities of war or authorized by provisions of the present regulations.

Article 19. Torpedoes. It is forbidden to employ torpedoes which do not become harmless when they have missed their mark.

Article 20. Submarine mines. It is forbidden to lay automatic contact mines, anchored or not, in the open sea.

Article 21. Belligerents may lay mines in their territorial waters and in those of the enemy.

But it is forbidden, even in territorial waters :

1. To lay unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;
2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

Article 22. A belligerent may not lay mines along the coast and harbors of his adversary except for naval and military ends. He is forbidden to lay them there in order to establish or to maintain a commercial blockade.

Article 23. When automatic contact mines, anchored or unanchored, are employed, every precaution must be taken for the security of peaceful shipping.

The belligerents must do their utmost to render these mines harmless within a limited time.

Should the mines cease to be under surveillance, the belligerents shall notify the danger zones as soon as military exigencies permit, by a notice addressed to ship-owners, which must also be communicated to the governments through the diplomatic channel.

Article 24. At the close of the war, the belligerent States shall do their utmost to remove the mines that they have laid, each one its own.

As regards the anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the State that has laid them, and each State must proceed, with the least possible delay, to remove the mines in its own waters.

Belligerent States upon whom rests the obligation of removing these mines after the war is over shall, with as little delay as possible, make known the fact that, so far as is possible, the mines have been removed.

Article 25. Bombardment. The bombardment of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because submarine automatic contact mines are anchored off its coast.

Article 26. Military works, military or naval establishments, depots of arms or war materiel[^] workshops or plants which could be utilized for the needs of the hostile fleet or army, and the war-ships in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

Article 27. The bombardment of undefended ports, towns, villages, dwellings, or buildings because of the non-payment of contributions of money, or the refusal to comply with requisitions for provisions or supplies is forbidden.

Article 28. In bombardments all useless destruction is forbidden, and especially should all necessary measures be taken by the commander of the attacking force to spare, as far as possible, sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on condition that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.

Article 29. If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

Article 30. Blockade. Ports and coasts belonging to the enemy or occupied by him may be subjected to blockade according to the rules of international law.

Section IV. — On the Rights and Duties of the Belligerent with Regard to Enemy Property

Article 31. A. Ships and cargoes — War-ships. The armed forces of a State may attack the enemy's war-ships, to take possession of them or to destroy them, together with their equipment and supplies, whether these ships, at the beginning of the struggle, are in a harbor of the State, or are encountered at sea, in ignorance of hostilities; or by force majeure are either compelled to enter a port, or are cast on the shores of said State.

Article 32. Public and private vessels — Stopping, visit, and search. All vessels other than those of the navy, whether they belong to the State or to individuals, may be summoned by a belligerent war-ship to stop that a visit and search may be conducted on board them.

The belligerent war-ship, in ordering a vessel to stop, shall fire a charge of powder as a summons and, if that warning is not sufficient, shall fire a projectile across the bow of the vessel. Previously or at the same time, the war-ship shall hoist its flag, above which, at night, a signal light shall be placed. The vessel answers the signal by hoisting its own flag and by stopping at once ; whereupon, the war-ship shall send to the stopped vessel a launch manned by an officer and a sufficient number of men, of whom only two or three shall accompany the officer on board the stopped vessel.

Visit consists in the first place in an examination of the ship's papers.

If the ship's papers are insufficient or not of a nature to allay suspicion, the officer conducting the visit has the right to proceed to a search of the vessel, for which purpose he must ask the cooperation of the captain.

Visit of post packets must, as Article 53 says, be conducted with all the consideration and all the expedition possible.

Vessels convoyed by a neutral war-ship are not subject to visit except in so far as permitted by the rules relating to convoys.

Article 33. Principle of capture. Public and private vessels of enemy nationality are subject to capture, and enemy goods on board, public or private, are liable to seizure.

Article 34. Capture and seizure are permitted even when the vessels or the goods have fallen into the power of the belligerent because of force majeure, through shipwreck or by being compelled to put into port.

Article 35. Vessels which possess no ship's papers, which have intentionally destroyed or hidden those that they had, or which offer false ones, are liable to seizure.

Article 36. Extenuation of the principle of capture.

When a public or private vessel belonging to one of the belligerent Powers is, at the commencement of hostilities, in an enemy port, it is allowed to depart freely, immediately or after a reasonable number of days of grace, and to proceed, after having been furnished with a passport, to its port of destination, or to any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered an enemy port while still ignorant of hostilities.

Article 37. The public or private vessel unable, owing to circumstances of force majeure, to leave the enemy port within the period contemplated in the preceding article, cannot be captured.

The belligerent may only detain it without payment of compensation but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

Article 38. Enemy vessels, public or private, which left their last port of departure before the commencement of the war and which are encountered on the high seas while still ignorant of the outbreak of hostilities, cannot be captured. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the passengers on board as well as for the security of the ship's papers.

But, where these vessels shall be encountered at sea before the expiration of a sufficient period to be granted by the belligerent, seizure is not permissible. Vessels thus encountered are free to proceed to their port of destination or to any other port indicated.

After touching at a port in their own country or at a neutral port, these vessels are subject to capture.

Article 39. Enemy cargo found on board the ships detained under Articles 37 and 38 may likewise be held. It must be restored after the termination of the war without payment of indemnity, unless requisitioned on payment of compensation.

The same rule is applicable to goods which are contraband of war found on board the vessels mentioned in Articles 36, 37 and 38, even when these vessels are not subject to capture.

Article 40. In all cases considered in Articles 36, 37 and 38, public or private ships whose build shows that they are intended for conversion into war-ships, may be seized or requisitioned upon payment of compensation. These vessels shall be restored after the war.

Goods found on board these ships shall be dealt with according to the rules in Article 39.

Article 41. Exceptions to the principles in Articles 31 and 32 — Hospital ships. Military hospital ships, that is to say, ships constructed or assigned by States specially and solely with a view to assisting the wounded, sick and ship-wrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and cannot be captured while hostilities last.

Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half (five feet) in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with the red cross provided by the Geneva Convention.

The ships and boats above mentioned which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the belligerent they are accompanying, take the measures necessary to render their special painting sufficiently plain.

The distinguishing signs referred to in this article can be used only for protecting or indicating the ships herein mentioned.

These ships cannot be used for any military purpose.

They must in no wise hamper the movements of the combatants.

During and after an engagement, they will act at their own risk and peril.

The belligerents shall have the right to control and search them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board ; they can even detain them, if important circumstances require it.

As far as possible, the belligerents shall enter in the log of the hospital ships the orders which they give them.

Hospital ships which, under the terms of this article, are detained by the enemy, must haul down the national flag of the belligerent to whom they belong.

Article 42. Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall likewise be respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

These ships must be provided with a certificate from competent authorities declaring that the vessels have been under their control while fitting out and on final departure.

The ships in question shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half (five feet) in breadth.

They are subject to the regulations laid down for military hospital ships by Article 41.

Article 43. In case of a fight on board a war-ship, the sick- wards and the materiel belonging to them shall be respected and spared as far as possible. Although remaining subject to the laws of war, they cannot be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded. The commander into whose power they have fallen may, however, apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded on board are properly provided for.

Article 44. Hospital ships and sick-wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy. The fact that the staff of the said ships and sick-wards is armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, are not sufficient reasons for withdrawing protection.

Article 45. Cartel ships. Ships called cartel ships, which act as bearers of a flag of truce, may not be seized while fulfilling their mission, even if they belong to the navy.

A ship authorized by one of the belligerents to enter into a parley with the other and carrying a white flag is considered a cartel ship.

The commanding officer to whom a cartel ship is sent is not obliged to receive it under all circumstances. He can take all measures necessary to prevent the cartel ship from profiting by its mission to obtain information. In case it abuses its privileges, he has the right to hold the cartel ship temporarily.

A cartel ship loses its rights of inviolability if it is proved, positively and unexceptionably, that the commander has profited by the privileged position of his vessel to provoke or to commit a treacherous act.

Article 46. Vessels charged with missions. Vessels charged with religious, scientific, or philanthropic missions are exempt from seizure.

Article 47. Vessels used exclusively for fishing along the coast and for local trade. Vessels used exclusively for fishing along the coast, or for local trade, under which term are included those used exclusively for piloting or for lighthouse service, as well as the boats meant principally for the navigation of rivers, canals, and lakes, are exempt from seizure, together with their appliances, rigging, tackle and cargo.

It is forbidden to take advantage of the harmless character of said boats in order to use them for military purposes while preserving their peaceful appearance.

Article 48. Vessels furnished with a safe-conduct or a license. Enemy vessels provided with a safe-conduct or a license are exempt from seizure.

Article 49. Suspension of immunities. The exceptions considered in Articles 41, 42, 45, 46, 47 and 48 cease to be applicable if the vessels to which they refer participate in the hostilities in any manner whatsoever or commit other acts which are forbidden to neutrals as unneutral service.

The same suspension occurs if, summoned to stop to submit to search, they seek to escape by force or by flight.

Article 50. Rights of the belligerent in the zone of operations. When a belligerent has not the right of seizing or of capturing enemy vessels, he may, even on the high seas, forbid them to enter the zone corresponding to the actual sphere of his operations.

He may also forbid them within this zone to perform certain acts calculated to interfere with his activities, especially certain acts of communication, such, for example, as the use of wireless telegraphy.

The simple infraction of these prohibitions will entail driving the vessel back, even by force, from the forbidden zone and the sequestration of the apparatus. The vessel, if it be proved that it has communicated with the enemy to furnish him with information concerning the conduct of hostilities, can be considered as having placed itself at the service of the enemy and, consequently, with its apparatus, shall be liable to capture.

Article 51. Enemy character. The enemy or neutral character of a vessel is determined by the flag which it is entitled to fly.

The enemy or neutral character of goods found on board an enemy vessel is determined by the enemy or the neutral character of the owner.

Each State must declare, not later than the outbreak of hostilities, whether the enemy or neutral character of the owner of the goods is determined by his place of residence or his nationality.

Enemy goods found on board an enemy ship retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

Article 52. Transfer to a neutral flag. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel as such is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost its belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void; this presumption may be rebutted.

Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

There is, however, an absolute presumption that a transfer is void: 1. if the transfer has been made during a voyage or in a blockaded port; 2. if a right to repurchase or recover the vessel

is reserved to the vendor; 3. if the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.

Article 53. B. Postal correspondence. Postal correspondence, whatever its official or private character may be, found on the high seas on board an enemy ship, is inviolable, unless it is destined for or proceeding from a blockaded port.

The inviolability of postal correspondence does not exempt mail-boats from the laws and customs of maritime war as to ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.

If the ship on which the mail is sent be seized, the correspondence is forwarded by the captor with the least possible delay.

Article 54. C. Submarine cables. In the conditions stated below, belligerent States are authorized to destroy or to seize only the submarine cables connecting their territories or two points in these territories, and the cables connecting the territory of one of the nations engaged in the war with a neutral territory.

The cable connecting the territories of the two belligerents or two points in the territory of one of the belligerents, may be seized or destroyed throughout its length, except in the waters of a neutral State.

A cable connecting a neutral territory with the territory of one of the belligerents may not, under any circumstances, be seized or destroyed in the waters under the power of a neutral territory. On the high seas, this cable may not be seized or destroyed unless there exists an effective blockade and within the limits of that blockade, on consideration of the restoration of the cable in the shortest time possible. This cable may be seized or destroyed on the territory of and in the waters belonging to the territory of the enemy for a distance of three marine miles from low tide. Seizure or destruction may never take place except in case of absolute necessity.

In applying the preceding rules no distinction is to be made between cables, according to whether they belong to the State or to individuals ; nor is any regard to be paid to the nationality of their owners.

Submarine cables connecting belligerent territory with neutral territory, which have been seized or destroyed, shall be restored and compensation fixed when peace is made.

Section V. — On the Rights and Duties of the Belligerent with Regard to Individuals

Article 55. A. Personnel of vessels — War-ships.

When a war-ship is captured by the enemy, combatants and non-combatants forming part of the armed forces of the belligerents, are to be treated as prisoners of war.

Article 56. Public or private vessels. When an enemy ship, public or private, is seized by a belligerent, such of its crew as are nationals of a neutral State, are not made prisoners of war. The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise in writing not to take, during hostilities, any service connected with the

operations of the war. The captain, officers and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war.

Article 57. The names of the persons retaining their liberty on condition of the promise provided for by the preceding article, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

Article 58. All persons constituting part of the crew of a public or a private enemy ship are, in the absence of proof to the contrary, presumed to be of enemy nationality.

Article 59. Members of the personnel of an enemy ship which, because of its special character, is itself exempt from seizure, cannot be held as enemies.

Article 60. When a public or a private ship has directly or indirectly taken part in the hostilities, the enemy may retain as prisoners of war the whole personnel of the ship, without prejudice to the penalties he might otherwise incur.

Article 61. Members of the personnel of a public or of a private vessel, who are personally guilty of an act of hostility towards the enemy, may be held by him as prisoners of war, without prejudice to the penalties he might otherwise incur.

Article 62. B. Passengers. When individuals who follow a naval force without belonging to it, such as contractors, newspaper correspondents, etc., fall into the enemy's hands, and when the latter thinks it expedient to detain them, they may be detained only so long as military exigencies require. They are entitled to be treated as prisoners of war.

Article 63. Passengers who, without forming part of the crew, are on board an enemy ship, may not be detained as prisoners of war, unless they have been guilty of a hostile act.

All passengers included in the armed force of the enemy may be made prisoners of war, even if the vessel is not subject to seizure.

Article 64. C. Religious, medical, and hospital personnel. The religious, medical, and hospital staff of every vessel taken or seized is inviolable, and its members may not be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the commander in chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.

The commissioner put by the belligerent on board the hospital ship of his adversary, in conformity with paragraph 10 of Article 41, enjoys the same protection as the medical staff.

The religious, medical, and hospital staffs lose their rights of inviolability, if they take part in hostilities, if, for example, they use their arms otherwise than for defense.

Article 65. D. Parlementaires. The personnel of cartel ships is inviolable.

It loses its rights of inviolability if it is proved in a clear and incontestable manner that it has taken advantage of its privileged position to provoke or commit an act of treason.

Article 66. E. Spies. A spy, even when taken in the act, may not be punished without first being tried.

Article 67. A person can be considered a spy only when, acting clandestinely or on false pretenses, thus concealing his operations, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Hence, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile fleet for the purpose of obtaining information, may not be considered as spies but are to be treated as prisoners of war. Similarly, soldiers or civilians, carrying out their mission openly, intrusted with the delivery of dispatches, or engaged in transmitting and receiving dispatches by wireless telegraphy, are not to be considered spies. To this class belong likewise persons sent in air-ships or in hydro-aeroplanes to act as scouts in the zone of operations of the enemy fleet or to maintain communications.

Article 68. The spy who succeeds in escaping from the zone corresponding to the enemy's actual sphere of operations, or who has rejoined the armed force to which he belongs, if he later falls into the power of the enemy, incurs no responsibility for his previous acts.

Article 69. F. Requisition of nationals of the enemy State — Guides, pilots, and hostages. A belligerent has no right to force persons who fall into his power, or nationals of the adverse party in general, to take part in the operations of the war directed against their own country, even when they were in his service before the beginning of the war, or to compel them to furnish information concerning their own State, its forces, its military position, or its means of defense.

He cannot force them to act as guides or as pilots.

He may, however, punish those who knowingly and voluntarily offer themselves in order to mislead him.

Compelling nationals of a belligerent to swear allegiance to the enemy Power is not permitted.

The taking of hostages is forbidden.

Article 70. G. Prisoners of war. Prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, military papers, and all objects in general which are specially adapted to a military end, remain their property.

Article 71. Prisoners of war may be interned on a ship only in case of necessity and temporarily.

Article 72. The government into whose hands prisoners of war have fallen is charged with their maintenance.

Article 73. All prisoners of war, so long as they are on board a ship, shall be subject to the laws, regulations, and orders in force in the navy of the State in whose power they are.

Article 74. Escaped prisoners who are retaken before succeeding in escaping from the enemy's actual sphere of action, or before being able to rejoin the armed force to which they belong, are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

Article 75. Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

Article 76. Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honor, scrupulously to fulfil, both towards their own government and the government by whom they were made prisoners, the engagements they have contracted.

In such cases their own government is bound neither to require nor to accept from them any service incompatible with the parole given.

Article 77. A prisoner of war cannot be compelled to accept his liberty on parole ; similarly the hostile government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

Article 78. Prisoners of war liberated on parole and recaptured bearing arms against the government to whom they had pledged their honor, or against the allies of that government, forfeit their right to be treated as prisoners of war, and can be brought before the courts, unless, subsequent to their liberation, they have been included in an unconditional cartel of exchange.

Article 79. Prisoners in naval warfare disembarked on land are subject to the rules laid down for prisoners in land warfare.

The same regulations should be applied, as far as possible, to prisoners of war interned on a vessel.

The preceding rules must, as far as it is possible to apply them, be followed toward prisoners of war from the moment they are captured, when they are on the ship which takes them to the place of their internment.

Article 80. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

Article 81. H. Wounded, sick, shipwrecked and dead. Vessels used for hospital service shall afford relief and assistance to the wounded, sick and shipwrecked of the belligerents without distinction of nationality.

Article 82. In case of the capture or seizure of an enemy vessel or a hospital ship that has failed in its duty, the sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by their captors.

Article 83. Any war-ship belonging to a belligerent may demand that sick, wounded or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.

Article 84. The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated cannot serve again while the war lasts.

Article 85. After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked and wounded, and to protect them, as well as the dead, from pillage and ill-treatment.

They shall see that the burial, whether by land or sea, or the cremation of the dead shall be preceded by a careful examination of the corpse.

Article 86. Each belligerent shall send, as early as possible, to the authorities of their country, their navy, or their army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to internments and transfers as well as to admissions into hospitals and the deaths which have occurred among the sick and wounded in their hands. They shall collect, in order to have them forwarded to the persons concerned by the authorities of their own country, all the objects of personal use, valuables, letters, etc., which are found in the captured or seized ships, or which have been left by the sick or wounded who died in hospital.

Article 87. In the case of operations of war between the land and sea forces of belligerents, the provisions of the present regulations on hospital assistance do not apply except between the forces actually on board ship.

Section VI. — On the Rights and Duties of the Belligerent in Occupied Territory

Article 88. Occupation: extent and effects. Occupation of maritime territory, that is of gulfs, bays, roadsteads, ports, and territorial waters, exists only when there is at the same time an occupation of continental territory, by either a naval or a military force. The occupation, in that case, is subject to the laws and usages of war on land.

Section VII. — On Conventions Between Belligerents

Article 89. General rules. The commander of any belligerent naval force may conclude agreements of a purely military character concerning the forces under his command.

He may not, without authority from his government, conclude any agreement of a political character, such as a general armistice.

Article 90. All agreements between belligerents must take into account the rules of military honor, and, once settled, must be scrupulously observed by the two parties.

Article 91. Capitulation. After having concluded a capitulation the commander may neither damage nor destroy the ships, objects, or supplies in his possession, but must surrender them unless the right of so doing has been expressly reserved to him in the terms of the capitulation.

Article 92. Armistice. An armistice suspends military operations.

Blockades established at the time of the armistice are not raised, unless by a special stipulation of the agreement.

The exercise of the right of visit continues to be permitted. The right of capture ceases except in cases where it exists with regard to neutral vessels.

Article 93. An armistice may be general or partial.

The first suspends the military operations of the belligerent States everywhere; the second, only between certain portions of the belligerent forces and within a fixed radius.

Article 94. The agreement which proclaims an armistice must indicate precisely the moment it is to begin and the moment it is to end.

An armistice must be notified officially and in good time to the competent authorities as well as to the forces engaged.

Article 95. Hostilities are suspended at the date fixed by the agreement, or, if no date has been set, immediately after the notification.

If the duration of the armistice has not been defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned in good time.

Article 96. The terms of a naval armistice shall settle, in cases where they permit the approach of enemy warships to certain points of the enemy's coast, the conditions of this approach and the communications of these ships either with the local authorities, or with the inhabitants.

Article 97. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Article 98. A violation of the terms of the armistice by isolated individuals, acting on their own initiative, entitles the injured party only to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

Article 99. Suspension of arms. A suspension of arms must, like an armistice, determine precisely the moment when hostilities are to be suspended and the moment when it ceases to be effective.

If no time is set for resuming hostilities, the belligerent who intends to continue the struggle must warn the enemy of his intention in good time.

The rupture of a suspension of arms by one of the belligerents or by isolated individuals entails the consequences stated in Articles 97 and 98.

Section VIII. — On the Formalities of Seizure and on Prize Procedure

Article 100. Formalities of seizure. When, after the search has been conducted, the vessel is considered subject to capture, the officer who seizes the ship must :

1. Seal all the ship's papers after having inventoried them;
2. Draw up a report of the seizure, as well as a short inventory of the vessel stating its condition;
3. State the condition of the cargo which he has inventoried, then close the hatchways of the hold, the chests and the store-room and, as far as circumstances will permit, seal them;
4. Draw up a list of the persons found on board ;
5. Put on board the seized vessel a crew sufficient to retain possession of it, maintain order upon it, and conduct it to such port as he may see fit.

If he thinks fit, the captain may, instead of sending a crew aboard a vessel, confine himself to escorting it.

Article 101. Except for persons who may be considered prisoners of war or who are liable to punishment, a belligerent may not detain on a seized ship for more than a reasonable time, those necessary as witnesses in ascertaining the facts ; but for insurmountable obstacles he must set them at liberty after the proces-verbal of their depositions has been drawn up.

If special circumstances require it, the captain, the officers, and a part of the crew of the captured ship may be taken on board the captor.

The captor shall attend to the maintenance of the persons detained, and shall always give them, as well as the crew, when they are set at liberty, means temporarily necessary for their further maintenance.

Article 102. The seized ship must be taken to the nearest possible port belonging either to the captor State or to an allied belligerent Power, which offers safe refuge, and has means of. easy communication with the prize court charged with deciding upon the capture.

During the voyage, the prize shall sail under the flag and the pendant carried by the war-ships of the State.

Article 103. The seized ship and its cargo shall, as far as possible, be kept intact during the voyage to port.

If the cargo includes articles liable to deteriorate easily, the captor, so far as possible with the consent of the captain of the seized ship and in his presence, shall take the best measures toward the preservation of these articles.

Article 104. Destruction of vessels and goods liable to confiscation. Belligerents are not permitted to destroy seized enemy ships, except in so far as they are subject to confiscation and because of exceptional necessity, that is, when the safety of the captor ship or the success of the war operations in which it is at that time engaged, demands it.

Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the war-ship. The same rule shall hold, as far as possible, for the goods.

A proems-verbal of the destruction of the captured ship and of the reasons which led to it must be drawn up.

Article 105. The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under the preceding article, justify the destruction of a vessel herself liable to condemnation.

The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

Article 106. Use of captured ships. If the captured ship or its cargo is necessary to the captor for immediate public use, he may use them thus. In this case, impartial persons shall make a careful estimate and inventory of the ship and its cargo, and this estimate shall be sent, together with the account of the capture, to the prize court.

Article 107. Loss of prizes through the perils of the sea. If a prize is lost by the perils of the sea, the fact must be carefully ascertained. In that case no indemnity is due, either for the ship or for the cargo, provided that if the prize be subsequently annulled the captor is able to prove that the loss would have occurred even without capture.

Article 108. Recapture. When a ship has been taken and retaken and is then captured from the recaptor, the last captor only has the right to it.

Article 109. Prize procedure. The captured vessel and its cargo, once in the port of the captor or of an allied State, shall be turned over, with all necessary documents, to the competent authority.

Article 110. The legality and the regularity of the capture of enemy vessels and of the seizure of goods must be established before a prize court.

Article 111. All recaptures must likewise be judged by a prize court.

Article 112. A belligerent State shall not obtain possession of the ship or goods that it has seized during the war until such time as, by final decree, the prize court shall have adjudged the confiscation of the said ship or said goods in its favor.

Article 113. If the seizure of the ship or of the goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or the goods.

Article 114. In case of the destruction of a vessel, the captor shall be required to compensate the parties interested, unless he is able to justify the exceptional necessity of the destruction, or unless, the destruction having been justified, the capture is subsequently declared void.

The same rule is applicable to the case provided for in Article 105.

If goods not liable to confiscation have been destroyed, the owner of the goods has a right to an indemnity.

In the case of a captor's using the ship or the cargo after the seizure, he must, if his act is held to have been illegal, pay the interested parties an equitable indemnity, according to the documents drawn up at the time the vessel or goods were used.

Article 115. Unlike non-military public ships and enemy private ships, belligerent war-ships taken by the adversary, as well as their materiel, become the property of the latter as soon as they fall into his possession, without the decision of a prize court being necessary.

Section IX. — On the End of Hostilities

Article 116. Peace. Acts of hostility must cease upon the signing of the treaty of peace.

Notice of the end of the war shall be communicated by each government to the commander of its naval forces with as little delay as possible.

When hostile acts have been committed after the signing of the treaty of peace, the former status must, as far as possible, be restored.

When they have been committed after the official notification of the treaty of peace, they entail the payment of an indemnity and the punishment of the guilty.

Additional Article

In conformity with Article 3 of the Hague Convention of October 18, 1907, concerning the laws and customs of war on land, the belligerent party which violates the provisions of the present regulations shall, if the case demands, be obliged to pay compensation; it shall be responsible for all acts committed by persons forming part of its armed naval forces.

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Session of Amsterdam – 1957

The Distinction Between the *Régime* of the Territorial Sea and the *Régime* of Internal Waters

(Tenth Commission, Rapporteur : Mr Frede Castberg)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Desiring to see States facilitate international communications through the régime of their maritime waters, notably by abstaining from denying access to their internal waters to foreign commercial vessels save where in exceptional cases this denial of access is imposed by imperative reasons ;

Declaring that it is consistent with the general practice of States to permit free access to ports and harbors by such vessels ;

Recalling the Resolution of Stockholm (1928) on the régime of maritime vessels and their crews in foreign ports in time of peace ;

Adopts the following Resolution, the purpose of which is to set forth certain principles of public international law and to state certain practices relating to differences between the régime of the territorial sea and the régime governing internal waters, without prejudging in any way the effects which might result from an eventual regulation by treaty of the methods of delimitation of the maritime domain and its legal régime :

I.

According to international law, the maritime spaces over which a State exercises its territorial competence include internal waters and the territorial sea.

The rules of international law concerning these two parts differ from each other in certain relations.

II.

Access and Passage. In the *territorial sea*, foreign vessels have a right of innocent passage, including the right of stopping or anchoring to the extent that they are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

Subject to the rights of passage sanctioned either by usage or by treaty, a coastal State may deny access to its *internal waters* to foreign vessels except where they are in distress.

III.

Power of Coercion. In its *internal waters* a State may exercise its power of coercion. In particular, it can make arrests or conduct investigations in accordance with its legislation. However, according to widely accepted practice, the exercise of the power of coercion is not generally applied to foreign vessels in internal waters except with regard to acts committed on the vessel which are likely to disturb public order.

A coastal State may not take any steps on board a foreign vessel passing through the *territorial sea* to arrest any person or to conduct any investigation except for a crime committed on board the vessel during its passage and only in the following cases :

- 1) if the consequences of the crime extend beyond the vessel ;
- 2) if the crime is of a kind to disturb the public peace of the country or the good order of the territorial sea ;
- 3) if the assistance of the authorities has been requested by the captain of the vessel or by the consul of the State whose flag the vessel flies.

A coastal State may not arrest or divert a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction. It may not levy execution against, or attach, such a vessel for the purpose of any civil proceedings except in respect of obligations assumed or liabilities incurred by the vessel for the purpose of, or during the course of, its passage through the waters of the coastal State.

A foreign vessel lying in the territorial sea after leaving internal waters is in the same juridical situation as if it were still in internal waters. The same shall apply to a vessel which lies in the territorial sea without being forced to do so for navigational reasons.

IV.

Judicial Competence. The coastal State may exercise its judicial competence over delictual acts committed on board a vessel during its sojourn in the internal waters of that State. In civil matters, if the seizure of the vessel has taken place in accordance with the laws of the coastal State and of international conventions civil proceedings may be instituted against the owner of the vessel even if the vessel and its conduct have given no occasion for the proceedings.

However, according to widely accepted practice, judicial competence is not exercised in penal matters with respect to acts committed on the vessel which are not of a kind to disturb public order. Nor, in general, is judicial competence exercised in matters of civil jurisdiction which relate to the internal order of the vessel.

Vessels in innocent passage through the *territorial sea* are not, because of such passage, subject to the judicial competence of the coastal State. Juridical acts performed on board a vessel in passage through the territorial sea are not, because of such passage, subject to -the judicial competence of the coastal State. Infractions committed on board the vessel do not, as such, fall within the judicial competence of the coastal State.

However, this competence can be exercised in cases of infraction of the police and navigation laws and regulations promulgated by a State. In every case, the infractions mentioned above under No. III, 1, 2 and 3, fall within the judicial competence of the State.

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(24 September 1957)

Session of Amsterdam – 1957

Judicial Redress Against the Decisions of International Organs

(Nineteenth Commission, Rapporteur : Mr Wilhelm Wengler)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that every international organ and every international organization has the duty to respect the law and to ensure that the law be respected by its agents and officials ; that the same duty is incumbent on States as members of such organs or organizations.

I.

Is of the opinion that the opportunity and the possibilities of establishing judicial redress against the decisions of international organs depend essentially on the nature, structure and powers of the organs or organizations under consideration.

In consequence, the establishment of this control, the means of redress which it implies and the effects which would follow there from do not appear realizable in the present state of affairs, except through the conclusion of treaties or other instruments particularly suited to each organ or organization.

II.

Is of the opinion that judicial control of the decisions of international organs must have as its object the assurance of respect for rules of law which are binding on the organ or organization under consideration, notably :

- a) general international law,
- b) the constitutional provisions applicable to that organ or organization and those which regulate the functioning of the international organ,

- c) the rules established by that organ or organization whether they concern the States members, the agents and officials of the organ or organization, or private persons to the extent that their rights and interests are involved,
- d) the provisions of applicable treaties,
- e) any provision of internal law applicable to the juridical relations of that organ or organization.

III.

1. As a minimum, expresses the wish that, for every particular decision of an international organ or organization which involves private rights or interests, there be provided appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from such a decision.
2. Except for cases in which a special jurisdictional regime is provided, (the Institute) is of the opinion that it is desirable that the International Court of Justice be called upon to decide as to grievances based upon the lack of competence or grave irregularities of procedure of judicial or arbitral organs charged with deciding the differences envisaged in the preceding paragraph.

IV.

Draws the attention of draftsmen of treaty provisions or other instruments relative to the establishment of judicial control of the decisions of international organs particularly to the following points which they should bear in mind :

- a) the indication of States, international organs or organizations, collectivities or private persons to which means of redress would be available,
- b) the question who is to defend the validity of the decision attacked,
- c) the need to establish methods for notifying member States, and other interested parties, of a pending action and for determining their right to intervene, as well as the effects of a decision for those who have not been party to the proceedings,
- d) the choice between a general clause and a clause limiting the cases in which redress should be available,
- e) the question whether and to what extent decisions involving the application of technical knowledge should be submitted to jurisdictional review and the nature of the assistance which experts might be called upon to give in such cases,
- f) the question of the time limits for invoking measures of redress and the effect of such an invocation on the execution of the decision appealed from (whether or not it should be suspended),

g) the determination of the juridical significance of the decision of the tribunal seized of the dispute (declaration of illegality, annulment, award of damages and interests, etc.),

h) the degree to which the invocation of proceedings of redress should exclude any other jurisdictional review.

*

(24 September 1957)

Session of Amsterdam – 1957

Arbitration in Private International Law

(Fourteenth Commission, Rapporteur : Mr Etienne Szászy)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that it appears to be of the greatest utility that the conflicts of laws to which private arbitration gives rise should be submitted to a single system of private international law,

Adopts the following Resolution :

A. General Questions

First Article

Parties shall be free in the arbitral agreement (submission or arbitral clause) to exercise their free choice and to indicate the place where the arbitral tribunal must sit ; this choice shall imply that they intend to submit the private arbitration to the law of the seat of the country arbitration, to the extent indicated by the following provisions.

If the parties have expressly chosen the law applicable to the arbitral agreement, without settling the seat of the arbitral tribunal, they shall be deemed tacitly to have agreed that the tribunal shall sit in the territory of the country the law of which has been chosen by them.

If the parties have indicated in the arbitral agreement the country of the seat of the arbitral tribunal, and adopted the law of another country to regulate the arbitral agreement, that seat shall be settled in the following manner :

- a) It shall be in the country of which the law has been chosen, when the law in both states establishes the principle that the arbitration should take place in the territory of the state of which the law has been chosen by the parties ;

b) In the country where the seat has been fixed by the parties, when the rule that the arbitration must take place in the territory of the state of which the law has been chosen by the parties is not admitted by the laws of either of these two states, or is only admitted by one of them.

Article 2

Where no seat has been settled by virtue of the first article hereof, the parties shall be deemed to have given the arbitrators the right to choose the place where the arbitral tribunal shall sit, and this choice shall determine the law applicable to the arbitration to the extent indicated in the following provisions.

In the case where the arbitrators are to sit successively in different states, the seat of the arbitral tribunal shall be deemed to be established at the place of their first meeting, unless the arbitrators expressly decide in favour of some other place.

If the arbitrators have their habitual residence in different states, and they proceed by virtue of the law, or of a submission, solely by way of exchange of letters, without meeting, the seat of the arbitral tribunal shall be deemed to be established in the place of the residence of the umpire ; if there is no umpire, the seat of the arbitral tribunal shall be fixed by mutual agreement or by the majority of the arbitrators ; in the case of a single arbitrator, his place of residence shall be the seat of the arbitration. For all these cases the law applicable to private arbitration shall be that of the seat settled by one or other of the methods indicated, to the extent determined by the following provisions.

Article 3

The arbitral award shall be deemed to have been rendered at the seat of the arbitral tribunal and on the day of its signature by the arbitrators, wherever those signatures have been subscribed.

B. Capacity and Power to Submit to Arbitration

Article 4

Capacity to submit to arbitration shall be regulated by the law indicated according to the rules of choice of law in force at the seat of the arbitral tribunal.

Article 5

The validity of an arbitral clause shall be regulated by the law of the seat of the arbitral tribunal.

Subject to this reservation, the power to submit to arbitration shall be regulated by the law applicable to the substance of the difference ; this law shall be determined by the rules of choice of law of the state where the arbitral tribunal shall sit.

C. Independence of the arbitral agreement in relation to the difference

Article 6

The conditions for the validity of a submission and of the arbitral clause shall not necessarily be subject to the same law as that applicable to the difference. These conditions shall be regulated by the law in force in the country of the seat of the arbitral tribunal, without it being necessary to distinguish whether the arbitral clause is or is not an integral part of the contract giving rise to a difference.

D. Form

Article 7

The form of an arbitral agreement shall be regulated by the law in force in the country where it has been concluded. Nevertheless the submission or the arbitral clause which does not fulfill the formal requirements of such law shall be valid if the forms required by the law of the place of the seat of the arbitral tribunal have been observed.

The same principle shall apply to the form of the act nominating the arbitrators taking place after the conclusion of the arbitration contract and to the compromise putting an end to a difference.

The provisions of the public policy of the law of the place where the arbitral tribunal sits shall nevertheless be obligatory.

E. Arbitrators and Procedure

Article 8

The contractual relations between the parties and the arbitrators shall be regulated by the law of the place where the arbitral tribunal shall sit.

This law shall also indicate the composition of the arbitral tribunal and the conditions to be observed by the arbitrators in order to carry out their function. It shall also apply to the reasons for challenging arbitrators, to their removal and to their resignation, to their consequences, as well as to the reasons for putting an end to the arbitration.

The authorities competent to proceed to the nomination of arbitrators or of an umpire, when they have not been designated by the parties, shall be those indicated by the law of the seat of the arbitral tribunal.

Article 9

The law of the place of the seat of the arbitral tribunal shall determine whether the procedure to be followed by the arbitrators may be freely established by the parties, and whether, failing agreement on this subject between the contracting parties, it may be settled by the arbitrators or should be replaced by the provisions applicable to procedure before the ordinary courts.

Article 10

The law of the place of the seat of the arbitral tribunal shall alone be applicable to decide whether arbitrators are competent to determine the nullity of the arbitral agreement when this is invoked before them by one of the parties.

F. Law Applicable to the Substance of the Difference

Article 11

The rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference.

Within the limits of such law, arbitrators shall apply the law chosen by the parties or, in default of any express indication by them, shall determine what is the will of the parties in this respect having regard to all the circumstances of the case.

If the law of the place of the seat of the arbitral tribunal so authorises them, the parties may give the arbitrators power to decide *ex cequo et bono* or according to the rules of professional bodies.

G. Appeal

Article 12

The law of the place of the seat of the arbitral tribunal shall apply to the deposit and to the formalities giving the award the effect of *res judicata* and rendering it executory, as well as to the conditions relating to methods of appeal against the award of the arbitrators which shall be open to the parties ; such law shall also determine the authorities before which these different legal measures may be sought.

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(26 September 1957)

Session of Neuchâtel – 1959

International Recognition and Enforcement of Arbitral Awards

(Fourteenth Commission, Rapporteur : Mr Georges Sanser-Hall)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Having adopted on the 26 September 1957, at its Amsterdam Session the Resolution relating to the conflicts of laws to which private arbitration may give rise ;

Considering that it is fitting to complete that Resolution by provisions relating to the international recognition and enforcement of arbitral awards ;

Bearing in mind the Convention on the recognition and enforcement of foreign arbitral awards concluded in New York on 10 June 1958 ;

Adopts the following Resolution :

First Article

At whatever place an award be given, all States shall recognize the existence and the effect of submissions to arbitrate and of arbitral clauses valid according to the provisions of the Resolution adopted by the Institute at its Amsterdam Session in 1957. Every court before which one party begins judicial proceedings in violation of a submission to arbitrate or of an arbitral clause shall disavow itself of the matter at the request of the other party.

If one of the parties before the arbitral tribunal raises the defence that the submission or the arbitral clause is invalid, the judge shall settle the question by applying the law competent by virtue of the Amsterdam Resolution ; he may also refer the parties to the arbitral tribunal, subject to any right of appeal to the courts laid down by the law of the seat of the arbitral tribunal.

Article 2

Subject to what is said in article 3, the recognition and enforcement of an arbitral award given according to the terms of the Amsterdam Resolution shall be provided by each State where it is invoked as soon as it has the force of *res judicata* according to the law of the country of the seat of the arbitral tribunal, without any need to proceed to examine the merits.

Article 3

The recognition or the enforcement of a foreign arbitral award may only be refused in the following cases :

1. when the parties have not received due notice, or have not been properly represented ;
2. when the award is contrary to a decision which has become *res judicata* concerning the same subject matter and between the same parties after the conclusion of the arbitral agreement, in a court of the country where the award is invoked ;
3. when the arbitrators have exceeded their competence or have not pronounced upon all the questions submitted to them by the parties ; or if the award does not give reasons when it should do so ;
4. when the award relates to a dispute which because of its nature is not capable of being regulated by means of arbitration according to the law of the country where it is invoked ;
5. when the award is manifestly incompatible with public policy of the place where it is invoked.

Article 4

The party who requests the recognition or the enforcement of a foreign arbitral award should include in his request :

1. the original award or a copy certifying its authenticity according to the law of the place of the seat of the arbitral tribunal ;
2. the original arbitration agreement or a copy certifying its authenticity ;
3. documentary evidence that the award has the effect of *res judicata* in the place of the seat of the arbitral tribunal.

Article 5

The law of the place where the foreign arbitral award is invoked shall govern the procedure and the effect of the recognition or of any order for enforcement (exequatur).

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(11 September 1959)

ANNEX

Arbitration in Private International Law

Complete Text of the Articles Adopted at Amsterdam (1957) and at Neuchâtel (1959)

A. General Questions

First Article

Parties shall be free in the arbitral agreement (submission or arbitral clause) to exercise their free choice and to indicate the place where the arbitral tribunal must sit ; this choice shall imply that they intend to submit the private arbitration to the law of the seat of the country arbitration, to the extent indicated by the following provisions.

If the parties have expressly chosen the law applicable to the arbitral agreement, without settling the seat of the arbitral tribunal, they shall be deemed tacitly to have agreed that the tribunal shall sit in the territory of the country the law of which has been chosen by them.

If the parties have indicated in the arbitral agreement the country of the seat of the arbitral tribunal, and adopted the law of another country to regulate the arbitral agreement, that seat shall be settled in the following manner :

- a) It shall be in the country of which the law has been chosen, when the law in both states establishes the principle that the arbitration should take place in the territory of the state of which the law has been chosen by the parties ;
- b) In the country where the seat has been fixed by the parties, when the rule that the arbitration must take place in the territory of the state of which the law has been chosen by the parties is not admitted by the laws of either of these two states, or is only admitted by one of them.

Article 2

Where no seat has been settled by virtue of the first article hereof, the parties shall be deemed to have given the arbitrators the right to choose the place where the arbitral tribunal shall sit, and this choice shall determine the law applicable to the arbitration to the extent indicated in the following provisions.

In the case where the arbitrators are to sit successively in different states, the seat of the arbitral tribunal shall be deemed to be established at the place of their first meeting, unless the arbitrators expressly decide in favour of some other place.

If the arbitrators have their habitual residence in different states, and they proceed by virtue of the law, or of a submission, solely by way of exchange of letters, without meeting, the seat of the arbitral tribunal shall be deemed to be established in the place of the residence of the umpire ; if there is no umpire, the seat of the arbitral tribunal shall be fixed by mutual agreement or by the majority of the arbitrators ; in the case of a single arbitrator, his place of residence shall be the seat of the arbitration. For all these cases the law applicable to private arbitration shall be that of the seat settled by one or other of the methods indicated, to the extent determined by the following provisions.

Article 3

The arbitral award shall be deemed to have been rendered at the seat of the arbitral tribunal and on the day of its signature by the arbitrators, wherever those signatures have been subscribed.

B. Capacity and Power to Submit to Arbitration

Article 4

Capacity to submit to arbitration shall be regulated by the law indicated according to the rules of choice of law in force at the seat of the arbitral tribunal.

Article 5

The validity of an arbitral clause shall be regulated by the law of the seat of the arbitral tribunal.

Subject to this reservation, the power to submit to arbitration shall be regulated by the law applicable to the substance of the difference ; this law shall be determined by the rules of choice of law of the state where the arbitral tribunal shall sit.

C. Independence of the arbitral agreement in relation to the difference

Article 6

The conditions for the validity of a submission and of the arbitral clause shall not necessarily be subject to the same law as that applicable to the difference. These conditions shall be regulated by the law in force in the country of the seat of the arbitral tribunal, without it being necessary to distinguish whether the arbitral clause is or is not an integral part of the contract giving rise to a difference.

D. *Form*

Article 7

The form of an arbitral agreement shall be regulated by the law in force in the country where it has been concluded. Nevertheless the submission or the arbitral clause which does not fulfill the formal requirements of such law shall be valid if the forms required by the law of the place of the seat of the arbitral tribunal have been observed.

The same principle shall apply to the form of the act nominating the arbitrators taking place after the conclusion of the arbitration contract and to the compromise putting an end to a difference.

The provisions of the public policy of the law of the place where the arbitral tribunal sits shall nevertheless be obligatory.

E. *Arbitrators and Procedure*

Article 8

The contractual relations between the parties and the arbitrators shall be regulated by the law of the place where the arbitral tribunal shall sit.

This law shall also indicate the composition of the arbitral tribunal and the conditions to be observed by the arbitrators in order to carry out their function. It shall also apply to the reasons for challenging arbitrators, to their removal and to their resignation, to their consequences, as well as to the reasons for putting an end to the arbitration.

The authorities competent to proceed to the nomination of arbitrators or of an umpire, when they have not been designated by the parties, shall be those indicated by the law of the seat of the arbitral tribunal.

Article 9

The law of the place of the seat of the arbitral tribunal shall determine whether the procedure to be followed by the arbitrators may be freely established by the parties, and whether, failing agreement on this subject between the contracting parties, it may be settled by the arbitrators or should be replaced by the provisions applicable to procedure before the ordinary courts.

Article 10

The law of the place of the seat of the arbitral tribunal shall alone be applicable to decide whether arbitrators are competent to determine the nullity of the arbitral agreement when this is invoked before them by one of the parties.

F. *Law Applicable to the Substance of the Difference*

Article 11

The rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference.

Within the limits of such law, arbitrators shall apply the law chosen by the parties or, in default of any express indication by them, shall determine what is the will of the parties in this respect having regard to all the circumstances of the case.

If the law of the place of the seat of the arbitral tribunal so authorises them, the parties may give the arbitrators power to decide *ex cequo et bono* or according to the rules of professional bodies.

G. *Appeal*

Article 12

The law of the place of the seat of the arbitral tribunal shall apply to the deposit and to the formalities giving the award the effect of *res judicata* and rendering it executory, as well as to the conditions relating to methods of appeal against the award of the arbitrators which shall be open to the parties ; such law shall also determine the authorities before which these different legal measures may be sought.

H. *International Recognition and Enforcement of Arbitral Awards*

Article 13

At whatever place an award be given, all States shall recognize the existence and the effect of submissions to arbitrate and of arbitral clauses valid according to the provisions of the Resolution adopted by the Institute at its Amsterdam Session in 1957. Every court before which one party begins judicial proceedings in violation of a submission to arbitrate or of an arbitral clause shall disseize itself of the matter at the request of the other party.

If one of the parties before the arbitral tribunal raises the defence that the submission or the arbitral clause is invalid, the judge shall settle the question by applying the law competent by virtue of the Amsterdam Resolution ; he may also refer the parties to the arbitral tribunal, subject to any right of appeal to the courts laid down by the law of the seat of the arbitral tribunal.

Article 14

Subject to what is said in article 3, the recognition and enforcement of an arbitral award given according to the terms of the Amsterdam Resolution shall be provided by each State where it is invoked as soon as it has the force of *res judicata* according to the law of the country of the seat of the arbitral tribunal, without any need to proceed to examine the merits.

Article 15

The recognition or the enforcement of a foreign arbitral award may only be refused in the following cases :

1. when the parties have not received due notice, or have not been properly represented ;
2. when the award is contrary to a decision which has become *res judicata* concerning the same subject matter and between the same parties after the conclusion of the arbitral agreement, in a court of the country where the award is invoked ;
3. when the arbitrators have exceeded their competence or have not pronounced upon all the questions submitted to them by the parties ; or if the award does not give reasons when it should do so ;
4. when the award relates to a dispute which because of its nature is not capable of being regulated by means of arbitration according to the law of the country where it is invoked ;
5. when the award is manifestly incompatible with public policy of the place where it is invoked.

Article 16

The party who requests the recognition or the enforcement of a foreign arbitral award should include in his request :

1. the original award or a copy certifying its authenticity according to the law of the place of the seat of the arbitral tribunal ;
2. the original arbitration agreement or a copy certifying its authenticity ;
3. documentary evidence that the award has the effect of *res judicata* in the place of the seat of the arbitral tribunal.

Article 17

The law of the place where the foreign arbitral award is invoked shall govern the procedure and the effect of the recognition or of any order for enforcement (exequatur).

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Session of Neuchâtel – 1959

Compulsory Jurisdiction of International Courts and Tribunals

(Twenty-fourth Commission, Rapporteur : Mr C. Wilfred Jenks)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Having examined the present situation as regards the compulsory jurisdiction of international courts and arbitral tribunals ;

Convinced that the maintenance of justice by submission to law through acceptance of recourse to international courts and arbitral tribunals is an essential complement to the renunciation of recourse to force in international relations ;

Considering that more general acceptance of compulsory jurisdiction would be an important contribution to respect for law and noting with concern that at the present time the development of such jurisdiction lags seriously behind the needs of satisfactory administration of international justice ;

Recognising the importance of confidence as a factor in the wider acceptance of international jurisdiction ;

Considering it essential that Article 36, paragraph 2, of the Statute of the International Court of Justice should remain an effective means for securing progressively more general acceptance of the compulsory jurisdiction of the Court ;

Recalling the Resolutions concerning the principle of compulsory jurisdiction adopted by the Institute in 1877, 1904, 1921, 1936, 1937, 1954, 1956 and 1957, and enumerated in the Annex to the present Resolution, and in particular the *voeu* concerning the reservation in respect of matters of domestic jurisdiction adopted at Aix-en-Provence in 1954 and the Resolution concerning a model clause conferring compulsory jurisdiction on the International Court of Justice for inclusion in conventions adopted at Granada in 1956 ;

Adopts the following Resolutions :

1. In an international community the members of which have renounced recourse to force and undertaken by the Charter of the United Nations to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, recourse to the International Court of Justice or to another international court or arbitral tribunal constitutes a normal method of settlement of legal disputes as defined in Article 36, paragraph 2, of the Statute of the International Court of Justice.

Consequently, recourse to the International Court of Justice or to another international court or arbitral tribunal can never be regarded as an unfriendly act towards the respondent State.

2. It is of the highest importance that engagements to accept the jurisdiction of the International Court of Justice undertaken by States should be effective in character and should not be illusory. In particular, States which accept the compulsory jurisdiction of the Court in virtue of Article 36, paragraph 2, of the Statute should do so in precise terms which respect the right of the Court to settle any dispute concerning its own jurisdiction in accordance with the Statute and do not permit States to elude their submission to international jurisdiction.

It is highly desirable that States having excluded from their acceptance of the compulsory jurisdiction of the International Court of Justice in virtue of Article 36, paragraph 2, of the Statute of the Court matters which are essentially within their domestic jurisdiction as determined by their own government, or having made similar reservations, should withdraw such reservations having regard to the judgments given and opinions expressed in the *Norwegian Loans* and *Interhandel* Cases and to the risk to which they expose themselves that other States may invoke such reservations against them.

3. In order to maintain the effectiveness of the engagements undertaken, it is highly desirable that declarations accepting the jurisdiction of the International Court of Justice in virtue of Article 36, paragraph 2, of the Statute of the Court should be valid for a period which, in principle, should not be less than five years. Such declarations should also provide that on the expiration of each such period they will, unless notice of denunciation is given not less than twelve months before the expiration of the current period, be tacitly renewed for a new period of not less than five years.

4. With a view to ensuring the effective application of general conventions, it is important to maintain and develop the practice of inserting in such conventions a clause, binding on all the parties, which makes it possible to submit disputes relating to the interpretation or application of the convention either to the International Court of Justice by unilateral application or to another international court or arbitral tribunal; this clause might be based on the provisions of the Resolution concerning a model clause conferring compulsory jurisdiction on the International Court of Justice for inclusion in conventions adopted by the Institute in 1956.

5. In the interest of world economic development it is desirable that economic and financial agreements concerning development schemes, whether concluded between States or concluded with States by international organisations or international public corporations, should contain a clause conferring on the International Court of Justice (so far as the Statute of the Court allows) or on another appropriate international court or arbitral tribunal compulsory jurisdiction in any dispute relating to their interpretation or application.

6. Without prejudice to the possibility of international remedies being made available directly to private parties, certain economic and financial agreements between States could usefully contain a general provision for compulsory jurisdiction in respect of claims brought by one of the States concerned (either acting on its own behalf or espousing a claim on behalf of one of its nationals) against one of the other States concerned.

Voeu

The Institute of International Law

Draws the attention of institutions responsible for legal education, of professional bodies of jurists and legal practitioners, and of all those engaged in the publication of judicial decisions to the need for strengthening the confidence of peoples and governments in international adjudication by promoting wider and more thorough knowledge of the working and decisions of the International Court of Justice and other international courts and arbitral tribunals ; and

Expresses the hope that public and private bodies, both national and international, will consider what measures should be taken to promote wider diffusion of the decisions of international courts and tribunals among jurists and legal practitioners.

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(11 September 1959)

ANNEX

Resolutions and Voeu of the Institute on the Principle of Compulsory Jurisdiction

1. Resolution on the compromis clause to be inserted in treaties (12 September 1877, Zurich Session)
*Tableau general*¹ No 45, p. 145 ; *Annuaire* 2 (1878), p. 160.
2. Resolution on recourse to the Permanent Court of Arbitration (26 September 1904, Edinburgh Session)
Tableau general No 46a, pp. 145, 146 ; *Annuaire* 20 (1904), p. 210.
3. Resolution on signature of the optional clause of the Permanent Court of International Justice (6 October 1921, Rome Session).
Tableau general N° 52, pp. 159, 160 ; *Annuaire* 28 (1921), pp. 201, 202.
4. Resolution on the extension of compulsory arbitration (14 October 1929, New York Session).
Tableau general N° 46b, pp. 146, 147 ; *Annuaire* 35 (1929), II, pp. 303, 304.
5. Resolution on the jurisdictional clause in conventions of international unions, notably those relating to industrial property and literary and artistic property (24 April 1936, Brussels Session)
Tableau general N° 88, pp. 273-276 ; *Annuaire* 39 (1936), II, pp. 305-310.
6. Resolution on the legal nature of advisory opinions of the Permanent Court of International Justice and on their value and significance in international law (3 September 1937, Luxembourg Session).
Tableau general N° 55, pp. 162, 163 ; *Annuaire* 40 (1937), pp. 272, 273.
7. *Voeu* concerning the reservation in respect of matters of domestic jurisdiction (29 April 1954, Aix-en-Provence Session).
Tableau general N° 2b, p. 4 ; *Annuaire* 45 (1954), II, p. 293.
8. Resolution concerning a model clause conferring compulsory jurisdiction on the International Court of Justice for inclusion in conventions (17 April 1956, Granada Session).
Tableau general N° 53, pp. 160, 161 ; *Annuaire* 46 (1956), pp. 360-362.
9. Resolution on judicial redress against decisions of international organisations (25 September 1957, Amsterdam Session)
Annuaire 47 (1957), II, pp. 476-479.

¹ *Tableau général des Résolutions (1873-1956)*, Bâle, 1957.

Session of Salzburg – 1961

**Utilisation of Non-maritime International Waters
(Except for Navigation)**

(Ninth Commission, Rapporteur : Mr Juraj Andrassy)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that the economic importance of the use of waters is transformed by modern technology and that the application of modern technology to the waters of a hydrographic basin which includes the territory of several States affects in general all these States, and renders necessary its restatement in juridical terms,

Considering that the maximum utilization of available natural resources is a matter of common interest,

Considering that the obligation not to cause unlawful harm to others is one of the basic general principles governing neighborly relations.

Considering that this principle is also applicable to relations arising from different utilizations of waters.

Considering that in the utilization of waters of interest to several States, each of them can obtain, by consultation, by plans established in common and by reciprocal concessions, the advantages of a more rational exploitation of a natural resource,

Recognizes the existence in international law of the following rules, and formulates the following recommendations :

Article 1

The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States.

Article 2

Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin.

Article 3

If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances.

Article 4

No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage.

Article 5

Works or utilizations referred to in the preceding article may not be undertaken except after previous notice to interested States.

Article 6

In case objection is made, the States will enter into negotiations with a view to reaching an agreement within a reasonable time.

For this purpose, it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned.

Article 7

During the negotiations, every State must, in conformity with the principle of good faith, refrain from undertaking the works or utilizations which are the object of the dispute or from taking any other measures which might aggravate the dispute or render agreement more difficult.

Article 8

If the interested States fail to reach agreement within a reasonable time, it is recommended that they submit to judicial settlement or arbitration the question whether the project is contrary to the above rules.

If the State objecting to the works or utilizations projected refuses to submit to judicial settlement or arbitration, the other State is free, subject to its responsibility, to go ahead while remaining bound by its obligations arising from the provisions of articles 2 to 4.

Article 9

It is recommended that States interested in particular hydrographic basins investigate the desirability of creating common organs for establishing plans of utilization designed to facilitate their economic development as well as to prevent and settle disputes which might arise.

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(11 September 1961)

Session of Salzburg – 1961

International Conciliation

(Thirtieth Commission, Rapporteur : Mr Henri Roulin)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that by the provisions of the Charter of the United Nations, States have the duty to seek by peaceful means the settlement of international disputes,

Acknowledging that nevertheless a certain number of disputes have remained unsettled in the course of recent years, the Parties having neglected or refused recourse to judicial settlement or arbitration,

Considering that such a state of affairs is prejudicial to international understandings,

Observing, on the other hand, that the procedure of international conciliation has been employed with success in a number of cases during recent years,

Draws the attention of States to the advantage, for a sound appreciation by them of questions arising from a dispute and for its peaceful solution, of the assistance of a small number of competent and impartial men of good will,

For this reason again *recommends* States to conclude, if they have not already done so, conventions establishing permanent bilateral commissions of conciliation as provided by different treaties and, in particular, by the General Act of 1928-1949, even if they are not disposed to undertake any engagement to submit to these commissions all disputes or certain categories of disputes,

Emphasizes that Parties willing to have recourse to the procedure of conciliation are free to determine the methods according to their particular preferences, either when establishing a permanent or ad hoc Commission or at a later date,

Declares that no admission or proposal formulated during the course of the conciliation procedure, either by one of the Parties or by the Commission, can be considered as prejudicing or affecting in any manner the rights or the contentions of either Party in the event of the failure of the procedure ; and, similarly, the acceptance by one Party of a proposal of settlement in no way implies any admission by it of the considerations of law or of fact which may have inspired the proposal of settlement, and

Recommends that States wishing either to conclude a bilateral conciliation convention or to submit a dispute which has already arisen to conciliation procedures before an *ad hoc* Commission, should adopt the rules contained in the annexed Regulations which the Institute substitutes for those adopted 2 September 1927, at the Session of Lausanne ; and that, in the absence of such adoption, the members of Commissions of Conciliation should be guided by these rules for the solution of questions entrusted to them by the Parties.

Regulations on the Procedure of International Conciliation

Sec. 1. Definition of Conciliation

Article 1

For the purpose of the present provisions, "conciliation" means a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or on an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.

Sec. 2. Procedure for Conciliation

Article 2

The Conciliation Commission is seised of the dispute in the manner agreed upon by the Parties. In the absence of such agreement, the Commission can be seised not only by a joint application of the Parties, but by an application by one of them, addressed to the President and indicating in summary form the object of the dispute. On receiving a unilateral application, the President is responsible for seeing that it has been communicated to the other Party and that the latter accepts recourse to conciliation.

Article 3

It is desirable that any application by which the Commission is seised of a dispute should contain the designation of the agent or agents who will represent the Party or Parties making the application.

Should occasion arise, the President of the Commission may request any Party to make such a designation.

He then designates the place and date of the first meeting to which the members of the Commission and the agents are summoned.¹

Article 4

At its first meeting, the Commission will name its secretary and, taking account of such circumstances, among others, as the time which may have been granted to it for the completion of its task, will determine the method for proceeding to the examination of the affair, whether, in particular, the Parties should be invited to present written pleadings, and in what order and with what time-limits such pleadings must be presented, as well as the time and the place where the agents and counsel will, should occasion arise, be heard.

Article 5

If the Commission establishes that the Parties are in disagreement on a question of fact, it may proceed, either at their request or *ex officio*, to the consultation of experts, to investigations on the spot, or to the interrogation of witnesses. In such case, the provisions of Part III of The Hague Convention of 18 October 1907 on the Pacific Settlement of International Disputes are applicable, except for article 35 which requires the Commission to set forth in a report the facts resulting from the investigation.

Article 6

If the Commission fails to achieve general agreement, it can decide by majority vote, without being obliged to indicate the number of votes.

Sec. 3. Conclusion of the Commission's Work

Article 7

At the conclusion of its examination, the Commission will attempt to define the terms of a settlement susceptible of being accepted by the Parties. In this connection, it may proceed to an exchange of views with the agents of the Parties, who may be heard either together or separately.

Once decided upon, the terms of the proposed settlement will be communicated by the President to the agents of the Parties with a request to inform him within a stated period whether or not the governments accept the proposed settlement. The President of the Commission may accompany his communication with a statement, either orally, or in writing, of the principal reasons which, in the opinion of the Commission, appear likely to persuade the Parties to accept the settlement. He will refrain in this statement from setting forth definitive conclusions with reference to disputed facts or from formally deciding questions of law involved, unless the Commission has been requested to do so by the Parties.

¹ Attention is drawn to the fact that the Administrative Council of the Permanent Court of Arbitration places its premises and staff at the disposition of States Parties to its Statute who resort to conciliation.

Article 8

If the Parties accept the proposed settlement, a *procès-verbal* will be drawn up setting forth its terms and will be signed by the President and by the secretary. A copy signed by the President and the secretary will be handed to each Party.

Article 9

If any of the Parties do not accept the settlement and the Commission decides that no purpose will be served by attempting to reach an agreement between the Parties on the terms of a different settlement, a *procès-verbal* will be drawn up as provided above, stating, without setting forth the terms of the proposed settlement, that the Parties were unable to accept the conciliation proposal.

Sec. 4. Secrecy of the Proceedings

Article 10

The meetings of the Commission will be secret ; the members of the Commission and the agents will refrain from divulging any documents or oral statements, as well as any *communiqué* relating to the progress of the proceedings which has not received the approval of both agents.

Should any indiscretion occur while the proceedings are pending, the Commission shall have power to determine its possible effect on the continuation of the proceedings.

Article 11

No declaration or communication of the agents or members of the Commission made with regard to the merits of the affair will be entered in the *procès-verbaux* of the meetings except with the permission of the agent or member of the Commission making it. On the other hand, written or oral reports of experts, the reports of investigations on the spot and depositions of witnesses will be annexed to the *procès-verbaux* of the meetings, unless, in a particular case, the Commission decides otherwise.

Article 12

Certified copies of the *procès-verbaux* of the meetings and copies of the annexes will be delivered to the agents through the secretary of the Commission unless, in a particular case, the Commission decides otherwise.

Article 13

Except for evidential material which may be derived from reports of experts, investigations on the spot or interrogations of witnesses, of which the agents will have received the *procès-verbaux*, the obligation to respect the secrecy of the proceedings and deliberations continues for the Parties as well as for the members of the Commission after the closure of the proceedings and even includes the terms of settlement in case the Commission has succeeded in its task of conciliation, unless, by common agreement, the Parties authorize a total or partial publication of the documents. When the Commission has completed its task, the Parties will consider whether or not to authorize the total or partial publication of the documents. The Commission may address recommendations to them on the subject.

Article 14

At the termination of the proceedings, the President of the Commission will deposit the documents in the archives of a government or of an international organization chosen by the Parties; the secretariat of the Permanent Court of Arbitration appears to be particularly well qualified for this purpose. The depositary authority will preserve the secrecy of the archives within the limits indicated above.

Sec. 5. Expenses

Article 15

Expenses connected with the conciliation procedure, including expenses occasioned by investigations which the Commission shall have judged it useful to institute, will be borne in equal shares by the Parties.

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(11 September 1961)

Session of Brussels – 1963

Conflicts of Laws in the Law of the Air

(Twenty-seventh Commission, Rapporteur : Mr Alexandre Makarov)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalls its earlier Resolutions relating to the problems of the Law of the Air, in particular the Resolution on the legal status of aircraft (Madrid, Session of 1911), the Resolution on international aerial navigation (Lausanne, Session of 1927) and the Draft Convention governing criminal jurisdiction in case of crimes committed on board private aircraft (Luxembourg, Session of 1937) ;

Restricts the object of the present Resolution to conflicts of laws in matters of private air law, without ignoring the importance of settling questions of jurisdiction ;

Postpones consideration of any problems that may be raised by the case of aircraft that might have an international character ;

Considers that, insofar as the ideal of adopting a uniform law of the air cannot be attained, it is opportune to adopt uniform laws of conflict in this matter ;

Taking as a starting point the principle that general rules of conflicts of laws should be applied in this special field insofar as the nature of aviation itself and the nature of aerial transport do not require the creation of special rules of conflict ;

Adopts the following Resolution :

Section 1

For the purpose of the following sections, the national law of the aircraft shall be that of the State in the registers of which the aircraft has been entered.

Nevertheless, save as regards the rights *in rem* covered by section 2, the national law of an aircraft chartered without crew by an operator who is the subject of a State other than the State of registration of the aircraft, shall, for the period of the Charter, be that of the State of which the Charterer is a subject.

Section 2

Rights *in rem* and private law claims in respect of an aircraft shall be governed by the law of the nationality of the aircraft.

Nevertheless creditors entitled to sums due for rescue of the aircraft and to special expenses essential for the maintenance of the aircraft may claim the preferences and the order of priority recognised to them by the law of the State where rescue or maintenance operations have been terminated.

A change of nationality of the aircraft shall not affect rights already acquired.

Section 3

The hiring and affreightment of aircraft shall be regulated by the law to which the parties have indicated their intention to submit them.

If the parties have not indicated their intention in this matter, the chartering and affreightment shall be subject to the national law of the aircraft.

Section 4

The contract of employment of the crew of an aircraft shall be governed by the law to which the parties have indicated their intention to submit it.

If the parties have not indicated their intention in this matter, the contract shall be governed by the national law of the aircraft.

Section 5

The contract of carriage of passengers and goods shall be governed by the law to which the parties have indicated their intention to submit it.

When the parties have not settled the law applicable, the contract shall be governed by the law of the principal place of business of the carrier.

Section 6

In case of an aerial collision which occurs in an area subject to State sovereignty, the law of the place where the collision has occurred shall apply.

In case of an aerial collision which has occurred in a place not subject to State sovereignty, the national law of the aircraft, if it is common to both parties, shall apply. In the absence of such a law, the law of the court seized shall apply.

Article 7

Obligations arising from any assistance or rescue carried out between aircrafts in areas subject to a single State sovereignty shall be governed by the law of the place where it has been rendered.

When assistance or salvage has been effected in an area not subject to State sovereignty, the national law of the assisted aircraft shall apply.

Section 8

Damage caused by aircraft to third parties on the ground shall be governed by the law of the place where it has been caused.

If damage has been caused in an area not subject to State sovereignty, the national law of the aircraft shall apply.

Section 9

If a legal act has taken place or a fact giving rise to legal liability has occurred on board of an aircraft in flight in an area not subject to State sovereignty, or whenever it is not possible to determine the territory over which the flight has taken place at the time of the act or fact giving rise to legal liability, the national law of the aircraft is substituted for the law of the place where such act or fact has occurred.

If the act covered by the preceding paragraph relates to goods situated on board an aircraft, the national law of the aircraft shall be substituted for the law of the situation of the goods.

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(11 September 1963)

Session of Brussels – 1963

The Legal Regime of Outer Space

(Second Commission, Rapporteur : Mr C. Wilfred Jenks)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that the legal regime of the exploration and utilisation of outer space and celestial bodies should be inspired by a spirit of universality ;

Acknowledging the common interest of mankind in the exclusive dedication of outer space to peaceful purposes in accordance with the Charter of the United Nations ;

Noting the Resolutions on international cooperation in the peaceful uses of outer space adopted unanimously by the General Assembly of the United Nations on 20 December 1961 and 14 December 1962 and the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water signed at Moscow on 6 August 1963 ;

Having regard to the urgency of international regulation of the matter in view of the rapidity of scientific and technical progress ;

Recognizes the validity of the following principles and would welcome their inclusion in a generally accepted treaty or declaration governing the legal regime of outer space :

1. Outer space and the celestial bodies are not subject to any kind of appropriation, they are free for exploration and use by all States for exclusively peaceful purposes in conformity with the following provisions.
2. No space object shall be launched otherwise than under the authority of a State. Each State shall ensure that the utilisation of every space object launched under its authority complies with the applicable international rules.
3. Every launching of a space object shall be registered by the State under the authority of which the launching took place with the United Nations or a special body to be created ; the registration shall be effected promptly and with particulars to be agreed.

4. Every space object shall bear marks of identification showing its origin and use call signals making it possible to identify the State under the authority of which the launching took place.
5. Every space object launched in accordance with the foregoing provisions shall remain subject to the jurisdiction of the State under the authority of which it was launched.
6. The State establishing a space installation is required to ensure good order and safety at the installation. Subject to any subsequent international agreement, persons using, and occurrences at, any space installation are subject to the jurisdiction of the State having established the installation.
7. All States shall ensure that space telecommunications comply with the regulations of the International Telecommunication Union.
8. States shall take appropriate measures for :
 - a) mutual assistance among astronauts ;
 - b) mutual assistance among States on behalf of astronauts in need of assistance ;
 - c) prompt repatriation of astronauts after any emergency landing or rescue.
9. Appropriate measures shall be provided for by an international agreement for the return to the State under the authority of which the launching took place of space objects the launching of which has been officially notified, which bear identification marks showing their origin, and which on return to the earth have come into the possession of another State.
10. The State under the authority of which the launching of a space object takes place shall ensure that every such object is, so far as practicable, fitted with a suitable device permitting the launcher to recover it on the termination of its useful life or if recovery is not feasible as a minimum to silence radio transmission there from and eliminate its other effects.
11. The State under the authority of which the launching of a space object takes place shall ensure that appropriate precautions are taken against biological, radiological or chemical contamination of or from outer space or celestial bodies. International cooperation in respect of the matter should be arranged.
12. Scientific or technological experiments or tests in space which may involve a risk of modifying the natural environment of the earth, of any of the celestial bodies or in space in a manner liable to be prejudicial to the future of scientific investigation and experiment, the well-being of human life, or the interests of another State, necessarily affect directly the interests of the whole international community. The provisions of this resolution should be supplemented by appropriate international arrangements to forestall such risk.

13. The State under the authority of which the launching of a space object has taken place shall be liable, irrespective of fault, for any injury, including loss of life, or damage that may result. Modalities of application of this principle may be determined by special convention. Any limitation of the amount of the reparation due shall be determined in the same manner.

14. In all matters not provided for in the preceding paragraphs, States are bound by general international law, including the principles of the Charter of the United Nations.

15. The principles set forth in this resolution apply to space activities undertaken by States acting individually or collectively or by international organizations.

References to States in the preceding paragraphs are to be construed as including a reference to international organizations, it being understood that the States members of an international organization remain responsible for the space activities of the organization.

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(11 September 1963)

Session of Warsaw – 1965

**The National Character of an International Claim
Presented by a State for
Injury Suffered by an Individual**

(First Commission, Rapporteur : Mr Herbert W. Briggs)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering it opportune to formulate with precision the rules regarding the national character of claims as developed from the practice of States and from international jurisprudence ;

Reserving the study of proposals which might improve the protection of individuals whether by diplomatic protection or by other methods and in particular by any special procedures established by an international organization ;

Reserving more especially for later examination the case where the nationality of the injured individual has changed as a consequence of territorial modifications of the State of which he was a national or by modifications of his personal statute ;

Adopts the following rules as applicable in the absence of contrary provisions agreed upon by the Parties :

First Article

a) An international claim brought by a State for injury suffered by an individual may be rejected by the State to which it is presented unless it possessed the national character of the claimant State both at the date of its presentation and at the date of the injury. Before a court (*jurisdiction*) seised of such a claim, absence of such national character is a ground for inadmissibility.

b) An international claim presented by a new State for injury suffered by one of its nationals prior to the attainment of independence by that State, may not be rejected or declared inadmissible in application of the preceding paragraph merely on the ground that the national was previously a national of the former State.

Article 2

When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seised of it unless it possessed the national character of the claimant State both at the date of injury and at the date of its presentation.

Article 3

a) An international claim presented in respect of an injury suffered by an individual possesses the national character of a State when the individual is a national of that State or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection.

b) By date of injury is meant the date of the loss or detriment suffered by the individual.

c) By date of presentation is meant, in case of a claim presented through diplomatic channels, the date of the formal presentation of the claim by a State and, in case of resort to an international court (*jurisdiction*), the date of filing of the claim before it.

Article 4

a) An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seised of the claim.

b) An international claim presented by a State for injury suffered by an individual who, in addition to possessing the nationality of the claimant State, also possesses the nationality of a State other than the respondent State may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seised of the claim unless it can be established that the interested person possesses a closer (*prépondérant*) link of attachment with the claimant State.

c) An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment.

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(10 September 1965)

Session of Warsaw – 1965

Companies in Private International Law

(Twenty-eighth Commission, Rapporteur : Mr Georges von Hecke)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Taking up this subject already dealt with at its Sessions at Hamburg (1891) and New York (1929) and taking into account the work recently done by the Conference on Private International Law at The Hague and by the International Law Association ;

Desiring to make a contribution towards overcoming the controversy which exists at the present time with regard to the connecting factor determining the law governing companies ;

Taking into account the interest of the international community in intensifying international economic relations by enabling companies to deploy their activities in States other than the State the law of which governs the company, and to do so directly and exclusively under that law ;

Being of the opinion that in order to give due consideration to this interest it is necessary to trace the limitations which States should observe in the exercise of their power to apply the provisions of their own legislation to foreign companies especially those provisions enacted with the purpose of protecting municipal creditors of foreign companies or of ensuring equal opportunities of competition between foreign companies and companies governed by the municipal law ;

Recommends to all States to adopt the following rules in order to resolve the conflicts of law with regard to companies formed under a municipal law :

First Article

A company is governed by the law under which it has been incorporated.

Article 2

Any company established in accordance with the law mentioned in the First Article will be recognized in all other States as a corporate person.

Article 3

If a company's actual seat is situated outside the territory in which the law of its incorporation is in force and if the principal business activities of the company take place outside that territory, the recognition of the company as a corporate person may be refused if its constitution is not in accordance with the law of the place where it has its actual seat.

Article 4

If a company's actual seat is situated outside the territory in which the law of its incorporation is in force and if the company has no real connection with that territory, the recognition of the company as a corporate person may be refused if its constitution is not in accordance with the law of the place where it has its actual seat.

The real connection must be established by facts other than the mere indication of a registered office, and may in particular consist of a place of business in the territory, of the origin of the share or loan capital of the company, of the nationality or habitual residence of the shareholders or of those in control of the company.

Article 5

The actual seat of a company is the place at which it has its principal centre of control and management, even if the decisions which are taken at that place follow directives given by shareholders who reside elsewhere.

Article 6

A company which is recognized in accordance with the preceding provisions enjoys all rights which are conferred upon it by the law by which it is governed, except rights which the State by which it is recognized refuses to grant either to foreign nationals in general or to companies of a corresponding type governed by its own law.

It can however carry on its business only under the conditions which are imposed by the local laws concerning the carrying on of business.

Article 7

The law governing the company applies to the form and to the substance of its constitution.

It applies in particular to the requirements concerning its capital, both at the time of its incorporation and in the course of its existence.

Article 8

The law governing the company determines what organs the company must have in order to operate, the powers of those organs, the rights and obligations of the persons serving as organs of the company and of the shareholders, both among each other and in relation to the company, including in particular the protection of minority shareholders and the replacement of lost or stolen share documents.

Article 9

If a company has a place of business in a State other than the State of its incorporation, the State in which that place of business is situated may impose upon the company obligations with regard to :

- a) the publication or the registration of its constitution, its annual accounts, and the powers conferred upon its organs ;
- b) the appointment of a representative in charge of the management of the place of business and, if required, the application to this representative of the local laws concerning the powers and duties of members of organs of management ;
- c) the application of the local provisions concerning the representation of the employees within the enterprise, but only of those which operate at the level of the plant or place of business ;
- d) the protection of creditors through the creation of financial securities.

The State in which the place of business is situated may also, in the interest of the creditors and under the conditions laid down in its own law, liquidate the place of business and the other assets belonging to the company situated in its territory.

Article 10

The public issue of shares is governed by the provisions of the law which governs the company as well as by the law of the country in which the issue takes place. The public issue of debentures is governed by the provisions of the proper law of the contract of loan as well as by the law of the country in which the issue takes place.

Article 11

The powers of the organs of the company to act on its behalf are governed by the law which governs the company. The liability of a person who has entered into a transaction by which the company is not bound is governed by the law of the place at which he has entered into that transaction.

Article 12

If a contract has been concluded in a country other than that in which the company is incorporated, the company cannot rely on any limitations of the power to act on behalf of the company which the law governing the company imposes upon the organ of the company that has concluded the contract if such limitations do not exist under the law of the place where the contract was concluded and if the other party to the contract did not have reasonable notice of the provisions of the law governing the company.

For the purposes of the preceding provision a contract is deemed to have been concluded in a given country only if it has been concluded there *inter praesentes* or, in the case of contracts by correspondence, if both the offer and the acceptance have taken place in that country.

Article 13

Any liabilities incurred by reason of a violation of the law governing the company are governed by that law.

Article 14

Any law which would be applicable by virtue of the preceding articles can be excluded if in a given case its application would lead to a result clearly incompatible with the public policy of the forum.

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(10 September 1965)

Session of Nice – 1967

Testamentary Succession in Private International Law

(Tenth Commission, Rapporteur : Mr Riccardo Monaco)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that testamentary succession is subject to the law governing succession in general (law of succession), but that it has not seemed possible, in the present climate of opinion, to propose a uniform solution for the determination of the said law ;

Having in mind the rules formulated by the Hague Convention of 5 October 1961, on the Conflicts of Laws relating to the Form of Testamentary Dispositions which has already come into operation and has served as a model for several national legislative measures ;

Considering that it seems useful to propose solutions to certain problems peculiar to testamentary succession, without prejudice to the determination of the law of succession, so as to achieve a relative unity in this field ;

Recommends the application of the following solutions in matters of testamentary succession :

1. That testamentary capacity should be recognized when it exists under the personal law of the testator at the time of making the testamentary dispositions ;
2. That the essential validity and the effects of testamentary dispositions should be governed by the law of succession, subject to the power of the testator to choose between the law of his nationality and that of his domicile ;
3. That the will should be considered valid as regards form if its form complies with the internal law :
 - a) of the place where the testator made it, or
 - b) of the nationality, domicile or habitual residence of the testator, either at the time when he made the disposition, or at the time of his death, or

- c) so far as immovables are concerned, of the place where they are situated ;
4. That the solutions contained in the preceding paragraph should apply also to the formal validity of the revocation of a will by testamentary disposition ;
5. That the powers of a testamentary executor nominated by the testator should be governed by the law of succession, subject to any provisions of the law of the place where the will is administered ;
6. That the powers of an administrator of the testamentary succession appointed by the court should be governed by the law of the court which appointed him ;
7. That the methods of administration of a will should be governed by the law of the place of its administration.

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(15 September 1967)

Session of Nice – 1967

Termination of Treaties

(Eleventh Commission, Rapporteur : Mr Shabtai Rosenne)

(The French text is authoritative. The English text is a translation.)

Convinced of the importance of the codification and the progressive development of the law of treaties for the security of international legal relationships, indispensable for the maintenance of peace and co-operation among States ;

Recognizing the value of the work accomplished by the International Law Commission of the law of treaties ;

Nothing that the General Assembly of the United Nations, in its Resolution 2166 (XXI), adopted on 5 December 1966, has decided to convene a conference of plenipotentiaries to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it deems appropriate, taking as the basic proposal the draft articles submitted by the International Law Commission ;

Having examined certain aspects of the general problem of the termination of treaties ;

I

The Institute of International Law *expresses* its desire :

1. That there should be included in an appropriate form in the codification of the law of treaties the obligation for a party claiming that a treaty has terminated, or intending to terminate it or withdraw from it, to notify, in accordance with the prescribed forms, the other parties of its position and the grounds therefore ; in the event of disagreement between the parties they should have recourse to the methods for the pacific settlement of disputes ;
2. That the codification should reaffirm the principle according to which, when an obligation embodied in a treaty is binding also by virtue of another rule of international law, the fact that a State has not become a party to that treaty, that the treaty has lawfully terminated or that a party has lawfully withdrawn from that treaty does not as such affect the existence of that obligation.

II

Having regard to the difficulties which can arise when a treaty contains no provisions regarding its termination or does not provide that a party may denounce it or withdrawn from it,

The Institute *recommends* that whenever States parties to a treaty intend to admit the possibility of denunciation or withdrawal, a provision regulating that right and laying down the conditions for its exercise should be included in the treaty or set forth in some other appropriate form.

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(14 September 1967)

Session of Edinburgh – 1969

**The Distinction Between Military Objectives and
Non-Military Objects in General and Particularly the Problems
Associated with Weapons of Mass Destruction**

(Fifth Commission, Rapporteur : Baron F.A. von der Heydte)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Reaffirming the existing rules of international law whereby the recourse to force is prohibited in international relations,

Considering that, if an armed conflict occurs in spite of these rules, the protection of civilian populations is one of the essential obligations of the parties,

Having in mind the general principles of international law, the customary rules and the conventions and agreements which clearly restrict the extent to which the parties engaged in a conflict may harm the adversary,

Having also in mind that these rules, which are enforced by international and national courts, have been formally confirmed on several occasions by a large number of international organizations and especially by the United Nations Organization,

Being of the opinion that these rules have kept their full validity notwithstanding the infringements suffered,

Having in mind that the consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilian populations and for mankind as a whole,

Notes that the following rules form part of the principles to be observed in armed conflicts by any *de jure* or *de facto* government, or by any other authority responsible for the conduct of hostilities :

1. The obligation to respect the distinction between military objectives and non-military objects as well as between persons participating in the hostilities and members of the civilian population remains a fundamental principle of the international law in force.

2. There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.

3. Neither the civilian population nor any of the objects expressly protected by conventions or agreements can be considered as military objectives, nor yet

a) under whatsoever circumstances the means indispensable for the survival of the civilian population,

b) those objects which, by their nature or use, serve primarily humanitarian or peaceful purposes such as religious or cultural needs.

4. Existing international law prohibits all armed attacks on the civilian population as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population, so long as these are not used for military purposes to such an extent as to justify action against them under the rule regarding military objectives as set forth in the second paragraph hereof.

5. The provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means.

6. Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population.

7. Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as of "blind" weapons.

8. Existing international law prohibits all attacks for whatsoever motive or by whatsoever means for the annihilation of any group, region or urban centre with no possible distinction between armed forces and civilian populations or between military objectives and non-military objects.

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(9 September 1969)

Session of Edinburgh – 1969

The Most Favoured Nation Clause in Multilateral Conventions

(Fourth Commission, Rapporteur : Mr Pierre Pescatore)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Having in mind the Resolution passed at its 40th Session (1936) on "the Effects on the Most Favoured Nation Clause in Matters of Trade and Navigation", especially as regards the unconditional nature of the clause, the automaticity and extent of its effects, as well as the observation of the principle of good faith in the application thereof,

Considering the need to review the problems of application and interpretation of the clause as a result of the profound changes in international relations which have been caused, since then, by the introduction of multilateral and institutional methods in the field of economic relations, both at world and regional level, and taking into account the various economic systems of States, together with the requirements of an economic policy in support of developing countries,

Having examined the thorough report by Mr Pierre Pescatore, Rapporteur of the Fourth Commission, on the Most Favoured Nation Clause in Multilateral Conventions, and the comments of the Members of that Commission,

Recognizing the greater efficiency of the clause through the incorporation of the most favoured nation treatment in multilateral institutional systems,

Taking into consideration that the investigation of the subject matter, if it were to lead to exhaustive conclusions, would require the Institute to take up a position on various problems which are still controversial and widely open to discussion and which, to be solved, mainly require political decisions :

1. Takes note of the Report and of its conclusions in thanking the Rapporteur and the Members of the Commission for their contribution to the study of the problem considered ;

2. Emphasizes in particular, as regards the most favoured nation clause in multilateral conventions on international trade, the following points contained in the Report :

- a) Preferential treatment in favour of developing countries by means of a general system of preferences based on objective criteria should not be hampered by the clause.
- b) States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.
- c) Derogations from the clause should be linked with appropriate institutional and procedural guarantees such as those provided by multilateral systems.

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(10 September 1969)

Session of Edinburgh – 1969

Measures Concerning Accidental Pollutions of the Seas

(Twelfth Commission, Rapporteur : Mr Juraj Andrassy)

(The French text is authoritative. The English text is a translation.)

A. PREVENTION OF ACCIDENTS

The Institute of International Law,

Conscious of the importance of the prevention of pollution of the seas,

Considering in particular the need to prevent any pollution caused by accidents occurring to ships which carry polluting materials,

Recognizing that it is in the interest of the international community and indeed of any State likely to be affected by the pollution of the seas that such accidents should be prevented,

Considering that appropriate measures to prevent such accidents as far as possible should be taken on a joint basis either by a multilateral agreement or through the action of an authorized body or, in the absence of such procedures, by the individual States concerned.

Adopts the following articles which might inspire the conduct of States in this matter :

I

All States must take appropriate measures to prevent pollution of the seas either individually or jointly under international agreements to be concluded, without ignoring the principle of freedom of the seas.

In the following articles are set forth the duties and rights of States to prevent pollutions caused by ships which carry polluting materials.

II

The measures referred to in Article I shall relate to the design and equipment of the ships, to the navigation instruments, to the qualifications of the officers and members of the crews, and to other significant factors.

They may also include traffic regulations in areas where such regulations are necessary and in particular provisions concerning the routes to be followed, the maximum speeds and the compulsory pilotage procedures.

III

States should co-operate in order to determine on a joint basis either by an international agreement or through an authorized body acting in accordance with its Statutes :

- a) the requirements set out in Article II,
- b) the State responsible for implementing each of these requirements.

IV

Nothing in Article III can be interpreted as preventing a State from enacting such measures within its competence as may be necessary to meet the obligations under Article I, pending the establishment of the rules contemplated by Article III, or in case the rules thus established should cover only part of the objectives mentioned in this Resolution.

V

Measures adopted under the preceding provisions :

- a) must remain within the strict limits of their final aim and lead to no discrimination in their implementation between means which may equivalently meet the safety requirements of navigation, and
- b) must be reported to the navigation authorities.

VI

States have the right to prohibit any ship that does not conform to the standards set up in accordance with the preceding articles for the design and equipment of the ships, for the navigation instruments, and for the qualifications of the officers and members of the crews, from crossing their territorial seas and contiguous zones and from reaching their ports.

VII

Any dispute concerning the application and interpretation of the preceding articles should be settled by a peaceful means agreed upon by the Parties. In the absence of such an agreement, or in the event of a failure of the means agreed upon, each Party might unilaterally resort to the means provided for to this end within the Intergovernmental Maritime Consultative Organization. If such means do not succeed or are lacking, the Parties might resort to means agreed upon between themselves beforehand for the peaceful settlement of disputes. Finally, in the event of a failure or in the absence of such means, each Party should be entitled to refer the matter to the International Court of Justice by unilateral request.

B. MEASURES FOLLOWING AN ACCIDENT

The Institute of International Law,

Recognizing the need for clear and uniform rules of the exercise of the right to take efficient measures in order to prevent, mitigate or eliminate the danger of pollution of the seas by polluting materials arising from an accident,

Expresses the opinion that the State threatened by such danger is entitled to take appropriate measures proportionate to the likely danger,

Pays a tribute to the work undertaken within the Inter-Governmental Maritime Consultative Organization with a view to drafting a Convention to this end,

Hopes that this task may be carried out as soon as possible with the participation of all States whose flags are flying on the seas.

Wishes to contribute to this work by setting forth the formulas which, in its opinion, express most accurately the main points of the Convention contemplated :

I

Any State facing grave and imminent danger to its coastline or related interests from pollution or threat of pollution of the sea, following upon an accident on the high seas, or acts related to such an accident, which may be expected to result in major consequences, may take such measures as may be necessary to prevent, mitigate or eliminate such danger.

II

Except for tankers, no measures shall be taken against warships or other ships owned or operated by a State and used only on government non-commercial service at the time considered.

III

Measures taken in accordance with Article I shall be proportionate to the damage which threatens the State concerned.

Such measures shall not go beyond what is reasonably necessary to achieve the aim mentioned in Article I.

They shall cease as soon as that aim has been achieved or as soon as it has become obvious that it cannot be achieved. They shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.

In considering whether the measures are proportionate to the damage, account shall in particular be taken of :

- a) the extent and probability of imminent damage if such measures are not taken ;
- b) the likelihood of such measures being effective ;
- c) the extent of the damage which may be caused by such measures.

IV

Before taking any measures, a coastal State shall proceed to consultations with other States affected by the maritime accident, particularly with the flag State or States.

The coastal State also shall notify without delay the proposed measures to any persons, physical or corporate, known to have interests which can reasonably be expected to be affected by such measures. It shall take into account any views which those persons may submit.

In cases of urgency requiring measures to be taken immediately, the coastal State may take such measures as may be rendered necessary by the urgency of the situation, without prior notification or consultations with other States affected by the maritime accident.

Measures which have been taken shall be notified without delay to the States and to the known physical or corporate persons concerned.

V

It is desirable that a system of consultation with independent experts whom the coastal States may consult before taking the above mentioned measures should be set up.

VI

Any State which has taken measures in contravention of the preceding provisions and has thus caused damage to others must pay compensation.

VII

Any controversy concerning the interpretation or application of the preceding provisions shall be settled by a peaceful means. The system to be provided for shall be such that in the event of a failure of the means used any Party may unilaterally resort to an arbitration or judicial procedure which can be carried on and brought to a successful issue even if the other Party abstains from taking part in it.

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(12 September 1969)

Session of Edinburgh – 1969

Delictual Obligations in Private International Law

(Twenty-sixth Commission, Rapporteur : Mr Otto Kahn-Freund)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Being of the opinion that as a result of technical developments the principles governing delictual liability in private international law have greatly gained in practical importance and that they continue to do so,

Observing that largely as a result of these developments the traditional application of the law of the place of delict has been and is being questioned in many countries by courts and by academic writers,

Being convinced that the application of the law of the place of delict should be subject to exceptions where that place is merely fortuitous and where the social environment of the parties differs from the geographical environment of the delict but that nevertheless the rule by which the law of the place of the delict governs liability should be maintained.

Being further of the opinion that the extent to which and the way in which the law of the place of delict is to be replaced by some other legal system must be worked out separately for each type of delict (traffic accidents, accidents at work, defamation and infringement of privacy through mass media of communication, unfair competition and other economic delicts, delicts committed on the high seas, in the air, or in space, etc.) and transcends the limits of a general resolution on delictual liability,

And being also of the opinion that the time has not yet arrived for the Institute to express any view in favour or against the expediency of applying different laws to different issues arising from delictual liability.

Considering that the difference between liability for fault and liability for risk and between the purposes of deterrence and of risk distribution are differences of degree and not differences in kind, that it is impossible to establish different principles of private international law for the two types of liability or for the two types of purposes, and that the same rules of private international law should apply to fault liability and to risk liability as well as to rules serving the primary purpose of deterrence and serving the primary purpose of social risk distribution.

Considering further that it is inexpedient to establish abstract rules for the definition of the place of delict, the determination of which must in each case depend on the degree to which the issue involved is connected with one of the places at which the conduct alleged to be delictual occurred or the effect of that conduct was produced,

Being of the opinion that it is inexpedient in a Resolution devoted to delictual liability to establish any rules of law governing the characterisation (qualification) of a claim, a matter which can only be discussed within the framework of the general principles of private international law,

But considering that the scope of the following rules on delictual liability should not include either contractual liability or liability for unjust enrichment, or any questions of the immunity *inter se* of members of a family from delictual claims, or the transmission of delictual claims to the estate, the heir or other successor in title of the victim of a delict or the transmission of delictual liability to the estate, the heir or other successor in title of the person responsible.

And considering further that the rights of an insurer of a victim to be subrogated to the claim of the victim against the person responsible for the accident, and the right of the victim to raise a direct claim against the insurer of the person responsible, are so closely connected with the sphere of the contract of insurance as to render it inadvisable for the Institute in this Resolution on delictual liability to express any views as to the law applicable to these rights.

And considering that in view of the rapid and often conflicting development of the law in many countries the time has not arrived to formulate a precise draft of legislation, but that general principles are required which can give guidance to courts and to academic writers,

Has passed the following Resolution :

Article 1

On principle delictual liabilities are governed by the law of the place at which the delict is committed.

Article 2

For the purpose of Article 1 a delict is regarded as having been committed at the place with which, in the light of all the facts connecting a delict with a given place (from the beginning of the delictual conduct to the infliction of the loss), the situation is most closely connected.

Article 3

In the absence of any substantial connection between the issue to be determined and the place or places at which the delict has been committed, and by way of exception to the rules in Articles 1 and 2, that law is to be applied which is indicated by a special relation between the parties or between the parties and the occurrence :

- a) thus the law of the common habitual residence may be applied between members of the same family, the law of the seat of an enterprise to liabilities arising between employers and employees and between fellow employees of the same enterprise ;
- b) thus the law of the registration of a vehicle may be applied to liabilities arising between its driver or owner and its passengers, whether for hire and reward or gratuitous, and between those passengers, the law of the place at which an expedition has been organised to delicts committed in the course of the expedition.

With the same intent the law of the flag may be applied to delicts on board a ship in foreign territorial waters, and the law of the place of registration to delicts committed on board an aircraft.

Article 4

The principles expressed in Articles 1, 2 and 3 apply to all issues arising from delictual liability, and notably :

- a) to the standard of liability, including the question whether a person made responsible is liable for the creation of a risk or for fault, for gross negligence or simple negligence, and to all presumptions relating to this liability ;
- b) to the question how far contributory fault of the victim is relevant to the liability of the person responsible ;
- c) to the question of delictual capacity, including that of infants and mentally disordered persons, and of corporate bodies ;
- d) to immunities from delictual liability of charitable organisations and trade unions ;
- e) to questions of vicarious liability, including those of employers for their employees and of corporate persons for their organs, but not necessarily to that of husbands for their wives, parents for their children, or teachers and masters for their pupils and apprentices ;
- f) to the determination of the person or persons entitled to compensation, to the determination of the loss for which compensation can be claimed (including the question of *dommage moral*) and to the assessment of the damage (including financial limitations).

Article 5

The application of the law which is applicable in accordance with the preceding rules can be only excluded in so far as such application to the issue to be determined would be manifestly incompatible with the public policy of the forum.

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(11 September 1969)

Session of Zagreb – 1971

Forwarding Agency Contracts in Private International Law

(Nineteenth Commission, Rapporteur : Mr. Léon Babinski)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that the present development of international trade shows more and more the need for a clear system of rules concerning international forwarding agency contracts, as an essential element for the proper operation of this trade,

Taking account, on the one hand, of the important work accomplished by the Institute for the Unification of Private Law (Unidroit) with a view to elaborating uniform rules on this subject, and, on the other hand, the intention of the United Nations Committee for International Trade Law (UNCITRAL) gradually to develop international trade law, including international transport law ; taking note that nevertheless conflicts of law in this field are, and are for a long time likely to remain, frequent and that they require a solution ;

Considering that it is useful for the Institute of International Law to determine the principles which seem to be generally accepted in this field, with a view to advancing the development of international trade ;

Expresses the opinion that, without prejudice to the general principles of international law, the following rules should be applied :

Article 1

Subject to Article 2, the contractual relations between the forwarding agent and the consignor shall be governed by the law of the office or other place of operation of the agent (*de l'établissement*) with which the consignor has concluded the contract.

Article 2

The parties to the contract are free to choose the law governing their contractual relations.

Article 3

The above-mentioned rules shall not apply either to the existence or to the extent of the forwarding agent's powers in his relation with the carrier. Such powers shall be governed by the law applicable in the place where they are exercised.

Article 4

Proprietary rights arising from the forwarding agency contract may only be exercised in conformity with the *lex rei sitae*.

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(2 September 1971)

Session of Zagreb – 1971

Conflicts of Laws in the Field of Labour Law

(Sixteenth Commission, Rapporteur : Mr. Etienne Szászy)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that one of the characteristic features of our time is the large number of workers employed outside their country of origin and that, in particular, massive flows of workers' migration can be observed ;

Considering that labour mobility, while contributing towards the increased contact among the nations, gives rise to problems of an increasing seriousness, concerning private interests as well as the interests of the receiving State and of the State of origin ;

Taking into consideration the important contribution of the International Labour Organisation towards the solution of these problems ;

Considering that, although the problem which law governs a contract of employment has already been studied by the Institute of International Law and was dealt with by the Institute's Resolutions of Luxembourg in 1937, it is appropriate to deal again with the question ;

Submits the following rules of conflict to the approval of States :

Article 1

The capacity to conclude a contract of employment is governed by the personal law of the party concerned. The capacity to perform a specific type of work is governed by the law indicated in Articles 3, 4 and 5.

A contract of employment concluded by a person who under his personal law lacks capacity to do so is nevertheless considered as valid if that person has the necessary capacity under the law of the State in whose territory the contract was concluded.

Article 2

A contract of employment is valid as to its form if it is in conformity either with the requirements of the law indicated in Articles 3, 4 and 5, or with those of the law of the State in whose territory the contract was concluded, or with those of the law of the common nationality or of the common domicile of the parties.

Nevertheless, any provision imposing special formal requirements must be observed in so far as they are in force in the country in which the work is to be performed.

Article 3

Subject to Article 4 and 5, the essential validity, the effect, the breach and the termination of contracts of employment are governed by the law of the country in which the work is to be performed. This applies to individual labour relations in general.

Article 4

Subject to Article 5, the systems of law referred to in this Article apply in the following circumstances :

- a) if and in so far as the work has to be performed in the territory of several States or is of a transitory nature, and if and in so far as the work has to be performed in a place which is not subject to the sovereignty of any State or which cannot be determined : the law of the country in which the employer has its corporate seat or his domicile ;
- b) if the employment relationship refers to carriage by sea : the law of the flag, and if it refers to carriage by inland waterway or by air : the law of the State in which the vessel or aircraft is registered.

Article 5

The law explicitly or implicitly chosen by the parties applies to the exclusion of the laws indicated in Articles 3 and 4.

Article 6

The law to be applied under the preceding provisions is deemed to comprise not only statutes and regulations, but also collective agreements and trade customs, provided that these are legally applicable.

Article 7

Whenever a contract is not performed in the territory of the State whose law governs the contract, account may be taken of such laws and regulations of the law of the place of performance as are by their nature compulsorily applied to all work performed in the territory.

Article 8

The provisions of a foreign law normally applicable according to these Articles are not in any circumstances to be applied where their application would be manifestly incompatible with public policy.

Article 9

Nothing in the present Resolution affects the law to be applied to workers employed by an intergovernmental organisation.

Voeux

The Institute of International Law has, furthermore, decided to recommend :

- I. That the existing network of treaties regulating the status of migrant workers should be further developed, both as regards treaties universally applicable (such as the Conventions of the International Labour Organisation) and as regards regional and bilateral treaties.
- II. That even in the absence of a treaty, the principle of non-discrimination between national and foreign workers should in this field be a guiding rule for the attitude of States and that it should inspire the work of legislators, administrators and national courts.
- III. That in regulating the status of foreign workers account should be taken of the social, domestic and financial difficulties caused to them by their expatriation.

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(3 September 1971)

Session of Zagreb – 1971

**Conditions of Application of Humanitarian Rules
of Armed Conflict to Hostilities in which
United Nations Forces May be Engaged**

(First Commission, Rapporteur : Mr. Paul de Visscher)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalling its Resolution on "Equality of application of the rules of the law of war to parties to an armed conflict" (Brussels Session, 1963) ;

Recalling its Resolutions on "The distinction between military objectives and non-military objects in general and particularly the problems associated with weapons of mass destruction" (Edinburgh Session, 1969) ;

Noting that the United Nations on various occasions has made use of armed Forces and that such Forces, whatever their mission, might become involved in actual hostilities ;

Considering that pending the elaboration of a comprehensive set of rules governing the status of United Nations Forces, it is necessary to determine the conditions under which the humanitarian rules of armed conflict apply to such Forces ;

Reserving the study of the general problem of the effects which the outlawry of war and of the use of force may have upon the principle of non-discrimination in the application of the other rules relating to armed conflict ;

Declaring, in addition, that the present Resolution is without prejudice to the solution which may be given to the problems connected with the competence of United Nations organs to create or to direct United Nations Forces ;

Has adopted the following Articles :

Article 1

For the purposes of the present Articles, the term "United Nations Forces" shall apply to all armed units under the control of the United Nations.

Article 2

The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities.

The rules referred to in the preceding paragraph include in particular :

- a) the rules pertaining to the conduct of hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives ;
- b) the rules contained in the Geneva Conventions of 12 August 1949 ;
- c) the rules which aim at protecting civilian persons and property.

Article 3

A. If United Nations Forces are formed through individual recruitment, the United Nations shall issue regulations defining the rights and duties of the members of such Forces.

In the event of these Forces becoming involved in hostilities, these regulations shall name the international authorities which, in regard to said Forces, shall be vested with the regulatory, executive and judicial powers necessary to secure effective compliance with the humanitarian rules of armed conflict.

B. If United Nations Forces are composed of national contingents with regard to which the United Nations has not issued any regulations such as those mentioned in the preceding paragraph, effective compliance with the humanitarian rules of armed conflict must be secured through agreements concluded between the Organisation and the several States which contribute contingents.

These agreements shall at least confer upon the United Nations the right to receive all information pertaining to and the right to supervise, at any time and at any place, the effective compliance with the humanitarian rules of armed conflict by each contingent.

Article 4

In order to secure effective compliance with the humanitarian rules of armed conflict by United Nations Forces, it is necessary that the individuals who may be called upon to participate in such Forces receive adequate and previous instruction on the law of armed conflict in its entirety, and especially on the meaning and the scope of the Geneva Conventions of 12 August 1949.

It is desirable that the United Nations, as well as those of its specialised agencies which are concerned with furthering education and health, take all steps within their power in order to coordinate the measures which the States parties to the Geneva Conventions have been invited to take in this field by the International Conferences of the Red Cross.

Article 5

In order to secure effective compliance with the humanitarian rules of armed conflict during hostilities in which United Nations Forces are engaged, it is necessary that the Organisation should ensure that there are, within its Forces, health services composed of competent personnel in sufficient numbers and provided with means of action that are proportionate to the foreseeable needs.

If the direction of such services is entrusted to the States which have contributed contingents, the Organisation shall take all measures in its power to coordinate the activities of these services.

Article 6

In order to ensure effective compliance with the humanitarian rules of armed conflict during hostilities in which United Nations Forces may become involved, it is desirable, if there is no Protecting Power, that an impartial body be empowered to assume the duties entrusted to the Protecting Power by the Geneva Conventions of 12 August 1949.

The body referred to in the present article as well as its members should enjoy the facilities necessary to carry out their functions effectively.

Article 7

Without prejudice to the individual or collective responsibility which derives from the very fact that the party opposing the United Nations Forces has committed aggression, that party shall make Reparation for injuries caused in violation of the humanitarian rules of armed conflict. The United Nations is entitled to demand compliance with these rules for the benefit of its Forces and to claim damages for injuries suffered by its Forces in violation of these rules.

Article 8

The United Nations is liable for damage which may be caused by its Forces in violation of the humanitarian rules of armed conflict, without prejudice to any possible recourse against the State whose contingent has caused the damage.

It is desirable that claims presented by persons thus injured be submitted to bodies composed of independent and impartial persons. Such bodies should be designated or set up either by the regulations issued by the United Nations or by the agreements concluded by the Organisation with the States which put contingents at its disposal and, possibly, with any other interested State.

It is equally desirable that if such bodies have been designated or set up by a binding decision of the United Nations, or if the jurisdiction of similar bodies has been accepted by the State of which the injured person is a national, no claims may be presented to the United Nations by that State unless the injured person has exhausted the remedy thus made available to it.

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(3 September 1971)

Session of Zagreb – 1971

Unlawful Diversion of Aircraft

(Eighteenth Commission, Rapporteur : Mr. Edward Mc Whinney)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that acts of seizure or unauthorized exercise of control of aircraft in flight, jeopardizing the life and health of passengers and crew, as well as those of persons on the ground or in other aircraft, in disregard of elementary considerations of humanity, are unlawful under international law,

Considering that such unlawful acts may endanger international peace and friendly relations among States,

Considering that such unlawful acts jeopardize the freedom of international communications and seriously affect the operations of air services and undermine the confidence of the peoples of the world in the safety of civil aviation.

Having regard to the general condemnation of such unlawful acts expressed in the Resolutions of the General Assembly of the United Nations and of the International Civil Aviation Organisation and of regional intergovernmental organisations,

I

Is of the opinion that no purpose or objective, whether political or other, can constitute justification for such unlawful acts, and that every State in whose territory the authors of such acts may be found has the right and the obligation, if it does not extradite such persons, to undertake criminal prosecution against them.

II

Notes that, among others, the following rules of international law apply :

1. Under the general rules of international air law, as expressed especially in the Chicago Convention of 7 December 1944, States are required to ensure the safety, regularity and efficiency of international air navigation and to collaborate with each other to this end.

2. Under the general rules of international law which find particular expression in Articles 25 and 37 of the Chicago Convention of 1944, States are required to render assistance to aircraft in distress in their territory and to permit, subject to control by their own authorities, the owners of the aircraft or authorities of the States in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances.

3. Under general international law, States are required not to allow knowingly their territory to be used for acts contrary to the rights of other States.

Expresses the opinion that, in consequence, States must take all appropriate measures to give effect to these principles, notably by taking action :

- a) to prevent the accomplishment of acts of unlawful diversion of aircraft in flight, and
- b) in cases where an unlawfully diverted aircraft lands in their territory,
 - to restore control of the unlawfully diverted aircraft to its lawful commander or to preserve his control of the aircraft,
 - to permit the passengers and crew of the aircraft to continue their journey as soon as practicable,
 - to return the aircraft and its cargo to the persons lawfully entitled to possession,
 - to ensure the personal safety and human dignity of the passengers and crew until their journey can be continued.

III

Notes that the concern of States to resolve the problem of unlawful diversion of aircraft in flight received a first recognition by the adoption of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, and in the Convention for the Suppression of Unlawful seizure of Aircraft, signed at The Hague on 16 December 1970.

Considers that, in ratifying these Conventions and in making all necessary dispositions to give effect to them, States will contribute to implementing and to rendering precise the obligations set out in this Resolution as well as to the progressive development of international law in these matters.

Emphasizes, in particular, the urgency for States to make such adaptations in their internal law as may be necessary to give effect to the principles contained in the above-mentioned Conventions.

IV

This Resolution does not prejudge in any way the question of the prevention and repression of all other acts of violence which may endanger the safety of air transport, nor the question of a more specific regulation of sanctions against States which fail to fulfill their international obligations in the matter of the unlawful diversion of aircraft in flight.

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(3 September 1971)

Session of Rome – 1973
Centenary Session

**The Application of the Rules of the General International
Law of Treaties to International Agreements
Concluded by International Organizations**

(Fourteenth Commission, Rapporteur : Mr René-Jean Dupuy)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Adopts the following Resolution :

I

The provisions of the Vienna Convention on the Law of Treaties, of 23 May 1969, are in principle applicable to international agreements concluded by International Organizations either with other International Organizations or with one or several States.

II

Any International Organization may conclude agreements in accordance with its own relevant rules and with the general practice in this field.

III

The relevant rules of each Organization determine the organ or organs empowered to perform any act relating to the formulation of the text of an agreement and to the expression of the consent of the Organization to be bound thereby.

IV

Unless exempted from it by his function or by practice, a person representing an Organization for the adoption or authentication of the text of an agreement, or for the purpose of expressing the consent of the Organization to be bound by the agreement, must deliver to the other party thereto, at the request of the latter, evidence of his capacity to represent that Organization.

V

An agreement concluded by an organ in accordance with II and III above is binding on the Organization as such.

This applies without prejudice to any obligation that may arise from such agreement for Member States either under the relevant rules of the Organization or under any general rule of international law.

The term "International Organization" means an Intergovernmental Organization.

The term "relevant rules of the Organization" means the constitutive instrument, any other rules governing the Organization and the practice established by the Organization.

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(14 September 1973)

Session of Rome – 1973
Centenary Session

**Recommendation on the Teaching of International Law
at Universities**

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Assembled at Rome from 5 to 15 September 1973 for its Centenary Session,

Convinced of the increasing role of international law in the world of today,

Emphasizing that international law is essential to the solution of difficulties that may arise between States,

Observing with regret that in many Universities international law is not, or is no longer, a compulsory teaching subject,

Recalling that the United Nations Organization and UNESCO have on several occasions recognized the importance of the knowledge of international law,

In line with its mission to promote international law by contributing in particular "through publications, public teaching and any other means to the triumph of the principles of justice and humanity which ought to govern the relations among peoples" (Article 1 of the Statutes of the Institute of International Law),

1. HAS DECIDED to set up a working group to collect information on the present state of international law teaching in the various parts of the world and to present Recommendations on the basis of such information at the next Session of the Institute of International Law,
2. URGENTLY DRAWS the attention of Universities and other Teaching Institutions as well as of Governments and International Organizations to the importance of ensuring university teaching of international law to the greatest extent possible.

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(14 September 1973)

Session of Rome – 1973
Centenary Session

The Effects of Adoption in Private International Law

(Seventh Commission, Rapporteur : Mr. Rodolfo de Nova)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Whereas most legal systems now provide for adoption as a legal act by which one person is treated - for some or all purposes - as the legitimate child of another person or of a married couple, of whom he, or she, is not the legitimate child,

And whereas adoptions of an international character are becoming more and more frequent, and there being no uniformity of substantive rules in the matter, troublesome conflicts of law may, and do in fact, arise,

Taking due account of the work done by the Hague Conference on Private International Law to solve these difficulties by establishing, in 1965, the Convention on jurisdiction, applicable law and recognition of decrees relating to adoptions,

Realizing, however, that the Hague Convention does not deal with the question of the law applicable to the effects of adoption,

Being convinced that further efforts should be made to develop choice-of-law rules relating at least to the principal effects of adoption and aiming at generalized acceptance,

Adopts this Resolution :

Article 1

a) In principle, the personal law of the adopter governs both the relations between the adopted person and the adopter, or the members of his, or her, family, and also the relations between the adopted person and his, or her, parent or parents of origin or the members of their family.

b) However, the rules on parental consent and on the power to dispense with such consent of the law governing at the time of adoption the relations between the adopted person and his, or her, family of origin must be satisfied. If they are not, the relations between the adopted person and his, or her, parent or parents of origin or the members of their family shall continue to be governed, in principle, by the law governing them independently of the adoption.

Article 2

If the adoption is effected by a married couple, the governing law under Article 1a) is the law that governs, or would govern, the relations between the adopters and the legitimate children of their marriage.

Article 3

A change after the adoption in the connecting factors operative according to Article 1a) and Article 2 involves a change in the applicable law.

However, in principle, the relations between the adopted person and his, or her, parent or parents of origin or the members of their family at the time of adoption are not affected by a change in any connecting factor.

Article 4

The preceding Articles cover, in particular, care and custody of the child, duties of maintenance and education, and parental power.

Article 5

Whether rights and liabilities, such as rights of succession, rights and liabilities in tort or contract, or social security or tax benefits, or criminal liability, are connected to, or affected by, an adoption depends on the law governing the particular issue.

The law referred to in the previous paragraph may refuse to give effect to an adoption which is not sufficiently similar, on the whole, to the adoption which it provides.

Article 6

The application of a law declared applicable by the previous Articles may be refused only where such application would be manifestly incompatible with public policy, especially in situations in which the paramountcy of the welfare of an adopted minor is in question.

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(14 September 1973)

RECOMMENDATION

The Institute of International Law,

Being of the opinion that a difference in nationality between the adopted person and the adopter or adopters may be an obstacle to unity within the adoptive family,

Makes the following Recommendation :

The competent authorities of each State should develop rules, procedures and practices leading to the prompt extension to an adopted minor of the nationality of his, or her, adopter or adopters.

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(14 September 1973)

Session of Wiesbaden - 1975

The Intertemporal Problem in Public International Law

(Eleventh Commission, Rapporteur : Mr Max Sorensen)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Whereas the general intertemporal problem both in the international legal order and in national law relates to the delimitation of the temporal sphere of application of norms ;

Whereas it is necessary to promote the development of the international legal system whilst preserving the principle of legal stability which is an essential part of any juridical system ;

Whereas any solution of an intertemporal problem in the international field must take account of the dual requirement of development and stability ;

Whereas a similar problem arises whenever a rule refers to a concept the scope or significance of which has changed in the course of time,

Adopts this Resolution :

1. Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it.
2. In application of this principle :
 - a) any rule which relates to a single fact shall apply to facts that occur while the rule is in force ;
 - b) any rule which relates to the repetition or succession of identical facts shall apply even though only one or some of such facts should occur after the entry into force of the rule ;

- c) any rule which relates to an actual situation shall apply to situations existing while the rule is in force, even if these situations have been created previously ;
- d) any rule which relates to a certain period of time, or to the existence of a situation during a defined period, shall apply only to periods the initial and terminal dates of which lie within the time when the rule is in force ;
- e) any rule which relates to the end of a period shall apply to any case where the period has come to an end at a time when the rule is in force ;
- f) any rule which relates to the licit or illicit nature of a legal act, or to the conditions of its validity, shall apply to acts performed while the rule is in force ;
- g) any rule which relates to the continuous effects of a legal act shall apply to effects produced while the rule is in force, even if the act has been performed prior to the entry into force of the rule ;
- h) any rule which relates to the substance of a legal status shall apply even if the status has been created or acquired prior to the entry into force of the rule.

3. States and other subjects of international law shall, however, have the power to determine by common consent the temporal sphere of application of norms, notwithstanding the rules laid down in Paragraphs 1 and 2 and subject to any imperative norm of international law which might restrict that power.

This provision shall be without prejudice to obligations which may ensue for contracting parties from previous treaties to which they are parties and from the provisions of which they cannot depart even by common consent.

4. Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application. Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of application.

5. The solution of such intertemporal problems as might arise within international Organizations is reserved.

6. In order to eliminate any cause of uncertainty or dispute, it is desirable that every international instrument should include express provisions indicating the solution which ought to be given to such intertemporal problems as might arise in the course of its application.

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(11 August 1975)

Session of Wiesbaden - 1975

**Conditions of Application of Rules,
other than Humanitarian Rules,
of Armed Conflict to Hostilities in which United Nations
Forces may be engaged**

(First Commission, Rapporteur : Mr Edward Hambro)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalling its Resolution on "Equality of application of the rules of the law of war to parties to an armed conflict" (Brussels Session, 1963) ;

Recalling its Resolution on "The distinction between military objectives and non-military objects in general and particularly the problems associated with weapons of mass destruction" (Edinburgh Session, 1969) ;

Recalling its Resolution on the "Conditions of application of humanitarian rules of armed conflict to hostilities in which United Nations Forces may be engaged" (Zagreb Session, 1971) ;

Noting that the United Nations has made use of armed Forces on various occasions and that such Forces, whatever their mission, might become involved in actual hostilities ;

Considering that pending the elaboration of a comprehensive set of rules for United Nations Forces, it is necessary to determine the conditions under which the rules of armed conflict apply to such Forces ;

Reserving the study of the problems of individual criminal responsibility ;

Declaring, furthermore, that the present Resolution is without prejudice to the eventual solution of the problems concerning the competences respectively of organs of the United Nations in creating or directing United Nations Forces,

Adopts this Resolution :

Article 1

For the purposes of this Resolution, the term "United Nations Forces" shall apply to all armed units under the control of the United Nations.

Article 2

Subject to the exceptions provided for in the following Articles, the rules of armed conflict shall apply to hostilities in which United Nations Forces are engaged, even if those rules are not specifically humanitarian in character.

Article 3

Every State shall be entitled to give the United Nations Forces any assistance requested from it by the Organization.

The following Articles shall be without prejudice to the effects which an illegal use of armed Forces may have in general international law upon the principle of non-discrimination in the application of non-humanitarian rules of armed conflict.

Article 4

Whenever United Nations Forces are engaged in hostilities, Member States of the Organization may not take advantage of the general rules of the law of neutrality in order to evade obligations laid upon them in pursuance of a decision of the Security Council acting in accordance with the Charter, nor may they depart from the rules of neutrality for the benefit of a party opposing the United Nations Forces.

Article 5

No State shall be deprived of its status of neutrality, including permanent neutrality, for complying with the rules laid down in this Resolution, nor shall such compliance justify the application of reprisals or any other measures of coercion against that State.

Article 6

The parties referred to in this Resolution shall be under the obligation to make reparation for any damage which they might cause in violation of the rules of armed conflict.

Recommendation I

It is desirable that the United Nations act upon Resolution I of the Intergovernmental Conference for the Protection of Cultural Property by enjoining their Forces to respect The Hague Convention of 14 May 1954 on the Protection of Cultural Property in the event of Armed Conflicts.

Recommendation II

It is desirable that the United Nations state in a appropriate form that it considers itself bound by the 1949 Geneva Convention in all operations to which its Forces might be parties.

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(13 August 1975)

Session of Wiesbaden - 1975

The Principle of Non-Intervention in Civil Wars

(Eighth Commission, Rapporteur : Mr Dietrich Schindler)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Noting the gravity of the phenomenon of civil wars and of the suffering which they cause ;

Considering that any civil war may affect the interests of other States and may therefore result in an international conflict if no provision is made for very stringent obligations of non-intervention ;

Considering in particular that the violation of the principle of non-intervention for the benefit of a party to a civil war often leads in practice to interference for the benefit of the opposite party ;

Convinced therefore that it is necessary to specify the duties of other States in the event of civil war breaking out in the territory of a given State ;

Reserving the study of issues arising from the danger of extermination of ethnic, religious or social groups or from other severe infringements of human rights during civil war,

Adopts the following Resolution :

Article 1. Concept of civil war

1. For the purposes of this Resolution, the term "civil war" shall apply to any armed conflict, not of an international character, which breaks out in the territory of a State and in which there is opposition between :

a) the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State, or

b) two or more groups which in the absence of any established government contend with one another for the control of the State.

2. Within the meaning of this Resolution, the term "civil war" shall not cover :

a) local disorders or riots ;

b) armed conflicts between political entities which are separated by an international demarcation line or which have existed *de facto* as States over a prolonged period of time, or conflicts between any such entity and a State ;

c) conflicts arising from decolonization.

Article 2. Prohibition from assistance

1. Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.

2. They shall in particular refrain from :

a) sending armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent or to set out ;

b) drawing up or training regular or irregular forces with a view to supporting any party to a civil war, or allowing them to be drawn up or trained ;

c) supplying weapons or other war material to any party to a civil war, or allowing them to be supplied ;

d) giving any party to a civil war any financial or economic aid likely to influence the outcome of that war, without prejudice to the exception provided for in Article 3 (b) ;

e) making their territories available to any party to a civil war, or allowing them to be used by any such party, as bases of operations or of supplies, as places of refuge, for the passage of regular or irregular forces, or for the transit of war material. The last mentioned prohibition includes transmitting military information to any of the parties ;

f) prematurely recognizing a provisional government which has no effective control over a substantial area of the territory of the State in question.

3.a) Third States shall use all means to prevent inhabitants of their territories, whether natives or aliens, from raising contingents and collecting equipment, from crossing the border or from embarking from their territories with a view to fomenting or causing a civil war.

b) They shall disarm and intern any force of either of the parties to the civil war which crosses their borders, on the understanding that expenses resulting from internment will be charged to the State faced with the civil war. Weapons found with such forces shall be seized and retained by the third State and returned to the State faced with the civil war after the end of the latter.

Article 3. Exceptions

Notwithstanding the provisions of Article 2, third States may :

- a) grant humanitarian aid in accordance with Article 4 ;
- b) continue to give any technical or economic aid which is not likely to have any substantial impact on the outcome of the civil war ;
- c) give any assistance prescribed, authorized or recommended by the United Nations in accordance with its Charter and other rules of international law.

Article 4. Humanitarian aid

1. The forwarding of relief or other forms of purely humanitarian aid for the benefit of victims of a civil war should be regarded as permissible.
2. In cases where the territory controlled by one party can be reached only by crossing the territory controlled by the other party or the territory of a third State, free passage over such territory should be granted to any relief consignment, at least insofar as is provided for in Article 23 of the Geneva Convention of 12 August 1949 on the Protection of Civilians in War-Time.

Article 5. Foreign intervention

Whenever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized or recommended by the United Nations.

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(14 August 1975)

Session of Wiesbaden - 1975

The Application of Foreign Public Law

(Twentieth Commission, Rapporteur : Mr Pierre Lalive)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that ideas vary from one legal system to another as to the validity, criteria and effects, and even the existence, of the distinction between public and private law ;

Noting that in the field of comparative law this distinction is of a relative and evolving nature, that there is an increasing interpenetration of the two branches of domestic law, and that changes have occurred in fact and in concepts as to the role of the State, especially as regards the regulation and protection of the interests of individuals and the management of the economy ;

Taking account of the needs of an international society characterized at one and the same time by the diversity of conflict of laws, policies and State interests and by the aspiration for international co-operation and for coexistence or harmonization of national legal systems ;

Wishing to promote a just solution of questions of the conflict of laws whilst respecting the acknowledged principles of public international law, the legitimate interests of States and the rights or interests of individuals, a solution which also takes account of the desirable progress in the field of international co-operation ;

Having regard to the favourable effect which may result in this field from the awareness, on the one hand, of the need for peaceful co-operation and mutual assistance between States and, on the other, of the special solidarity that exists within groups of States united by close links of friendship, alliance or integration ;

Being of the opinion that it is opportune to state some principles likely to provide for or facilitate the solution of certain issues of the conflict of laws involving foreign public law,

Adopts the following Resolutions :

A.

I. 1. The public law character attributed to a provision of foreign law which is designated by the rule of conflict of laws shall not prevent the application of that provision, subject however to the fundamental reservation of public policy.

2. The same shall apply whenever a provision of foreign law constitutes the condition for applying some other rule of law or whenever it appears necessary to take the former provision into consideration.

II. The so-called principle of the inapplicability *a priori* of foreign public law, like that of its absolute territoriality, a principle invoked, if not actually applied, in judicial decisions and legal writings of certain countries :

- a) is based on no cogent theoretical or practical reason, and
- b) often duplicates with the principles of public policy,
- c) may entail results that are undesirable and inconsistent with contemporary needs for international co-operation.

III. The same applies for similar reasons to the inapplicability *a priori* of certain categories of provisions of foreign public law, such as provisions which do not concern the protection of private interests but primarily serve the interests of the State.

IV. The scope of the preceding rule and statements shall in no way be affected by the fact that foreign law which is regarded as public law is still applied less frequently for various reasons, and mainly :

- a) because the question does not arise owing to the nature of the social relationships referred to in the rule of conflict of laws or to the very subject of the foreign provision, or
- b) because the foreign provision is restricted in its scope to the territory of the legislator from whom it originates and because such restriction is in principle respected, or
- c) because authorities of the State of the forum often hold either that they have no jurisdiction to apply certain foreign laws which are regarded as public law, notably in giving administrative or constitutive judgments, or that they need not assist in the application of such provisions in the absence of treaties, of reciprocity or of a convergence of the economic or political interests of the States with which the situation is connected.

B.

Decides to reserve the question of claims made by a foreign authority or a foreign public body and based on provisions of its public law, and to continue discussion of the topic at a later session.

(11 August 1975)

Session of Oslo - 1977

**Public Law Claims Instituted by a Foreign Authority
or a Foreign Public Body**

(Twentieth Commission, Rapporteur : Mr Pierre Lalive)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalling the Resolution on "The Application of Foreign Public Law" which it adopted at its Wiesbaden Session on 11 August 1975, and wishing to specify the scope of its application with respect to the admissibility of public law claims instituted in legal proceedings by a foreign authority or a foreign public body,

Taking account of the state of opinion and of practice with respect to such claims as well as of the tendency, particularly in some recent conventions, towards increased co-operation and mutual assistance,

Adopts the following Resolution :

I

- a) Public law claims instituted in legal proceedings by a foreign authority or a foreign public body should, in principle, be considered inadmissible in so far as, from the viewpoint of the State of the forum, the subject-matter of such claims is related to the exercise of Governmental power.
- b) Such claims should nevertheless be considered admissible if, from the viewpoint of the State of the forum and taking account of the right of the defendant to equitable treatment in his relations with the authority or body in question, this is justified by reason of the subject-matter of the claim, the needs of international cooperation or the interests of the States concerned.

II

Public law claims other than those referred to in the preceding Article, instituted in legal proceedings by a foreign authority or a foreign public body, should be considered admissible, as for example claims which from the viewpoint of the State of the forum stem from or are ancillary to private law claims.

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(1 September 1977)

Session of Oslo - 1977

Multinational Enterprises

(Second Commission, Rapporteur : Mr Berthold Goldman)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Whereas enterprises characterized by the economic unity which they derive from the directing force of a parent company acting as their decision-making centre, as well as by the dissemination through a large number of countries of places of business, with or without legal personality, which constitute their operating centres, play a leading and increasing part in the sphere of international production and trade and thereby exert an economic, social and even political influence ;

Whereas at international level such enterprises are the subject of investigations, studies, debates and decisions, especially within the framework of many international organizations ;

Whereas these efforts have essentially been directed to the political economic and social problems which are raised by the activities of multinational enterprises, particularly in developing countries ;

Whereas a review of the legal problems relating specifically to multinational enterprises and a progressive study of solutions applicable to these problems can make a substantial contribution to the progress of political, economic and social efforts devoted to such enterprises ;

Whereas such an investigation should aim at developing an efficient legal regime for the enterprises in question, taking account of the interests of the international community, particularly those of developing countries ;

Whereas the Institute has, as a first step, explored some of the legal problems relating to multinational enterprises and is aware of the need to extend this work subsequently ;

Adopts this Resolution :

I

Enterprises which consist of a decision-making centre located in one country and of operating centres, with or without legal personality, situated in one or more other countries should, in law, be considered as multinational enterprises.

II

For the enterprises defined above there should be developed progressively a legal regime which would, in particular, safeguard the sovereignty and economic independence of States, especially of developing States.

III

1. (a) The legal connection of the parent company, as well as that of the subsidiaries, with a given State should take account, according to the circumstances, of the links of the parent company with the countries of the subsidiaries and conversely, of the links of the subsidiaries with the country of the parent company.

(b) It would be desirable that the principle set out in the preceding sub-paragraph be implemented through international agreements.

2. (a) It would be useful if a study were made on the introduction of an international registration of multinational enterprises, on a compulsory or voluntary basis, within an appropriate international organization, either existing or to be created.

(b) The study to be undertaken should, in particular, cover the ways and means of setting up the registration system, the types of enterprises which could or should register, and the consequences of registration (*inter alia* : extended obligations of information disclosure for registered enterprises : application to such enterprises of international agreements of Codes of Conduct concerning multinational enterprises in general ; possibility of resorting to arbitration or to other means for the settlement of disputes involving registered enterprises).

IV

1. The choice of law system of each forum considering the matter shall be applied to determine the law applicable to the formation, organization, functioning and activities of the various constituent members of the multinational enterprise. As regards the activities of multinational enterprises, it would be desirable that those systems be harmonized progressively so as to take account primarily of the country in which the activities are performed and, in addition, of the countries in which they produce direct and immediate effects.

2. It is desirable that a progressive international harmonization of the substantive rules of law concerning the activities of multinational enterprises be envisaged and that the preparation of "Codes of Conduct" for such enterprises be continued.

V

States in which the parent company and the subsidiaries or dependent places of business of multinational enterprises are located should co-operate in exercising their legislative, executive and judicial jurisdiction to control such enterprises and, to this end, envisage in particular the conclusion of international agreements.

VI

1. Jurisdiction to regulate, control and penalize restrictive competition practices of multinational enterprises, which shall be based in all cases on the place where such practices are performed, should, in addition, be made dependent on the effects of the latter, but only if these effects are deliberate - or at least predictable -, substantial, direct and immediate within the territory of the State concerned.

2. It would be desirable that international agreements be concluded for the allocation of jurisdiction in this field in order to prevent any gap or overlap between applicable rules.

3. It would also be desirable that the rules of competition concerning multinational enterprises be harmonized at international level.

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(7 September 1977)

Session of Oslo - 1977

**Contracts Concluded by International Organizations
with Private Persons**

(Fourth Commission, Rapporteur : Mr Nicolas Valticos)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Whereas the development of international organizations and of their activities involves the conclusion of an increasing number of contracts of various types between such organizations and private persons ;

Whereas it is desirable that such contractual relations meet the following requirements : allow international organizations to perform their duties without hindrance within the framework established by international law, show regard for the law, and safeguard the stability of transactions and legal relations ;

Having regard to the information obtained by consulting a large number of international organizations, and taking account of the various situations and practices existing in this field ;

Recalling the spirit of the Resolution of Amsterdam (1957) on judicial redress against the decisions of international bodies,

Adopts this Resolution :

Article 1

This Resolution concerns contracts concluded by international inter-governmental organizations with private persons, natural or legal.

I. The Proper Law of the Contract

Article 2

1. To facilitate the settlement of difficulties which may arise in connection with the contracts under consideration, it is desirable that the parties expressly specify the source, national or international, from which the proper law of the contract is to be derived.

2. The parties may expressly refer to a combination of several sources.

Article 3

The parties may stipulate that domestic law provisions referred to in the contract shall be considered as being those in force at the time of conclusion of the contract.

Article 4

Whenever the private party may be subject to special burdens or risks - such as alteration, suspension or termination of the contract upon the initiative of the contracting organization - due to the connection of the contract with the exercise of the organization's particular functions, the contract should specify the implications for the rights and obligations of the parties.

Article 5

If not expressly indicated in the contract, the proper law shall, where necessary and unless otherwise agreed by the parties at a later stage, be determined by the body entrusted with the settlement of the dispute, which shall try to ascertain the parties' tacit intention or, failing this, apply objective criteria.

Article 6

In so far as it constitutes the proper law of the contract, the law of the organization shall be considered as including the constitutive instrument, any other rules governing the organization and the practice established by the latter, these sources being supplemented by the general principles of law.

II. Settlement of Disputes in Case of Immunity from Jurisdiction

Article 7

Contracts concluded with private persons by international organizations should, in cases where the latter enjoy immunity from jurisdiction, provide for the settlement of disputes arising out of such contracts by an independent body.

Article 8

The body referred to in Article 7 may be :

- a) an arbitration body set up in accordance with the rules of a permanent arbitration institution or in pursuance of *ad hoc* clauses ;
- b) a tribunal set up by an international organization, if conferring such jurisdiction is compatible with the rules of the organization ; or
- c) a national judicial body, if this is not incompatible with the status and functions of the organization.

Article 9

If a dispute arises in connection with a contract which contains no clause on the settlement of disputes, the organization concerned should either waive immunity from jurisdiction or negotiate with the other party to the contract with a view to settling the dispute or to establishing an appropriate procedure for its settlement - particularly through arbitration.

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(6 September 1977)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Athens - 1979

**The Proper Law of the Contract in Agreements
Between a State and a Foreign Private Person**

(Twenty-first Commission, Rapporteur : Mr Georges van Hecke)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Conscious of the importance which agreements between a State and a foreign private person have nowadays in international economic relations,

Wishing to contribute to the clarification of rules of private international law relating to such agreements,

Considering that in the case of a contract between a State and a foreign private person the parties may, under the general principles of private international law, designate the proper law of the contract and, if such is their intent, withdraw the contract from the exclusive application of any given domestic law,

Reserving the question of a possible operation of public policy or mandatory legislation in this field,

Reserving the question of contracts concluded by a public enterprise or body having a legal personality of its own with a foreign private person,

Stressing that the international responsibility of States under international law is not covered by this Resolution,

Adopts this Resolution :

Article 1

Contracts between a State and a foreign private person shall be subjected to the rules of law chosen by the parties or, failing such a choice, to the rules of law with which the contract has the closest link.

Article 2

The parties may in particular choose as the proper law of the contract either one or several domestic legal systems or the principles common to such systems, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of these sources of law.

Article 3

The parties may agree that domestic law provisions referred to in the contract shall be considered as being those in force at the time of conclusion of the contract.

Article 4

It is desirable that the parties expressly designate the proper law of the contract.

It is also desirable that in designating the latter the parties take into consideration the difficulties which may result from the possible application or combination of a variety of legal systems or principles.

Article 5

In the absence of any choice by the parties, the proper law of the contract shall be derived from indications of the closest connection of the contract.

Article 6

The rules of law chosen in accordance with the preceding provisions shall govern the incidence of contractual liability between the parties, in particular those raised by the State's exercise of its sovereign powers in violation of any of its commitments toward the contracting partner.

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(11 September 1979)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Athens - 1979

The Pollution of Rivers and Lakes and International Law

(Fifteenth Commission, Rapporteur : Mr Jean Salmon)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalling its Resolutions of Madrid in 1911 and of Salzburg in 1961 ;

Conscious of the multiple potential uses of international rivers and lakes and of the common interest in a rational and equitable utilization of such resources through the achievement of a reasonable balance between the various interests ;

Considering that pollution spread by rivers and lakes to the territories of more than one State is assuming increasingly alarming and diversified proportions whilst protection and improvement of the environment are duties incumbent upon States ;

Recalling the obligation to respect the sovereignty of every State over its territory, as a result of which each State has the obligation to avoid any use of its own territory that causes injury in the territory of another State,

Hereby adopts the following articles :

Article I

I. For the purpose of this Resolution, "pollution" means any physical, chemical or biological alteration in the composition or quality of waters which results directly or indirectly from human action and affects the legitimate uses of such waters, thereby causing injury.

2. In specific cases, the existence of pollution and the characteristics thereof shall, to the extent possible, be determined by referring to environmental norms established through agreements or by the competent international organizations and commissions.

3. This Resolution shall apply to international rivers and lakes and to their basins.

Article II

In the exercise of their sovereign right to exploit their own resources pursuant to their own environmental policies, and without prejudice to their contractual obligations, States shall be under a duty to ensure that their activities or those conducted within their jurisdiction or under their control cause no pollution in the waters of international rivers and lakes beyond their boundaries.

Article III

1. For the purpose of fulfilling their obligation under Article II, States shall take, and adapt to the circumstances, all measures required to :

- a) prevent any new form of pollution or any increase in the existing degree of pollution : and
- b) abate existing pollution within the best possible time limits.

2. Such measures shall be particularly strict in the case of ultra-hazardous activities or activities which pose a danger to highly exposed areas or environments.

Article IV

In order to comply with the obligations set forth in Articles II and III, States shall in particular use the following means :

- a) at national level, enactment of all necessary laws and regulations and adoption of efficient and adequate administrative measures and judicial procedures for the enforcement of such laws and regulations ;
- b) at international level, co-operation in good faith with the other States concerned.

Article V

States shall incur international liability under international law for any breach of their international obligations with respect to pollution of rivers and lakes.

Article VI

With a view to ensuring an effective system of prevention and of compensation for victims of transboundary pollution, States should conclude international conventions concerning in particular :

- a) the jurisdiction of courts, the applicable law and the enforcement of judgments ;

- b) the procedure for special arrangements providing in particular for objective liability systems and compensation funds with regard to pollution brought about by ultra-hazardous activities.

Article VII

1. In carrying out their duty to co-operate, States bordering the same hydrographic basin shall, as far as practicable, especially through agreements, resort to the following ways of co-operation :

- a) inform co-riparian States regularly of all appropriate data on the pollution of the basin, its causes, its nature, the damage resulting from it and the preventive procedures ;
- b) notify the States concerned in due time of any activities envisaged in their own territories which may involve the basin in a significant threat of transboundary pollution ;
- c) promptly inform States that might be affected by a sudden increase in the level of transboundary pollution in the basin and take all appropriate steps to reduce the effects of any such increase ;
- d) consult with each other on actual or potential problems of transboundary pollution of the basin so as to reach, by methods of their own choice, a solution consistent with the interests of the States concerned and with the protection of the environment ;
- e) co-ordinate or pool their scientific and technical research programmes to combat pollution of the basin ;
- f) establish by common agreement environmental norms, in particular quality norms for the whole or part of the basin ;
- g) set up international commissions with the largest terms of reference for the entire basin, providing for the participation of local authorities if this proves useful, or strengthen the powers or co-ordination of existing institutions ;
- h) establish harmonized, co-ordinated or unified networks for permanent observation and pollution control ;
- i) develop safeguards for individuals who may be affected by polluting activities, both at the stages of prevention and compensation, by granting on a non-discriminatory basis the greatest access to judicial and administrative procedures in States in which such activities originate and by setting up compensation funds for ecological damage the origin of which cannot be clearly determined or which is of exceptional magnitude.

Article VIII

In order to assist developing States in the fulfilment of the obligations and in the implementation of the recommendations referred to in this Resolution, it is desirable that developed States and competent international organizations provide such States with technical assistance or any other assistance as may be appropriate in this field.

Article IX

This Resolution is without prejudice to the obligations which fundamental human rights impose upon States with regard to pollution occurring in their own territories.

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(12 September 1979)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Athens - 1979

Teaching of International Law

*(Third Working Group, Rapporteur : Mr Jaroslav Zourek
Deputy Rapporteur : M. Pierre Lalive)*

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalling the Recommendation on the Teaching of International Law which it adopted in Rome on 14 September 1973 at its Centenary,

Stressing the primary importance of international law for the maintenance of international peace and security and for the development of trade and relations between individuals at international level,

Mindful of the expanding internationalization of social relationships and the growing impact of international factors on the most diverse aspects of the lives of individuals, peoples and States,

Considering that the requirements of the international community call for the training of new generations open to the realities and problems of international life,

Expressing the wish that teaching in general, in elementary and secondary schools as well as in institutes of higher learning, be adapted in all countries to the need for better understanding of the international community,

Noting that in many countries law is still taught essentially or even exclusively along the lines of national considerations and methods and that the teaching of international law whether public or private, is often quantitatively and qualitatively inadequate to meet the demands of our times and is not provided in a sufficiently international perspective,

Whereas this entails a host of unfavourable consequences which are often not appreciated or are underestimated and leads, in particular, to inadequate preparation for the needs of contemporary international life in the relations between both individuals and States.

Considering further that the essential role of international law in preventing and solving difficulties which may arise in international relations has been highlighted in many Resolutions of the United Nations General Assembly,

Taking into account in particular Resolutions 137 (II) of 17 November 1947 and 176 (II) of 21 November 1947, in which the United Nations General Assembly invited Member States to encourage the teaching of international law,

Considering the obligations to disseminate humanitarian law as set forth in the Geneva Conventions of 1949 and the Protocols of 1977 thereto, as well as the Resolution adopted on this subject on 7 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,

Considering finally that private international law nowadays constitutes an essential means for the security and development of trade and relations between individuals at international level,

Hereby adopts this Resolution :

I

1. It is essential that specific measures be taken in universities, faculties or similar institutions teaching law, economics, political science or international relations to promote development and coherence of all subjects of international relevance.
2. In addition to public international law (inclusive of humanitarian law) and private international law in its broadest sense, these subjects are to include the study of international co-operation, especially in the economic field.
3. The value of the comparative method of investigation and its potential contribution towards better international understanding must not be overlooked in the study of these subjects.

II

1. Knowledge of public international law has become indispensable for the training of the ever-increasing number of experts required by States and international organizations and highly desirable for the training not only of lawyers in general, but also of many civilian and military holders of office.
2. It is necessary that compulsory basic teaching covering public international law and international organizations, as well as optional specialized teaching, be made general in universities, faculties, law schools and similar institutions.

3. It is essential to ensure, for the public at large, a wide dissemination of the main principles of public international law.

III

1. Knowledge of private international law in a broad sense has become indispensable for the training not only of the ever-increasing number of experts called for by the expanding internationalization of social relationships, but also of practitioners in general (barristers, judges, company lawyers, etc.) and of any person that may have to deal with legal or economic issues of international relevance.

2. It is necessary that compulsory basic teaching covering private international law, as well as optional specialized teaching, be made general in universities, faculties, schools of law or commercial science and similar institutions. Bearing in mind the methods and techniques peculiar to this discipline and the advisability of harmonizing national solutions in this regard, it is desirable that such teaching, whether basic or specialized, be provided in a comparatist and international spirit.

IV

Contemporary developments call for public as well as private international law to be studied and taught in such a way as to stress the links between both disciplines, especially in the field of economic relations, and to depart from conceptions based on a rigid separation between public law and private law.

V

In consideration of the foregoing, the Institute of International Law

Requests all its Members and Associates to contribute by all appropriate means, especially through their publications, to the circulation of this Resolution and to the fulfilment of the wishes and recommendations formulated above,

Urgently appeals to political authorities, universities and other educational institutions to examine, in the light of the foregoing recitals and declarations and of the present and foreseeable demands of an increasingly international world, the place set aside in their programmes for international legal disciplines and the methods of teaching such disciplines, without prejudice to more general measures by which a basic knowledge of international law could be disseminated and popularized.

Emphasizes the vital role being played in the progress of international law by national and international institutions, whether scientific or professional, which take an active part in teaching,

Calls attention in particular to the decisive contribution made by the The Hague Academy of International Law since its foundation in 1923, while deploring that today its work is threatened by financial problems,

Decides to establish a standing committee of the Institute to follow up the development of the teaching of international law in the spirit of this Resolution.

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(12 September 1979)

Session of Dijon - 1981

The Problem of Choice of Time in Private International Law

(Twenty-fourth Commission, Rapporteur : Mr Ronald Graveson)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Recalling the Resolution on the Intertemporal Problem in Public International Law adopted at its Wiesbaden Session in 1975 ;

Noting that certain problems of time in private international law differ from those in public international law ;

Considering it desirable accordingly to propose appropriate solutions to the problem of time in systems of private international law generally ;

Considering that the application of the following principles will facilitate the achievement of just and equitable solutions ;

I

Adopts this Resolution :

1. The temporal effect of change in a rule of private international law shall be determined by the legal system to which that rule belongs.
2. The temporal effect of changes in the facts that constitute the basis for assuming jurisdiction or for selecting the applicable law, whether such changes result from the action of a natural or legal person or from that of a legislative, judicial or executive authority, shall be determined as follows :
 - a) changes during the course of the proceedings in the facts that constitute the basis for assuming jurisdiction shall not deprive a court of its existing jurisdiction or normally affect the recognition or enforcement of its judgments in other States ;

b) in the case of changes in the facts that constitute the basis for selecting the applicable law, by applying that law, from amongst those under consideration, the application of which corresponds most closely to the objectives of the forum's system of choice of law.

3. The temporal effect of change in the applicable law shall be determined by that law.

4. The legal relevance of facts occurring before or after the legally decisive event, except in so far as relevant for the purposes of assuming jurisdiction or of choice of law, shall be determined by the applicable law.

5. The effect of retrospective legal provisions, whether legislative, executive or judicial, should normally be determined by reference to the legal system in which they originate.

6. Particularly in continuous legal situations of personal status, property or obligation, personal status established and rights acquired before the happening of a relevant change of law should be protected so far as possible.

7. In any case in which, on the occasion of regulating the conflict in time, the effects of a legal situation may be subjected to a law different from that applicable to the conditions of its formation, the solution adopted should take into consideration the need to ensure continuity and cohesion of the total regime of the situation under review.

II

Recommends that :

In order to avoid any cause of uncertainty or dispute, every international instrument or statute relating to matters of private international law should include provisions indicating the solution that ought to be given to such problems of applicable time as might arise in the course of its application.

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(29 August 1981)

Session of Dijon - 1981

**The Scope of Application of Rules of Conflict of Law
or of Uniform Substantive Law Contained in Treaties**

(Twenty-third Commission, Rapporteur : Mr Alfred E. von Overbeck)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Observing the increasing number of rules of conflict of laws or of uniform substantive law that are contained in treaties and the difficulties encountered in determining their scope of application,

Makes the following Recommendations in aid of the drafting of future treaties :

I. Treaties covered by the Recommendations

Article 1

1. These Recommendations apply to multilateral and bilateral treaties containing rules :
 - a) on the applicable law ;
 - b) on the jurisdiction of courts and other authorities ;
 - c) on the recognition and enforcement of foreign decisions and on judicial assistance ;
 - d) of uniform substantive law.
2. The Recommendations are concerned only with the scope of application of such rules and do not deal with the entry into force of a treaty either between contracting States or in the legal system of any such State.

II. Issues to be Regulated in the Treaties

Article 2

1. It is desirable that all the treaties referred to contain in particular precise provisions relating to the following issues :

- a) the subject-matter covered by the rules which they contain ;
- b) the territorial application of such rules (provisions on territorial application) ;
- c) the application of such rules to facts that occurred before the entry into force of the treaty (provisions on the application in time) ;
- d) conflicts with other treaties covering the same subject-matter ;
- e) the operation of the treaty in relation to States having a non-unified legal system and, where appropriate, its application to situations which concern several units of one of such States ;
- f) the meaning of such terms as “law”, “national law”, “international law”, if used in the treaty ;
- g) the scope of clauses on reciprocity, if any ;
- h) issues on which reservations are permitted and, if appropriate, the effect of such reservations.

2. Since the content of provisions on these issues will depend on the subject-matter of the treaty, the only recommendations which it seems possible to make at the present time relate to provisions on territorial application, to reservations and to the application in time. On the last point, the Institute refers to the Resolution on the Problem of Time in Private International Law which it also adopted at its Dijon Session.

III. Conditions of Territorial Application

Article 3

The provisions on territorial application shall define the scope of the treaty rules with respect to :

- a) purely internal situations subject to national law ;
- b) situations which have no significant link with a contracting State.

Article 4

1. Treaties on the applicable law or on the jurisdiction of courts and other authorities which permit the parties to choose the applicable law or the competent authority shall specify whether the parties may use this option in purely internal situations.
2. Treaties on the jurisdiction of courts and other authorities shall contain provisions on territorial application specifying the links which the situations covered must have with a contracting State.
3. Treaties on the recognition and enforcement of foreign decisions shall indicate precisely the decisions to which they refer.
4. Treaties on the applicable law which only govern situations having certain links with a contracting State shall contain provisions on territorial application that describe the situations covered. Treaties which do not contain such limitations should make this clear by means of an express provision which could be worded as follows : “The rules of this Treaty shall apply even to a situation that has no link with a contracting State”.

Article 5

1. Where the application of uniform substantive law is limited to situations involving a foreign element, the treaty shall contain a provision specifying that element.
2. Treaties which contain rules of uniform substantive law shall restrict the application of such law to situations that have a significant link with at least one contracting State. To this end, the treaties may :
 - a) contain applicability provisions that directly specify the situations to which the uniform substantive law applies ;or
 - b) contain their own provisions on the applicable law, or refer to provisions on the applicable law that are contained in another treaty which is binding upon all parties to the treaty on uniform substantive law ;
 - c) combine the methods of subparagraphs a) and b) above.
3. Under the system described in subparagraph b) of the preceding paragraph, the uniform substantive law shall apply if the provision on the applicable law designates the law of a contracting State and if the uniform substantive law is applicable pursuant to the provision referred to in paragraph 1 of this Article.
4. Treaties which contain rules of uniform substantive law shall specify whether the persons concerned may agree to deviate from provisions that determine the territorial application of such rules.

Article 6

1. Article 4 also applies to rules of uniform substantive law that are contained as ancillary provisions in a treaty covered by that Article.
2. Article 5, except where otherwise expressly provided in the treaty, applies to rules of conflict of law in a treaty which contains mainly rules of uniform substantive law.

Article 7

The criteria that determine territorial application shall be clearly defined. In particular, one should indicate :

- a) the time at which a criterion is to be assessed ;
- b) the subsidiary solution to be used whenever a criterion would result in the designation either of several legal systems or of none at all.

IV. Reservations

Article 8

Reservations to a treaty which applies even if a situation has no link with a contracting State have no reciprocal effects.

Article 9

Whenever reservations to a treaty which is restricted in its application to situations that have some link with a contracting State are to be given reciprocal effects, one should specify in the treaty the factor which, in connecting the situation with the State that has made the reservation, produces these effects.

Article 10

Whenever reservations are permitted by a treaty which contains rules on the recognition and enforcement of foreign decisions, the recognition and enforcement of the decisions of a State that has made such a reservation shall be subject, unless otherwise provided, to similar limitations in the other contracting States.

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(1st September 1981)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Cambridge - 1983

The Conflict-of-laws Rules on Unfair Competition

(Twenty-first Commission, Rapporteurs : Messrs Willis L.M. Reese and Frank Vischer)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Whereas the Institute, at its Edinburgh Session in 1969, adopted a Resolution on Delictual Obligations in Private International Law, dealing with the general field of the law of tort ;

Whereas the time has come for the Institute to deal with specific areas of that field of law ;

Whereas unfair competition is an area of growing importance in the law ;

Whereas the choice-of-law problems involving this area have not everywhere been given the attention that they deserve ;

Whereas the present appears to be a desirable time to make a contribution towards a solution of these problems,

Adopts the following Resolution (with explanatory Notes) :

Article 1

The area covered by this Resolution can broadly be defined, as in Article 10bis of the Paris Convention for the Protection of Industrial Property, as “any act of competition contrary to honest practice in industrial or commercial matters”.

In particular this Resolution covers :

- 1) passing off one's goods as those of another ;
- 2) improper appropriation of a competitor's efforts, including the sale of a competitor's goods under the representation that these goods are of one's own manufacture and improper appropriation and disclosure of trade secrets ;
- 3) improper advertising ;
- 4) defamation or disparagement of a competitor in relation to his products or business ;
- 5) unfair price competition, such as selling below cost or price discrimination ;
- 6) improper interference with a competitor's business, as, for example, by enticing his employees to leave his employ, inducing breach of a competitor's contract or interference with a competitor's supplier and customer relations.

On the other hand, this Resolution does not cover trademark, patent and copyright infringement or any liability arising from special legislation concerning restrictive or monopolistic practices.

Note : This list of matters covered and excluded seems reasonably self- explanatory. Trademark, patent and copyright infringement is excluded on the ground that, except where otherwise provided by treaty, statutes providing such protection are not given extraterritorial effect. On the other hand, the intention is to include passing off by means of a confusing tradename irrespective of whether this name is entitled to trademark protection in one or more States. For example, the Resolution is intended to cover the situation where a trademark registered in State X but not in State Y is treated as a tradename under Y law with the result that a person who associated that name with his goods in State Y would be liable for passing off under Y law. Restrictive or monopolistic practices such as cartels and monopolies are excluded on the ground that they present special problems.

Article II

1. Where injury is caused to a competitor's business in a particular market by conduct which could reasonably have been expected to have that effect, the internal law of the State in which that market is situated should apply to determine the rights and liabilities of the parties, whether such conduct occurs in that State or in some other State or States.

Note : As the term is used in this Resolution, a “market” is limited to the territory of a single State.

The application of the law of the market is conditioned by the foreseeability of the injury to the competitor's business. The applicable law where such injury is not foreseeable is determined by Article IV.

The rules in this paragraph and the following paragraph of Article II apply even in situations where both the plaintiff and the defendant are citizens or domiciliaries of another State whose law differs from that of the State where the injury occurs. By "injury" is meant the immediate impact of the defendant's act upon the plaintiff's business. So, if in State X the defendant passes off his goods as those of a competitor which is incorporated and has its principal place of business in State Y, State X, rather than State Y, is the place of injury .

The expression "internal law" is employed to refer to the whole law of the State selected, with the exception of its choice-of-law rules, thus including both law applicable within the territory and special law (if any) adopted to operate in particular fields with extraterritorial effect.

Examples of situations covered by this rule are where the defendant in State X sends goods into State Y, or advertises his goods in State Y, or arranges for the publication in State Y of statements that defame the plaintiff or disparage the plaintiff's products.

There will be situations where what the defendant did was prohibited by the local law of the State where he acted but not by the local law of the State where injury was done to the plaintiff's business. An example would involve a radio broadcast from State X which is heard in State Y and which contains advertising of a sort which is prohibited by X local law but not by the local law of Y. The local law of Y should here be applied to determine whether the defendant is liable to the plaintiff for any injury caused to the latter's business in Y. And this should be true even in a situation where the plaintiff is a citizen or habitual resident of State X. Y local law should be applied in these instances for the reason, among others, that equal treatment should be accorded to all persons injured in Y.

One special situation in which reference to the market affected would not assist in determining the choice of law is that contemplated by subparagraph (6) of Article I (see the Note to Article III, paragraph I).

2. Where conduct causes injury to a competitor's business in a number of markets situated in different States, the applicable law should be the internal law of each State where such a market is situated.

Note : This formulation would be applicable for example in a situation where the defendant's broadcast from one State is heard in a number of States or where the defendant in one State packages his goods to resemble those of the plaintiff and then ships them into a number of States to be sold there on the retail market. On rare occasions, it might be that the application of the internal law of each State of injury would be rendered impracticable by reason of the number of States where injury was suffered. Such circumstances might justify recourse to the law of the State of most significant relationship under Article III.

Article III

In exceptional situations in which the State whose internal law would be applicable under the rules stated in Article II does not have a sufficiently significant relationship with the parties, their conduct and the injury, the internal law of the State indicated by the most relevant connecting factors, or by the majority of the relevant connecting factors, should be applied.

Note : In determining whether a State has a sufficiently significant relationship, a court should take into account all relevant factors, including the nationality and domicile of the parties, the relationship of the States concerned to the parties and the occurrence, and the question or questions before the court.

One situation in which this rule might be applied is that, mentioned above, in which injury is suffered in so many States as to render impracticable the application distributively of the internal law of each place of injury. In such a situation the internal law to be applied would usually be that of the State where the defendant's conduct had the greatest immediate impact upon the plaintiff's business, provided that it is possible to identify such a State. Otherwise the governing law would usually be the internal law of the State of the plaintiff's principal place of business.

Article IV

Rights and liabilities resulting from unfair competition in situations that are not covered by the rules stated in Article II should be determined by the internal law of the State which has the most significant relationship with the parties, their conduct and the injury.

Note : The rules stated in Article II will not cover all possible situations. There may, for example, be rare situations where a place of injury cannot be identified.

Another example, mentioned above, involves sub-paragraph (6) of Article I. The improper enticement of a competitor's employees to leave his employ may not directly involve any market. In such a case, the applicable choice-of-law solution cannot be found in Article II, and Article III must be resorted to.

Again, application of the law of the market is excluded under Article II above if the defendant establishes that he could not reasonably have foreseen that he would by his conduct be injuring the plaintiff's business in a particular State. In such a situation, a court might find that the internal law of the State where the defendant's conduct took place should be applied.

As to determination of the State of "most significant relationship", see the Note to Article III.

Article V

Notwithstanding Articles II, III and IV; preparations for an act of unfair competition may be restrained by injunction under the law of the State where those preparations are made.

Note : The State where the act is done has a natural interest in restraining acts designed to lead to an act of unfair competition in another State. Whether an injunction is the appropriate form of relief will depend on the procedural law of the forum : the appropriate substantive law to be applied will usually be the local internal law, but may, in appropriate cases, be the internal law of the State where the contemplated act of unfair competition is to be performed.

Article VI

The above-stated rules determine, in particular :

- 1) the basis and extent of liability ;
- 2) the grounds for exemption from liability, any limitation of liability and any division of liability ;
- 3) the kinds of injury for which relief can be given ;
- 4) the measure of damages, but excluding all questions of multiple damages ;
- 5) the question whether a claim to relief may be assigned or inherited ;
- 6) subject to the rules of the forum concerning standing to sue, the persons who may seek a remedy ;
- 7) the liability of a principal for the acts of his agent or of an employer for the acts of his employee ;
- 8) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability ;
- 9) rules of prescription and limitation, including rules relating to the commencement of a period of prescription of limitation, and the interruption of this period.

Note : This formulation is based upon provisions found in a number of Hague Conventions, e.g., Article 8 of the Convention of the Law Applicable to Products Liability.

Most of what is said here is thought to be self-explanatory.

Paragraph (3) refers to the interests that are entitled to legal protection ; it includes, for example, the question whether damages can be recovered for loss not quantifiable in pecuniary terms.

Paragraph (6) deals with situations where the forum may deny standing to sue to an entity which has a right of action under the law governing unfair competition as laid down in this Resolution, for example class actions and suits by associations representing consumer interests. The effect of the paragraph is the cumulative application of the procedural law of the forum and the applicable substantive law.

Article VII

The rules set forth in this Resolution need not be applied if they would lead to a result which would be manifestly incompatible with the public policy (*ordre public*) of the forum.

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(30 August 1983)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Cambridge - 1983

**International Texts of Legal Import in the Mutual Relations of their
Authors and Texts Devoid of Such Import**

(Seventh Commission, Rapporteurs : Mr Michel Virally)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Having examined the whole set of reports of the 7th Commission, in particular the final report and the conclusions of the Rapporteur ;

Observing that States frequently adopt variously denominated texts by which they accept commitments in their mutual relations in respect of which there is an express or implicit agreement that they are not of a legal character, or the character or import of which is difficult to determine ;

Taking into consideration the debate on the reports of the 7th Commission, which indicated an interest in the topic, the diversity of opinions thereon and the need to continue to study it ;

Convinced of the utility of clarifying the nature of these texts and their consequences for the States concerned,

1. *Congratulates* the 7th Commission on the work done, which has thrown considerable light on the problems raised by international practice ;
2. Requests the Bureau to consider in the near future whether further development of practice and more profound doctrinal thought on the subject might justify the Institute in placing this topic again on its agenda.

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(29 August 1983)

For purposes of information, the conclusions reached by the Rapporteur, as amended by him in the light of the debates which took place in the Institute, are set below :

1. International texts of legal import in the relations between their authors include, irrespective of their form :

- a) texts by which their authors agree to define, to amend or to revoke legal commitments ;
- b) texts by which their authors agree to produce other legal effects, whatever their nature, such as the establishment of a legal framework for future action of the parties, the creation of an organ or institutional mechanism likely to act at the legal level, the recognition of a specific legal situation or claim, and the recognition of the legal authority of principles or rules of international law.

2. Legal obligations resulting from a legal commitment are more or less restrictive of the freedom of action of those who accepted that commitment (and are therefore more or less binding), depending on the degree of precision (or lack of precision) of the terms used to define it, on the nature of any reservation attached to it, or on the more or less discretionary conditions to which the performance of the commitment may be subject.

However, when substantiated, the violation of a legal obligation always entails the consequences that are defined by the international legal system.

3. Despite the high degree of subjective appreciation which they involve for those who are subject to them, and despite the fact that their performance usually requires supplementary agreements (or even discretionary unilateral decisions), obligations to co-operate, to negotiate, to consult or even simply to take into consideration a possible future occurrence with a view to an equally possible action, are legal obligations which a third party may determine, within certain limits, as having been or not having been performed in good faith.

The violation of such obligations entails the same consequences as that of any other legal obligation.

4. Subject to what is stated in paragraphs 5 and 6, texts containing commitments which States that accepted them intended to be binding solely at the political level and which have all their effects at that level (hereafter referred to as "purely political commitments") do not constitute international texts of legal import in the mutual relations between their authors.

However, a specific text, whatever its name, may contain at the same time provisions of a legal character within the meaning of paragraph 1 and purely political commitments within the meaning of the preceding subparagraph.

5. The violation of a purely political commitments justifies the aggrieved party in resorting to all means within its power in order to put an end to, or compensate for, its harmful consequences or drawbacks, in so far as such means are not prohibited by international law. Disputes arising from such violations may be submitted to all appropriate means of peaceful settlement and must be submitted to peaceful settlement procedures in the circumstances specified in Article 33, para. 1, of the Charter of the United Nations.

6. A State which has accepted a purely political commitment is subject to the general obligation of good faith which governs the conduct of subjects of international law in their mutual relations.

Consequently, it is subject to all legal obligations resulting from such a commitment, in particular when it has created the appearance of a legal commitment upon which another person has relied and if the conditions required by international law for the creation of such obligations are fulfilled.

Likewise, it is deemed to have waived the right to invoke possible pleas under international law (including the objection related to domestic jurisdiction) against an action for enforcement of its commitment brought by someone in relation to whom it has bound itself. Consequently, such an action cannot be regarded as unlawful interference.

7. Commitments set forth in the text of an international treaty within the meaning of the Vienna Convention of 23 May 1969 are legal commitments unless it follows unquestionably from that text that the intention was to the contrary.

8. The legal or purely political character of a commitment set forth in an international text of uncertain character depends upon the intention of the parties as may be established by the usual rules of interpretation, including an examination of the terms used to express such intention, the circumstances in which the text was adopted and the subsequent behaviour of the parties.

9. International texts that merely formulate declarations of intent, whereby their authors simply mean to give some indication of their views in relation to a particular issue at the time of drafting the text without wishing to be bound for the future, are devoid of any legal import and are only binding on their authors if they have generated a situation of estoppel.

A declaration of intent is admissible only if the will not to be bound, as resulting in particular from the terms used, the circumstances in which the declaration was made and the subsequent behaviour of its author, proves perfectly clear .

In particular, a treaty provision may be considered to contain a mere declaration of intent only if it cannot be construed otherwise.

Session of Cambridge - 1983

New Problems of Extradition

(Twelfth Commission, Rapporteurs : Mr Karl Doehring)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Recalling the previous Resolutions of the Institute on matter of extradition (Oxford 1880, Geneva 1892, Paris 1984) ;

Desirous to contribute to a more effective suppression of crime by means of a better regulation of the systems of extradition ;

Conscious of the need to ensure in this field the observance of fundamental rights of the accused in particular of his rights of defence,

Adopts the following Resolution :

I. The Treaty System on Extradition

1. Both systems of extradition at present in use, the bilateral and the multilateral, should be developed and extended.
2. Since in certain respects the laws of States or groups of States show essential differences and in order nevertheless to promote a more satisfactory State practice in matters of extradition, States should be encouraged to agree upon a system of extradition in accordance with the general principles of this Resolution. Such agreements might contribute more effectively to the development of a modern system of extradition than would efforts exclusively aimed at establishing a universal system.
3. The making of reservations to multilateral treaties on extradition should be limited as far as possible.

4. When there exists no extradition treaty between them, States should nevertheless be encouraged reciprocally to extradite accused persons. The requirements of international law should be respected in such cases.

II. The Political Offence

1. Where the extradition treaty does not expressly contain the right to refuse extradition for political offences, a State may nevertheless invoke this defence in support of its refusal.

2. The right to refuse extradition for a political offence should not be replaced by the mere right to grant asylum from political persecution ; the prosecution of a political offender does not always necessarily amount to persecution justifying the grant of asylum by third States.

3. Acts of a particularly heinous character, such as acts of terrorism, should not be considered political crimes.

III. The *Attentat* Clause

The traditional *attentat* clause should be maintained, and its application should be extended to representatives of States, in particular members of diplomatic missions, and to representatives to, and officials of, international organizations.

The application of the *attentat* clause should be extended to acts of a particularly heinous nature.

IV. The Protection of the Fundamental Rights of the Human Person

In cases where there is a well-founded fear of the violation of the fundamental human rights of an accused in the territory of the requesting State, extradition may be refused, whosoever the individual whose extradition is requested and whatever the nature of the offence of which he is accused.

V. The Relationship between the Grant of Political Asylum and the Duty to Extradite

Notwithstanding the provisions of Article II, section I, the right to refuse extradition by granting asylum against political persecution should not be exercised where there is reason to conclude that the requesting State will prosecute the accused with due observance of all requirements, both substantive and procedural, of the rule of law. Where the treaty to be applied contains pertinent provisions, the right to refuse extradition for a political offence should depend on those provisions.

VI. *Aut judicare aut dedere*

1. The rule *aut judicare aut dedere* should be strengthened and amplified, and it should provide for detailed methods of legal assistance.

2. When a State undertakes to prosecute the person concerned, other interested States, in particular the State on the territory of which the offence was committed, should be entitled to send observers to the trial unless serious grounds related to the preservation of State security in fact justify the non-admittance of such observers.

3. In cases of such prosecution, if the tribunal concerned finds the accused guilty, an appropriate penalty should be imposed similar to that which would normally be applied under the law of that State in a similar case.

VII. The Extradition of Nationals

While every State should in principle remain free to refuse the extradition of its nationals, it should in that event try the offence under its own law. The extradition of nationals, on a reciprocal basis, may serve to reduce crime.

VIII. The Relationship between an Obligation to Extradite and Municipal Law

1. Extradition treaties or appropriate national legislation should provide that a person whose extradition is requested is entitled to invoke before national courts any protective treaty provision. A person whose extradition is requested should similarly be entitled to rely before national courts on rules of customary international law which provide for his protection.

2. The fact that the extradition of an alien may be forbidden by municipal law should not prevent his expulsion by legal procedure. It must be left to each State to harmonize its municipal provisions on extradition and expulsion. The exercise of any right to expel an alien should, internationally, be limited by the duty to respect human rights, in particular by avoiding the deportation of the person to a State which might persecute him and by avoiding any arbitrary expulsion.

IX. The Settlement of Disputes

Disputes concerning treaties on extradition should be submitted to arbitral or judicial settlement, in particular to the International Court of Justice.

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(1st September 1983)

Session of Helsinki - 1985

**The Law Applicable to Certain Effects
of a Marriage After its Dissolution**

(Sixteenth Commission, Rapporteur : Mr François Rigaux)

(The French text is authoritative. The English text is a translation.)

EXPLANATORY NOTE BY THE RAPPORTEUR

1. The work on the law applicable to the effects of a marriage after its dissolution has brought to light the difficulty inherent in the task of the Institute when dealing with private international law. The founders of the Institute had faith in the future of a universal system of private international law that would be constructed, *pari passu*, with the same methodology as public international law. However, the uncertainties to which the various positivist schools of thought have given rise in that respect are no justification for failing to elaborate solutions that would be common to the different States. As a matter of fact, one should welcome the existence of an institution where experiences can be exchanged between specialists of the various branches of international law. The excessive element in the positivist reaction was the drawing of a strict dividing line which is no longer acceptable today between international law and private international law, reduced to a mere subdivision of internal law. Chiefly, but not exclusively, it appears that a sharp separation between the domain of internal law and that of international law is no longer suitable for economic, financial and monetary relations.

2. Rather than draw a boundary line between international law and private international law, one ought to explore the problems of the confines, and reflect on methodological aspects where the rules of international law and of internal law appear to coincide in substance. Assuming that a legal system does not simply amount to a pyramid of norms but is a living organism consisting of rules and institutions, one can easily make out the main difference in methodology between international law and private international law : while there is a system of international law having its own institutions, there is no such system of private international law. Even if conflict-of-laws rules originate in international treaties, and however broad the scope of these treaties may be, such rules are necessarily enforced through the institutions, whether administrative or judicial, of every State in which the treaties are in force. The internal or international character of the rules of conflict therefore proves less conclusive than the fact that private international law has no institutions of its own.

3. When agreeing on common rules of private international law at intergovernmental conferences, State representatives act in view of the reception of the new *corpus juris* in the legal system familiar to each of them and consequently are in a position to estimate the true purport of those rules and their impact on the institutional framework in which they are going to be incorporated. A purely scientific society works under completely different conditions. While the members of the Institute do contribute to the debates with their specific knowledge of the various national systems of law, the most palpable difference here lies in that they are not able to appreciate the degree of relevance of the proposals in respect of any particular system of internal law since the Institute's resolutions in the sphere of private international law give an outline of an abstract legal system, a set of normative propositions, the meaning of which can be perceived whereas their implications cannot be determined. At times it may be apprehended that the worst of two worlds should thus be combined : it could be that, while the solution proposed for adoption appears to be universally applicable, individual options in favour of a given solution may sometimes be based on the manner in which it will be received in the legal system most familiar to the person who expresses an opinion in this regard.

4. Considerations of this kind can easily be illustrated by the experience gained from the work on the law applicable to the effects of a marriage after its dissolution. Emphasis should first be placed on two difficulties common to all codification attempts in private international law, even within intergovernmental organizations. One is due to the variety of national systems of internal law, which can be observed in respect of both rules of internal substantive law and solutions of private international law. Any attempt to codify private international law is bound to fail if it is not substantiated by a thorough study of comparative law from the two points of view just mentioned, *i.e.* a comparison of both substantive law and private international law. The present policy of the Institute to introduce a better geographical distribution of new Associates can contribute to take the non-Western legal systems more adequately into consideration in the future ; nevertheless there is a pressing need to improve the working conditions of the commissions between sessions ; one might expect from members of the commissions that with regard to subjects of private international law they address written contributions to the Rapporteurs as to the law in force in their respective countries and even in the systems of law in which these countries participate.

5. The second difficulty common to all codification attempts in private international law consists in the lack of comprehensiveness of such attempts. After agreement has been reached on specific issues under review, the solutions thus elaborated should be consistent with the rules that remain peculiar to each of the internal legal systems applicable to the issues excluded from the codification. The problem appears all the more acute as the traditional connection categories - personal status, marriage property systems, inheritance, maintenance obligations - are linked with a dogmatic cutting-up of subject-matters which is often unsuited to the complexity of solutions of substantive law. The law applicable to the effects of a marriage after its dissolution provides an excellent illustration of such difficulties.

In the first place the meaning of "dissolution of marriage" should be made clear. Some forms of nullity (or non-existence) of the marriage do not deserve, strictly speaking, this designation. This first difficulty can easily be obviated by giving the concept of dissolution of marriage a conventional meaning that includes declaration of nullity and annulment in addition to divorce. The essential effect of the dissolution of a marriage with this meaning consists in the termination of the marriage bond. It is obtained as soon as the act of dissolution, whether administrative, judicial or merely private, is recognized : to examine the "effects of a marriage after its dissolution" in a given legal system implies as a working assumption that the dissolution of the marriage as such is recognized in the legal system considered.

The dissolution of a marriage, which establishes the failure of the initial plan to live together, normally leads to the liquidation of the relations, in particular patrimonial relations, between the spouses and thereafter, where appropriate, to a readjustment of those relations. Its main implications are the sharing or redistribution of parental authority over children whom they have in common, the adoption of new arrangements on remaining maintenance obligations, rights to succession or rights to a survivor's pension, and the impact of the dissolution of the marriage on the name of each of the former spouses (in case marriage itself has had some effect in this regard). Such implications are to be considered in relation to the different institutions on which the dissolution of the marriage exerts its own disturbing influence. The terms "effects of a marriage after its dissolution" should be taken to include such aspects.

6. From the foregoing it follows that no single conflict-of-laws rule covers all effects of a marriage after its dissolution. Besides, in many legal systems, especially those of common law, the issues mentioned are matters of conflict of jurisdictions rather than of conflict of laws. For example, as regards orders relating to the custody of minors or even maintenance obligations in general, the court that declared itself competent will apply the substantive law solutions of its internal system, without excluding the substantive rules of private international law. No foundation supports the idea of a "status of dissolution of marriage" (or a "status of divorce") that would govern all the effects of the act of dissolution on the relations of former spouses as a whole.

7. A quick look at the recent Hague Conventions having some link with one or other of the effects of a marriage after its dissolution shows the drawbacks of non-comprehensive codifications. The second paragraph of Article 1 of the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations excludes from the scope of the Convention "ancillary orders pronounced on the making of a decree of divorce or legal separation [,] in particular ... orders relating to pecuniary obligations or to the custody of children". Such recognition, though restricted to decisions "which ha[ve] given judgment on a maintenance claim" is provided for in Article 8 of the Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, on condition that the jurisdiction of the authority of the State of origin in matters of divorce or annulment or nullity of marriage is recognized in the requested State, which condition is verified, in States in which the above-mentioned Convention of 1 June 1970 is in force, in accordance with that Convention.

As to minors, a distinction is to be made between custody measures, which fall under the Convention of 5 October 1961 on Jurisdiction and Applicable Law Relating to the Protection of Minors (save in respect of States which made use of the reservation provided for in Article 15, allowing them not to apply the Convention to measures of custody after divorce), and maintenance orders, which are subject to the two Conventions of 2 October 1973.

For the purpose of determining the law applicable to maintenance obligations between (former) spouses, Article 8 of the Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations makes a distinction depending on whether or not the act of dissolution of the marriage is recognized in the Contracting State in which maintenance is claimed. In the second case the general conflict-of-laws rules of Articles 4 to 6 will apply, but, from the point of view of the court seized, they refer to the status of spouses. In the first case the maintenance obligation is governed by the "law applied" to the divorce or, where appropriate, to the declaration of nullity or annulment, except in States which reserved the right not to apply this solution if the marriage was dissolved by default in a country in which the defaulting party did not have his habitual residence (Art. 14).

8. The concept of "law applied to the divorce" is distinct from that of "law applicable to the divorce". The second phrase means that, if a former spouse claims maintenance from the other in a given State, the law governing such a claim will be identical with that governing divorce proceedings in the same State, whether the latter was applied or not. The first phrase appears to state a mere fact., *i.e.*, to specify the law that was actually applied by the foreign authority whose act of dissolution of the marriage is recognized in the State in which maintenance is claimed. This solution is, however, far from being satisfactory as it is not always easy to find out under what law a marriage was dissolved, particularly when the court or authority failed to give the reasons for its decision on this point or when the relevant rule of conflict prescribes that several laws be applied cumulatively ; moreover, in most cases the court will have applied to the divorce the internal substantive law of the *lex fori*. Yet, there is no justification that for a period of time which may last long maintenance obligations between former spouses should remain subject to the law of the court or authority that dissolved the marriage, one additional flaw in this being the incitement to *forum shopping*.

9. Thus, it does not suffice to dismiss the idea of any global conflict-of-laws solution that would be applicable to all effects of the dissolution of a marriage on the relations between former spouses : one cannot help observing that such a solution even falls short of what would be suitable for the more restricted, indeed too restricted, domain of maintenance obligations. In fact even a brief survey of comparative law shows the ingenuity of legislators and courts who endeavour today to make up for the loss through divorce of the pooling of the resources of each of the spouses. Maintenance orders may be one means of preserving some form of connection between the respective patrimonies of former spouses. But divorce has its logic and coherence : in many cases it is followed by a second marriage and only few men or women are in a position to contribute to the upkeep of several households. It is therefore tempting to put an end to financial relations between former spouses, using various procedures to that effect : maintenance payment by one former spouse to the other on a calculation basis not subject to revision, capital payment by one former spouse to the other, constitution with such capital of a rent to be paid by a financial institution, allocation to one former spouse of common property or even separate property of the other, and, in anticipation of the time of retirement of the spouses, set-off of

pension rights or distribution of a right to a survivor's pension between successive spouses of a predeceased spouse or former spouse. Such final settlement has some advantages for the former spouse who benefits from it, but there are also a few disadvantages to it : while the advantages lie in the financial independence resulting in part from the immediate control over capital or other property and in the protection against the risk of insolvency or ill-will of the debtor of recurring allowances, it may prove that, if the final settlement at the time of dissolution of the marriage causes each former spouse to be deprived of the right to claim anything beyond the enforcement of the causes of settlement, there are drawbacks to freezing each party's position, de denying each former spouse any benefit from a possibly improved economic situation of the other, and to relying on public welfare for the support of a former spouse who squandered or mismanaged his capital. It may also occur that at the time of dissolution of the marriage both parties are similarly well off and that final settlement consists in freeing them from any maintenance obligation in the future, or one former spouse may even, because of his position in the divorce proceedings, be definitely deprived of any maintenance aid from the other.

10. On the level of substantive law concepts, the concept of "maintenance obligation" appears too narrow to cover all the assumptions considered above. Furthermore, any form of overall settlement is necessarily linked with the liquidation of the matrimonial property regime and it is sometimes difficult to determine what property is allocated under the rules of partition or for maintenance purposes.

The set of solutions envisaged in the previous section may assume at least three quite different forms and be included either in a private agreement entered into at the time of celebration of the marriage, or during marriage in anticipation of its dissolution, or even after the dissolution as a result of it ; or in an agreement approved by the court which dissolved the marriage ; or in a decision adopted by the same court or by another court in the same other States.

Whatever its form, the final settlement of pecuniary relations between former spouses raises problems of private international law that differ greatly from those likely to be solved by a rule of conflict which designates the law applied to the divorce. Whether it is contained in an act or in a judgment such a settlement has two effects : a positive and a negative one. The positive effect consists in that, in the territory of a State other than the State under which law the agreement was concluded or in which a court approved the agreement or made an order, each of the former spouses may seek enforcement of the clauses of the agreement or of the terms of the decision. The negative effect consists in that, in the same other States, the final character of the settlement reached may be invoked to oppose any claim for maintenance excluded under the terms of the final settlement. The reasons for which such a negative effect which actually amounts to a deprivation of entitlement to maintenance or at least of the right to obtain a revision of the method of calculation of the maintenance allowance, is granted or denied do not coincide with the reasons for which enforcement of the clauses of attribution or transfer of property or allocation of maintenance is granted or denied.

11. Except for the specification of solutions which help to make the procedures for global and final settlement of pecuniary relations between former spouses internationally more efficient, there is no reason to exclude from the general law of maintenance obligations in private international law obligations of that type which continue after the dissolution of a marriage. The solution contained in the principle of the Hague Convention of 2 October 1973 on the Law Applicable consists in subjecting all maintenance obligations, with the exception of precisely the obligation between divorced spouses, to the law of the habitual residence of the maintenance creditor. Nothing can warrant that this solution should not be retained in the case of spouses whose marriage has been dissolved, since in that case as in all other cases the need to be satisfied is located at the residence of the creditor. The principle as well as the extent and variability of the obligation between divorced spouses should be governed by that same law. In particular, the competence conferred on the "law applied" or even the "law applicable" to the divorce, which at best purports to crystallize a connecting circumstance that is no longer appropriate for the interests to be protected, appears unjustified. On the other hand, one should take account of the patrimonial settlement actually effected at the time of the dissolution of the marriage, ensure that in principle the maintenance creditor shall benefit from agreements entered into or orders obtained by him, but also, for the sake of a fair balance between the parties, encourage courts of States other than the State in which a final settlement was reached to take such a settlement into consideration. Provisions relating to these various issues should be carefully formulated so that no aspect of the situation is neglected ; there are mainly provisions of private international law requesting courts before which a claim for maintenance is brought not to apply the law of the divorce, but to give due consideration to provisions that really incorporate the situation of the parties.

12. It is in the light of the foregoing explanations that the Resolution adopted by the Institute at the Helsinki Session should be read. Although it appears in the form of normative provisions, the Resolution should rather be regarded as a set of directives attempting :

- to maintain a proper balance between the various objectives that any codification of the rules applicable to the effects of a marriage after its dissolution should pursue in private international law ;
- to have due regard to the variety of methods resorted to in the different States ;
- to reserve reconciliation of the proposed peacemeal solutions with related issues that cannot be dealt with.

RESOLUTION

The Institute of International Law,

Considering that a marriage continues to produce certain effects after a decree of divorce has been pronounced or after the marriage has been declared void or annulled and that consequently the law applicable to such effects should be determined ;

Considering that conflict-of-laws problems arising from the effects of a marriage after its dissolution cannot be settled without regard to questions of judicial jurisdiction and of the international effectiveness of decrees already granted, in particular the decree dissolving the marriage ;

Nothing that the effects of a marriage after its dissolution are connected with several institutions of private law and that, to serve their purpose, any resolutions on this specific subject should be incorporated into the legal systems of the various States in which these institutions are likely to be governed by differing rules, in relation both to private international law and to substantive law ;

Taking into account The Hague Conventions concerning, *inter alia*, the recognition of divorce, the recognition and enforcement of judgments relating to maintenance obligations and the law applicable to such obligations, while observing, however, that certain effects of a marriage after its dissolution are dealt with in three different instruments which may have led to gaps and inconsistencies ;

Noting that numerous codifications of private international law have been enacted at a national level during the past decade and that important draft codifications have been published recently ;

Taking into account the particular role of the Institute in the field of private international law.

Adopts the following Resolution :

I - Definitions and Scope

1. For the purposes of this Resolution :
 - a) "Dissolution of marriage" means dissolution of the marriage by divorce or by declaration of nullity or annulment.
 - b) "Effects of the marriage after its dissolution" means, apart from the termination of the marriage bond, the effects that are produced even after the termination, either during the lifetime of the former spouses or after the death of one of them.
 - c) "Former spouse" means a man or a woman whose marriage has been dissolved by divorce, or has been declared void or annulled.

2. The rights and duties of former spouses in respect of their children are excluded from the scope of this Resolution.

II - Exclusion of the Application of a Single Law to all Effects of a Marriage After its Dissolution

3. Since no rule of private international law is able to cover satisfactorily all effects of the marriage after its dissolution, it is necessary to take into consideration the exact nature of each legal issue arising from these various effects.

4. The law applied to the dissolution of the marriage shall not govern, *inter alia* :

- a) the effects of the dissolution on the name acquired as a result of the marriage by the spouses, or by one of them ;
- b) the limitations introduced as a result of the divorce in respect of the right to re-marry of either of the former spouses.

III - Maintenance Obligations and Compensation Payments

5. Maintenance obligations between the former spouses shall be governed by the law applicable to maintenance obligations in general ; that law shall, in particular, determine the possibility of varying the obligations and of changing previous obligations.

6. In applying Article 5, whenever an agreement has been concluded according to the law of a given State or an order has been made in a given State, the courts and authorities of other States shall take into consideration the following principles ;

- a) Whenever, with a view to, or by reason of, the dissolution of their marriage, the spouses have entered into a valid agreement which provides for a maintenance pension, a compensation payment or an equivalent benefit, that agreement shall be binding in all the States in which the act dissolving the marriage is recognized.
- b) Whenever a judicial order has provided one of the spouses with a maintenance pension, a compensation payment or an equivalent benefit, or has approved an agreement by the parties to the same effect, this order will in principle be recognized on the same terms as the order that dissolved the marriage.
- c) Whenever, under the applicable law, a valid agreement or a recognized judicial order constitutes a final settlement which prohibits each of the former spouses from making further claims against the other, this final character shall be one of the elements to be taken into consideration by the court dealing with such a further claim.
- d) If two consecutive orders determining the extent of maintenance rights satisfy the conditions for recognition of a given State, or if one of them has been made in that State, the more recent order shall be enforced.

IV - Survivors' Pensions and Set-off Pension Rights

7. The law of the institution which provides for a survivor's pension shall determine whether, and to what extent, a former spouse may claim the pension.

That same law shall determine whether the right to a survivor's pension is affected by the grounds on which the divorce was granted.

8. Set-off of pension rights shall be governed in principle by the law applicable to the divorce. If there is no such set-off under that law, the set-off shall be governed by the law applicable to the personal effects of the marriage.

It is desirable that public or private institutions operating a pension fund should co-operate in the enforcement of orders by which a foreign court effected a set-off of the pension right of a member of that fund.

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(28 August 1985)

Session of Helsinki - 1985

**The Law Applicable to Joint International State
or Quasi-State Enterprises of an Economic Nature**

(Ninth Commission, Rapporteur : Mr Ignaz Seidl-Hohenveldern)

(The French text is authoritative. The English text is a translation.)

Whereas States, their subdivisions and their public enterprises create joint international enterprises in order to promote international co-operation and to foster their own interests,

The Institute of International Law,

Having regard to its Resolution of Oslo (1977) on Contracts concluded by international Organizations with Private Persons ;

Having regard to its Resolution of Oslo (1977) on Multinational Enterprises ;

Having regard to its Resolution of Athens (1979) on the Proper Law of the Contract in Agreements between a State and a Foreign Private Person ;

Desiring to provide solutions for certain problems that arise with respect to such enterprises so far as those problems lie outside the scope of the above Resolutions ;

Realizing, however, that the great variety of such enterprises precludes the elaboration of a comprehensive set of propositions applicable to all of them and covering every issue that may arise with respect to them ;

Excluding, for the purpose of the present Resolution, questions pertaining to the relations between the enterprise and its employees, the nationality of the enterprise, diplomatic protection, privileges and immunities, and the possible responsibility of the participants for acts or omissions of their enterprises whether under international law or under national law,

Adopts the following Resolution :

Article 1

This Resolution concerns any joint international enterprise that combines the following features :

- a) two or more States, State subdivisions or other State-controlled entities have a dominant participation in the capital of the enterprise ;
- b) it acts in one or more States for purposes of general economic interest principally through private law procedures ; and
- c) it is distinct from the several entities referred to in (a) above.

Article 2

A joint international enterprise may be established by one or more of the following constitutive instruments : by a treaty, by a decision of an international organization or by an act of the participants governed by one or more of the sources of law enumerated in Article 7.

Article 3

The constitutive instruments of the enterprise should include all provisions which may be necessary or useful for the efficient functioning of the enterprise in relations among the participants as well as in relations with third parties.

Article 4

1. The participants may, in establishing the joint international enterprise, either
 - a) use a legal model existing under a national law, e.g., a defined type of company ; or
 - b) determine the purpose of the enterprise and the rules applicable to its creation and activities without using provisions of a national law or using them only in certain respects.
2. The fact that the constitutive instruments of the enterprise or some of them are treaties does not necessarily imply that the enterprise shall be governed by public international law.
3. The existence of the enterprise shall be recognized in the legal systems of the States participating directly or through enterprises or authorities.
4. The existence of the enterprise shall be recognized in other States in accordance with each such State's system of law and with international law.

Article 5

1. The participants may, in establishing the enterprise, either submit the relations among themselves to a national law, including any special rules laid down by such law for the participation of national or foreign public authorities, or submit these relations to such law subsidiarily to the constitutive instruments, or exempt them entirely from the application of a particular national law.

2. The constitutive instruments of the enterprise, when submitting the relations among the participants to a national law :

- a) may expressly derogate from that national law ;
- b) shall be deemed to derogate implicitly from provisions inconsistent with the terms of the instruments or incompatible with their object and purpose.

Except where the instruments are treaties, such derogations may not affect mandatory provisions of law or *ordre public* of the abovementioned national law.

3. To the extent that an issue respecting relations among participants is neither regulated by the constitutive instruments nor submitted to a system of law of their choice, the issue is governed by the general principles of law regulating the issue in the legal systems of the States concerned, by the general principles of the law of international organizations, and, where appropriate, by other rules of international law.

4. In submitting these relations to a national law either as the principal or as a subsidiary source of law, the constitutive instruments may provide that the provisions of that national law shall be those in force at the time of the adoption of those instruments.

5. If an enterprise is established by a decision of an international organization, the law of that organization shall be applicable to it only where it is expressly so provided.

Article 6

1. When a treaty provides for the establishment of constitutive instruments for the enterprise, they shall be interpreted in the light of the object and purpose of the treaty.

2. A national law declared applicable as a subsidiary source of law shall be resorted to only to the extent that interpreting the constitutive instruments in the light of their object and purpose fails to resolve the issue.

3. A national law made applicable as a principal or subsidiary source shall be interpreted in accordance with the methods of interpretation employed in that law.

Article 7

In respect of the relations of the enterprise with third parties, the contracting parties may choose as the proper law of the contract either one or several national laws or the principles common to these laws, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of these sources of law.

Article 8

Where in respect of questions other than those dealt with in the foregoing provisions the applicable rules of private international law of a State refer to the personal law of the enterprise, that law shall be the one expressly or implicitly determined by the constitutive instruments.

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(28 August 1985)

Session of Helsinki - 1985

The Effects of Armed Conflicts on Treaties

(Fifth Commission, Rapporteur : Mr Bengt Broms)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Recalling its Resolution at the Christiania Session in 1912 on the effects of war on treaties ;

Considering that armed conflicts continue to occur in violation of the prohibition on the use of force contained in the Charter of the United Nations ;

Considering that the practice of States with regard to the effects of armed conflicts on treaties to which they are parties is not uniform and that it is therefore appropriate to affirm certain principles of international law on this problem ;

Recognizing that the present Resolution shall not prejudice the application of the provisions of the Vienna Convention on the Law of Treaties,

Adopts the following Resolution :

Article 1

For the purpose of this Resolution, the term "armed conflict" means a state of war or an international conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Article 2

The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict.

Article 3

The outbreak of an armed conflict renders operative, in accordance with their own provisions, between the parties treaties which expressly provide that they are to be operative during an armed conflict or which by reason of their nature or purpose are to be regarded as operative during an armed conflict.

Article 4

The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless treaty otherwise provides.

Article 5

The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of bilateral treaties in force between a party to that conflict and third States.

The outbreak of an armed conflict between some of the parties to a multilateral treaty does not *ipso facto* terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict.

Article 6

A treaty establishing an international organization is not affected by the existence of an armed conflict between any of its parties.

Article 7

A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

Article 8

A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution.

Article 9

A State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State.

Article 10

This Resolution does not prejudge rights and duties arising from neutrality.

Article 11

At the end of an armed conflict and unless otherwise agreed, the operation of a treaty which has been suspended should be resumed as soon as possible.

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(28 August 1985)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Cairo - 1987

The Duality of the Nationality Principle and the Domicile Principle in Private International Law

(Fifteenth Commission, Rapporteur : Mr Yvon Loussouarn)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Whereas the duality of the nationality principle and the domicile principle remains an important problem of private international law ;

Whereas each of these criteria has its advantages and disadvantages, which makes it inappropriate to advocate the adoption of a rule of conflicts of law based exclusively on either of the two criteria ;

Whereas it would be useful to formulate principles which could lead to some harmonization of the conflict rules in force in different States ;

Adopts the following Resolution :

A. Conflicts of Adjudicatory Jurisdiction

1. It is recommended that States with rules of international jurisdiction based on nationality not treat them as rules of exclusive jurisdiction.
2. It is recommended that States which subject a matter to the law of the nationality and States which subject that matter to the law of the domicile, and which in either case recognise foreign decisions only when they were made by reference to the law designated by the rule of conflict of laws of the requested State, should waive this requirement when called upon to recognize a decision made by reference to the law of the nationality or of the domicile.

B. Conflicts of Laws

3. In matters of matrimonial property regimes, it is recommended that States with a rule of conflicts of law based on an objective connecting factor allow spouses to select either the law of the nationality or of the domicile of either of them.

4. In matters of succession, it is recommended that States allow persons to select by will or donation *mortis causa* either the law of their nationality or of their domicile for the distribution of their property.

5. In regard to the effect of marriage on the person, and to divorce and judicial separation, in cases where the State of the nationality is different from the State of the domicile, it is recommended that States allow spouses to select either the law of their nationality or of their domicile when they have a common nationality and a common domicile.

6. In regard to the personal status of refugees and stateless persons, it is recommended that States not parties to the Geneva Convention of 28 July 1951 on the Status of Refugees or the New York Convention of 28 September 1954 on the Status of Stateless Persons adopt the solutions contained in Article 12 of each Convention.

It is desirable that States extend those solutions to certain categories of persons who are in a similar situation but are unable to claim the status of refugee or stateless person as defined in those Conventions.

7. In cases of conflict between personal laws, it is recommended that :

a) States whose rules of conflicts of law give effect to the law of the nationality should apply the law of the common domicile when the persons involved in the legal relationship in question are of different nationalities, and there is no good reason to prefer the law of one or other nationality ;

b) States whose rules of conflicts of law give effect to the law of the domicile should apply the law of the common nationality when the persons involved in the legal relationship in question do not have a common domicile, and there is no good reason to prefer the law of one or other domicile.

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(19 September 1987)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Cairo - 1987

**The Elaboration of General Multilateral Conventions
And of Non-contractual Instruments
Having a Normative Function or Objective**

(Thirteenth Commission, Rapporteur : Mr Krzysztof Skubiszewski)

(The English text is authoritative. The French text is a translation.)

RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

The Institute of International Law,

Considering that the mandate of the Thirteenth Commission includes an inquiry into the elaboration of non-contractual instruments that have a normative role,

Considering that some Resolutions of the General Assembly of the United Nations have that role,

Having examined the reports of the Thirteenth Commission on the Resolutions of the General Assembly of the United Nations together with the comments and conclusions attached thereto,

1. Congratulates the Rapporteur and the Members of the Thirteenth Commission on having succeeded in elucidating the numerous factors which, depending on circumstances, allow such Resolutions to contribute to a better knowledge of international law, to hasten its development, to enhance its authority and to ensure stricter compliance therewith.
2. Expresses the wish that the work of the Thirteenth Commission in its entirety should be the object of thorough study by all concerned.

CONCLUSIONS OF THE COMMISSION

I - The Constitutional Position

Conclusion 1 : Recommendations

Although the Charter of the United Nations does not confer on the General Assembly the power to enact rules binding on States in their relations *inter se*, the Assembly may make recommendations contributing to the progressive development of international law, its consolidation and codification. This may be accomplished through a variety of Resolutions.

Conclusion 2 : Addressees of Resolutions

Resolutions referred to in Conclusion 1 are addressed to Member States and international organizations.

There is no impediment to addressing these Resolutions and their rules to all States, but the legal position of States not Members of the United Nations is not thereby prejudiced.

II - Categories of Resolutions

Conclusion 3 : Types of Resolutions

The recommendations referred to in Conclusion 1 include Resolutions of the following types :

- a) Resolutions expressly formulating or reiterating general and abstract rules of conduct for States ;
- b) Resolutions dealing with specific situations but assuming, expressly or impliedly, a general and abstract rule of conduct for States ;
- c) Resolutions addressed to specific States, but assuming that the rule of conduct required of the State specifically named would be required of all States.

Some of these Resolutions constitute a restatement of the existing law (Conclusion 4), while others contribute to crystallising or generating new law (Conclusion 5). Other Resolutions set forth standards relevant to the application or interpretation of law.

Various provisions of a single Resolution may have different functions.

Conclusion 4 : Law-Declaring Resolutions

A law-declaring Resolution purports to state an existing rule of law. In particular, it may be a means for the determination or interpretation of international law, it may constitute evidence of international custom, or it may set forth general principles of law.

Conclusion 5 : Law-Developing Resolutions

The following law-developing Resolutions may be distinguished :

- a) Resolutions contributing to the creation of international custom ;
- b) Resolutions contributing to the emergence of general principles of law ;
- c) Resolutions defining the scope of negotiations on a multilateral treaty of general interest, in particular Resolutions setting forth rules to be included in a future treaty ;
- d) Resolutions laying down policies that determine the substance of future law, whether customary or treaty.

Conclusion 6 : Relevant Elements

The elements which help to identify a Resolution as falling under one of the categories enumerated in Conclusions 3 to 5 include, *inter alia* :

- a) the intent and expectations of States ;
- b) respect for procedural standards and requirements ;
- c) the text of the Resolution ;
- d) the extent of support for the Resolution ;
- e) the context in which the Resolution was elaborated and adopted, including relevant political factors ;
- f) any implementing procedures provided by the Resolution.

III - Procedural Standards and Requirements

Conclusion 7 : Negotiation as a Method

When appropriate, Resolutions referred to in Conclusions 3 to 5 should be based on a negotiated arrangement. The Rules of Procedure of the General Assembly are sufficiently flexible to permit the integration of the negotiating process into the United Nations' parliamentary diplomacy.

Conclusion 8 : Composition of the Intergovernmental Organ

If the elaborating organ is not composed of all the Members of the United Nations, equitable geographical representation, presence of the main legal systems, and legal expertise are factors which favour the formulation of universally acceptable principles and more detailed rules.

Moreover, it is desirable that States particularly interested in the matter be enabled to take part in the deliberations of the organ and in the elaboration of the draft.

Conclusion 9 : Circulation of Drafts

The circulation of drafts for comment in the process of the elaboration of some Resolutions is desirable.

IV - The Language of Resolutions

Conclusion 10 : Importance of Terminology

The language and context of a Resolution help to determine its normative purport. References to international law or equivalent phrases, or their deliberate omission, are relevant but not in themselves determinative.

Conclusion 11 : Principles

Resolutions use the term "principle" with different meanings :

- a) a legal or non-legal principle ;
- b) a norm of a higher or the highest order ;
- c) a norm that generates specific rules ;
- d) an important norm having regard to the purpose of the Resolution ;
- e) a purpose to be achieved, a guiding idea, a demand as to legal or other policies to be followed, particularly relevant to revising old or introducing new law ;
- f) rules or standards of interpretation.

In some cases several of these meanings are combined.

Conclusion 12: Declarations

The legal status of Resolutions designated as declarations is not different from that of other Resolutions. Yet this particular form may emphasize the importance of the norms enunciated. Declarations are suitable for a comprehensive treatment of a subject or for expressing principles the purpose of which is to influence the progressive development of international law.

V - Adoption of Resolutions

Conclusion 13 : Unanimous Statement of Existing Law

A law-declaring Resolution, adopted without negative vote or abstention, creates a presumption that the Resolution contains a correct statement of law. That presumption is subject to rebuttal.

Conclusion 14 : Unanimity and the Development of New Law

In situations where a rule of customary law is emerging from State practice or where there is still doubt whether a rule, though already applied by an international organ or by some States, is a rule of law, a Resolution adopted without negative vote or abstention may consolidate a custom or remove doubts that might have existed.

Conclusion 15 : Majority

The authority of a Resolution is enhanced when it is adopted by a representative majority that includes the main legal systems.

If the number of negative votes or abstentions is large, or qualitatively significant, the law-stating or rule-developing effect of the Resolution is weakened.

Conclusion 16 : Consensus

The authority of a Resolution is enhanced when it is adopted by consensus.

Conclusion 17 : Reservations

Where a Resolution may be subjected to reservations either in the explanations of votes or in other statements, the effect of such reservations is to qualify or limit the extent of approval by the reserving State. Depending on its contents a reservation may mean less than rejection of the rule. It may be merely an expression of doubt.

If a Resolution expresses existing law, a State cannot exclude itself from the binding force of that law by making a reservation.

VI - Implementation of Resolutions

Conclusion 18 : Implementing Procedures

The inclusion in a Resolution of provisions on implementing procedures, or on the supervision of compliance with a Resolution, may contribute to the interpretation or application of law, or to the emergence of new law.

VII - Particular Problems of Law-Declaring Resolutions

Conclusion 19 : Means for the Determination of Law

A Resolution may serve as a supplementary means for the determination of a rule of international law, particularly where evidence of State practice or of *opinio juris* is not otherwise readily available.

A Resolution may constitute evidence of general principles of law where the circumstances of its consideration, including studies of national law, provide ground for inferring that the decision of the General Assembly rested on an adequate foundation.

Conclusion 20 : Evidence of International Custom

A Resolution may constitute evidence of customary law or of one of its ingredients (custom-creating practice, *opinio juris*), in particular when that has been the intention of States in adopting the Resolution or when the procedures applied have led to the elaboration of a statement of law.

Conclusion 21 : Rebuttable Evidence of International Custom

Evidence supplied by a Resolution is rebuttable.

VIII - Particular Issues Relating to Law-Developing Resolutions

Conclusion 22 : International Custom

Principles and rules proclaimed in a Resolution may influence State practice, or initiate a new practice that constitutes an ingredient of new customary law.

A Resolution may contribute to the consolidation of State practice, or to the formation of the *opinio juris communis*.

Conclusion 23 : First Stage of Treaty-making

A Resolution may lay the basis for negotiations designed to lead to a multilateral treaty of general interest by indicating the matters to be dealt with in the treaty and the policies which should underlie the treaty. A Resolution may also make recommendations regarding the contents of a proposed treaty.

A Resolution referred to in the preceding paragraph does not bind States in the elaboration of the treaty.

Conclusion 24 : Treaty Obligation to Abide by a Resolution

A Resolution is binding for States which have accepted it as binding in a treaty.

Conclusion 25 : Inclusion of Treaty Rules in a Resolution

The inclusion of a treaty rule in a Resolution does not affect the binding character of the rule for the parties to the treaty.

Conclusion 26 : Legal Policies

A Resolution or a series of Resolutions may express or reveal tendencies in the development of international law. Such Resolutions may determine policies as to the substance of law to be made, whether by formulating principles or detailed rules or by expressing the main ideas and concepts of prospective law.

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(17 September 1987)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Cairo - 1987

Transboundary Air Pollution

(Twentieth Commission, Rapporteur : Mr Geraldo E. do Nascimento e Silva)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Recalling its Resolution of Athens in 1979 on the Pollution of Rivers and Lakes and International Law ;

Considering that transboundary air pollution is assuming increasingly alarming proportions, over a broad field, for example acid rain and nuclear contamination ;

Deeply concerned by the effects of transboundary air pollution on the environment and on human health, on soil, agriculture and production, forests, life in lakes, rivers and the sea, and the ozone layer ;

Equally concerned by irreparable damage to buildings, monuments and sites, many of which are part of the cultural and natural heritage of mankind ;

Recalling the obligation to respect the sovereignty of every State over its territory, as a result of which each State has the duty to prohibit and to prevent any use of its territory likely to cause injury in the territory of another State ;

Bearing in mind the need to protect areas beyond the limits of national jurisdiction ;

Adopts the following articles :

Article I

1. For the purposes of this Resolution, “transboundary air pollution” means any physical, chemical or biological alteration in the composition or quality of the atmosphere which results directly or indirectly from human acts or omissions, and produces injurious or deleterious effects in the environment of other States or of areas beyond the limits of national jurisdiction.

2. In specific cases, the existence and characteristics of pollution shall, to the extent possible, be determined by reference to environmental norms established through agreements or by the competent international organizations and commissions.

Article 2

In the exercise of their sovereign right to exploit their resources pursuant to their own environmental policies, States shall be under a duty to take all appropriate and effective measures to ensure that their activities or those conducted within their jurisdiction or under their control cause no transboundary air pollution.

Article 3

1. For the purpose of fulfilling their obligation under Article 2, States shall take, and adapt to the circumstances, all appropriate and effective measures, in particular :

- a) to prevent any new form of transboundary air pollution or any increase in the existing degree of pollution ; and
- b) progressively to eliminate existing transboundary air pollution within the shortest possible time.

2. Such measures can be especially rigorous in the case of activities which :

- a) involve particularly dangerous materials ; or
- b) threaten areas or environments requiring special protection.

Article 4

In order to comply with the obligations set forth in Articles 2 and 3, States shall in particular use the following means :

- a) at the national level, enactment of all necessary laws and regulations, and adoption of efficient and adequate administrative and technical measures and judicial procedures for the enforcement of such laws and regulations ;
- b) at the international level, regional or universal co-operation in good faith with other States concerned.

Article 5

States are under a duty to take all appropriate and effective measures to prevent any extension, through the export of polluted products or other polluted objects, of the harmful effects of a pollution of their atmosphere resulting from the activities of other States.

Article 6

States incur responsibility under international law for any breach of their international obligations with respect to transboundary air pollution.

Article 7

With a view to ensuring an effective system of prevention and of compensation for victims of transboundary air pollution, States should conclude international treaties and enact laws and regulations concerning, in particular :

- a) systems of strict liability and compensation funds ;
- b) environmental norms, whether regional or universal, in particular quality and safety norms ;
- c) the jurisdiction of courts, the applicable law and the enforcement of judgments.

Article 8

1. In carrying out their duty to co-operate, States shall :

- a) regularly inform other States concerned of all appropriate data on air pollution in their territories, including its causes, its nature, whether man-made or natural, the damage resulting from it, and the preventive measures taken or proposed ;
- b) notify other States concerned in due time of any activities envisaged in their own territories which may cause a significant threat of transboundary air pollution ;
- c) consult with other States concerned on actual or potential problems of transboundary air pollution so as to reach, by methods of their own choice, solutions consistent with their interests and with the protection of the environment ;

2. States shall, where appropriate, conclude agreements in order to :

- a) co-ordinate or pool their scientific and technical research programmes to combat air pollution, whether man-made or natural ;
- b) set up international or regional commissions with the widest terms of reference, providing where appropriate for the participation of local authorities, or strengthen the powers or co-ordination of existing institutions ;
- c) establish co-ordinated or unified networks for permanent observation and control of air pollution, whether man-made or natural ;

d) attempt a harmonisation of environmental norms as well as of norms relating to the level of contamination of consumer goods.

3. States shall also develop safeguards for persons who may be affected by transboundary air pollution, in relation both to prevention and compensation, by granting on a non-discriminatory basis the widest access to judicial and administrative procedures in the States in which such pollution originates.

Article 9

1. In the event of an accident or activities causing a sudden increase in the level of air pollution, even if due to natural causes, which is capable of causing substantial harm in another State, the State of origin is under a duty :

- a) promptly to warn all affected or potentially affected States ;
- b) to take all appropriate steps to reduce the effects of such increase.

2. In the event of a disaster involving air pollution in the territory of a State, other States and competent international organisations should, as a matter of urgency and with the consent of the State concerned, undertake humanitarian action to assist the victims.

Article 10

1. Without prejudice to their other obligations relating to nuclear explosions, States shall prohibit, prevent and refrain from carrying out any nuclear explosion likely to cause transboundary air pollution of a radioactive nature.

2. In order to ensure compliance with applicable health and safety standards, States should open nuclear power plants on their territory to international inspection.

Article 11

States shall take all necessary measures to protect the ozone layer against adverse effects resulting or likely to result from human action, in order to protect life and the environment.

Article 12

States shall take all necessary measures to prevent the emission, in their territories, of fumes which, by reason of their quantity or chemical composition, are likely to contribute to the formation of acid rain.

Article 13

Developed States and competent international organisations should provide developing States with appropriate technical or other assistance, in order to assist them in fulfilling the obligations and in implementing the recommendations referred to in this Resolution.

Article 14

This Resolution is without prejudice to any obligation which a State may have to protect individuals from the effects of air pollution other than transboundary air pollution.

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(20 September 1987)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

**Session of
Santiago de Compostela - 1989**

**Arbitration Between States, State Enterprises,
or State Entities, and Foreign Enterprises**

*(Eighteenth Commission, Rapporteur : Messrs Eduardo Jiménez de Aréchaga
and Arthur von Mehren)*

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Whereas the Institute, at its Amsterdam Session in 1957, adopted a Resolution on Arbitration in Private International Law and, at its Athens Session in 1979, adopted a Resolution on The Proper Law of the Contract in Agreements between a State and a Foreign Private Person ;

Whereas these Resolutions have implications for- but do not systematically treat -a subject of great practical as well as theoretical importance, namely, arbitrations between States, state enterprises, or states entities, on the one hand, and foreign enterprises, on the other ;

Whereas statement of a coherent body of principle regarding the arbitrator's role and obligations in such arbitrations will clarify certain fundamental questions and contribute to legal security ;

Whereas, while there are many principles that apply to international arbitrations in general, this Resolution also draws attention to other principles which are of special importance to arbitrations between States, state enterprises, or state entities, on the one hand, and foreign enterprises, on the other ;

Whereas an arbitral tribunal's duty to act pursuant to the agreement from which its authority derives sets the limits within which concern for the award's enforceability in a given jurisdiction can appropriately influence the result to be reached ; and

Noting that this Resolution is without prejudice to the applicable provisions of international treaties ; and

Noting further that this Resolution has in view only the authority and duties of arbitrators in arbitrations between States, state enterprises, or state entities, on the one hand, and foreign enterprises, on the other,

Adopts the following Articles :

Article 1

Arbitrators derive their authority and powers from the parties' agreement providing for arbitration. An arbitrator shall neither exceed his powers nor do less than is required to exercise his authority completely; and he shall exercise his functions impartially and independently.

Article 2

In no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.

Article 3

Unless the arbitration agreement provides otherwise, the following general principles apply :

- a) The arbitration agreement is separable from the legal relationship to which it refers ;
- b) The tribunal determines the existence and extent of its jurisdiction and powers ;
- c) A party's refusal to participate in the arbitration, whether by failing to appoint an arbitrator pursuant to the arbitration agreement, or through the withdrawal of an arbitrator, or by resorting to other obstructionist measures, neither suspends the proceedings nor prevents the rendition of a valid award ;
- d) Should it become unduly difficult to carry on an arbitration at the agreed place, the tribunal is entitled, after consultation with the parties, to remove the arbitration to such place as it may decide ;
- e) The obstructionist measures of an arbitrator, including a refusal to discharge his functions, shall not unreasonably delay the proceedings. Where the other arbitrators agree that the delay has become unreasonable, the appointing party or authority should act to replace the arbitrator responsible for the delay. Should the aforesaid fail to act within a reasonable period of time, the other party to the arbitration is entitled to take the necessary steps to have the arbitrator replaced by a competent authority. In case of replacement, the arbitration proceedings need not be repeated if a majority of the tribunal rules that an adequate record of the proceedings has been maintained and that there are strong reasons why repetition is undesirable. Unless the parties agree to the contrary or the applicable rules provide otherwise, the arbitration shall proceed even though no replacement is made.

Article 4

Where the validity of the agreement to arbitrate is challenged, the tribunal shall resolve the issue by applying one or more of the following : the law chosen by the parties, the law indicated by the system of private international law stipulated by the parties, general principles of public or private international law, general principles of international arbitration, or the law that would be applied by the courts of the territory in which the tribunal has its seat. In making this selection, the tribunal shall be guided in every case by the principle in *favorem validitatis*.

Article 5

A State, a state enterprise, or a state entity cannot invoke incapacity to arbitrate in order to resist arbitration to which it has agreed.

Article 6

The parties have full autonomy to determine the procedural and substantive rules and principles that are to apply in the arbitration. In particular, (1) a different source may be chosen for the rules and principles applicable to each issue that arises and (2) these rules and principles may be derived from different national legal systems as well as from non-national sources such as principles of international law, general principles of law, and the usages of international commerce.

To the extent that the parties have left such issues open, the tribunal shall supply the necessary rules and principles drawing on the sources indicated in Article 4.

Article 7

Agreement by a state enterprise to arbitrate does not in itself imply consent by the State to be a party to the arbitration.

Article 8

The requirement of exhaustion of local remedies as a condition of implementation of an obligation to arbitrate is not admissible unless the arbitration agreement provides otherwise.

Article 9

Denial of the tribunal's jurisdiction based on a State's sovereign status is not admissible in arbitrations between a State, a state enterprise, or a state entity, on the one hand, and a foreign enterprise, on the other.

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(12 September 1989)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

**Session of
Santiago de Compostela - 1989**

**Equality of Treatment of the Law of the Forum
and of Foreign Law**

(Tenth Commission, Rapporteur : Mr Pierre Gannagé)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Whereas nowadays there is a strong tendency towards national codification of the rules of private international law ;

Whereas at the same time the number of treaties, in particular of those concluded under the auspices of The Hague Conference on Private International Law, continues to increase ;

Whereas international harmonization is one of the objectives that States are to pursue in establishing and implementing choice of law rules ;

Whereas it is contrary to a balanced and open-minded regulation of international relations to regard the law of the forum as superior in nature to foreign law ;

Whereas the adoption of bilateral choice of law rules tends usually to favour this objective ;

Whereas equality of treatment of the law of the forum and of foreign law appears equally necessary and may nowadays more easily be achieved as a result of the development of ways of obtaining information on foreign law ;

Referring to its Resolution adopted at Siena on 25th April 1952 which recommended that, when laying down choice of law rules, States shall "generally use criteria which may be applied internationally, that is to say, which in particular may be adopted in international conventions, so as to avoid the risk of conflicting solutions being reached in a particular case in different countries",

Deems it useful to elaborate and supplement that Resolution in the following fields :

I. In Shaping Choice of Law Rules

1. It is recommended that States :

- a) unless their essential interests require otherwise, adopt choice of law rules based on connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum; and, consequently,
- b) refrain from adopting choice of law rules which broaden the scope of the application of the law of the forum as against that of foreign law ;

and, in particular, exclude such rules whenever their application would result in discrimination between parties based on factors under which one of them is personally connected to the state of the forum, such as nationality or religion.

2) It is recommended that States, when it seems necessary to them to adopt subsidiary choice of law rules, use connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum.

3) It is recommended that States, when introducing choice of law rules whose objective is to achieve a particular substantive result, such as alternative reference rules, use connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum.

II. In Implementing Choice of Law Rules

a) Given the mandatory nature of choice of law rules, which select either foreign law or the law of the forum as applicable, it is recommended that, to the extent that their general rules of procedure permit, States :

- require their competent authorities to raise *ex officio* the question of the application of the choice of law rule ; and
- when that rule is applicable, apply *ex officio* the foreign law determined by it.

b) It is recommended that judicial authorities, through means available under the rules of procedure of their country, should be able to take the necessary initiatives to ascertain the content of foreign law as applied in the foreign country, in particular by seeking the assistance of the parties.

c) It is recommended that the application of foreign law shall allow for the granting of remedies similar to those available when the law of the forum is applied.

d) It is recommended that the applicable foreign law shall only be set aside if its effects are manifestly contrary to public policy.

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(12 September 1989)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

**Session of
Santiago de Compostela - 1989**

**The Protection of Human Rights and the Principle of
Non-intervention in Internal Affairs of States**

(Eighth Commission, Rapporteur : Mr Giuseppe Sperduti)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalling its Declarations of New York (1929) on “International Human Rights” and of Lausanne (1947) on "The fundamental Human Rights as a Basis for Restoring International Law" as well as its Resolutions of Oslo (1932) and Aix-en-Provence (1954) on “The Determination of the 'Reserved Domain' and its Effects” ;

Considering,

That the protection of human rights as a guarantee of the physical and moral integrity and of the fundamental freedom of every person has been given expression in both the constitutional systems of States and in the international legal system, especially in the charters and constituent instruments of international organizations ;

That the Members of the United Nations have undertaken to ensure, in co-operation with the Organization, universal respect for and observance of human rights and fundamental freedoms, and that the General Assembly, recognizing that a common understanding of these rights and freedoms is of the highest importance for the full realization of this undertaking, has adopted and proclaimed the Universal Declaration of Human Rights on 10 December 1948 ;

That frequent gross violations of human rights, including those affecting ethnic, religious and linguistic minorities, cause legitimate and increasing outrage to public opinion and impel many States and international organizations to have recourse to various measures to ensure that human rights are respected ;

That these reactions, as well as international doctrine and jurisprudence, bear witness that human rights, having been given international protection, are no longer matters essentially within the domestic jurisdiction of States ;

That it is nonetheless important, in the interest of maintaining peace and friendly relations between sovereign States as well as in the interest of protecting human rights, to define more precisely the conditions and limitations imposed by international law on the measures that may be taken by States and international organizations in response to violations of human rights,

Adopts the following Resolution :

Article 1

Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights.

This international obligation, as expressed by the International Court of Justice, is *erga omnes* ; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.

Article 2

A State acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction.

Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in case of violation of the obligations assumed by the members of the Organizations, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article 1, provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. These measures cannot be considered an unlawful intervention in the internal affairs of that State.

Violations justifying recourse to the measures referred to above shall be viewed in the light of their gravity and of all the relevant circumstances. Measures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights, notably large-scale or systematic violations, as well as those infringing rights that cannot be derogated from in any circumstances.

Article 3

Diplomatic representations as well as purely verbal expressions of concern or disapproval regarding any violations of human rights are lawful in all circumstances.

Article 4

All measures, individual or collective, designed to ensure the protection of human rights shall meet the following conditions :

1. except in case of extreme urgency, the State perpetrating the violation shall be formally requested to desist before the measures are taken ;
2. measures taken shall be proportionate to the gravity of violation ;
3. measures taken shall be limited to the State perpetrating the violation ;
4. the States having recourse to measures shall take into account the interests of individuals and of third States, as well as the effect of such measures on the standard of living of the population concerned.

Article 5

An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State. However, such offers of assistance shall not, particularly by virtue of the means used to implement them, take a form suggestive of a threat of armed intervention or any other measure of intimidation; assistance shall be granted and distributed without discrimination.

States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance.

Article 6

The provisions of this Resolution apply without prejudice to the procedures prescribed in matters of human rights by the terms of or pursuant to the constitutive instruments and the conventions of the United Nations and of specialized agencies or regional organizations.

Article 7

It is highly desirable to strengthen international methods and procedures, in particular methods and procedures of international organizations, intended to prevent, punish and eliminate violations of human rights.

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(13 September 1989)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Basel - 1991

**Non-Appearance Before the
International Court of Justice**

(Fourth Commission, Rapporteur : Mr Gaetano Arangio-Ruiz)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Considering the frequent cases of non-appearance which have occurred before the International Court of Justice ;

Considering that the International Court of Justice is the principal judicial organ of the United Nations, and that all the members of the United Nations are *ipso facto* parties to the Court's Statute ;

Considering that Article 53 of the Court's Statute provides :

"1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law." ;

Considering that the said Article implies that a State may not appear before the Court ;

Considering that the absence of a party is such as to hinder the regular conduct of the proceedings, and may affect the good administration of justice ;

Considering in particular the difficulties that non-appearance of a party may present in some circumstances for the other party or parties and for the Court itself, especially with regard to :

- a) the full implementation of the principle of the equality of the parties ; and
- b) the acquisition by the Court of knowledge of facts which may be relevant for the Court's pronouncements on interim measures, preliminary objections or the merits ;

Considering the positions which non-appearing States have taken in a number of cases in parallel with, or following, their failure to appear ;

Recalling further the attitude taken by non-appearing States in some instances with regard to the Court's pronouncements on interim measures, preliminary objections or the merits,

Adopts the following Resolution :

Article 1

Each State entitled under the Statute to appear before the Court and with respect to which the Court is seized of a case is *ipso facto*, by virtue of the Statute, a party to the proceedings, regardless of whether it appears or not.

Article 2

In considering whether to appear or to continue to appear in any phase of proceedings before the Court, a State should have regard to its duty to co-operate in the fulfilment of the Court's judicial functions.

Article 3

In the event that a State fails to appear in a case instituted against it, the Court should, if the circumstances so warrant :

- a) invite argument from the appearing party on specific issues which the Court considers have not been canvassed or have been inadequately canvassed in the written or oral pleadings ;
- b) take whatever other steps it may consider necessary, within the scope of its powers under the Statute and the Rule of Court, to maintain equality between the parties.

Article 4

Notwithstanding the non-appearance of a State before the Court in proceedings to which it is a party, that State is, by virtue of the Statute, bound by any decision of the Court in that case, whether on jurisdiction, admissibility, or the merits.

Article 5

A State's non-appearance before the Court is in itself no obstacle to the exercise by the Court of its functions under Article 41 of the Statute.

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(31 August 1991)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Basel - 1991

**The Autonomy of the Parties in International Contracts
Between Private Persons or Entities**

(Seventh Commission, Rapporteur : Mr Eric Jayme)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Stressing the primary importance of private international law for the development of trade and relations between private persons or entities in the international sphere ;

Considering that the autonomy of the parties is one of the fundamental principles of private international law ;

Recognizing that the autonomy of the parties has also been enshrined as a freedom of the individual in several conventions and various United Nations resolutions ;

Reserving generally, and especially with regard to arbitration, the question of the choice by the parties, and the application of rules of law other than those of a particular State ;

Adopts the following Resolution :

Article I

1. This Resolution shall apply to international commercial contracts made between private persons or entities, where the parties have agreed on the application of the law of any State.
2. However, this Resolution shall not apply to contracts of employment or to contracts concluded with consumers.

Article 2

1. The parties shall be free to choose the law applicable to their contract. They may agree on the application of the law of any State.

For the purpose of this Resolution, a territorial unit shall be treated as if it were a State where such unit has its own substantive law governing contracts.

2. The law chosen by the parties shall apply to the exclusion of its choice of law rules, unless the parties expressly provide otherwise.

Article 3

1. The choice of the applicable law shall be derived from the agreement of the parties.

2. In the absence of an express agreement, the choice shall be derived from those circumstances which indicate clearly the intention of the parties.

3. Whenever the contract is not valid under the law chosen by the parties, that choice shall have no effect.

Article 4

1. The existence and validity of the agreement of the parties to the choice of the applicable law shall be determined by that law.

2. However, a party who does not reply to an offer to conclude a contract may have the effects of his silence governed by the law of the State of his habitual residence.

Article 5

1. The applicable law may be designated by general conditions of contract, to which the parties have agreed.

2. Such agreement must be expressed in writing, or in a way which conforms with practices established by the parties, or in accordance with trade custom known to them.

Article 6

1. The parties may, after the conclusion of the contract, choose the applicable law or modify an earlier choice.

2. Subject to rights acquired by third parties, the parties may give retrospective effect to such a choice.

Article 7

The parties may choose the law to be applied to the whole or to one or more parts of the contract.

Article 8

If the parties agree that the chosen law is to be applied as it is in force at the time when the contract was concluded, the provisions of that law shall be applied as substantive provisions incorporated in the contract ; if, however, the chosen law has been amended or repealed by mandatory rules which are intended to govern existing contracts, effect shall be given to those rules.

Article 9

1. The chosen law shall apply without prejudice to mandatory provisions of the law of the forum, which must be applied to the situation irrespective of the law applicable to the contract.
2. If regard is to be had to mandatory provisions, within the meaning of the preceding paragraph, of a law other than that of the forum or that chosen by the parties, then such provisions can only prevent the chosen law from being applied if there is a close link between the contract and the country of that law and if they further such aims as are generally accepted by the international community.

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(31 August 1991)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Basel - 1991

**Contemporary Problems Concerning the Immunity of States in
Relation to Questions of Jurisdiction and Enforcement**

(Fourteenth Commission, Rapporteur : Mr Ian Brownlie)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Whereas significant trends have appeared both in the practice of States and in doctrine and jurisprudence since the Resolution on the immunities of foreign States adopted at the Aix-en-Provence Session of the Institute in 1954 ;

Whereas it is helpful to propose formulations pertinent to the application within the various national legal systems of the rules relating to the jurisdictional immunity of States with a view to limiting the immunity, while maintaining the protection of essential States interests ;

Adopts the following Resolution :

Article I
Scope of the Resolution

The present Resolution is concerned exclusively with the competence of the relevant organs of the State of the forum in respect of the acts or omissions of a State which is a party to proceedings in the courts of the forum State or in other organs of that State with powers of a quasi-judicial character.

Article 2
Criteria Indicating the Competence of
Courts or Other Relevant Organs of the Forum State
in Relation to Jurisdictional Immunity

1. In determining the question of the competence of the relevant organs of the forum State, each case is to be separately characterised in the light of the relevant facts and the relevant criteria, both of competence and incompetence ; no presumption is to be applied concerning the priority of either group of criteria.

2. In the absence of agreement to the contrary, the following criteria are indicative of the competence of the relevant organs of the forum State to determine the substance of the claim, notwithstanding a claim to jurisdictional immunity by a foreign State which is a party :

a) The organs of the forum State are competent in respect of proceedings relating to a commercial transaction to which a foreign State (or its agent) is a party.

b) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign State (or its agent) is a party ; the class of relationships referred to includes (but is not confined to) the following legal categories : commercial contracts ; contracts for the supply of services ; loans and financing arrangements ; guarantees or indemnities in respect of financial obligations ; ownership, possession and use of property ; the protection of industrial and intellectual property ; the legal incidents attaching to incorporated bodies, unincorporated bodies and associations, and partnerships ; actions *in rem* against ships and cargoes ; and bills of exchange.

c) The organs of the forum State are competent in respect of proceedings concerning contracts of employment and contracts for professional services to which a foreign State (or its agent) is a party.

d) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships which are not classified in the forum as having a "private law character" but which nevertheless are based upon elements of good faith and reliance (legal security) within the context of the local law.

e) The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss of or damage to tangible property, which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State.

f) The organs of the forum State are competent in respect of proceedings relating to any interests of a foreign State in movable or immovable property, being a right or interest arising by way of succession, gift or *bona vacantia* ; or a right or interest in the administration of property forming part of the estate of a deceased person or a person of unsound mind or a bankrupt ; or a right or interest in the administration of property of a company in the event of its dissolution or winding up ; or a right or interest in the administration of trust property or property otherwise held on a fiduciary basis.

g) The organs of the forum State are competent in so far as it has a supervisory jurisdiction in respect of an agreement to arbitrate between a foreign State and a natural or juridical person.

h) The organs of the forum State are competent in respect of transactions in relation to which the reasonable inference is that the parties did not intend that the settlement of disputes would be on the basis of a diplomatic claim.

i) The organs of the forum State are competent in respect of proceedings relating to fiscal liabilities, income tax, customs duties, stamp duty, registration fees, and similar impositions provided that such liabilities are the normal concomitant or commercial and other legal relationships in the context of the local legal system.

3. In the absence of agreement to the contrary, the following criteria are indicative of the incompetence of the organs of the forum State to determine the substance of the claim, in a case where the jurisdictional immunity of a foreign State party is in issue :

a) The relation between the subject-matter of the dispute and the validity of the transactions of the defendant State in terms of public international law.

b) The relation between the subject-matter of the dispute and the validity of the internal administrative and legislative acts of the defendant State in terms of public international law.

c) The organs of the forum State should not assume competence in respect of issues the Resolution of which has been allocated to another remedial context.

d) The organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State.

e) The organs of the forum State should not assume competence in respect of the validity, meaning and implementation of an intergovernmental agreement or decision creating agencies, institutions or funds subject to the rules of public international law.

Article 3

State Agencies and Political Subdivisions

1. The general criteria of competence and incompetence set forth above are applicable to the activities of the agencies and political subdivisions of foreign States whatever their formal designation or constitutional status in the State concerned.

2. The fact that an agency or political subdivision of a foreign State possesses a separate legal personality as a consequence of incorporation or otherwise under the law of the foreign State does not in itself preclude immunity in respect of its activities.

3. The fact that an entity has the status of a constituent unit of a federal State, or a comparable status of special autonomy, under the law of the foreign State does not preclude immunity in respect of its activities.

Article 4
Measures of Constraint

1. The property of a foreign State is not subject to any process or order of the courts or other organs of the forum State for the satisfaction or enforcement of a judgment or order, or for the purpose of prejudgment measures in preparation for execution (hereafter referred to as measures of constraint), except as provided for by this Article and by Article 5.

2. The following categories of property of a State in particular are immune from measures of constraint :

- a) property used or set aside for use by the State's diplomatic or consular missions, its special missions or its missions to international organizations ;
- b) property in use or set aside for use by the armed forces of the State for military purposes ;
- c) property of the central bank or monetary authority of the State in use or set aside for use for the purposes of the central bank or monetary authority ;
- d) property identified as part of the cultural heritage of the State, or of its archives, and not placed or intended to be placed on sale.

3. Subject to paragraph (2) above, the following property of a State is not immune from measures of constraint :

- a) property allocated or earmarked by the State for the satisfaction of the claim in question ;
- b) where the property referred to in sub-paragraph (a) has been exhausted or is shown to be clearly inadequate to satisfy the claim, other property of the State within the territory of the forum State which is in use or intended for use for commercial purposes.

4. This Article applies to property of or in the possession of State agencies and political subdivisions of a State, whatever their formal designation or constitutional status ; but this is without prejudice to the due identification of :

- a) the legal entity liable in respect of the claim, and

b) the property which belongs to that entity and which may accordingly be liable in accordance with paragraph (3) to measures of prejudgment attachment and seizure in execution to satisfy its liabilities.

5. The courts and other organs of the forum State shall give appropriate effect to the principle of proportionality as between the remedy sought and the consequences of enforcement measures.

Article 5 *Consent or Waiver*

1. A foreign State may not invoke immunity from jurisdiction or from measures of constraint if it has expressly consented to the exercise of the relevant type of jurisdiction by the relevant court or other organs of the forum State :

a) by international agreement ;

b) in a written contract ;

c) by a declaration relating to the specific case ;

d) by a voluntary submission to jurisdiction in the form of the institution of proceedings in the relevant organs of the forum State, or of intervention in proceedings for the purpose of pursuing issues related to the merits of those proceedings, or of a comparable step in the proceedings.

2. Consent to the exercise of jurisdiction does not imply consent to measures of constraint, for which separate and explicit consent is required.

Article 6 *The Principle of Good Faith*

The principle of good faith is to be given appropriate weight in applying the present Resolution.

Article 7 *Saving Clauses*

1. The present Resolution is not intended to indicate either directly or indirectly the validity or otherwise of doctrines affecting the competence of municipal courts which form part of one or more systems of municipal law and of which the act of State doctrine is an example.

2. The present Resolution is not intended to regulate the general question of the recognition, as a matter of private international law, of the validity of foreign governmental acts.

3. A foreign State which asserts its jurisdictional immunity in respect of a claim before a relevant organ of the forum State is not thereby precluded from arguing that the organ lacks competence to determine the subject-matter of the claim for reasons other than jurisdictional immunity.

4. The present Resolution is without prejudice to the privileges and immunities accorded to a State under international law in relation to the exercise of the functions of :

a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences ; and

b) persons connected with them.

5. The present Resolution is without prejudice to the personal privileges and immunities accorded to Heads of States under international law.

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(2 September 1991)

Session of Basel - 1991

**The International Sale of Works of Art from the Angle
of the Protection of the Cultural Heritage**

(Twelfth Commission, Rapporteur : Mr Antonio de Arruda Ferrer-Correia)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering the increasing importance given by international society and by national or regional communities to the protection and preservation of the cultural heritage ;

Considering that every country has the right and the duty to take measures to preserve its cultural heritage ;

Considering that in a number of cases such measures entail restrictions on the free movement of works of art which are considered integral elements of the cultural heritage of the country ;

Considering that such measures, while being justified by the need to safeguard this heritage, should be reconciled as far as possible with the general interests of the international trade of works of art ;

Considering that such measures, which interfere with the export of works of art, should be justified by the general interest in protecting the national cultural heritage or the common cultural heritage of international society ;

Considering it desirable that measures to protect the cultural heritage which are in force in the country of origin of the work of art be recognized in other countries, in particular in those in which such property is actually located ;

Convinced that it is opportune to propose to States guidelines for the development of their internal law, including rules of private international law, governing the subject matter with a view to ensuring adequate protection of other interests involved,

Underlining that this Resolution is without prejudice to situations which have occurred prior to its adoption,

Reserving the application of the proper law of the contract to contractual claims which the buyer may have against the seller,

Recalling its Resolutions of Wiesbaden (1975) on the Application of Foreign Public Law and of Oslo (1977) on Claims Based by a Foreign Authority and by a Foreign Public Agency on Provisions of its Public Law,

Adopts the following Resolution :

Article 1

1. For the purpose of this Resolution :

a) a "work of art" is a work which is identified as belonging to the cultural heritage of a country by registration, classification or by any relevant internationally accepted method of publicity ;

b) "country of origin" of a work of art means the country with which the property concerned is most closely linked from the cultural point of view.

2. This Resolution relates to sales concluded before or after the property has been exported from the territory of the country of origin in breach of the non-retrospective legislation of the latter on the export of cultural property.

3. This Resolution applies to all future cases where a work of art has been stolen or otherwise taken away illegally from its owner or holder, or illegally exported.

Article 2

The transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country.

Article 3

The provisions of the law of the country of origin governing the export of works of art shall apply.

Article 4

1. If under the law of the country of origin there has been no change in title to the property, the country of origin may claim, within a reasonable time, that the property be returned to its territory, provided that it proves that the absence of such property would significantly affect its cultural heritage.

2. Where works of art belonging to the cultural heritage of a country have been exported from the country of origin in circumstances covered by in Article 1, the holder may not invoke any presumption of good faith. The country of origin should provide for equitable compensation to be effected to the holder who has proved his good faith.

3. For the purposes of paragraph 2, a holder in good faith is a person who at the time the property was acquired was unaware of, and could not reasonably be expected to be aware of, the defect in title of the person disposing of such property, or of the fact that the property had been exported in breach of the provisions of the country of origin on export. In case of gift or succession, the holder may not enjoy a status more favourable than that of the previous holder.

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(3 September 1991)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Milan - 1993

**The Activities of National Judges and
the International Relations of their State**

(Ninth Commission, Rapporteur : Mr Benedetto Conforti)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Whereas international law plays an increasingly important role within the various national legal systems ;

Whereas this necessarily leads national courts to decide questions whose solution depends on the application of international norms ;

Whereas it is in principle for the legal system of each State to provide the most appropriate ways and means for ensuring that international law is applied at the national level ;

Whereas, however, in order to attain within each State a correct application of international law through its own methods of interpretation within each State, it is appropriate to strengthen the independence of national courts in relation to the Executive and to promote better knowledge of international law by such courts ;

Whereas the strengthening of the role of national courts may be facilitated by removing certain limitations on their independence which are sometimes imposed with regard to the application of international law by law and by practice ;

Whereas it is appropriate to this end to make recommendations to be followed in the national legal systems ;

Noting this Resolution is not directed to the question of the pre-eminence of international law over domestic law,

Adopts the following Resolution :

Article 1

1. National courts should be empowered by their domestic legal order to interpret and apply international law with full independence.
2. National courts in determining the existence or content of international law, either on the merits or as preliminary or incidental questions, should enjoy the same freedom of interpretation and application as for other legal rules, basing themselves on the methods followed by international tribunals.
3. Nothing should prevent national courts from requesting the opinion of the Executive, provided that such consultation has no binding effect.

Article 2

National courts, when called upon to adjudicate a question related to the exercise of executive power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law.

Article 3

1. National courts, when called upon to apply a foreign law, should recognize themselves as competent to pronounce upon the compatibility of such law with international law. They should decline to give effect to foreign public acts that violate international law.
2. No rule of international law prevents national courts from acting as here above indicated.

Article 4

National courts, in determining the existence or content of customary international law, should take account of developments in the practice of States, as well as in case law and jurisprudence.

Article 5

1. The appropriate national courts should have the power independently to determine whether a treaty claimed to be binding on the forum State has come into existence or has been modified or terminated.
2. In a case brought before them, national courts should refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even when the forum State has not denounced it.

3. National courts should have full independence in the interpretation of a treaty, making every effort to interpret it as it would be interpreted by an international tribunal and avoiding interpretations influenced by national interests.

Article 6

National courts should determine with full independence the existence or content of any general principle of law in accordance with Article 38, paragraph 1, of the Statute of the International Court of Justice, as well as of binding resolutions of international organizations.

Article 7

1. National courts should be able to defer to the Executive, in particular the organs responsible for foreign policy, for the ascertainment of facts pertaining to the international relations of the forum State or of other States.
2. The ascertainment of international facts by the Executive should constitute *prima facie* evidence of the existence of such facts.
3. The legal characterization of the facts should be reserved for the judiciary alone.

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(7 September 1993)

Session of Lisbonne - 1995

**Problems Arising from a Succession of Codification
Conventions on a Particular Subject**

(First Commission, Rapporteur : Sir Ian Sinclair)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Considering that the mandate of the First Commission is to study the problems arising from a succession of codification conventions on a particular subject,

Considering that these problems include *inter alia* questions of the law of treaties and questions pertaining to the relationship between treaty and custom,

Having examined the reports of the First Commission together with the comments and conclusions attached thereto,

1. *Recommends* that the negotiators of any codification convention relating to the same subject-matter as that of an earlier codification convention should incorporate provisions in that convention regulating the relationship between it and the earlier convention ;

2. *Adopts* the Conclusions annexed to this Resolution.

Conclusions

I. General

Conclusion 1 : Terms Used

For the purposes of these Conclusions :

a) the expression “codification convention” means any multilateral convention containing provisions intended to codify or progressively to develop rules of general public international law ;

b) the expression “general codification convention” means a codification convention that is normally open to participation by States irrespective of the regional group or groups to which they may belong ;

c) the expression “regional codification convention” means a codification convention concluded at the regional level, which may reserve participation to the States belonging to the regional group concerned. Such a regional codification convention may contain provisions which codify or progressively develop rules of general public international law or rules of public international law applicable only as between States within the region.

Conclusion 2 : Effect of Codification Provisions

A codification convention may contain provisions (hereinafter referred to as “codification provisions”) which are declaratory of customary law, or which serve to crystallise rules of customary law, or which may contribute to the generation of new rules of customary law in accordance with the criteria laid down by the International Court of Justice.

Conclusion 3 : Scope of the Conclusions

These Conclusions apply to a succession to the codification provisions of general codification conventions relating to the same subject-matter, and also apply to a succession to the codification provisions of regional codification conventions relating to the same subject-matter where this raises the same problems as those raised by a succession to the codification provisions of general codification conventions of this nature.

Conclusion 4 : Provisions Regarding jus cogens

These Conclusions are without prejudice to the application of Articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969.

II. Treaty Law

Conclusion 5 : Treaty-Law Consequences of a Succession of Codification Conventions Relating to the Same Subject-Matter

The consequences, as a matter of the law of treaties, of a succession to the codification provisions of codification conventions relating to the same subject-matter flow from the provisions of Article 30 of the Vienna Convention on the Law of Treaties dealing with priorities in the application of successive treaties of this nature. Where appropriate, the provisions of Articles 40, 41 and 59 of that Convention should also be borne in mind, these provisions constituting in many respects a codification of existing customary law on the matters which they cover.

Conclusion 6 : Provisions Regarding Consequences of Breach

Conclusion 5 is without prejudice to the application of Article 60 of the Vienna Convention on the Law of Treaties in a case where the content of a later codification convention constitutes a breach of an obligation in the earlier convention. It is equally without prejudice to the other legal consequences of breach of such an obligation deriving, for example, from the rules of the law of State responsibility.

Conclusion 7 : Rules or Practices of an International Organization

In the case of successive codification conventions relating to the same subject-matter adopted within an international organization which has rules or practices regulating the relationship between successive conventions of this type, Conclusion 5 is without prejudice to the application of any such rules or practices.

Conclusion 8 : Priority to be Given to Treaty Provisions Regulating Relationship Between Successive Codification Conventions

Conclusion 5 applies to a succession to the codification provisions of codification conventions relating to the same subject-matter even in cases where the earlier or later codification convention embodies a provision specifically regulating the relationship between the two conventions ; in such a case that provision will, to the extent that it is applicable in the particular circumstances, prevail.

Conclusion 9 : Special Case of a Later Codification Convention Regulating in Greater Detail Part of the Ground Covered by an Earlier Codification Convention

Where the object and purpose of a later codification convention are to regulate in greater detail a matter or matters already regulated by an earlier codification convention and where two States are parties to both conventions, there may be room in the interpretation and application of the two conventions to apply the distinction between the *lex specialis* and the *lex generalis*. In appropriate cases and unless the later convention provides otherwise, where there is incompatibility between the provisions of the two conventions, the *lex specialis* should prevail.

III. Relationship Between Treaty and Custom

Conclusion 10 : As Sources of International Law

Treaty and custom form distinct, interrelated, sources of international law. A norm deriving from one of these two sources may have an impact upon the content and interpretation of norms deriving from the other source. In principle, however, each retains its separate existence as a norm of treaty law or of customary law respectively.

Conclusion 11 : Hierarchy of Sources

There is no *a priori* hierarchy between treaty and custom as sources of international law. However, in the application of international law, relevant norms deriving from a treaty will prevail between the parties over norms deriving from customary law.

Conclusion 12 : The Effects of Repetition of a Norm in Successive Codification Conventions

The repetition in two or more codification conventions of the substance of the same norm may be an important element in establishing the existence of that norm as a customary rule of general international law.

Conclusion 13 : State Practice in Relation to the Process of Generation of Customary Law by Codification Convention

In assessing the element of State practice in the process by which a rule of customary law may be generated through a codification convention, the practice of both parties and non-parties should be taken into account. In the case of conduct of a party to the codification convention in its relations with another party or with a non-party, the significance of the practice will be substantially enhanced if it is established that the State concerned acted in the conviction that the practice was required by a rule of customary international law independently of the applicability of the convention.

Conclusion 14 : Effect of Judicial Pronouncements

A judicial pronouncement to the effect that a particular provision of a codification convention is or is not declaratory of customary law, or has or has not crystallised as, or has or has not generated, a rule of customary law states the law as at the date upon which that pronouncement was made.

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(1st September 1995)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Lisbonne - 1995

**The Legal Consequences for Member States of
the Non-fulfilment by International Organizations
of their Obligations toward Third Parties**

(Fifth Commission, Rapporteur : Mrs Rosalyn Higgins)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Mindful of the tensions existing between the importance of the independent responsibility of international organizations on the one hand, and the need to protect third parties dealing with such international organizations, on the other hand ;

Taking into account the considerable diversity of international organizations, both in their membership and their structure and functions ;

Realizing that solutions which are adequate for some organizations are not necessarily suited for others ;

Taking also into account the uncertainties of the present international practice in solving the above mentioned tensions ;

Seeking also to promote the credibility of international organizations ;

Attempting to identify the existing international law on the legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties ;

Attempting further to make useful recommendations for future practice of international organizations ;

Adopts the following Resolution :

A. Use of Terms

Article 1

This Resolution deals with issues arising in the case of an international organization possessing an international legal personality distinct from that of its members.

Article 2

For the purposes of this Resolution :

- a) “third parties” means persons other than the organization itself, whether they are private parties, states or organizations. It includes States members of an organization acting in a capacity other than as an organ or as a member of an organ of the organization ;
- b) “liability” means both concurrent and subsidiary liability.
 - i) Concurrent liability means a liability that allows third parties having a legal claim against an international organization to bring their claim, at their choice, against either the organization or its members.
 - ii) Subsidiary liability means a liability by which third parties having a legal claim against the international organization will have a remedy against States members only if and when the organization defaults.
- c) “Rules of the organization” means the constituent instruments of the organization and any amendments thereto, regulations adopted thereunder, binding decisions and resolutions adopted in accordance with such instruments and the established practice of the organization.

B. Current Law

Article 3

An international organization within the meaning of Article 1 is liable for its own obligations towards third parties.

Article 4

- a) The obligations that an international organization has to third parties may arise under international law (including the Rules of the organization) or under the law of a particular State.

b) Whether States have concurrent or subsidiary liability for the fulfilment of such obligations due solely to their membership in an international organization is a matter of international law, whether a claim by a third party is made in an international court or tribunal or a national court.

Article 5

a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization.

b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights.

c) In addition, a member State may incur liability to a third party

i) through undertakings by the State,

or

ii) if the international organization has acted as the agent of the State, in law or in fact.

Article 6

a) Save as specified in Article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are members.

b) No inference of a general rule of international law providing for liability of States is to be deduced from the fact that the Rules of some organizations make specific provision :

i) for the limitation or exclusion of such liability,

or

ii) for the dissolution of these organizations.

c) No liability of a State arises merely by virtue of

- having participated in the establishment of an international organization to serve the State's own purposes ;

- the fact that the act of the organization giving rise to its liability to a third party is claimed to be *ultra vires*.

Article 7

Unless the Rules of the organization direct otherwise, no distinction is to be made between claims in contract and other claims for purposes of determining whether any liability exists for member States for the obligations of an international organization.

C. Desirable Developments

Article 8

Important considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations, militate against the development of a general and comprehensive rule of liability of member States to third parties for the obligations of international organizations.

Article 9

1. Important considerations of policy entitle third parties to know, so that they may freely choose their course of action, whether, in relation to any particular transaction or to dealings generally with an international organization, the financial liabilities that may ensue are those of the organization alone or also of the members jointly or subsidiarily. Accordingly, an international organization should specify the position regarding liability :

- a) in its Rules and contracts ;
- b) in communications made to the third party prior to the event or transaction leading to liability ; or
- c) in response to any specific request by any third party for information on the matter.

2. A failure to take any of the above actions should be taken as a relevant factor in considering the liability of the States members.

3. Member States may, unless prohibited by the Rules of the organization, exclude or limit their liability for the obligations of the organization, provided that they do so before any relevant dealings with third parties and provided that such limitation or exclusion is specified in appropriate detail, in accordance with paragraph 1. This is without prejudice to the duty of member States at all times to pay their assessed and apportioned contributions, or subscription to capital, as the case may be.

Article 10

If, pursuant to its Rules, member States have an obligation to put an international organization in funds to meet its obligations, this obligation should (unless the Rules make different provision) be proportionate to their contribution to the regular budget or to their subscription to the capital, as the case may be.

Article 11

a) International organizations should contain provisions in their Rules for the discharging of outstanding liabilities upon their dissolution. Where the obligation to third parties is that of the organization alone, upon the extinction of its legal personality there should be a first call upon its assets for the purpose of discharging such obligation. A failure to specify arrangements in the Rules of the organization should, unless the prevailing facts indicate otherwise, be taken as an implied acceptance by the States members that the duty to discharge outstanding obligations, not met by the remaining assets of the dissolved organization, will fall upon them. In this last case, the principles of Article 10 will apply.

b) The liability of members withdrawing from an international organization less than a year before its dissolution should be determined as if they were still members upon its dissolution.

Article 12

Where liability of member States is provided for, the Rules of the organization should provide for international arbitration or other mechanisms leading to a binding decision to resolve any dispute arising between the organization and a member State or between member States over the liability of the latter *inter se* or to put the former in funds.

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(1st September 1995)

Session of Lisbonne - 1995

**Cooperation Between State Authorities Combatting
the Unlawful Displacement of Children**

(Thirteenth Commission, Rapporteur : Mr Franz Matscher)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Aware of the human and legal problems which affect an increasing number of family relations and the main victims of which are the children ;

Having regard to the fact that such problems occur in particular whenever the parents reside in different countries, or whenever one of the parents has moved abroad with the children or with one of them ;

Having regard to the fact that highly sensitive problems may also arise whenever the parents belong to different cultural backgrounds ;

Mindful of the need to propose regulations whereby objective, fair and effective solutions based on the interest of the child can be reached ;

Taking into account the international conventions already concluded on the subject, *i.e* :

- the European Convention on the Recognition and Enforcement of Decisions in matters of Custody of Children and Restoration of the Custody of Children, signed in Luxembourg on 20 May 1980 and entered into force on 1 September 1983,
- the Convention on Civil Aspects of International Child Abduction, signed in the Hague on 25 October 1980 and entered into force on 1st September 1983,
- the Inter-American Convention on the Return of Children, signed in Montevideo on 15 July 1989, not yet entered into force ;

Considering that these conventions allow the legal and practical problems relating to the restoration of custody in the event of wrongful retention or removal of children to be solved efficiently ;

Considering that the scope of these conventions should be extended as much as possible ;

Noting that there are also several bilateral conventions on this matter ;

Considering that the existence of "Central Authorities" as provided for by the European Convention and the Hague Convention is an important element for the proper operation of these conventions ;

Considering that, as shown by periodical reviews of the operation of these conventions, there still remain several problems, due in particular to the limited number of ratifications and to the defective application of these conventions by States ;

Whereas it would be useful to supplement these "basic" conventions with special conventions concluded between States in which such problems occur more frequently ;

Taking note of the United Nations Convention of 20 November 1989 on the Rights of Children ;

Taking note also of various initiatives on the protection of minors taken by the Hague Conference on Private International Law, the Council of Europe and other international organizations, such as the Organization of American States ;

Recalling the Resolution adopted by the Institute of International Law at its Helsinki Session (1985) on "The law applicable to certain effects of a marriage after its dissolution" ;

Desirous to make its contribution within the framework of international relations towards a better legal settlement of the problem of custody of children born of estranged parents,

Adopts the following Resolution :

1. The States concerned are requested to ratify as soon as possible the Hague Convention, the European Convention or the Inter-American Convention ; it would also be desirable that they extend the application of these conventions to facts prior to their entry into force.
2. States parties to the Hague Convention are requested to consider the usefulness of special conventions to be concluded between themselves in order to facilitate the application of that convention.
3. States parties to the Hague Convention and to the European Convention are requested to provide the Central Authorities with sufficient means in staff and budgetary resources in order to enable them to perform their duties speedily, vigorously and efficiently.

4. In order to allow a continuous exchange of information and experience between themselves, States parties to these conventions are requested to encourage activities of the respective secretariats of the Council of Europe and of the Hague Conference on Private International Law as regards the co-ordination of the activities of the Central Authorities, the setting-up of a documentation on the application of the said conventions and the organization of periodical meetings of senior officials.

5. The documentation on the application of the conventions should be made available to all circles concerned through the competent services of the Council of Europe and the Hague Conference on Private International Law.

6. In order to ensure the proper operation and the effectiveness of the above mentioned conventions, States are requested to disseminate both the conventions and the relevant case law to the authorities, the professional circles and the public at large.

7. States are requested to take the following measures within their internal systems :

a) the establishment of flexible and easily accessible procedures, including the setting-up of systems of free legal aid and assistance ;

b) a limitation of remedies and a shortening of the procedural time limits, taking into account the rights and interests of the persons concerned ;

c) the establishment of rules permitting the adoption of provisional measures and the provisional enforcement of judgments ;

d) the speedy establishment of contacts between Central Authorities and between each of them and the administrative and judicial authorities of its own country ;

e) the speedy performance by the various competent administrative and judicial authorities of the duties assigned to them.

8. Reservations on grounds of public policy and other clauses which restrict the normal operation of rules provided for in the conventions shall be narrowly interpreted ; their application shall thus be limited to cases where either the recognition and enforcement of a foreign judgment or the treatment of a request received from the competent authority of another State would be manifestly contrary to the fundamental principles of the legal order of the requested State relating to the protection of human rights and fundamental freedoms.

9. Contracting States which at the time of ratification, acceptance, approval or accession have made reservations are requested to reconsider such reservations and to withdraw them as far as possible.

States which are not parties to the conventions concerned are requested to ratify or accede to the latter without making reservations.

10. Contracting States shall see to it that their competent administrative authorities, when issuing passports to minors or registering minors in the passports of one of the parents, make sure that the applicants for the passports or registration are duly authorized to that effect.

11. Steps required for the return of a child shall not be delayed on the ground that the financial problems relating to the expenses incurred by the search for the child, by the procedure followed in the requested State and by the arrangements for the return journey have not yet been settled. As a provisional measure, the expenses in question should be advanced by the requested State.

12. Contracting States shall ensure that their authorities act promptly to respond to any application from Central Authorities or Interpol services for search of the whereabouts of an abducted child.

13. As the abduction of children or refusal to return children is often the consequence of an unsatisfactory exercise of the rights of custody and of access as agreed between parents or determined by courts, the competent authorities of the States concerned shall strive to ensure that the terms of the rights of custody and of access are complied with.

14. In view of the fact that the basic principles of the conventions referred to in this Resolution as well as the methods laid down for their application appear to be more widely acceptable, States which have not yet acceded to these conventions are requested to use them as a guidance in their legislation and administrative practice ; States could also be guided by them when concluding bilateral conventions on the matter, as the conclusion of such conventions appears particularly appropriate in the relations between States committed to different cultural notions.

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(31 August 1995)

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Lisbonne - 1995

Obligations of Multinational Enterprises and their Member Companies

(Fifteenth Commission, Rapporteur : Mr Andreas Lowenfeld)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Recognizing that the principles of company law, as developed in the States of Europe and the Americas in the Nineteenth Century, do not address the modern phenomenon of large groups of companies incorporated in different States but operating under common ownership, common or related trade names, and common management or control ;

Aware that different States have adopted different and sometimes inconsistent laws in regard to the exercise of jurisdiction over groups of companies ;

Persuaded that no single rule can cover all situations in which multinational enterprises are sought to be held responsible for the acts of member companies established under the law of a given State, but that it is desirable to give guidance to States and to multinational enterprises concerning the consistency of such rules with international law ;

Proposes (without prejudice to special rules of liability in bankruptcy or insolvency proceedings) the following Guidelines concerning the responsibility of multinational enterprise :

I. Definitions

For purposes of these Guidelines

1. A *multinational enterprise* is a group of companies operating under common ownership or control, whose members are incorporated under the laws of more than one State. Generally, the members of the group of companies operate under common or related trade marks or trade names and produce or distribute common or related products or services, but the absence of such integrated activity does not, by itself, deprive a group of companies of the character of a multinational enterprise. A multinational enterprise may, but need not, appear to the public to be linked to a particular State in which the parent company has its headquarters ; and the multinational enterprise may be operated under a hierarchical or under a decentralized system of management. While some holding of shares of companies forming part of the multinational enterprise by non-members is not excluded, an essential characteristic of a multinational enterprise is that shares of companies that are members of the group are not dispersed, and that management of the companies constituting the multinational enterprise is exercised by the parent company, whether through controlling shareholding, direct or indirect, or by other means.

2(a) *Control* is the power to exercise decisive influence over the activities of a company, whether by appointment of its directors or principal managers or otherwise ; a *controlling entity* is a company or other entity that has or exercises control over another member of the group of companies that constitute the multinational enterprise. A controlling entity may, but need not, be the parent company of the multinational enterprise.

(b) If the parent company, another controlling entity, or several members of the group of companies constituting the multinational enterprise taken together hold a majority of the voting shares of the company in question, control by the parent company or the group of companies is assumed ; control meeting the test of paragraph (a) may also rest in an entity holding less than a majority of the shares of a company, if by virtue of management contracts, conditions in credit arrangements, voting trusts, license or franchise agreements, or other elements, it has the power to exercise decisive influence over the activities of the company in question.

3(a) A *parent company* is a company or other entity that directly or indirectly owns a majority of the shares of, or otherwise exercises control over, other companies that constitute a multinational enterprise. A parent company may, but need not, be an operating enterprise engaged in the production or distribution of goods or services. Ownership of a parent company may be confined to a small group or even an individual ; more commonly, ownership of a parent company is dispersed through shares held by the public and traded on securities markets.

(b) A *subsidiary* is a company that is owned or controlled by another company belonging to the same group of companies. Usually, a subsidiary is incorporated under the laws of the State in which it is established.

(c) A *branch* is a unit of a larger entity not separately incorporated in the State where it is established or engaged in operation.

II. Principles

1. As a general rule, shareholders of a company or similar entity are presumed not to be liable for the obligations of the company whose shares they hold. However, it is open to States, in limited circumstances, such as those illustrated in the following paragraphs, to apply their law (including their conflict of laws) to impose liability for the obligations of a company on an entity that alone, or as a member of a group of companies constituting the multinational enterprise, holds all or substantially all of the shares of the company in question or exercises control over it.

2(a) Liability for claims arising out of contractual relations between a company and a third party may be imputed by a court or arbitral tribunal to the parent company or other controlling entity of a multinational enterprise when

(i) the controlling entity has taken part in the negotiation, performance, or termination of the contract on which the claim is based in such manner as to lead the claimant reasonably to rely on its responsibility ;

(ii) the company in question or the controlling entity has engaged in fraud or deceptive practice in respect of the obligation on which the claim is based ; or

(iii) a member of a multinational enterprise ceases its activity, enters into liquidation, or is put into bankruptcy, in order to contribute to the compensation due to its employees in accordance with the law applicable at the place of the activity or employment.

(b) Liability for claims arising out of non-contractual obligations may be imputed to the controlling entity in circumstances, such as mass disasters, in which the resources of the member or members of the multinational enterprise directly involved appear likely to be insufficient to respond to the claim in full.

(c) Liability for claims arising out of contractual or non-contractual relations may also be imputed to another member of the multinational enterprise in circumstances under which the controlling entity could be held responsible in accordance with paragraphs (a) or (b) when that other member has participated in the activity on which the claim is based or has derived direct economic benefit from that activity.

3. In addition to such other bases of judicial jurisdiction as it may provide over persons not established in its territory, including jurisdiction based on injury sustained or contracts made or breached in the State, it is open to a State, when a claim for which jurisdiction is asserted arises out of or is closely related to the activities conducted by, or on behalf of, a multinational enterprise in that State, to provide that

(a) a parent company or a controlling entity of a multinational enterprise is subject to the jurisdiction of its courts on the basis

(i) of the permanent presence in the State of a branch or comparable establishment of the multinational enterprise ; or

(ii) of the permanent presence in the State of a subsidiary so closely linked to the multinational enterprise by common ownership, control, personnel, management, or activity as to be fairly regarded as a mere department or *alter ego* of the multinational enterprise ; or

(iii) of the existence of circumstances that could justify imputation of liability of the parent company or controlling entity in accordance with Paragraph 2(a) or (b) of these Principles,

(b) another member of the multinational enterprise is subject to the jurisdiction of its courts on the basis of the existence of circumstances that could justify imputation of liability to that member in accordance with Paragraph 2(c) of these Principles.

4. A judgment or arbitral award that has imposed liability on a parent company, controlling entity, or other member company of a multinational enterprise - if it otherwise fulfils the conditions for recognition and enforcement under the rules in effect in the State where recognition and enforcement are sought - should not be refused in that State if liability has been imposed consistently with these Principles.

5. If a subsidiary of a multinational enterprise is established in a State and regularly engages in economic activity with the parent company or other members of a multinational enterprise, that State may impose reasonable requirements on a multinational enterprise and its member companies to disclose information, submit financial statements, and comply with economic regulations having direct effect in the regulating State.

6(a) A State may impose reasonable regulations on a multinational enterprise whose parent company is established in that State with regard to the activity of its subsidiaries established in other States, provided such regulations are part of a program of general application. In applying such regulations a State should seek to avoid conflict with the law or regulations of the States in which the subsidiaries are established or the activities take place.

(b) In the event of a conflict between regulations imposed by two or more States on a multinational enterprise or its component units,

(i) each State is required to weigh the interests of the other State in the regulation in question ;

(ii) where accommodation between or among the conflicting regulations is not possible, the greatest weight is generally to be given to the law of the State where the activity to be regulated takes place, or where the member company of the multinational enterprise whose activity is sought to be regulated is incorporated or established.

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(1st September 1995)

Session of Strasbourg - 1997

The Teaching of Public and Private International Law

(Tenth Commission, Rapporteur : Mr Ronald Macdonald)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Reaffirming the Resolution adopted at its Athens Session on 12 September 1979 on the teaching of international law ;

Emphasising that international law increasingly affects the content of municipal law and that a knowledge of international law is necessary to discharge a wide range of professional responsibilities at the national level and the responsibilities of individuals in an increasingly cohesive international society ;

Reaffirming that, in the conditions prevailing in the present world, legal education is incomplete if it does not cover the basic elements of public and private international law ;

Noting that the international community is moving to a more complex system in which non-State actors are increasing in importance and that international and national laws are becoming more closely interrelated ;

Anxious to ensure that the teaching of international law is sufficiently adapted to changes in the international system and to the role and interests of various non-State actors, including individuals ;

Desiring to contribute to global efforts to strengthen the teaching, study, dissemination, and wider appreciation of international law within the framework of the United Nations Decade on International Law in pursuance of the goals set out in General Assembly Resolution 44/23 of 17 November 1989 ;

I

Recommends that :

1. Every school and faculty of law offer a foundation course or courses on public and private international law. The purpose of such courses is to familiarise students with the basic elements of public and private international law and to provide a foundation on which more specialized knowledge can be acquired at later stages of the educational process.
2. No law student graduate from schools or faculties of law or enter the practice of law and the judicial or diplomatic service without having had a foundation course or courses on public and private international law. The foundation course might usefully include the topics referred to in Annex I.
3. Schools and faculties of law offer a range of optional courses and seminars supplementing the foundation course or courses described in paragraph 1. Subjects that might be offered on an optional basis at advanced levels of instruction are referred to in Annex II.
4. Where two separate courses are offered on public and private international law, there will be close interrelation and coordination between them.
5. Where admission to the practice of law is by professional examination, the examination or examinations should include public and private international law among the subjects regularly examined.
6. (1) The curricula of the political science faculties and similar university departments should include a course on the basic principles of public and private international law.

(2) The curricula of military academies and similar institutions for the training of officers and non-commissioned officers should incorporate, in addition to the course on general matters, a course on the law of armed conflict, including international humanitarian law. The main rules of this body of law should also be part of the training of all members of the armed forces.

(3) Every effort should be made to offer in high schools an introduction to the international legal system.

II

Invites the Bureau to create a permanent Commission within the framework of the Institute to facilitate the realisation of the goals of this Resolution. Special attention should be given to teaching of public and private international law in developing countries, including access to legal information and the provision of adequate library sources.

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(September 4, 1997)

ANNEX I

For Public International Law, the foundation course might usefully include the following topics :

- (i) The history, nature and function of international law.
- (ii) The sources of international law.
- (iii) The law of treaties.
- (iv) The relationship between public and private international law.
- (v) The relationship between international law and national law.
- (vi) Subjects of international law, including the individual.
- (vii) The regulation of land, sea, air, space.
- (viii) Jurisdiction and immunities ; nationality ; aliens ; refugees.
- (ix) The international law of human rights.
- (x) State responsibility.
- (xi) The peaceful settlement of disputes.
- (xii) The use of force and the United Nations system of collective security.

For Private International Law, the foundation course might usefully include the following topics :

- (i) Sources of private international law.
- (ii) The relationship between private and public international law.
- (iii) Principles of jurisdiction to adjudicate.
- (iv) Choice of law (connecting factors, characterisation, public policy).
- (v) Recognition and enforcement of foreign judgements.

ANNEX II

For Public International Law, the following subjects, among others, might be offered on an optional basis :

- (i) The law and practice of the United Nations, its principles, purposes and practices.
- (ii) International institutional law.
- (iii) The law of diplomatic and consular relations.
- (iv) International law of development.
- (v) International environmental law.
- (vi) International economic law.
- (vii) International criminal law.
- (viii) International humanitarian law.
- (ix) International labour law.
- (x) International administrative law.
- (xi) The law on the use and regulation of natural resources.
- (xii) The international law of disarmament.
- (xiii) The international law of the sea and international maritime law.
- (xiv) The international law of regional integration.
- (xv) The law of unification, integration, and harmonization.

For Private International Law, the following subjects, among others, might be offered on an optional basis :

- (i) International arbitration.
- (ii) International contracts.
- (iii) International company law.
- (iv) International torts.
- (v) International family law and succession.

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Session of Strasbourg - 1997

Environment

(Eighth Commission, Rapporteur : Mr Luigi Ferrari Bravo)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Having considered during previous Sessions the problems raised by the management of the environment as much at the level of international law as that of conflicts of laws and of the harmonization of domestic legal systems ;

Bearing in mind that the search for new forms of regulation, particularly in regard to the prevention and precautionary principles, is linked to the requirements of the sustainable development of human societies as determined by the powers which govern those societies ;

Recalling that the Institute has already addressed environmental issues in its Resolutions adopted at Athens in 1979 and Cairo in 1987, dealing respectively with “International Law and the Pollution of Rivers and Lakes” and “Transboundary Air Pollution” ;

Recalling the desire of the Institute to contribute to the United Nations Decade of International Law ;

Bearing in mind that this Resolution deals only with certain aspects of the general architecture of international environmental law and considering therefore that the environment as a general topic should continue to be one of the topics of the future work of the Institute in the fields of both public international law and private international law,

Adopts this Resolution :

Article 1

For the purposes of this Resolution, the concept of “environment” includes abiotic and biotic natural resources, in particular air, water, soil, fauna and flora, as well as the interaction between these factors. It also includes the characteristic features of the landscape.

Article 2

Every human being has the right to live in a healthy environment.

Article 3

The effective realization of the right to live in a healthy environment should be integrated into the objectives of sustainable development.

Article 4

International law determines the basic principles and minimum rules for the protection of the environment.

International law also establishes such rules as may be necessary when national regulations are insufficient or inadequate.

Article 5

The environmental impact assessment of any project, whether international, national or local, which may have consequences for the environment shall take into account the living conditions and the development prospects of the human societies with which the project is concerned. The assessment shall be carried out in accordance with criteria which are comparable to criteria used by other countries and in a spirit of international co-operation.

Article 6

Every State, when intervening on the basis of decisions taken in the exercise of its sovereignty in fields of activity where the effects of such decisions on the environment are clear, has the responsibility to ensure that activities within its jurisdiction or under its control do not cause damage which may affect the lives of the present and future generations.

To this end, such activities shall be decided upon and carried out in the light of available scientific data.

If the activities referred to above involve the risk of causing significant damage to the environment, the State shall provide prior and timely notification to potentially affected States.

Article 7

Whenever a State has at its disposal a monitoring system which may give it advance warning of any risk of impact on the environment resulting from activities conducted within its territory, it shall make any information obtained from such system immediately available to the countries where such a risk may occur and, where necessary, to the international community.

Whenever a State has at its disposal a monitoring system which may give it advance warning of any risk of impact on the environment resulting from activities conducted outside its boundaries, it shall make any information obtained from such system immediately available to the country where the threat to the environment may originate and, where necessary, to the international community.

In this field, international co-operation through appropriate institutions is highly recommended.

Article 8

Any State which fears that activities carried out by another State within its own jurisdiction or under its control affect its rights may request an impartial assessment of the ultimate consequences of such activities. The State show activities are challenges shall be obliged to facilitate such an assessment.

Article 9

States, regional and local governments and juridical or natural persons shall, to the extent possible, ensure that their activities do not cause any damage to the environment that could significantly diminish the enjoyment of the latter by other persons. In this respect, they shall take all necessary care.

The obligation to prevent damage exists independently of any obligation to make reparation.

Article 10

The assessment of the circumstances which have given rise to the damage in respect of which reparation is to be made, as well as of any factual element concerning the environment, must be effected in a reliable manner, whether the matter arises within the international legal order or within a competent domestic legal order.

To this end, any enquiry has to be conducted by impartial authorities and the results arrived at be as acceptable at the domestic as at the international level. It is strongly recommended that the assistance of competent international organizations be obtained.

Article 11

International procedures for the settlement of disputes relating to matters of environment should allow any interested persons to make known their points of view, even if they are not subjects of international law.

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(September 4, 1997)

Session of Strasbourg - 1997

**Responsibility and Liability under International Law for
Environmental Damage**

(Eighth Commission, Rapporteur : Mr Francisco Orrego Vicuña)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Recalling the “Declaration on a Programme of Action on the Protection of the Global Environment” adopted at the 65th Session of the Institute in Basle ;

Mindful of the increasing activities that entail risks of environmental damage with transboundary and global impacts ;

Taking into account the evolving principles and criteria governing State responsibility, responsibility for harm alone and civil liability for environmental damage under both international and national law ;

Noting in particular Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration on the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction ;

Realizing that both responsibility and liability have in addition to the traditional role of ensuring restoration and compensation that of enhancing prevention of environmental damage ;

Seeking to identify, harmonize and to the necessary extent develop the principles of international law applicable to responsibility and liability in the context of environmental damage ;

Desiring to make useful recommendations for the negotiation and management of regimes on responsibility and liability for environmental damage established under international conventions in furtherance of the objectives of adequate environmental protection (environmental regimes) ;

Realizing that international environmental law is developing significant new links with the concepts of intergenerational equity, the precautionary approach, sustainable development, environmental security and with human rights law, as well as with the principle of shared but differentiated responsibility, thereby also influencing the issues relating to responsibility and liability ;

Adopts this Resolution :

Basic Distinction on Responsibility and Liability

Article 1

The breach of an obligation of environmental protection established under international law engages responsibility of the State (international responsibility), entailing as a consequence the obligation to reestablish the original position or to pay compensation.

The latter obligation may also arise from a rule of international law providing for strict responsibility on the basis of harm or injury alone, particularly in case of ultra-hazardous activities (responsibility for harm alone).

Civil liability of operators can be engaged under domestic law or the governing rules of international law regardless of the lawfulness of the activity concerned if it results in environmental damage.

The foregoing is without prejudice to the question of criminal responsibility of natural or juridical persons.

Article 2

Without precluding the application of rules of general international law, environmental regimes should include specific rules on responsibility and liability in order to ensure their effectiveness in terms of both encouraging prevention and providing for restoration and compensation. The object and purpose of each regime should be taken into account in establishing the extent of such rules.

International Responsibility

Article 3

The principles of international law governing international responsibility also apply to obligations relating to environmental protection.

When due diligence is utilized as a test for engaging responsibility it is appropriate that it be measured in accordance with objective standards relating to the conduct to be expected from a good government and detached from subjectivity. Generally accepted international rules and standards further provide an objective measurement for the due diligence test.

Responsibility for Harm Alone

Article 4

The rules of international law may also provide for the engagement of strict responsibility of the State on the basis of harm or injury alone. This type of responsibility is most appropriate in case of ultra-hazardous activities, and activities entailing risk or having other similar characteristics.

Failure of the State to enact appropriate rules and controls in accordance with environmental regimes, even if not amounting as such to a breach of an obligation, may result in its responsibility if harm ensues as a consequence, including damage caused by operators within its jurisdiction or control.

The use of methods facilitating the proof required to substantiate a claim for environmental damage should be considered under such regimes.

Civil Liability

Article 5

While fault-based, strict and absolute standards of civil liability are provided for under national legislation, environmental regimes should prefer the strict liability of operators as the normal standard applicable under such regimes, thereby relying on the objective fact of harm and also allowing for the appropriate exceptions and limits to liability. This is without prejudice to the role of harmonization of national laws and the application in this context of the standards generally prevailing under such national legislation.

Article 6

Environmental regimes should normally assign primary liability to operators. States engaged in activities *qua* operators are governed by this rule.

This is without prejudice to the questions relating to international responsibility which may be incurred for failure of the State to comply with the obligation to establish and implement civil liability mechanisms under national law, including insurance schemes, compensation funds and other remedies and safeguards, as provided for under such regimes.

An operator fully complying with applicable domestic rules and standards and government controls may be exempted from liability in case of environmental damage under environmental regimes. In such case the rules set out above on international responsibility and responsibility for harm alone may apply.

Article 7

A causal nexus between the activity undertaken and the ensuing damage shall normally be required under environmental regimes. This is without prejudice to the establishment of presumptions of causality relating to hazardous activities or cumulative damage or long-standing damages not attributable to a single entity but to a sector or type of activity.

Article 8

Subsidiary State liability, contributions by the State to international funds and other forms of State participation in compensation schemes should be considered under environmental regimes as a back-up system of liability in case that the operator who is primarily liable is unable to pay the required compensation. This does not prejudice the question of the State obtaining reimbursement from operators under its domestic law.

Limits to Responsibility for Harm Alone and Civil Liability

Article 9

In accordance with the evolving rules of international law it is appropriate for environmental regimes to permit for reasonable limits to the amount of compensation resulting from responsibility for harm alone and civil liability, bearing in mind both the objective of achieving effective environmental protection and ensuring adequate reparation of damage and the need to avoid discouragement of investments. Limits so established should be periodically reviewed.

Insurance

Article 10

States should ensure that operators have adequate financial capacity to pay possible compensation resulting from liability and are required to make arrangements for adequate insurance and other financial security, taking into account the requirements of their respective domestic laws. Where insurance coverage is not available or is inadequate, the establishment of national insurance funds for this purpose should be considered. Foreseeability of damage in general terms of risk should not affect the availability of insurance.

Apportionment of Liability

Article 11

Apportionment of liability under environmental regimes should include all entities that legitimately may be required to participate in the payment of compensation so as to ensure full reparation of damage. To this end, in addition to primary and subsidiary liability, forms of several and joint liability should also be considered particularly in the light of the operations of major international consortia.

Such regimes should also provide for product liability to the extent applicable so as to reach the entity ultimately liable for pollution or other forms of environmental damage.

Collective Reparation

Article 12

Should the source of environmental damage be unidentified or compensation be unavailable from the entity liable or other back-up sources, environmental regimes should ensure that the damage does not remain uncompensated and may consider the intervention of special compensation funds or other mechanisms of collective reparation, or the establishment of such mechanisms where necessary.

Entities engaged in activities likely to produce environmental damage of the kind envisaged under a given regime may be required to contribute to a special fund or another mechanism of collective reparation established under such regime.

Preventive Mechanisms Associated with Responsibility and Liability

Article 13

Environmental regimes should consider the appropriate connections between the preventive function of responsibility and liability and other preventive mechanisms such as notification and consultation, regular exchange of information and the increased utilization of environmental impact assessments. The implications of the precautionary principle, the “polluter pays” principle and the principle of common but differentiated responsibility in the context of responsibility and liability should also be considered under such regimes.

Response Action

Article 14

Environmental regimes should provide for additional mechanisms which ensure that operators shall undertake timely and effective response action, including preparation of the necessary contingency plans and appropriate restoration measures directed to prevent further damage and to control, reduce and eliminate damage already caused.

Response action and restoration should be undertaken also to the extent necessary by States, technical bodies established under such regimes, and by private entities other than the operator in case of emergency.

Article 15

The failure to comply with the obligations on response action and restoration should engage civil liability of operators, the operation of back-up liability mechanisms and possible international responsibility. Compliance with the obligations should not preclude responsibility for harm alone or civil liability for the ensuring damage except to the extent that it has eliminated or significantly reduced such damage.

Article 16

States and other entities undertaking response action and restoration are entitled to be reimbursed by the entity liable for the costs incurred as a consequence of the discharge of these obligations. While claims for these costs can be made independently of responsibility for harm alone or civil liability, they may also be consolidated with other claims for compensation for environmental damage.

Activities Engaging Responsibility for Harm Alone or Strict Civil Liability

Article 17

Environmental regimes should define such environmentally hazardous activities that may engage responsibility for harm alone or strict civil liability, taking into account the nature of the risk involved and the financial implications of such definition.

Specific sectors of activity, lists of dangerous substances and activities, or activities undertaken in special sensitive areas may be included in this definition.

Article 18

If more than one liability regime applies to a given activity, the regime prepared later in time should provide criteria to establish an order of priority. The standard most favorable to the environment or for the compensation of the victim should be adopted for this purpose.

Degree of Damage

Article 19

Environmental regimes should provide for the reparation and compensation of damage in all circumstances involving the breach of an obligation. In the case of a regime providing for responsibility for harm alone, the threshold above which damage must be compensated must be clearly established.

Article 20

The submission of a given proposed activity to environmental impact assessment under environmental regimes does not in itself exempt from responsibility for harm alone or civil liability if the assessed impact exceeds the limit judged acceptable. An environmental impact assessment may require that a specific guarantee be given for adequate compensation should the case arise.

Exemptions from Responsibility and Civil Liability

Article 21

Exemptions from international responsibility are governed by the principles and rules of international law. Environmental regimes may provide for exemptions from responsibility for harm alone or civil liability, as the case may be, to the extent compatible with their objectives. The mere unforeseeable character of an impact should not be accepted in itself as an exemption.

Article 22

Without prejudice to the rules of international law governing armed conflicts, such an event as well as terrorism and a natural disaster of an irresistible character and other similar situations normally provided for under civil liability conventions may be considered as acceptable exemptions in environmental regimes, subject to the principle that no one can benefit from his or her own wrongful act.

Intentional or grossly negligent acts or omissions of a third party shall also normally be an acceptable exemption, but the third party should in such case be fully liable for the damage. Damage resulting from humanitarian activities may be exempted from liability if the circumstances so warrant.

Compensation and Reparation of Damage

Article 23

Environmental regimes should provide for the reparation of damage to the environment as such separately from or in addition to the reparation of damage relating to death, personal injury or loss of property or economic value. The specific type of damage envisaged shall depend on the purpose and nature of the regime.

Article 24

Environmental regimes should provide for a broad concept of reparation, including cessation of the activity concerned, restitution, compensation and, if necessary, satisfaction.

Compensation under such regimes should include amounts covering both economic loss and the costs of environmental reinstatement and rehabilitation. In this context, equitable assessment and other criteria developed under international conventions and by the decisions of tribunals should also be considered.

Article 25

The fact that environmental damage is irreparable or unquantifiable shall not result in exemption from compensation. An entity which causes environmental damage of an irreparable nature must not end up in a possibly more favorable condition than other entities causing damage that allows for quantification.

Where damage is irreparable for physical, technical or economic reasons, additional criteria should be made available for the assessment of damage. Impairment of use, aesthetic and other non-use values, domestic or international guidelines, intergenerational equity, and generally equitable assessment should be considered as alternative criteria for establishing a measure of compensation.

Full reparation of environmental damage should not result in the assessment of excessive, exemplary or punitive damages.

Access to Dispute Prevention and Remedies

Article 26

Access by States, international organizations and individuals to mechanisms facilitating compliance with environmental regimes, with particular reference to consultations, negotiations and other dispute prevention arrangements, should be provided for under such regimes.

In the event of preventive mechanisms being unsuccessful, expeditious access to remedies, as well as submission of claims relating to environmental damage, should also be provided for.

Article 27

Environmental regimes should make flexible arrangements to facilitate the standing of claimants, with particular reference to claims concerning the environment *per se* and damages to areas beyond the limits of national jurisdiction. This is without prejudice to the requirement of a direct legal interest of the affected or potentially affected party to make an environmental claim under international law.

Article 28

Environmental regimes should identify entities that would be entitled to make claims and receive compensation in the absence of a direct legal interest if appropriate. Institutions established under such regimes, including ombudsmen and funds, might be empowered to this end. A High Commissioner for the Environment might also be envisaged to act on behalf or in the interests of the international community.

Article 29

Dispute prevention might also be facilitated by the participation of qualified States and entities in the planning process of major projects of another State in the context of mechanisms of international cooperation. Domestic and regional environmental impact assessment should also be required for activities likely to have transboundary effects or affect areas beyond the limits of national jurisdiction.

Remedies Available to Interested Entities and Persons for Domestic and Transnational Claims

Article 30

Environmental regimes should provide for equal access on a non-discriminatory basis to domestic courts and remedies by national and foreign entities and by all other interested persons.

Article 31

Environmental regimes should provide for the waiver of State immunity from legal process in appropriate claims. Arbitral awards and other decisions rendered by international tribunals under such regimes should have the same force as national decisions at the domestic level.

In cases having multinational aspects, environmental regimes should take into consideration existing rules on jurisdiction and choice of law and, if necessary, provide for such rules.

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(September 4, 1997)

Session of Strasbourg - 1997

**Procedures for the Adoption and Implementation of Rules
in the Field of Environment**

(Eighth Commission, Rapporteur : Mr Felipe Paolillo)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Noting that during the last decades international environmental law has evolved into a vast *corpus juris* composed of a considerable number and variety of principles and rules with different degrees of legal value ;

Considering that the development of international environmental law has taken place in an uncoordinated manner, producing overlappings, inconsistencies and lacunae and that its implementation has been uneven and in several areas unsatisfactory ;

Convinced that the development and effective implementation of international environmental law are essential to solve the serious problems arising out of the degradation of the environment ;

Realizing that treaties and decisions adopted by international organizations appear to be the most practical instruments to promote the development of the international law in the field of the environment ;

Convinced that existing procedures for the adoption of international environmental rules and mechanisms to ensure their implementation require adjustments in order to make them more responsive to the seriousness of environmental problems,

Adopts this Resolution :

I

Adoption of Environmental Rules

Article 1

Multilateral environmental treaties and other international instruments setting forth general legal frameworks should provide for expeditious procedures for the adoption of supplementary rules, regulations and standards in separate instruments, and for their review and amendment, in order to ensure their rapid coming into force and continuous up-dating.

Article 2

In negotiating and adopting multilateral environmental treaties and decisions of international organizations, the widest participation of States, in particular those with specific interests or responsibilities in the matter being regulated, should be sought to enhance the prospects of their general acceptance and implementation.

Article 3

Technical and financial assistance, including assistance in building up appropriate institutional infrastructure and expertise in international environmental law, should be made available to developing countries to ensure their effective participation in environmental law-making processes.

Article 4

Multilateral environmental treaties and other international instruments prescribing the adoption of measures for the protection of the environment shall, on the basis of the differences in the financial and technological capabilities of States and their different contribution to the environmental problem, provide for economic incentives, technical assistance, transfer of technologies and differentiated treatment where appropriate.

Article 5

To achieve the widest possible acceptance of international environmental rules and ensure their effective implementation, all efforts should be made to reach consensus for their adoption before resorting to voting. However, efforts to reach consensus should not result in the significant weakening of the contents of the rules.

Article 6

States and international organizations should provide to interested non-governmental organizations opportunities to contribute effectively to the development and implementation of international environmental law through, *inter alia*, appropriate participation in the law-making process, provision of technical advice to States and international organizations, raising of public awareness of environmental problems and public support for regulation, and monitoring of compliance by States and non-State actors with environmental obligations.

Article 7

States and international organizations should also allow the scientific community, the industry and labour sectors and other non-State entities to participate, as appropriate, in the legal process of adopting environmental rules, and in their implementation and monitoring.

II Implementation of Environmental Rules

Article 8

Environmental protection regimes should include the duty by participating States to submit periodically, to the competent international organization, reports on the implementation of international environmental rules for their public review.

Article 9

Multilateral environmental treaties and decisions of international organizations establishing environmental obligations should provide for procedures to :

- a) adopt, review and amend, through expeditious procedures, rules, regulations and standards to implement such obligations ;
- b) review and assess reports submitted by States on implementation of such obligations ;
- c) supervise their implementation and compliance. Implementation and compliance mechanisms should include, *inter alia*, reporting, fact finding and inspection.

Article 10

International environmental organizations endowed with regulatory powers should provide for procedures to ensure that environmental rules adopted by them are not contrary to or incompatible with the legal framework governing the activities of such organizations.

Article 11

States that have voted in favour of, or have acquiesced in, the adoption of a non-binding instrument containing clear and precise rules on the protection of the environment should act in conformity with those rules.

Article 12

In order to prevent disputes and to facilitate compliance with environmental obligations, multilateral environmental treaties and decisions of international organizations establishing regimes for the protection of the environment should provide for informal, non-confrontational procedures, open to States and, when appropriate, to other entities or persons.

Article 13

In order to ensure the enforcement within domestic legal systems of international environmental obligations, States shall make available to any interested person, judicial and non-judicial procedures for the settlement of disputes arising from violations of such obligations.

Article 14

Multilateral environmental treaties and decisions of international organizations prescribing the enactment of domestic legislation or the adoption of other implementation measures by State Parties to the treaties or Member States of the international organizations, should establish time-limits within which States must take the prescribed action.

Article 15

States bound to enact domestic legislation or to adopt other measures to implement environmental obligations contained in a treaty to which they are parties or in a decision of an international organization to which they are members, shall adopt such measures within a reasonable period of time when non specific time-limit has been established in the treaty or in the decision of the international organization.

Article 16

When a State bound by a treaty or a decision of an international organization to enact domestic legislation or to adopt other measures to implement environmental obligations, has not done so within the established time-limit or, in case no time-limit has been established, within a reasonable period of time, the State should report to the conference of the contracting parties, to any other competent international authorities or to the other parties to the treaty or members of the international organization, the reasons why it has not taken the prescribed action.

Article 17

In order to encourage the participation of all interested entities and persons in the discussion of environmental issues, States should cooperate with interested non-governmental organizations in disseminating information as complete as possible on environmental problems and issues and on national and international rules relating to them.

Article 18

States shall make arrangements for appropriate authorities to be designated to deal with questions concerning the implementation of international environmental rules within their jurisdiction and to supervise compliance with them.

Article 19

States and environmental international organizations should give due publicity to implementation procedures, including publication and dissemination of reports submitted by States and reports of organs of international organizations on compliance by States with environmental obligations. Implementation activities of international environmental organizations should be open, as appropriate, to interested non-governmental organizations.

Article 20

International organizations with competence in environmental matters should keep governments, interested non-governmental organizations and public opinion in general permanently informed on their activities and programmes.

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(September 4, 1997)

Session of Berlin - 1999

Taking Foreign Private International Law to Account

(Fourth Commission, Rapporteur : Mr Kurt Lipstein)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Considering that the task of private international law is the search for the legal rules most appropriate to be applied in the individual case ;

Considering that the legal rules most appropriate to be applied in the individual case are those which promote justice, legal certainty, effectiveness, uniformity or compliance with the common intention or justified expectations of the parties ;

Considering that legal certainty may be advanced by reliance on the same law in respect of situations created and transactions concluded ;

Considering that effectiveness may be advanced by paying special regard to the law which exercises factual control ;

Considering that uniformity of decision is only achieved if the relevant choice of law rules of the countries concerned either contain identical choice of law rules interpreted uniformly or if one of different connecting factors is accorded precedence ;

Considering that even if total uniformity of decision cannot be achieved, a degree of uniformity may be achieved in the individual case if the referring court takes foreign private international law into consideration ;

Considering that the interest of justice may be advanced by taking foreign private international law into account ;

Considering that these aims can be furthered best if in some situations not only foreign domestic law but also foreign private international law is taken into account ;

Adopts the following Resolution :

Taking foreign private international law to account

1. Should not be excluded altogether, irrespective of whether it involves a reference back or on ;
2. Should not be restricted to situations where uniformity is desired ;
3. Should be considered :
 - (a) if the validity or the effectiveness of an act or a transaction is regarded as desirable and assured thereby ; or
 - (b) if a uniform treatment of an act or a transaction is desirable and can be achieved ; or
 - (c) if the parties enjoy a choice of law, have exercised it, and have included private international law ; or
 - (d) if the validity of an act or transaction concluded according to the choice of law rules of the law applicable at the time when the act or transaction was concluded is questioned in later proceedings ; and or
 - (e) if, when deciding an incidental question, the validity of an act would be ensured either by application of the conflict rules of the law governing the main question or of the conflict rules of the law governing the incidental question ;
4. Ought not to be considered :
 - (a) if the law of the forum contains alternative choice of law rules operating on an equal footing ;
 - (b) if the parties enjoy a choice of law, have exercised it, and have not included private international law.

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(23rd August 1999)

Session of Berlin - 1999

**Judicial and Arbitral Settlement of International Disputes
Involving More Than Two States**

(Eleventh Commission, Rapporteur : Mr Rudolf Bernhardt)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Reaffirming that judicial and arbitral settlement is one important means to settle disputes between States in accordance with the Charter of the United Nations ;

Noting that international judicial and arbitral dispute settlement is, in general, bilaterally conceived, and that the increasing multilateral character of international relations requires an adaptation of the traditional dispute settlement rules ;

Considering that possible consequences of peremptory norms of international law and of *erga omnes* obligations are not addressed in this Resolution ;

Adopts the following Resolution :

I. Principles

1. The consent of States is the basis of the jurisdiction of international courts and tribunals, and consequently a dispute between more than two States cannot be decided without the consent of all States concerned. Without such consent either no settlement or only partial settlement of the dispute is possible.

2. Provisions concerning jurisdiction and procedure in statutes and rules of international courts and tribunals often present specific and unique features. Therefore the interpretation of the relevant texts is the starting point in all cases including those involving more than two States. Nevertheless, some general principles and similar provisions concerning intervention and other forms of third-State participation can be identified.

3. The general principles and rules concerning third-State participation applicable to the International Court of Justice may also be applied, if appropriate in the particular circumstances, to proceedings before other international courts and tribunals.

II. Disputes involving more than two States as Parties

4. Where two or more States have identical or similar interests of a legal nature in a dispute they should consider taking joint or common action before the competent international court or tribunal.

5. Unilateral application to a court or tribunal by one or more States directed against more than one State as respondents requires, in principle, parallel and separate proceedings if no previous agreement between the States involved can be reached.

6. Subject to the relevant legal instruments, the court or tribunal may join pending cases or order common proceedings taking into account all the circumstances. The procedural consequences of a joinder of cases or of common proceedings without a formal joinder should be determined by the court or tribunal with due respect for the requirements of a fair procedure.

III. Intervention

7. Subject to the provisions of the instruments governing the functioning of the court or tribunal, two principal types of intervention are:

- (a) intervention by a third State in cases where it considers that it has an interest of a legal nature which may be affected by the decision in the case; and
- (b) intervention by third States Parties to a multilateral treaty the construction of which is in question.

8. Intervention by a third State does not mean that this State becomes a full party to the proceedings. Parties and interveners have different positions and functions which cannot be combined without special agreements.

9. The consequences of intervention in cases raising a question of the construction of a multilateral treaty (Article 63 of the Statute of the International Court of Justice and similar texts in other statutes) are explicitly set out in the relevant texts. If the third State is a party to the treaty, it has a right to intervene and to participate as an intervener. The parties to the case as well as the intervening State are bound by the construction given to the relevant treaty provisions by the court or tribunal.

10. Intervention under Article 62 of the Statute of the International Court of Justice and similar texts in other statutes requires the existence of an interest of a legal nature on the part of the intervening State. That means that rights or obligations of this State under public international law can be affected by the decision. Whether the State can claim such an interest and whether it may be affected by the decision of the court or tribunal has to be determined by the court or tribunal according to the specific features of each case. When the court or tribunal has found a legal interest to exist, the State applying for intervention should be admitted as intervener.

11. Intervention does not require the existence of a jurisdictional link between the parties to the dispute and the third State beyond the provisions of the Statute of the International Court of Justice and similar provisions in other relevant texts allowing intervention.

12. A State may apply to intervene on the merits as well as in proceedings confined to matters of jurisdiction and admissibility; in exceptional cases, it may also apply to intervene in other incidental proceedings.

13. When a State considers intervening, it may request the court or tribunal to provide it with copies of the pleadings. The court or tribunal shall decide after consulting the parties.

14. Should the relevant instrument provide for the appointment of a judge *ad hoc*, this does not apply to an intervening State.

15. The decision concerning the admissibility of the intervention is binding on the parties and the intervening State.

16. The intervening State has the right to take part in the written and oral proceedings. The extent of such participation depends on the relevant rules of the court or tribunal and on the need to conduct the proceedings in an effective and equitable manner.

17. The decision of the court or tribunal is binding on the intervening State to the extent of the admitted intervention. To the same extent, the decision is binding on the principal parties in their relations with the intervening State.

18. With the consent of all parties to the case, an intervening State may become a full party to the proceedings with the corresponding rights and obligations.

IV. Indispensable Parties

19. If the rights or obligations of a third State are the very subject-matter of a dispute submitted by other States to a court or tribunal and if a decision on that dispute is not possible without deciding on the rights or obligations of the third State, the court or tribunal cannot take such a decision unless that third State becomes a party to the proceedings. This third State is an “indispensable party” to the proceedings.

20. If the rights or obligations of the parties to the proceedings can be separated from those of a third State, the court or tribunal may decide on that part of the dispute relating to these rights or obligations.

21. All the States involved may agree that the “indispensable party” becomes a full party to the proceedings with the corresponding rights and obligations, in order to enable the court or tribunal to decide the entire dispute.

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(24th August 1999)

Session of Berlin - 1999

**The Application of International Humanitarian Law and
Fundamental Human Rights, in Armed Conflicts in which
Non-State Entities are Parties**

(Fourteenth Commission, Rapporteur : Mr Milan Šahović)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalling its Resolutions “Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l’insurrection” (Neuchâtel Session, 1900), “The Principle of Non-Intervention in Civil Wars” (Wiesbaden Session, 1975) and “The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States” (Santiago de Compostela Session, 1989) ;

Recalling further its Resolutions on the “Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged” (Zagreb Session, 1971) and on the “Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged” (Wiesbaden Session, 1975) ;

Considering that armed conflicts in which non-State entities are parties have become more and more numerous and increasingly motivated in particular by ethnic, religious or racial causes ;

Noting that, as a consequence, the civilian population is increasingly affected by internal armed conflicts and ultimately bears the brunt of the resulting violence, causing great suffering, death and privation ;

Noting that armed conflicts in which non-State entities are parties do not only concern those States in which they take place, but also affect the interests of the international community as a whole ;

Bearing in mind that, in the last fifty years, the principles of the United Nations Charter and of human rights law have had a substantial impact on the development and application of international humanitarian law ;

Recalling the ruling of the International Court of Justice that the obligation laid down in Article 1 common to the Geneva Conventions “to respect” the Conventions and to “ensure respect” for them “in all circumstances” derives from general principles of international humanitarian law, with the consequence that it has acquired the status of an obligation of customary international law ;

Emphasizing the ruling of the International Court of Justice that Article 3 common to the Geneva Conventions of 1949 reflects “elementary considerations of humanity” and that the fundamental rules of humanitarian law applicable in armed conflicts “are to be observed ... because they constitute intransgressible principles of international customary law” ;

Considering the ruling of the International Criminal Tribunal for the Former Yugoslavia whereby many principles and rules previously applicable only in international armed conflicts are now applicable in internal armed conflicts and serious violations of international humanitarian law committed within the context of the latter category of conflicts constitute war crimes ;

Supporting the prosecution and punishment by national jurisdictions of those responsible for war crimes, crimes against humanity, genocide or other serious violations of international humanitarian law, as well as the establishment of international tribunals entrusted with this task ;

Recognizing that, under Article 7 of the Rome Statute of the International Criminal Court, crimes against humanity can be committed by persons acting for States or non-State entities ;

Noting that the actions undertaken by the Security Council under Chapter VII of the Charter in armed conflicts in which non-State entities were parties confirm that respect for international humanitarian law is an integral element of the security system of the World Organization ;

Welcoming the United Nations Secretary General's regulation of 6 August 1999 on the Observance by United Nations Forces of international humanitarian law which reaffirms their obligation to comply strictly with humanitarian law, in particular as to the protection of the civilian population, and provides for the possibility of prosecuting members of the military personnel of such Forces in case of violations of humanitarian law, in particular in situations of internal armed conflicts ;

Welcoming also the important role played by the International Committee of the Red Cross (ICRC) in recent conflicts to which non-State entities were parties in seeking to ensure humanitarian protection for all victims and in inviting the parties to such conflicts to abide by elementary principles of humanity, notably to spare the civilian population the effects of violence and devastation ;

Considering that it is desirable that international humanitarian law be reconsidered and adapted to new circumstances, so as to reinforce respect for this law and the protection of victims in armed conflicts in which non-State entities are parties ;

Adopts this Resolution :

I. For the purposes of this Resolution :

- the expression “armed conflicts in which non-State entities are parties” means internal armed conflicts between a government’s armed forces and those of one or several non-State entities, or between several non-State entities ; also included are internal armed conflicts in which peacekeeping forces intervene ;
- the expression “non-State entities” means the parties to internal armed conflicts who oppose the government’s armed forces or are fighting entities of a similar nature and who fulfill the conditions set forth in Article 3 common to the Geneva Conventions of 1949 on the Protection of Victims of War or in Article 1 of the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

II. All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, as well as the United Nations, and competent regional and other international organizations have the obligation to respect international humanitarian law as well as fundamental human rights. The application of such principles and rules does not affect the legal status of the parties to the conflict and is not dependent on their recognition as belligerents or insurgents.

III. Respect for international humanitarian law and fundamental human rights constitutes an integral part of international order for the maintenance and reestablishment of peace and security, in particular in armed conflicts in which non-State entities are parties.

IV. International law applicable to armed conflicts in which non-State entities are parties includes :

- Article 3 common to the Geneva Conventions of 1949 as basic principles of international humanitarian law ;
- Protocol II and all other conventions applicable to non-international armed conflicts ;
- customary principles and rules of international humanitarian law on the conduct of hostilities and the protection of victims applicable to internal armed conflicts ;
- the principles and rules of international law guaranteeing fundamental human rights ;
- the principles and rules of international law applicable in internal armed conflicts, relating to war crimes, crimes against humanity, genocide and other international crimes ;
- the principles of international law “derived from established custom, from the principles of humanity and from dictates of public conscience.”

V. Every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect international humanitarian law in all circumstances, and any other State is legally entitled to demand respect for this body of law. No State or non-State entity can escape its obligations by denying the existence of an armed conflict.

VI. In cases of serious violations of international humanitarian law or fundamental human rights, the United Nations and competent regional and other international organizations have the right to adopt appropriate measures in accordance with international law.

VII. Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations, in case of systematic and massive violations of humanitarian law or fundamental human rights, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any party to the armed conflict which has violated its obligations, provided such measures are permitted under international law.

VIII. Any serious violation of international humanitarian law in armed conflicts in which non-State entities are parties entails the individual responsibility of the persons involved, regardless of their status or official position, in accordance with international instruments that entrust the repression of these acts to national or international jurisdictions.

The competent authorities of a State on the territory of which is found a person against whom is alleged a serious violation of international humanitarian law committed in a non-international armed conflict are entitled to prosecute and try such a person before their courts; they are urged to do so.

IX. In order to achieve a better protection for the victims in armed conflicts in which non-State entities are parties and taking into account the experience of recent armed conflicts of a non-international character the following measures should be considered :

- the conclusion by the parties to such conflicts of special agreements, in accordance with Article 3 paragraph 2 common to the Geneva Conventions of 1949, on the application of all or part of the provisions of the Conventions ;
- the support of States, the United Nations, the ICRC as well as other international bodies of a humanitarian character for measures to verify and oversee the application of international humanitarian law in internal armed conflicts ; furthermore, should the State concerned claim that no internal armed conflict has broken out, the authorisation given to the United Nations or any other competent regional or international organisation to establish impartially whether international humanitarian law is applicable ;
- the application of Protocol II in all non-international armed conflicts, without waiting for its formal revision ;

- the amendment of Protocol II, with a view to complementing its rules and in particular so as :

- (a) to establish an impartial and independent international body designed to investigate respect for international humanitarian law (*cf.* Article 90 of Protocol I) ;
- (b) to add a grave breaches provision addressing, in particular, issues of jurisdiction, extradition and surrender to an international criminal jurisdiction.

X. To the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights. All parties are bound to respect fundamental human rights under the scrutiny of the international community.

XI. The Institute welcomes and encourages the progressive adaptation of the principles and rules relating to internal armed conflicts to the principles and rules applicable in international armed conflicts. Therefore it is desirable and necessary that States, the United Nations and competent regional and other international organizations, drawing special inspiration from the important work done by the ICRC in this field, draft and adopt a convention designed to regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character.

XII. All States and non-State entities must disseminate the principles and rules of humanitarian law and fundamental human rights which are applicable in internal armed conflicts.

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(25th August 1999)

Session of Vancouver - 2001

State Succession in Matters of Property and Debts

(Seventh Commission, Rapporteur : Mr Georg Ress)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Given the development of State practice since the United Nations Vienna Conference which adopted the Convention on Succession of States in respect of State Property, Archives and Debts in 1983, notably following the disintegration of the USSR, the Socialist Federal Republic of Yugoslavia and the Czech and Slovak Federal Republic as well as the unification of Germany ;

Convinced of the utility of reaffirming the rules and principles relative to State succession in respect of property and debts which have been confirmed by recent State practice ;

Convinced, equally, of the need to identify *de lege ferenda* the trends in developments and criteria of the regime in this domain in order better to guarantee legal certainty in international relations ;

Believing that the questions relating to State succession in respect of State property and debts are of particular importance for all States ;

Bearing in mind that the phenomena of integration and disintegration of States are universal in their appearance ;

Given the problems which arise due to the uncertainty which may prevail in the period before the process of succession has been completed and the legal status of the States concerned is determined ;

Considering that the self-determination of peoples, a principle recognised by the United Nations Charter, and the principle of democracy should play a significant role in this process ;

Affirming that all situations leading to a succession of States should take place in full conformity with public international law, and in particular with humanitarian law and human rights ;

Adopts the following guiding principles relating to the succession of States in respect of property and debts :

Part One : Categories of State Succession

Article 1 : Notion of State Succession

State succession is the replacement of one State by another in the responsibility for the international relations of a territory.

Article 2 : Categories of Succession

For the purpose of this Resolution, State succession includes situations of dissolution of a State (*discontinuity*); cession, that is, the transfer of a part of the territory of a State to another States (*continuity* of the two States, the predecessor State and the successor State) ; secession, that is the separation of a territory by constituting a new State (*continuity* of the predecessor State with the creation of a new State), as well as situations of unification of two or more States (*continuity* of a State with the incorporation of another State or *discontinuity* of two States and the creation of a new State).

Article 3 : Succession and Continuity of States

Succession and continuity of States are legal concepts which are not mutually exclusive. Continuity means that legal personality under international law subsists despite the changes in territory, population, political and legal regime and name. The fact that a State remains identical to itself in political and legal situations that are different to prior ones - sometimes deemed fictitious – supposes that the changes have not brought about a dissolution of the State.

Article 4 : Distinction between Discontinuity and Continuity of the State

The distinction between State secession (continuity of the predecessor State) and State dissolution (discontinuity) although clear in theory, is difficult to apply to complex situations of territorial changes. The qualification depends on the development of numerous factors over time.

Article 5 : Obligations of States during an Intermediate Period of Time

1. In determining the legal regime where the qualification of continuity or discontinuity of a State remains uncertain and in dispute, to the extent possible, the interests of the States concerned and the requirements of good faith and equity shall be taken into account. During such intermediate period of time, the provisional application of rules of succession is not excluded.
2. To clarify and improve the situation of individuals, the States concerned shall take into account, at least for the time being, the fact that territorial changes have taken place.

Part Two : Rules Common to Succession in Respect of Property and of Debts

Article 6 : Role of Agreements between States Concerned

1. In the event of succession, the States concerned should, in good faith, settle by agreement amongst themselves the apportionment of State property and debts bearing in mind the criteria for apportionment enunciated in this Resolution.
2. States concerned should act likewise towards private creditors with respect to the allocation of debts. Further, private creditors should cooperate with the States concerned in respect of the apportionment of State property held by them.

Article 7 : Passing of Property and Debts and Possibility of Compensation

1. The application of the rules relative to the passing of property and debts are without prejudice to any question of equitable compensation between (a) the predecessor State and the successor State or (b) between the successor States.
2. Such compensation is owed when the application of the criteria enunciated in this Resolution gives rise to serious disequilibria in the apportionment of property and debts.

Article 8 : Result of Apportionment

1. The result of the apportionment of property and debts must be equitable.
2. If the apportionment of property and debts does not produce an equitable result and cannot be otherwise corrected, the predecessor State and the successor State or successor States shall settle this matter by equitable compensation.
3. Unjust enrichment shall be avoided.
4. The apportionment of property and debts shall preserve the capacity of States concerned to survive as viable entities.

Article 9 : Correlation Between the Proportion of Property and of Debts in the Repartition Operations and Equity

1. In all cases of succession involving the passing of debts and property, a correlation should be ensured between the proportion of such property, rights and interests on the one hand, and State debts on the other. They shall pass together.
2. For the various categories of State succession, equity dictates that there be no difference of substance between the result of the apportionment of property and the result of the apportionment of debts.

Article 10 : Procedure for the Apportionment of State Property and Debts

1. Unless otherwise agreed by the States concerned or decided upon by an appropriate international body, property and debts pass from predecessor State to successor State with the rights and obligations *pro rata* of the apportionment of that property and debts. The apportionment shall take place according to a formula derived *inter alia* from the criteria set out in Article 11 of this Resolution. There is no joint and several liability of all the successor States.
2. In situations where the question of an automatic passage of certain property and debts to a successor State does not arise, the States concerned should be deemed to own the assets and be liable for the debts in common (*communio incidens*) from the outset of the apportionment procedure. If the States concerned do not succeed in reaching an agreement on the apportionment, any of them shall have the right to claim that a formula for the *pro rata* apportionment be determined by a national or international judicial or arbitral organ.
3. Successor States, as well as the predecessor State in case of continuity, shall negotiate between themselves the apportionment of property and debts in good faith.
4. States concerned shall tender all documents and information necessary for this apportionment procedure.
5. States concerned shall establish inventories of debts and property to which the succession relates and make known to each other, within a reasonable period, all elements which may be useful for the purpose of apportionment.
6. Without prejudice to paragraph 1 above, if States are unable to establish an apportionment in common, they should establish an apportionment procedure with a commission of independent experts, which shall be responsible for establishing the inventory of all the State property and debts and determine the apportionment amongst them.

Article 11 : Principles of Apportionment

1. Apportionment is to be carried out, first, according to the territoriality principle ; it shall, furthermore, be in conformity with the principle that any unjust enrichment is to be avoided.
2. Property and debts that cannot be apportioned in accordance with the territoriality principle shall be apportioned equitably, bearing in mind the result of the apportionment of other property or debts on the basis of the territoriality principle.
3. Amongst the criteria that may be used for the determination of an equitable apportionment, States should take into account :
 - a. any special connections existing between the areas affected by a State succession, on the one hand, and the activities to which the property and debts to be apportioned relate, on the other ;

- b. the connections between property, rights and interests that pass to successor States, on the one hand, and State debts, on the other ;
 - c. the respective parts in the Gross National Product (GNP) of the States concerned at the time of the succession or at the time of the decision or agreement on apportionment ;
 - d. the formula adopted by the IMF for the apportionment of quotas among the States concerned.
4. If the application of the above criteria does not lead to a satisfactory result the States concerned may take account, *inter alia*, the part of revenues of each State concerned which are derived from the exportation or the fact that certain amongst them have more than others contributed to the financing of or benefited from the exploitation of a specific project.

Part Three : State Property

Article 12 : Notion of State Property

- 1. In principle, the term “State property of the predecessor State” means all property, rights and interests which belong to the predecessor State at the date of the State succession pursuant to its domestic law and in conformity with international law.
- 2. The term “State property” equally covers property of public institutions but does not include property of private legal persons, even if they have been created with public funds.

Article 13 : Effect of Passing of State Property

- 1. State property shall normally pass from the predecessor State to the successor State without financial compensation.
- 2. The automatic and gratuitous passing of property, however, does not exclude the grant of financial compensation in order to avoid unjust enrichment of a predecessor or successor State.
- 3. The passing of State property from the predecessor State to the successor State entails extinction of the rights of the former and creation of rights of the latter. Without prejudice to other provisions of this Resolution, it entails a novation of their rights and obligations.
- 4. The successor State substituting itself for the predecessor State shall, in principle, take on the same rights and obligations as the predecessor State.

Article 14 : Information and Inventory

- 1. Without prejudice to Article 10 of this Resolution, States concerned shall cooperate and consult amongst themselves in order to reach agreement on an inventory of property and its apportionment.

2. They shall ensure for each other and for the competent international institutions the information necessary for the apportionment of property and debts. In case of disagreement, they shall have recourse to inadequate means for the settlement of disputes.

Article 15 : Date of Passing of State Property

The date of passing of State property of the predecessor State to the successor State is normally that of the State succession, unless otherwise agreed by the States concerned or decided upon by an appropriate body, for all or part of the property, notably in consideration of the effective exercise of certain rights or interests by the State claiming to be a successor.

Article 16 : Allocation of Property in Accordance with the Principle of Territoriality

1. State property that is closely connected to a territory passes with that territory to the successor State.

2. State property not having a close connection with a particular territory shall be apportioned equitably.

3. If the apportionment of property and debts in conformity with the preceding paragraphs leads to an inadequate result, a correction shall be made on the basis of equity. Such a correction can take place by means of transfer of certain property or by means of financial compensation.

4. In the application of the principle of equity no account shall, generally speaking, be taken of the prior physical or financial origin of property, whether movable or immovable.

5. Property that is of major importance to the cultural heritage of a successor State from whose territory it originates shall pass to that State. Such goods shall be identified by that State within a reasonable period of time following the succession. The passing shall be regulated by the States concerned.

6. Except for the preceding paragraph, this Resolution does not address the passing of State archives.

Article 17 : Absence of Effect of State Succession on Property of a Third State

Property rights or interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State, shall remain unaffected by the State succession.

Article 18 : Preservation of State Property

The States concerned shall take all measures necessary to prevent damage to, or the destruction of, property which passes, or may pass to another State.

Article 19 : Immovable State Property

1. Immovable property of the predecessor State situated on the territory to which the succession relates passes to the successor State on whose territory the property is located.
2. In the event of unification (disappearance of the predecessor States), immovable property situated outside their territories passes to the successor State. In the case of the incorporation of one State in another State, immovable property of the predecessor State situated outside its territory passes to the successor State.
3. In the case of dissolution (*discontinuity*), immovable property of the predecessor State situated outside its territory passes to the successor States in equitable proportions. The successor States shall reach an agreement as to the apportionment in an equitable manner, or, if not possible, apply the principle of compensation.
4. In the event of cession and secession (*continuity* of the predecessor State), immovable property of the predecessor State situated outside its territory remains, in principle, the property of the predecessor State. Nevertheless, successor States have the right to an equitable apportionment of the property of the predecessor State situated outside its territory.

Article 20 : Movable Property and other State Property

1. Movable property of the predecessor State connected to the activity of the predecessor State in relation to the territory to which the succession relates, passes to that successor State.
2. In the event of secession or dissolution an equitable proportion of any other movable property also passes to the successor State or to the successor States.
3. All other property, rights and interests passes according to the same rules (territorial link, equitable apportionment) to the successor State or States.
4. The rules contained in Article 19 of this Resolution on immovable property situated outside the territory of the States involved in the succession apply *mutatis mutandis* also to movable property and to other property.

Article 21 : Protection of property before its attribution to one of the States concerned

Before being attributed to one of the States concerned, property shall be protected in accordance with the law of the State on whose territory it is located. Rights acquired by third parties in respect of such property pursuant to that law shall be respected.

Part Four : State Debts

Article 22 : State Debts

The term “State debt” covers :

- a. any financial obligation of a predecessor State towards another State, an international organization or any other subject of international law, arising in conformity with international law ;
- b. any financial obligation of a predecessor State towards any natural or legal person under domestic law.

Article 23 : Effects and Date of Passing of Debts

1. For the effects of passing of State debts and for the date of passing, the rules applicable to property enunciated in Articles 13 and following of this Resolution are applicable *mutatis mutandis*.
2. Failing an agreement on the passing of State debts of the predecessor State, the State debt shall, in each category of succession, pass to the successor State in an equitable proportion taking into account, notably, the property, rights and interests passing to the successor State or successor States in relation with such State debt.

Article 24 : Effect of State Succession on Private Creditors and Debtors

1. A succession of States should not affect the rights and obligations of private creditors and debtors.
2. Successor States shall, in their domestic legal orders, recognise the existence of rights and obligations of creditors established in the legal order of the predecessor State.
3. Private creditors are under an obligation to participate in the negotiations between the States concerned on the apportionment of private debts. They shall provide such States with any information in their possession relating to the assets of the predecessor State that are the subject-matter of the succession. Such an obligation shall apply equally to foreign private creditors entering into separate debt collection agreements with any State taking part in the succession. The same obligation shall equally apply, *mutatis mutandis*, to predecessor and successor States in relation to their private debtors.

Article 25 : Acquired Rights

Successor States shall in so far as is possible respect the acquired rights of private persons in the legal order of the predecessor State.

Article 26 : Passing of State Debts in Equitable Proportions

1. In the event of cession of part of the territory as in the case of secession, the predecessor State and the successor State should settle the passing of debts by agreement between themselves ; with regard to private debts of the predecessor State, such agreement should be reached with the participation of the private creditors in its drafting and conclusion.
2. In the absence of such an agreement, the public State debts of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State in relation to such State debts.
3. Paragraphs 1 and 2 equally apply when a part of the territory of a State separates there from and joins another State.

Article 27 : National Debts

1. State debts made by the predecessor State to the benefit of the whole State (national debts) are subject to the rules contained in Articles 22 and following of this Resolution.
2. The debts of public institutions and State owned enterprises which operate nationally are subject to the same rules regardless of the location of their registered office.

Article 28 : Localised Debts

1. State debts contracted by the predecessor State or a public institution or enterprise operating nationally, for particular projects or objects in a specific region (localised national debts), are governed by the rules contained in the previous Article.
2. However, the apportionment of this debt in accordance with the demands of equity shall take account of the passing of property (objects/installations) connected to the debt and any profit from these projects or objects benefiting the successor State on whose territory they are situated.

Article 29 : Local Debts

1. Debts of local public institutions (communes, regions, federal entities, departments, public utilities and other regional and local institutions) pass to the successor State on whose territory this public institution is situated.
2. The debt continues to attach to such local public institutions even after the succession and the financial burden remain to be charged with them.
3. The successor State shall not be liable for these debts, albeit jointly and severally with the institution, unless such liability previously existed in the predecessor State or if the successor State accepted such liability either directly or indirectly (for example through the modification of the statutes of the institution concerned).
4. This Article applies to private debts of local public institutions.

5. Article 9 of the present Resolution (correlation of the proportions between property and debts in the apportionment and equity) applies to local debts.

6. The predecessor State and the successor State or States may by agreement otherwise settle the passing of local debts. For settlements involving private debts, the private creditors shall participate in the drafting and conclusion of this agreement.

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(26 August 2001)

Session of Vancouver - 2001

**Immunities from Jurisdiction and Execution of Heads of State
and of Government in International Law**

(Thirteenth Commission, Rapporteur : Mr Joe Verhoeven)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Recalling the draft international rules on the jurisdiction of courts in proceedings against foreign States, sovereigns and Heads of State it adopted at its 11th Session (Hamburg, 1891), as well as the Resolutions on “Immunity of Foreign States from Jurisdiction and Measure of Execution”, and on the “Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement”, adopted respectively at its 46th (Aix-en-Provence, 1954) and 65th (Basel, 1991) Sessions ;

Wishing to dispel uncertainties encountered in contemporary practice pertaining to the inviolability and immunity from jurisdiction and enforcement that a Head of State or Head of Government can invoke before the authorities of another State ;

Affirming that special treatment is to be given to a Head of State or a Head of Government, as a representative of that State and not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole ;

Recalling that the immunities afforded to a Head of State or Head of Government in no way imply that he or she is not under an obligation to respect the law in force on the territory of the forum ;

Emphasising that these immunities of Heads of State or of Heads of Government should not be understood as allowing him or her to misappropriate the assets of the State which they represent, and that all States shall render each other mutual assistance in the recovery of such funds by the State to whom they belong, in conformity with the principles stressed in the Institute’s Resolution on “Public Claims Instituted by a Foreign Authority or a Foreign Public Body” adopted at the Oslo Session (1977) ;

Adopts the following Resolution :

1st Part : Serving Heads of State

Article 1

When in the territory of a foreign State, the person of the Head of State is inviolable. While there, he or she may not be placed under any form of arrest or detention. The Head of State shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, or dignity.

Article 2

In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.

Article 3

In civil and administrative matters, the Head of State does not enjoy any immunity from jurisdiction before the courts of a foreign State, unless that suit relates to acts performed in the exercise of his or her official functions. Even in such a case, the Head of State shall enjoy no immunity in respect of a counterclaim. Nonetheless, nothing shall be done by way of court proceedings with regard to the Head of State while he or she is in the territory of that State, in the exercise of official functions.

Article 4

1. Property belonging personally to a Head of State and located in the territory of a foreign State may not be subject to any measure of execution except to give effect to a final judgement, rendered against such Head of State. In any event, no measure of execution may be taken against such property when the Head of State is present in the territory of the foreign State in the exercise of official functions.

2. When serious doubt arises as to the legality of the appropriation of a fund or any other asset held by, or on behalf of, the Head of State, nothing in these provisions prevents the State authorities of the territory on which those funds or other assets are located, from taking provisional measures with respect to those funds or assets, as are necessary for the maintenance of control over them while the legality of the appropriation remains insufficiently established.

3. In conformity with their obligations of cooperation, States should take all appropriate measures to combat illegal practices, in particular to clarify the origin of deposits and dealings in assets and to supply all relevant information in this respect.

Article 5

Neither family members nor members of the suite of the Head of State benefit from immunity before the authorities of a foreign State, unless afforded as a matter of comity. This is without prejudice to any immunities they may enjoy in another capacity, in particular as a member of a special mission, while accompanying a Head of State abroad.

Article 6

The authorities of the State shall afford to a foreign Head of State, the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them.

Article 7

1. The Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State. Such waiver may be explicit or implied, provided it is certain.

The domestic law of the State concerned determines which organ is competent to effect such a waiver.

2. Such a waiver should be made when the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take.

Article 8

1. States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State.

2. In the absence of an express derogation, there is a presumption that no derogation has been made to the inviolability and immunities referred to in the preceding paragraph; the existence and extent of such a derogation shall be unambiguously established by any legal means.

Article 9

Nothing in this Resolution prohibits a State from unilaterally granting to a foreign Head of State, in conformity with international law, larger immunities than those laid down by the present provisions.

Article 10

Nothing in this Resolution affects any right of, or obligation incumbent upon, a State to grant or refuse to the Head of a foreign State access to, or sojourn on, its territory.

Article 11

1. Nothing in this Resolution may be understood to detract from :
 - a. obligations under the Charter of the United Nations ;
 - b. the obligations under the statutes of the international criminal tribunals as well as the obligations, for those States that have become parties thereto, under the Rome Statute for an International Criminal Court.
2. This Resolution is without prejudice to :
 - a. the rules which determine the jurisdiction of a tribunal before which immunity may be raised ;
 - b. the rules which relate to the definition of crimes under international law ;
 - c. the obligations of cooperation incumbent upon States in these matters.
3. Nothing in this Resolution implies nor can be taken to mean that a Head of State enjoys an immunity before an international tribunal with universal or regional jurisdiction.

Article 12

This Resolution is without prejudice to the effect of recognition or non-recognition of a foreign State or government on the application of its provisions.

2nd Part : Former Heads of State

Article 13

1. A former Head of State enjoys no inviolability in the territory of a foreign State.
2. Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.
3. Neither does he or she enjoy immunity from execution.

Article 14

Article 4, paragraphs 2 and 3, and Articles 5 to 12 of this Resolution apply *mutatis mutandis* to former Heads of State to the extent that they enjoy immunity under Article 13.

3rd Part : Heads of Government

Article 15

1. The Head of Government of a foreign State enjoys the same inviolability, and immunity from jurisdiction recognised, in this Resolution, to the Head of the State. This provision is without prejudice to any immunity from execution of a Head of Government.

2. Paragraph 1 is without prejudice to such immunities to which other members of the government may be entitled on account of their official functions.

Article 16

Articles 13 and 14 are applicable to former Heads of Government.

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(26th August 2001)

SECOND COMMISSION

The principles for determining when the use of the doctrine of forum non conveniens
and anti-suit injunctions is appropriate

Rapporteur : Sir Lawrence Collins
Co-rapporteur : M. Georges Droz

RESOLUTION

Whereas

- a. Transnational litigation has greatly increased in recent years.
- b. National court systems have developed differing solutions to deal with questions of transnational jurisdiction and litispence, including the practice of declining to assume or exercise jurisdiction on the ground that a court in another country is more appropriate to deal with the issues (forum non conveniens) and the practice of granting injunctions to restrain parties from commencing or continuing proceedings in another country (anti-suit injunctions).
- c. Issues of transnational jurisdiction and litispence have increasingly become the subject of international conventions and regional instruments.
- d. Parallel litigation in more than one country between the same, or related, parties in relation to the same, or related, issues may lead to injustice, delay, increased expense, and inconsistent decisions.

- e. It is universally recognized that (subject to special rules based on the policy of the protection of the interests of the weaker party) effect should be given to choice of court agreements in international transactions.
- f. Anti-suit injunctions may result in interference in foreign proceedings in breach of comity.
- g. Nothing in the following principles is intended to prevent the grant of bona fide provisional or protective measures by a court having a reasonable connection with the parties or the measures to be taken.

The Institute recognizes, in the interests of justice, the applicability of the following principles, which relate to proceedings in civil and commercial matters (excluding family law) and are subject to any applicable international conventions or other provisions of law.

1. When the jurisdiction of the court seised is not founded upon an exclusive choice of court agreement, and where its law enables the court to do so, a court may refuse to assume or exercise jurisdiction in relation to the substance of the claim on the ground that the courts of another country, which have jurisdiction under their law, are clearly more appropriate to determine the issues in question.
2. In deciding whether the courts of another country are clearly more appropriate, the court seised may take into account (in particular): (a) the adequacy of the alternative forum; (b) the residence of the parties; (c) the location of the evidence (witnesses and documents) and the procedures for obtaining such evidence; (d) the law applicable to the issues; (e) the effect of applicable limitation or prescription periods; (f) the effectiveness and enforceability of any resulting judgment.
3. Parallel litigation in more than one country between the same, or related, parties, in relation to the same, or related, issues, should be discouraged.

4. In principle, the court first seised should determine the issues (including the issue whether it has jurisdiction) except (a) when the parties have conferred exclusive jurisdiction on the courts of another country, or (b) when the first seised court is seised in proceedings which are designed (e.g. by an action for a negative declaration) to frustrate proceedings in a second forum which is clearly more appropriate.

5. Courts which grant anti-suit injunctions should be sensitive to the demands of comity, and in particular should refrain from granting such injunctions in cases other than (a) a breach of a choice of court agreement or arbitration agreement; (b) unreasonable or oppressive conduct by a plaintiff in a foreign jurisdiction; or (c) the protection of their own jurisdiction in such matters as the administration of estates and insolvency.

TWELFTH COMMISSION
Arbitral settlement of international disputes other than between States
involving more than two parties

Rapporteur : Mr. Allan Philip

DECLARATION

The Institut de droit international approves the Report of the 12th Commission.

The Commission has studied problems arising in private law arbitrations of an international character between more than two parties (multiparty arbitration). The problems arise, in particular, in connection with the appointment of arbitrators, and out of requests to consolidate several independent arbitrations or to join parties in the arbitration proceedings who are not parties to the arbitration agreement. Multiparty arbitrations are not infrequent.

The Commission's studies have confirmed the general principle underlying earlier resolutions of the Institut de droit international, that the consent of the parties to an international arbitration agreement must be required in all circumstances.

Issues of an international character such as appointment of arbitrators in multiparty arbitration, consolidation of arbitration proceedings and related issues should be regulated either by the parties' agreement or by the arbitration rules of arbitration institutions and not by national legislation.

In the interests of economy and efficiency, national courts may consolidate judicial proceedings and permit the participation therein of third parties regardless of the parties' wishes. Attempts to transfer these practices to international arbitration run the risk of compromising both the integrity of arbitration as a dispute resolution method and the principle that arbitration rests on the consent of the parties. Parties should retain the right to choose those with whom they wish to go to arbitration, the rules to which they wish to subject themselves, and the arbitrators to whom they are willing to entrust their case. Arbitrators are appointed for a variety of reasons, including their expertise and experience in the type of controversy that the arbitration involves. That is particularly so in international arbitration where knowledge of, and experience in, international trade and relations often are of great importance. There is no assurance that in consolidated arbitrations, where only some, if any, of the original arbitrators will take part, a party will consider that its chosen arbitrator has been replaced by an equally appropriate substitute. Similarly, other basic rights, such as to choose the party with whom one wishes to arbitrate and the applicable arbitration rules, may be set aside where consolidation or third party intervention are imposed.

Where consolidation or other similar measures have been imposed upon the parties without their agreement, the question will inevitably arise whether the resulting award will be enforceable in other countries.

Sixteenth Commission

Humanitarian Assistance

Rapporteur: M. Budislav VUKAS

RESOLUTION

The Institute of International Law,

Recalling its Resolutions “The Principle of Non-Intervention in Civil Wars” (Wiesbaden Session, 1975) and “The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States” (Santiago de Compostela, 1989);

Considering that situations of urgency and disaster endangering fundamental human rights and the well-being of a large number of persons are increasingly brought about by natural or technological disasters, by international or internal armed conflicts, by internal disturbances or violence or by terrorist activities;

Noting that great disasters often affect not only individual States but also several States or entire regions, and are a matter of concern for the international community as a whole;

Emphasizing that States and competent international organizations should take measures to increase public awareness of the need to prevent natural and man-made disasters and to enhance community preparedness through education, training and other means;

Considering that it is imperative to render rapid and efficient assistance to victims in situations of disasters and that often humanitarian assistance is only the first necessary step to rehabilitation, recovery and long-term development;

Bearing in mind the essential role played by the United Nations, intergovernmental organizations, the International Committee of the Red Cross and non-governmental organizations in organizing, providing, and distributing humanitarian assistance;

Noting the Resolutions adopted by the United Nations General Assembly on “a new international humanitarian order”, and on “strengthening of the coordination of emergency humanitarian assistance of the United Nations”, and particularly Resolution 46/182 of 19 September 1991, as well as the various instruments adopted by other universal and regional intergovernmental organizations, by the Red Cross and Red Crescent Movement, and by other non-governmental organizations;

Noting the special rules of international humanitarian law applicable in armed conflict;

Considering that it is desirable that international human rights law and international humanitarian law be further developed, so as to prevent or mitigate human suffering caused by disasters in time of peace or war;

Adopts the following Resolution:

I. Definitions

For the purposes of this Resolution:

1. “Humanitarian assistance” means all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters.

a) “Goods” includes foodstuffs, drinking water, medical supplies and equipment, means of shelter, clothing, bedding, vehicles, and all other goods indispensable for the survival and the fulfillment of the essential needs of the victims of disasters; this term never includes weapons, ammunition or any other military material.

b) “Services” means the means of transport, tracing services, medical services, religious, spiritual and psychological assistance, reconstruction, de-mining, decontamination, voluntary return of refugees and internally displaced persons, and all other services indispensable for the survival and the fulfilment of the essential needs of the victims of disasters.

2. “Disaster” means calamitous events which endanger life, health, physical integrity, or the right not to be subjected to cruel, inhuman or degrading treatment, or other fundamental human rights, or the essential needs of the population, whether

- of natural origin (such as earthquakes, volcanic eruptions, windstorms, torrential rains, floods, landslides, droughts, fires, famine, epidemics), or

- man-made disasters of technological origin (such as chemical disasters or nuclear explosions), or
- caused by armed conflicts or violence (such as international or internal armed conflicts, internal disturbances or violence, terrorist activities).

3. “Victims” means groups of human beings whose fundamental human rights or whose essential needs are endangered.

4. “Affected State” means the State or the territorial entity where humanitarian assistance is needed.

5. “Assisting State or organization” means the State or intergovernmental organization, or impartial international or national non-governmental organization which organizes, provides or distributes humanitarian assistance.

II. *Right to humanitarian assistance*

1. Leaving the victims of disaster without humanitarian assistance constitutes a threat to human life and an offence to human dignity and therefore a violation of fundamental human rights.

2. The victims of disaster are entitled to request and receive humanitarian assistance. Assistance may be sought on behalf of the victims, by the members of the group, by local and regional authorities, the government of the affected State, and national or international organizations.

3. Humanitarian assistance shall be offered and, if accepted, distributed without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups.

III. *Primary responsibility of the affected State*

1. The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.
2. Any other authority exercising jurisdiction or *de facto* control over the victims of a disaster (for example in case of disintegration of the governmental authority) has the duty to provide them with the necessary humanitarian assistance, and also has all the other duties and rights of the affected State provided for in this Resolution.
3. Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States.

IV. *Right to offer and provide humanitarian assistance*

1. States and organizations have the right to offer humanitarian assistance to the affected State. Such an offer shall not be considered unlawful interference in the internal affairs of the affected State, to the extent that it has an exclusively humanitarian character.
2. States and organizations have the right to provide humanitarian assistance to victims in the affected States, subject to the consent of these States.

V. *Duties in respect of humanitarian assistance*

1 All States should to the maximum extent possible offer humanitarian assistance to the victims in States affected by disasters, except when such assistance would result in seriously jeopardizing their own economic, social or political conditions. Special attention should be paid to disasters affecting neighbouring States.

2 Intergovernmental organisations shall offer humanitarian assistance to the victims of disasters in accordance with their own mandates and statutory mandates.

3. The assisting State or organization may not interfere, in any manner whatsoever in the internal affairs of the affected State.

4. Assisting States and organizations, including non-governmental organizations, shall take the necessary steps in order to prevent misappropriation of stocks of goods and other grave abuses (such as illicit traffic of persons, arms, or prohibited drugs) by personnel under their responsibility.

VI. *Duty to cooperate*

1. In organizing, providing and distributing humanitarian assistance, the assisting States and organizations shall cooperate with the authorities of the affected State or States.

2. In the case of a disaster which endangers the territory and the population of more than one State, or which originates in one State and endangers the territory and the population of another State, the relevant States shall cooperate in mitigating the consequences.

VII. *Duty to facilitate humanitarian assistance*

1. States shall facilitate the organization, provision and distribution of humanitarian assistance rendered by other States and organizations. They shall accord them, among other things, overflight and landing rights, telecommunication facilities and necessary immunities. Humanitarian assistance missions shall be exempted from any requisition, import, export and transit restrictions and customs duties for relief goods and services. When visas or other authorizations are required they shall be promptly given free of charge.
2. States should adopt laws and regulations and conclude bilateral or multilateral treaties providing for the above-mentioned facilities relative to humanitarian assistance.
3. The affected States shall permit the humanitarian personnel full and free access to all the victims and ensure the freedom of movement and the protection of personnel, goods and services provided.

VIII. *Duty of affected States not arbitrarily to reject bona fide offer of humanitarian assistance*

1. Affected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.

2. In the event of the refusal of an offer of humanitarian assistance or of access to the victims, the States or organizations offering assistance, if they consider that such refusal may lead to a graver humanitarian catastrophe, may call upon the United Nations bodies dealing with humanitarian issues and other competent universal or regional international organizations to consider taking appropriate measures in accordance with international law and their statutory rules, in order to induce the affected State to comply.

3. If a refusal to accept a *bona fide* offer of humanitarian assistance or to allow access to the victims, leads to a threat to international peace and security, the Security Council may take the necessary measures under Chapter VII of the Charter of the United Nations.

IX. *Protection of personnel and installations engaged in humanitarian assistance*

1. Intentionally directing attacks against personnel, installations, goods or vehicles involved in a humanitarian assistance action is serious breach of fundamental principles of international law.

2. If such serious breaches are committed, the accused persons shall be brought to trial before a competent domestic or international court or tribunal.

X. *Relationship with other rules of international law*

This Resolution is without prejudice to the:

- a) principles and rules of international humanitarian law applicable in armed conflict, in particular the 1949 Geneva Conventions for the Protection of War Victims and the 1977 Additional Protocols; and,
 - b) rules of international law regulating humanitarian assistance in specific situations.
-

BRUGES DECLARATION ON THE USE OF FORCE

September 2, 2003

The Institut de Droit international

Recalls Article 1 of its Statutes adopted by the Ghent international legal conference (*conférence juridique internationale*) of 10 September 1873 in which it is stated that the *Institut's*

“2. [...] purpose is to promote the progress of international law [...] d) by contributing, within the limits of its competence, either to the maintenance of peace, or to the observance of the laws of war”.

Recalls its resolution adopted at the Zurich Session in 1877 entitled “Application of the Law of Nations to the War of 1877 between Russia and Turkey” in which it considered itself “unable to close the present Session without again raising its voices in favour of law and humanity”.

The *Institut* considers that its duty is to reaffirm that the use of force by States in international relations is governed by international law. One of the major achievements of the twentieth century was the “outlawing” of war, in particular by the Briand-Kellogg Pact whose 75th anniversary is being celebrated, and by the United Nations Charter on the basis of which the following fundamental principles were proclaimed:

- the threat or use of force are prohibited and States are bound to settle their disputes by peaceful means;
- a war of aggression constitutes an international crime;

- force may be used only in the exercise of the right to legitimate self-defence or under the authorization of the Security Council;
- the primary responsibility for the maintenance of international peace and security is entrusted to the Security Council.

Only the Security Council, or the General Assembly acting under the more limited framework of the “Uniting For Peace” Resolution of 1950, may, depending on the particular circumstances at hand, decide that a given situation constitutes a threat to international peace and security, without this necessarily meaning that the recourse to force is the only possible adequate response.

The *Institut* equally reaffirms that acts of terrorism, from whatever source, are prohibited under international law and constitute an international crime.

In addition, the waging of an armed conflict entails the application of the totality of international humanitarian law and in particular, the following principles:

- the distinction between the civilian population and military personnel as well as between civilian objects and military objectives must be respected in all circumstances; and civilian persons and objects must never be targeted;
- combatants who are captured have the right to be treated as prisoners of war; in cases of doubt, their status has to be determined by a tribunal; and even if such a tribunal decides that they do not meet the conditions for the status of prisoner of war, they nonetheless benefit from the rights guaranteed by international humanitarian law in respect of all persons in the power of the enemy (which are codified in Article 75 of the First Additional Protocol of 1977 to the Geneva Conventions of 1949).

Belligerent occupation of a territory entails the application of the rules of international humanitarian law codified in the Hague Regulations of 1907, the Fourth Geneva Convention of 1949 and the First Additional Protocol:

- belligerent occupation does not transfer sovereignty over territory to the occupying power;
- the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population;
- the occupying power assumes the responsibility and the obligation to maintain order and to guarantee the security of the inhabitants of the territory and to protect its historical heritage, cultural property and basic infrastructure essential to the needs of the population;
- the occupying power has the obligation to meet the basic needs of the population;
- the occupying power has the obligation to respect the rights of the inhabitants of the occupied territory which are guaranteed by international humanitarian law and international human rights law, the minimum content of which is codified in Article 75 of the First Additional Protocol.

The *Institut de Droit international* appealing to the universal conscience of mankind, emphatically requests all States to respect the above mentioned fundamental principles.

JUSTITIA ET PACE

CINQUIEME COMMISSION
Les obligations et les droits *erga omnes* en droit international

FIFTH COMMISSION
Obligations and rights erga omnes in international law

Rapporteur : M. Giorgio Gaja

RESOLUTION

OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW

The *Institute of International Law*,

Considering that under international law, certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community;

Considering that a wide consensus exists to the effect that the prohibition of acts of aggression, the prohibition of genocide, obligations concerning the protection of basic human rights, obligations relating to self-determination and obligations relating to the environment of common spaces are examples of obligations reflecting those fundamental values;

Desiring to take a first step in clarifying certain aspects of inter-State relations created by these obligations, especially the consequences of their breach and the related remedies, while acknowledging that some of these obligations also exist towards subjects of international law other than States;

Adopts the following Resolution:

Article 1

For the purposes of the present articles, an obligation *erga omnes* is:

- (a) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or
- (b) an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action.

Article 2

When a State commits a breach of an obligation *erga omnes*, all the States to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State in particular:

- (a) cessation of the internationally wrongful act ;
- (b) performance of the obligation of reparation in the interest of the State, entity or individual which is specially affected by the breach. Restitution should be effected unless materially impossible.

Article 3

In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.

Article 4

The International Court of Justice or other international judicial institution should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation.

Article 5

Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed:

- (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations;
- (b) shall not recognize as lawful a situation created by the breach;
- (c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach.

Article 6

The preceding articles are without prejudice:

- (a) to the rights and remedies pertaining to a State which is specially affected by the breach of an obligation *erga omnes*;
- (b) to the application of special rules to the breach of certain obligations *erga omnes*;
- (c) to the rights that a State party to a multilateral treaty has, under the law of treaties, as a consequence of a breach concerning the same treaty.

Adopted on August 27, 2005.

NEUVIEME COMMISSION
Différences culturelles et ordre public en droit international privé de la famille

NINTH COMMISSION
Cultural differences and ordre public in family private international law

Rapporteur : M. Paul Lagarde

RESOLUTION

The Institute of International Law,

Noting that at the present time, population movements make the contradiction of laws emanating from different legal cultures very frequent, particularly in the field of family law ;

Noting that the opposition between various legal cultures is a consequence especially of the conflict between secular and religious doctrines ;

Considering that the systematic reciprocal exclusion of laws from different cultures by the invocation of public policy fails to take into account the need to coordinate legal systems ;

Considering that respect for cultural identities has become a goal of international law, a goal which must find an expression in private international law ;

Recalling nevertheless the primacy of the principles of equality and non-discrimination, particularly in relation to gender and religion, recognised by customary international law, and proclaimed by numerous international instruments, universal or regional, notably the International Covenants of the United Nations of 19 December 1966, the Convention of 7 March 1966 on the Elimination of all Forms of Racial Discrimination, the Convention of 1 March 1980 on the Elimination of all Forms of Discrimination against Women, the Convention of 20 November 1989 on the Rights of the Child, as well as the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950, the American Convention on Human Rights (San Jose Pact) of 22 November 1969, the African Charter of Human and Peoples' Rights of 27 June 1981, and the Arab Charter on Human Rights of May 23, 2004;

Considering that the right of everyone to freedom of religion, thought and opinion includes the right not to have a religion and to change religion ;

Recalling its 1987 Cairo Resolution on the Duality of the Nationality Principle and the Domicile Principle in Private International Law;

Adopts the following provisions:

A. General principles

1. States shall avoid using religion as a connecting factor for the purpose of determining the law applicable to the personal status of foreigners. They should make it possible for the latter to choose between their national law and the law of their domicile in cases where the State of nationality and the State of domicile differ.
2. Public policy should not be invoked against the applicable foreign law on the sole ground that this law is religious or secular.
3. Public policy should be invoked against the normally applicable law only to the extent that, in the circumstances of the case, the application of that law would infringe the principles of equality, non-discrimination and freedom of religion.

B. Marriage

1. States shall guarantee respect for freedom of marriage. This means that, for the purposes of private international law, States shall invoke public policy against foreign laws that restrict that freedom on racial or religious grounds, and recognise the validity of a marriage celebrated in violation of the religious prescriptions of the normally applicable law.
2. States should not refuse to recognise marriages celebrated abroad, even when they involve their nationals, on the ground that their mode of celebration, religious or secular, is unknown in their law. They will not be bound to recognise marriages celebrated abroad in a way that is not recognised by the law of the State where the marriage was celebrated.
3. States should not invoke public policy against the recognition of polygamous unions celebrated in a State allowing polygamy. They will not be bound to recognise such unions if both spouses had their habitual residence at the time of celebration in a state that did not admit polygamy or if the first spouse has the nationality of, or her habitual residence in, such a State.

C. Divorce

1. Subject to point 2, public policy should not be invoked to deny recognition to a divorce pronounced or registered in a foreign State by an authority competent under the law of that State on the ground that the procedure followed is unknown in the recognising State.
2. Public policy may be invoked against the recognition of the unilateral repudiation of the woman by her husband if the woman has or has had the nationality of the recognising State or of a State not allowing such repudiation, or if she has her habitual residence in one of these States, unless she has consented to the repudiation or if she has benefited from adequate financial provision.

D. Filiation

States may invoke public policy against foreign laws forbidding the establishment of filiation outside marriage, at least when the child is linked through nationality or habitual residence to the forum State or a State allowing the establishment of that filiation.

E. Succession

States may invoke public policy against foreign succession laws containing discrimination based on gender or religion when assets part of the deceased's estate were located in the forum State at the time of death.

Adopted on August 25, 2005.

DIX-SEPTIEME COMMISSION

**La compétence universelle en matière pénale à l'égard du crime de génocide,
des crimes contre l'humanité et des crimes de guerre**

SEVENTEENTH COMMISSION

***Universal criminal jurisdiction with regard to the crime of genocide,
crimes against humanity and war crimes***

Rapporteur : M. Christian Tomuschat

RESOLUTION

The Institute of International Law,

Considering that fundamental values of the international community are infringed by serious international crimes as defined by international law (hereinafter: international crimes);

Affirming that universal jurisdiction is designed to protect and uphold these values, in particular human life, human dignity, and physical integrity, by allowing prosecution of international crimes;

Wishing therefore to contribute to the prevention and suppression of such crimes with a view to putting an end to impunity which may result, in particular, from the unwillingness or the inability of State authorities to take the requisite steps for prosecution;

Recalling that all States bear primary responsibility for effectively prosecuting the international crimes committed within their jurisdiction or by persons under their control;

Conscious of the importance of international judicial bodies entrusted with the suppression of international crimes which are not or not adequately prosecuted by the competent national judicial authorities;

Noting that universal jurisdiction is an additional effective means to prevent impunity for international crimes;

Stressing that the jurisdiction of States to prosecute crimes committed by non-nationals in the territory of another State must be governed by clear rules in order to ensure legal certainty, and the reasonable exercise of that jurisdiction;

Adopts the following Resolution:

1. Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.
2. Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person.
3. Unless otherwise lawfully agreed, the exercise of universal jurisdiction shall be subject to the following provisions:
 - a) Universal jurisdiction may be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict.
 - b) Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender.
 - c) Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.
 - d) Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.
4. Any State prosecuting an alleged offender on the basis of universal jurisdiction is bound to comply with the generally recognized standards of human rights and international humanitarian law.
5. States should, where appropriate, assist and cooperate with each other in detecting, investigating, gathering evidence, arresting and bringing to trial persons suspected of having committed international crimes, and take adequate measures for that purpose.
6. The above provisions are without prejudice to the immunities established by international law.

Adopted on August 26, 2005.

PREMIERE COMMISSION
La substitution et l'équivalence en droit international privé

FIRST COMMISSION
Substitution and Equivalence in Private International Law

Rapporteur: M. Erik Jayme/Andreas Bucher

RESOLUTION

The Institute of International Law,

Recalling that ensuring the harmony and continuity of legal relationships across borders is a fundamental objective of private international law;

Considering that achieving that objective calls for the taking into account of similarities of legal relationships notwithstanding differences between the laws involved;

Adopts the following Resolution:

Article 1

Substitution allows a legal relationship or act originating in a given State to entail all or part of the effects attached to a similar relationship or act under the law of another State.

Article 2

Equivalence is the decisive requirement in matter of substitution. It is based on a functional comparison between the rules of the law governing the effects of the legal relationship or act and the rules of the law under which the legal relationship or act was created.

Article 3

Substitution does not require the laws under consideration to be identical; a similarity between the aims and interests respectively pursued by those laws is sufficient.

Article 4

Equivalence is determined according to the law applicable to the effects of the legal relationship or act which is the object of the comparison.

The possibility and scope of substitution are determined by that same law.

Article 5

To an act requiring the intervention of an authority such as a judge, notary, or registrar, an equivalent act by the authority of another State is substituted if the respective authorities exercise the same or similar functions. As the case may be, such authority may be a religious authority.

Article 6

In respect of the form of acts, if the local law does not know the type of act as provided for by the law applicable to the substance, it is sufficient to comply with the requirements as to form determined by the local law in respect of an act that is functionally equivalent.

TENTH COMMISSION
Present Problems of the Use of Armed Force in International Law

A. Self-defence

Rapporteur: M. Emmanuel Roucounas

RESOLUTION

The Institute,

Mindful of the problems raised by the use of force in international relations;

Convinced that the system of collective security established by the United Nations Charter strengthens international peace and security;

Acknowledging the fundamental importance of individual and collective self-defence as a response of States to the unlawful use of force;

Mindful that the problems of self-defence of States facing armed attacks by non-State actors, as well as those of the relationship between self-defence and international organizations, require further study by the Institute;

Adopts the following resolution:

1. Article 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence.
2. Necessity and proportionality are essential components of the normative framework of self-defence.
3. The right of self-defence arises for the target State in case of an actual or manifestly imminent armed attack. It may be exercised only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack, until the Security Council takes effective measures necessary to maintain or restore international peace and security.

4. The target State is under the obligation immediately to report to the Security Council actions taken in self-defence.
5. An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to counter-measures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3.
6. There is no basis in international law for the doctrines of “preventive” self-defence (in the absence of an actual or manifestly imminent armed attack.
7. In case of threat of an armed attack against a State, only the Security Council is entitled to decide or authorize the use of force.
8. Collective self-defence may be exercised only at the request of the target State.
9. When the Security Council decides, within the framework of collective security, on measures required for the maintenance or restoration of international peace and security, it may determine the conditions under which the target State is entitled to continue to use armed force.
10. In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle.

A number of situations of armed attack by non-State actors have been raised, and some preliminary responses to the complex problems arising out of them may be as follows:

- (i) If non-State actors launch an armed attack at the instructions, direction or control of a State, the latter can become the object of action in self-defence by the target State.
- (ii) If an armed attack by non-State actors is launched from an area beyond the jurisdiction of any State, the target State may exercise its right of self-defence in that area against those non-State actors.

The State from which the armed attack by non-State actors is launched has the obligation to cooperate with the target State.

TENTH COMMISSION

Present Problems of the Use of Armed Force in international Law

- Humanitarian action-

Rapporteurs: Mr Reisman/Mr Owada

RESOLUTION

The Institute of International Law,

Having considered the subject of Humanitarian Action for the object of putting an end to genocide, large-scale crimes against humanity and large-scale war crimes;

Approves the following Resolution, together with a Declaration of the President, who was asked to issue this Declaration to express the understanding of the Institute in respect of the question of military actions which have not been authorized by the United Nations:

The President's Declaration is as follows:

“The Institute has discussed in detail the question of the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity or large-scale war crimes. While a number of members supported the view that such actions might be lawful under certain circumstances and observing certain conditions, a number of other members were of the view that this is not the case under present international law and in particular under the Charter of the United Nations.

In view of these differences of opinion and in consideration of the fact that another sub-group is specifically dealing with the Present Problems of the Use of Armed Force in International Law and the authorization to resort to the use of force by the United Nations, the Institute decided to refer this particular issue to that sub-group for further discussion in a subsequent session.

Accordingly, Article VI of the Resolution explains that its text does not address this issue, and therefore its referral to a different sub-group in no way preempts nor prejudices the continuation of the discussion on this issue in a subsequent session.”

The text of the Resolution is as follows:

I. International law embodies the right to the protection of human life and human dignity against genocide, crimes against humanity and war crimes. Every State is under an obligation to prevent or promptly put an end to genocide, crimes against humanity and war crimes, occurring within its jurisdiction or control.

II. Genocide, large-scale crimes against humanity or large-scale war crimes should be considered as a threat to international peace and security pursuant to Article 39 of the Charter of the United Nations.

III. The competent organs of the United Nations should use all statutory powers at their disposal to take prompt action to put an end to genocide, large-scale crimes against humanity or large-scale war crimes which have not been suppressed by the State within whose jurisdiction or control they are occurring.

IV. Actions to put an end to genocide, large-scale crimes against humanity, or large-scale war crimes shall be conducted in accordance with international law.

V. If military action is taken, the sole objective of such action shall be to put an end to genocide, large-scale crimes against humanity, or large-scale war crimes. International humanitarian law shall be strictly observed during and after the operations, so as to secure in particular maximum protection of the civilian population. This paragraph is without prejudice to any obligation with regard to the repression of international crimes.

VI. This Resolution does not address the question of the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes.

THIRD COMMISSION

*Resolution on the Immunity from Jurisdiction of the State
and of Persons Who Act on Behalf of the State in case of International Crimes*

Rapporteur : Lady Fox

RESOLUTION

The Institute of International Law,

Mindful that the Institute has addressed jurisdictional immunities of States in the 1891 Hamburg Resolution on the jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix-en-Provence Resolution on immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the 2001 Vancouver Resolution on immunities from jurisdiction and execution of heads of State and of Government in international law ;

Conscious that under conventional and customary international law a State has an obligation to respect and to ensure the human rights of all persons within its jurisdiction;

Considering the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes;

Desirous of making progress towards a resolution of that conflict;

Recognizing that the removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved;

Adopts the following Resolution:

Article I: Definitions

1. For the purposes of this Resolution “international crimes” means serious crimes under international law such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant treaties and the statutes and jurisprudence of international courts and tribunals.
2. For the purposes of this Resolution “jurisdiction” means the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the immunity of another State or its agents conferred by treaties or customary international law.

Article II: Principles

1. Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.

2. Pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled.
3. States should consider waiving immunity where international crimes are allegedly committed by their agents.

Article III: Immunity of persons who act on behalf of a State

1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.
2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases.
3. The above provisions are without prejudice to:
 - (a) the responsibility under international law of a person referred to in the preceding paragraphs;
 - (b) the attribution to a State of the act of any such person constituting an international crime.

Article IV: Immunity of States

The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State.

RESOLUTION OF THE INSTITUTE
NAPLES DECLARATION ON PIRACY

The Institute of International Law,

Deeply concerned by the increase of acts of piracy and of other acts of violence which endanger the safety of international navigation and trade and put at risk the life and freedom of seafarers;

Acknowledging that existing international law on piracy, as reflected in the 1982 UN Convention on the Law of the Sea, which is restricted to proscribing acts of violence committed for private ends on the high seas and undertaken by one ship against another, does not fully cover all acts of violence endangering the safety of international navigation;

Noting the lack of capability of some coastal States to comply with their responsibility to ensure safety of navigation in the territorial sea and to take effective steps, within their territory, including internal waters, to prevent acts of piracy and other acts of violence at sea and activities connected with such acts;

Welcomes UN Security Council Resolution 1816 (2008) and others broadening and adapting, as regards the most serious current situation and without prejudice to general international law, the scope of the existing international rules on piracy to include, in particular, acts against vessels committed in the territorial sea;

Expresses its concern over the reluctance of States to exercise their jurisdiction under the UN Convention on the Law of the Sea to prosecute pirates and perpetrators of other acts of violence at sea and to implement the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1979 UN Convention against the Taking of Hostages;

Expresses its concern over the lack of uniformity and sometimes the inadequacy of domestic policies and laws concerning pirates and perpetrators of other acts of violence at sea when found within their jurisdiction;

Calls upon States, with full regard to the human rights of the victims and of the other persons involved, to implement the relevant resolutions of the UN Security Council, and, in particular:

(a) to adopt or develop effective domestic laws and procedures to prevent and suppress piracy and other acts of violence at sea,

(b) to adopt cooperative arrangements to deal with piracy and other acts of violence at sea, including the preparation and deployment of effective naval responses and assistance to coastal States that lack the capability to fight piracy and other acts of violence at sea and to prosecute the perpetrators thereof.

Naples, 10 September 2009

SIXTH COMMISSION

The Position of the International Judge

Rapporteur : M. Gilbert Guillaume

RESOLUTION

The Institute of International Law,

Recalling its resolutions concerning the Statute of the International Court of Justice adopted during the Sienna Session on 24 April 1952 and the Aix-en-Provence Session on 26 April 1954;

Considering the significant evolution undergone in the meantime by international justice, and in particular the establishment, besides the International Court of Justice, of numerous specialized courts and tribunals, both at the universal and regional levels;

Mindful of the diversity of such international courts and tribunals as well as of their common mission, needs and requirements;

Desiring to contribute to the development of international justice and *intent on* promoting its authority and effectiveness;

Taking into account the report of its Sixth Commission;

Adopts the following guidelines:

Article 1
Selection of Judges

1. The quality of international courts and tribunals depends first of all on the intellectual and moral character of their judges. Therefore, the selection of judges must be carried out with the greatest care. Moreover, States shall ensure an adequate geographical representation within international courts and tribunals. They shall also ensure that judges possess the required competence and that the court or tribunal is in a position effectively to deal with issues of general international law. The ability to exercise high jurisdictional functions shall nonetheless remain the paramount criterion for the selection of judges, as pointed out by the Institute in its 1954 Resolution.

2. Procedures of selection of candidates both at the national and international levels should support the above-mentioned principles and should, as necessary, be improved to that end.

3. From this standpoint, it seems that the national groups of the Permanent Court of Arbitration do not always play the role accorded to them by the relevant texts. In this respect, all States Parties to the 1899 and 1907 Hague Conventions, in compliance with their obligations, should establish a permanent national group, notify its composition to the Bureau of the Court and make sure that the group's membership is periodically renewed. Moreover, it is important that, before nominating, fully independently, candidates for the International Court of Justice or the International Criminal Court, national groups carry out consultations with judicial and academic authorities as provided by Article 6 of the Statute of the International Court of Justice. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of candidacy.

4. In certain countries, national groups play a role in the selection of candidates to other international courts and tribunals. This practice deserves to be applied more broadly.

5. In any case, the relevant procedures shall be such as to ensure the selection of candidates having the required moral character, competence and experience, without any discrimination, in particular on grounds of sex, origin or beliefs.

6. The selection of judges should be carried out taking into consideration, first and foremost, the qualifications of candidates, of which political authorities should be fully apprised. It must be noted, in particular, that elections of judges should not be subjected to prior bargaining which would make voting in such elections dependent on votes in other elections.

Article 2

Term of Judicial Functions

1. In order to strengthen the independence of judges, it would be desirable that they be appointed for long terms of office, ranging between nine and twelve years. Such terms of office should not be renewable.

2. During their entire term of office, judges shall enjoy irremovability. Judges may be removed from office only if they cease to meet the required conditions for the performance of the judicial function, and following a decision adopted by their peers in accordance with due process. Such a decision could be preceded, if necessary, by a suspension of the judge concerned. In addition, these decisions should be taken by qualified majority voting, for example a three-quarters majority.

Article 3

Status of Judges

1. Members of each permanent international court and tribunal should be treated on the basis of absolute equality, including as regards remuneration.

2. They may not exercise political or administrative functions, or act as agents, counsel or advocates before any courts and tribunals.

3. Should judges engage in any other external activity, such as teaching or arbitration, if not prohibited by their statute, they shall afford absolute priority to the work of the international court or tribunal to which they belong. Moreover, they may not engage in any activity capable of impinging on their independence or susceptible of raising doubts on their impartiality in a given case.

4. It is undesirable for judges serving in courts and tribunals with a heavy workload to engage in arbitrations or in substantial teaching activities.

5. Special procedures should be set up within every international court or tribunal in order to regulate such matters. In any case, judges shall first request the authorization of the president of the court of which they are members. The president will decide, first and foremost, according to the interests and the needs of the international court or tribunal. Similar procedures are required when it appears that there is a risk of incompatibility in a particular case.

6. A former judge should not act as agent, counsel or advocate before the court or tribunal of which that judge has been a member during at least three years following the end of his/her term.

Article 4

Remuneration and Conditions of Service

1. International judges should receive remuneration allowing them to perform their functions in the best possible conditions. Such remuneration shall not be reduced during their term of office. Therefore, it should be regularly adapted to the cost of living in the country where the seat of the court or tribunal is located. An appropriate retirement scheme shall be provided for full time judges of international courts or tribunals.

2. Judges should be provided with adequate assistance in order to perform their functions satisfactorily.

Article 5

Organization of International Courts and Tribunals

The independence of courts and tribunals depends not only on the procedures of selection of judges and their status, but also on the way in which the court or tribunal is organized and operates. In this respect, the registries of international courts and tribunals, while enjoying the independence necessary to carry out their tasks, should remain under the ultimate authority of the court or tribunal itself. The international court or tribunal shall have exclusive responsibility to submit proposals to the relevant budgetary authorities, and shall be in a position to defend those proposals directly before such authorities. The latter may not substitute their appreciation to that of the court or tribunal in the management of its staff.

Article 6

Immunities and Privileges

The main purpose of immunities and privileges is to ensure the independence of judges. Therefore, judges having the nationality of the State in which the court or tribunal is located or having their permanent residence in that State at the time of their appointment should be accorded the same immunities and privileges as their colleagues.

Article 7

International Part-time Judges

The principles set out in this Resolution relating to the qualifications and the independence of judges apply to part-time judges. The other provisions of this Resolution only apply to them as may be needed.

TENTH COMMISSION
Present Problems of the Use of Force in International Law

Sub-group D – Authorization of the Use of Force by the United Nations

Rapporteur : M. Raúl Emilio Vinuesa

RESOLUTION

The Institute of International Law,

Recalling its Resolutions on “The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States” (Santiago de Compostela, 1989), and on “Self-Defence” and “Humanitarian Action” (Santiago de Chile, 2007);

Whereas the main purpose of the United Nations is to maintain international peace and security and, to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace;

Whereas in pursuit of that purpose all Member States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;

Mindful that the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State shall not prejudice the application of enforcement measures under Chapter VII of the Charter of the United Nations;

Further acknowledging that, in order to ensure prompt and effective action by the United Nations, its Members conferred on the Security Council primary responsibility for the maintenance of international peace and security, and that in discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations;

Adopts the following Resolution:

Article 1

Under Chapters VII and VIII of the Charter of the United Nations, the Security Council, without prejudice to its power to undertake peacekeeping and peace enforcement operations of its own, has the power to authorize Member States or regional arrangements or agencies to take all necessary measures, including the use of force, to maintain or restore international peace and security.

Article 2

In authorizing the use of force, the Security Council should specify the objectives, scope and modes of control of any measure taken pursuant to that authorization.

Article 3

When the Security Council authorizes a State or a regional arrangement or agency to take measures set out in Article 1, it may subsequently change or terminate that authorization.

Article 4

The Security Council may only authorize the use of force by Member States or regional arrangements or agencies upon a determination by it of a threat to the peace, breach of the peace or act of aggression.

Article 5

Security Council determinations of a threat to the peace, a breach of the peace or an act of aggression must be performed in accordance with the Purposes and Principles of the United Nations.

Article 6

Any situation amounting to massive and grave violations of human rights and/or grave breaches of international humanitarian law should be considered by the Security Council as a threat to the peace with respect of which it should immediately take such measures as it deems appropriate in the circumstances, including the use of force.

Article 7

In circumstances in which the Security Council is unable to act in the exercise of its primary responsibility to maintain international peace and security due to the lack of unanimity of the permanent members, the General Assembly should exercise its competence under the “Uniting for Peace” Resolution to recommend such measures as it deems appropriate.

Article 8

In all circumstances, the use of force should only be authorized as a last resort.

Article 9

The objectives, scope and modes of control of each authorization should be strictly interpreted and implemented. When the use of force is authorized, it shall be conducted proportionately to the gravity of the situation and in full compliance with international humanitarian law.

Article 10

In no case may a previous authorization be invoked for any purpose beyond its specific objectives, time and scope.

Article 11

When the Security Council authorizes Member States or regional arrangements or agencies to enforce its decisions, the means chosen for such enforcement shall remain within the scope of the mandate.

Article 12

States not taking part in military operations duly authorized by the Security Council and conducted accordingly shall not interfere with such operations.

Article 13

The lack of a Security Council reaction to or condemnation of the use of force not previously authorized may not be interpreted as an implicit or *ex post facto* authorization. This is without prejudice to the power of the Security Council to review the situation and to authorize ongoing military operations.

Declaration of Mr Roucounas, President of the Institute

Following the Institute's Resolution on "Humanitarian Action" adopted during the Santiago session of 2007, and in accordance with the Declaration of the President included in that Resolution, Sub-Group D on "Authorization of the Use of Force by the United Nations" of the Tenth Commission has duly studied and discussed the controversial issue of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, crimes against humanity or large-scale war crimes.

During the current Rhodes session, that issue has also been debated in the plenary sessions.

Having regard to the very difficult problems raised by that issue and the differences of views among its members, the Institute considers that the topic deserves more consideration and study.

Therefore, the present Resolution on "Authorization of the Use of Force by the United Nations" does not address that issue and is without prejudice to further work of the Institute in that regard.

TENTH COMMISSION

Present Problems of the Use of Force in International Law

Sub-Group C – Military assistance on request

Rapporteur : M. Gerhard Hafner

RESOLUTION

The Institute of International Law,

Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good neighbourliness and friendly relations and co-operation among States;

Recalling in particular the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA Res. 2625 (XXV) of 24 October 1970);

Recalling the Resolution of the Institute on “The Principle of Non-Intervention in Civil Wars” (Wiesbaden Session, 1975);

Having regard to existing State practice on military assistance on request;

Recalling the need for strict observance of the principle of non-intervention;

Considering that each State must respect the principle of equal rights and self-determination of peoples as expressed in Article 1, paragraph 2, of the Charter of the United Nations;

Recalling further the need for strict observance of the Charter of the United Nations, in particular its Article 2(4) and Article 2(7);

Adopts the following Resolution:

Article 1
Definitions

For the purposes of this Resolution:

- a) “Military assistance on request” means direct military assistance by the sending of armed forces by one State to another State upon the latter’s request.
- b) “Request” means a request reflecting the free expression of will of the requesting State and its consent to the terms and modalities of the military assistance.

Article 2
Scope

- 1. This Resolution applies to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977.
- 2. The objective of military assistance is to assist the requesting State in its struggle against non-State actors or individual persons within its territory, with full respect for human rights and fundamental freedoms.

Article 3
Prohibition of military assistance

- 1. Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.
- 2. Military assistance shall not be provided where such provision would be inconsistent with a Security Council resolution relating to the specific situation, adopted under Chapter VII of the Charter of the United Nations.

Article 4
Request

1. Military assistance may only be provided upon the request of the requesting State.
2. The request shall be valid, specific and in conformity with the international obligations of the requesting State.
3. If military assistance is based on a treaty, an *ad hoc* request is required for the specific case.
4. Any request that is followed by military assistance shall be notified to the Secretary-General of the United Nations.

Article 5
Withdrawal

The requesting State is free to terminate its request or to withdraw its consent to the provision of military assistance at any time, irrespective of the expression of consent through a treaty.

Article 6
Other limits on the provision of military assistance

1. Military assistance shall be carried out in conformity with the terms and modalities of the request.
2. Military assistance shall not be provided beyond the time agreed to by the requesting State, without further agreement thereon.
3. Military assistance shall not constitute a coercive measure in order to obtain from a State the subordination of the exercise of its sovereign rights.

Article 7
Additional obligation of the requesting State

Military assistance shall not be used by the requesting State to circumvent its international obligations.

EIGHTEENTH COMMISSION

**Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the
Host State under Inter-State Treaties**

Rapporteur : M. Andrea Giardina

RESOLUTION

The Institute of International Law,

Whereas the Institute has adopted, at its Amsterdam Session in 1957, a Resolution on Arbitration in Private International Law, at its Athens Session in 1979, a Resolution on The Proper Law of the Contract in Agreements between a State and a Foreign Private Person, and, at its Santiago de Compostela Session in 1989, a Resolution on Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises;

Emphasizing the importance of international investment for economic and social development, both in periods of expansion and in periods of crisis, and the need to ensure a balanced protection of the interests of the involved parties, guaranteeing due protection of the rights of investors and the rights of States to pursue, in a non-discriminatory way, their public and regulatory purposes;

Recalling the differences which, for a long time, have prevented the negotiation and the adoption of a general multilateral convention on the regulation of foreign investment;

Considering the increasing number of bilateral treaties and regional agreements for the promotion and the protection of investment;

Considering the important evolution permitting investors to initiate directly international arbitration procedures against States on the basis of consent to arbitration expressed by the State in an international treaty or a national law;

Considering the most recent developments relating to international investment in certain regional areas, Free Trade Areas or Preferential Trade Areas regulating both trade and investments or in conventions in specific economic sectors, and the situation resulting from European Union competence in matters of foreign investment;

Considering the large and increasing number of arbitral awards involving disputes between investors and States and the desirability of creating consistent jurisprudence that would promote reasonable predictability, and the confirmation and consolidation of the rights and obligations of both foreign investors and host States;

Considering that certain recurring problems call for the elaboration of principles enjoying wide support, and *reserving* certain more specific matters for further discussion;

Calls upon

States and international organizations parties to bilateral and multilateral treaties on investment promotion and protection,

private parties having recourse to, or participating in, arbitral mechanisms for the resolution of investment disputes as provided for in such treaties,

arbitrators appointed for the resolution of investment disputes and/or authorities in charge of the control and enforcement of arbitral awards,

public and private international institutions with responsibility for the administration of such arbitral proceedings,

to recognize and apply the following principles and rules, and promote compliance with them:

GENERAL ISSUES

Article 1

The interpretation and application of bilateral and multilateral international instruments for the protection of international investments shall be in accordance with the general rules of international law as reflected in the Vienna Convention on the Law of Treaties.

Article 2

Consistency of solutions in investment arbitration contributes to legal certainty for all actors involved. The quest for consistency does not require the mechanical application of prior practice without regard to the particular circumstances of the case or the need for the interpretation and development of the law.

Article 3

The requirements and characteristics of investment arbitral mechanisms chosen by the parties shall be respected and their effects recognized. This applies, *inter alia*, to the existence of the parties' consent (host States and investors) and the existence of an investment in conformity with the applicable international instruments, taking particularly into account the features of different ICSID or non-ICSID arbitral mechanisms.

Article 4

Arbitral tribunals, when referring to notions defined in municipal law, such as that of nationality or legal personality, shall at the same time respect the relevant rules of international law.

Article 5

The development of special foreign investment regulations in certain regional economic entities shall not impair the rights of the investors of third States acquired on the basis of the treaties entered into by these third States and the member States of such regional economic entities.

Article 6

Transparency in investment arbitration and in particular intervention of *amici curiae* shall be accommodated according to the will of the parties and in conformity with applicable arbitration rules, as well as in light of the confidentiality requirements of each particular case.

Article 7

The power of arbitral tribunals to pronounce on mass claims should be addressed by appropriate provisions in the instruments governing investment arbitration.

Article 8

Conflicts of interest shall be avoided in investor-State arbitration. Particular attention shall be given to problems that may arise from third-party funding.

Article 9

Acceptance by individuals of different roles as counsel, arbitrators, members of ICSID *ad hoc* committees must not be allowed to affect the impartiality and independence of arbitrators.

SUBSTANTIVE ISSUES

Article 10

The definition of investment is determined according to the applicable international instruments, in compliance with the rules of interpretation mentioned in Articles 1-2 and 4 above.

Given the fact that investment arbitration can be initiated by investors solely on the basis of a treaty, special weight must be given to the requirement that the investment contribute to the development of the host State, as may appear in the relevant instrument.

Article 11

Treaty clauses requiring compliance with non-treaty obligations of the State (“umbrella clauses”), frequently inserted in bilateral investment treaties, are to be interpreted taking into account the specific wording of the clause and the instrument in which they are included in order to determine whether a breach of an obligation amounts to a breach of the treaty.

Article 12

Most favoured nation treatment requires interpretation of the specific wording of the clause of the treaty in which it is inserted, in order to respect the intentions of the States parties. This is of particular significance when the MFN clause is claimed to encompass dispute settlement provisions.

Exceptions to MFN clauses are allowed for customs unions and other regional economic agreements.

MFN treatment required by an investment treaty which does not contain an umbrella clause does not apply to an umbrella clause included in a treaty concluded by the host State with a third country.

Article 13

Fair and equitable treatment, which is a key standard of investment protection, must accord investors and investments, in particular: (i) due process, (ii) non-discrimination and non-arbitrary treatment, (iii) due diligence, and (iv) respect of legitimate expectations.

The notion of legitimate expectations, as applied to the investor, shall not be construed to include mere expectations of profit, in the absence of specific engagements undertaken towards them by competent State organs.

Compensation due to an investor for violation of the FET standard shall be assessed without regard to compensation that could be allocated in case of an expropriation, in accordance with the damage suffered by the investor.

Article 14

Expropriation of foreign property, whether direct or indirect, including measures tantamount to an expropriation, is subject to the following rules. Foreign property cannot be expropriated except: (i) for public purposes, (ii) on a non-discriminatory basis, (iii) in accordance with due process of law, and (iv) against compensation.

Without prejudice to the particular provisions of the applicable treaty or of the specific agreement on which the investment is based, compensation must be: (i) prompt, (ii) adequate, and (iii) effective. As to the interpretation and application of the notion of “adequate” compensation, an appropriate balance must be assured between the interests of the investor and the public purposes of the State.

In principle, these rules are also applicable to nationalizations in the absence of specific agreed rules.

FIRST COMMISSION

**Universal Civil Jurisdiction with regard to Reparation
for International Crimes**

Rapporteur : M. Andreas Bucher

RESOLUTION

The Institute of International Law,

Conscious that appropriate and effective reparation has to be provided for the harm suffered by the victims of international crimes;

Considering that “international crimes” means serious crimes under international law such as genocide, torture and other crimes against humanity, and war crimes;

Recalling that universal criminal jurisdiction is a means of preventing the commission of such crimes and to avoid their impunity, as affirmed in the 2005 Krakow Resolution on “universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes”;

Noting that the prosecution of the authors of international crimes and their punishment provides only a partial satisfaction to the victims;

Considering that universal civil jurisdiction is a means of avoiding the deprivation of the victims of international crimes to obtain reparation of the harm suffered, in particular because the courts ordinarily having jurisdiction do not provide for an appropriate remedy;

Adopts the following Resolution:

Article I

1. Victims of international crimes have a right to appropriate and effective reparation from persons liable for the injury.
2. They have a right to an effective access to justice to claim reparation.
3. These rights do not depend on any criminal conviction of the author of the crime.

Article 2

1. A court should exercise jurisdiction over claims for reparation by victims provided that:
 - a) no other State has stronger connections with the claim, taking into account the connection with the victims and the defendants and the relevant facts and circumstances; or
 - b) even though one or more other States have such stronger connections, such victims do not have available remedies in the courts of any such other State.
2. For the purposes of paragraph 1(b), courts shall be considered to provide an available remedy if they have jurisdiction and if they are capable of dealing with the claim in compliance with the requirements of due process and of providing remedies that afford appropriate and effective redress.
3. The court where claims for relief by victims have been brought should decline to entertain the claims or suspend the proceedings, in view of the circumstances, when the victims' claims have also been brought before:
 - a) an international jurisdiction, such as the International Criminal Court;
 - b) an authority for conciliation or indemnification established under international law; or
 - c) the court of another State having stronger connections and available remedies within the meaning of the foregoing paragraphs.

Article 3

States should see that the legal and financial obstacles facing victims and their representatives are kept to a minimum in the course of procedures relating to claims for reparation.

Article 4

States should endeavour to develop procedures to allow groups of victims to present claims for reparation.

Article 5

The immunity of States should not deprive victims of their right to reparation.

Article 6

It is recommended that in the course of the preparation of an instrument on jurisdiction and enforcement of judgments in civil and commercial matters, in particular by the Hague Conference on Private International Law, the rights of victims as set out in these Articles be taken into account.

NINTH COMMISSION

**The Legal Regime of Wrecks of Warships and
Other State-owned Ships in International Law**

Rapporteur : M. Natalino Ronzitti

RESOLUTION

The Institute of International Law,

Emphasising the duty of co-operation for the preservation and protection of cultural heritage,

Conscious of the duty to protect and preserve the marine environment,

Guided by the rules of customary international law enshrined in the United Nations Convention on the Law of the Sea (1982),

Recalling the Convention on the Protection of Underwater Cultural Heritage (2001) as well as the Convention on the Means of Protecting and Preventing the Illicit Transfer of Ownership of Cultural Property (1970) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995),

Taking note of the Nairobi International Convention on the Removal of Wrecks (2007),

Taking also note of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004),

Bearing in mind the law of armed conflict at sea as well as the customary rules on the succession of States,

Being aware of the uncertainties that continue to surround the question of wrecks of warships and desiring to contribute to the clarification of international law concerning this matter,

Adopts the following Resolution:

Article 1
Definitions

For the purposes of this Resolution:

1. “Wreck” means a sunken State ship which is no longer operational, or any part thereof, including any sunken object that is or has been on board such ship.
2. “A sunken State ship” means a warship, naval auxiliary or other ship owned by a State and used at the time of sinking solely for governmental non-commercial purposes. It includes all or part of any cargo or other object connected with such a ship regardless of whether such cargo or object is owned by the State or privately. This definition does not include stranded ships, ships in the process of sinking, or oil platforms.

Article 2
Cultural heritage

1. A wreck of an archaeological and historical nature is part of cultural heritage when it has been submerged for at least 100 years.
2. All States are required to take the necessary measures to ensure the protection of wrecks which are part of cultural heritage.
3. Where appropriate, wrecks of the nature referred to in paragraph 1 should be preserved *in situ*.
4. Wrecks of the nature referred to in paragraph 1 not preserved *in situ* should be recovered in accordance with appropriate archaeological practices and properly displayed.
5. States shall take the measures necessary to prevent or control commercial exploitation or pillage of sunken State ships, which are part of cultural heritage, that are incompatible with the duties set out in this Article as well as in applicable treaties.

Article 3
Immunity of sunken State ships

Without prejudice to other provisions of this Resolution, sunken State ships are immune from the jurisdiction of any State other than the flag State.

Article 4
Sunken State ships as property of the flag State

Sunken State ships remain the property of the flag State, unless the flag State has clearly stated that it has abandoned the wreck or relinquished or transferred title to it.

Article 5
Status of the cargo

1. Cargo on board sunken State ships is immune from the jurisdiction of any State other than the flag State.
2. Cargo owned by the flag State remains the property of that State.
3. Cargo owned by other States remains the property of those States.
4. The sinking of a ship has no effect on property rights concerning cargo on board. However, cargo may not be disturbed or removed without the consent of the flag State.

Article 6
Armed conflict at sea

Wrecks of captured State ships are the property of the captor State if the capture occurred in accordance with the applicable rules of international law.

Article 7
**Sunken State ships in internal waters,
archipelagic waters and the territorial sea**

The coastal State, in the exercise of its sovereignty, has the exclusive right to regulate activities on wrecks in its internal waters, archipelagic waters, and territorial sea without prejudice to Article 3 of this Resolution.

Article 8
Sunken State ships in the contiguous zone

In accordance with Article 303 of the United Nations Convention on the Law of the Sea, the coastal State may regulate the removal of sunken State ships from its contiguous zone.

Article 9
**Sunken State ships in the exclusive economic zone
or on the continental shelf**

Any activity of the flag State on a sunken ship in the exclusive economic zone or on the continental shelf of a foreign State should be carried out with due regard to the sovereign rights and jurisdiction of the coastal State. In accordance with applicable treaties, the flag State should notify the coastal State of any activity on the wreck which it intends to carry out. The coastal State has the right to remove a wreck interfering with the exercise of its sovereign rights if the flag State does not take any action after having been requested to co-operate with the coastal State for the removal of the wreck.

Article 10

Sunken State ships in the Area

Without prejudice to Article 149 of the United Nations Convention on the Law of the Sea, wrecks of sunken State ships in the Area are under the exclusive jurisdiction of the flag State.

Article 11

Succession of States

The provisions of this Resolution are without prejudice to the principles and rules of international law regarding succession of States.

Article 12

War graves

Due respect shall be shown for the remains of any person in a sunken State ship. This obligation may be implemented through the establishment of the wreck as a war cemetery or other proper treatment of the remains of deceased persons and their burial when the wreck is recovered. States concerned should provide for the establishment of war cemeteries for wrecks.

Article 13

Salvage

The salvage of sunken State ships is subject to the applicable rules of international law, the provisions of this Resolution, and appropriate archaeological practices.

Article 14

Hazard to navigation and protection of the marine environment

1. Subject to Article 7 of this Resolution, the flag State shall remove wrecks constituting a hazard to navigation or a source of, or threat to, marine pollution.
2. The coastal State may take the measures necessary to eliminate or mitigate an imminent danger.

Article 15

Duty of co-operation

1. All States should co-operate to protect and preserve wrecks which are part of cultural heritage, to remove wrecks which are a hazard to navigation, and to ensure that wrecks do not cause or threaten pollution of the marine environment.
2. In particular, States bordering an enclosed or semi-enclosed sea should co-operate in the performance of their duties set out in this Resolution in a manner consistent with the rights and duties of other States.

FOURTEENTH COMMISSION

Succession of States in Matters of International Responsibility

Rapporteur : M. Kohen

RESOLUTION
(FINAL TEXT)

The Institute of International Law,

Noting that the work of codification and progressive development carried out in the field of succession of States has not covered matters relating to international responsibility of States, and that work in the latter field has set aside matters relating to succession of States,

Convinced of the need for the codification and progressive development of the rules relating to succession of States in matters of international responsibility of States, as a means to ensure greater legal security in international relations,

Bearing in mind that cases of succession of States should not constitute a reason for not implementing the consequences arising from an internationally wrongful act,

Taking into account that different categories of succession of States and their particular circumstances may lead to different solutions,

Considering that law and equity require the identification of the States or other subjects of international law to which, after the date of succession of States, pertain the rights and obligations arising from internationally wrongful acts committed by the predecessor State or injuring it,

Noting that the principles of free consent, good faith, equity and *pacta sunt servanda* are universally recognized,

Recalling the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force, and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Noting that respect for the territorial integrity and political independence of any State is required by the Charter of the United Nations,

Adopts the following Resolution:

CHAPTER I: GENERAL PROVISIONS

Article 1: Use of terms

For the purposes of this Resolution:

- a) “Succession of States” means the replacement of one State by another in the responsibility for the international relations of territory.
- b) “Predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States.
- c) “Successor State” means the State which has replaced another State on the occurrence of a succession of States.
- d) “Date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.
- e) “Newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.
- f) “Devolution agreement” means an agreement, concluded by the predecessor State and the successor State or a national liberation, insurrectional or other movement, or an entity or organ that later becomes the organ of the successor State, providing that rights and/or obligations of the predecessor State shall devolve upon the successor State.
- g) “Internationally wrongful act” means conduct consisting of an action or omission which:
(i) is attributable to the State or another subject under international law; and (ii) constitutes a breach of an international obligation of the State or the other subject. The characterization of an act as internationally wrongful is governed by international law.
- h) “international responsibility” refers to the legal consequences of an internationally wrongful act.

Article 2: Scope of the present Resolution

1. The present Resolution applies to the effects of a succession of States in respect of the rights and obligations arising out of an internationally wrongful act that the predecessor State committed against another State or another subject of international law prior to the date of

succession, or that a State or another subject of international law committed against the predecessor State prior to the date of succession.

2. The present Resolution applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

3. The present Articles do not govern the situations resulting from political changes within a State, including changes in the regime or name of the State.

CHAPTER II: COMMON RULES

Article 3: Subsidiary character of the guiding principles

The guiding principles mentioned below apply in the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the State or other subject of international law injured by the internationally wrongful act.

Article 4: Invocation of responsibility for an internationally wrongful act committed by the predecessor State before the date of succession of States

1. International responsibility arising from an internationally wrongful act committed before the date of succession of States by a predecessor State falls on this State.

2. If the predecessor State continues to exist, the injured State or subject of international law may, even after the date of succession, invoke the international responsibility of the predecessor State for an internationally wrongful act committed by that State before the date of succession of States and request from it reparation for the injury caused by that internationally wrongful act.

3. In conformity with the following Articles, the injured State or subject of international law may also or solely request reparation from a successor State for the injury caused by an internationally wrongful act of the predecessor State.

Article 5: Invocation of responsibility for an internationally wrongful act committed against the predecessor State before the date of succession of States

1. The predecessor State which after the date of succession of States continues to exist may invoke the international responsibility of another State or subject of international law for an internationally wrongful act committed against it before that date by that State or subject and may request reparation for the injury caused by this act.

2. If the injury caused by an internationally wrongful act committed before the date of succession of States against a predecessor State affected the territory or persons which, after this date, are under the jurisdiction of a successor State, the successor State may request reparation for the injury caused by such act, as provided in the following Articles, unless reparation was already obtained in full before the date of succession of States.

Article 6: Devolution agreements and unilateral acts

1. Devolution agreements concluded before the date of succession of States between the predecessor State and an entity or national liberation movement representing a people entitled to self-determination, as well as agreements concluded by the States concerned after the date of succession of States, are subject to the rules relating to the consent of the parties and to the validity of treaties, as reflected in the Vienna Convention on the Law of Treaties. The same principle applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.
2. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement, providing that such obligations shall devolve upon the successor State.
3. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it.
4. Where the injured State or subject of international law does not accept the solution envisaged by the devolution agreement or unilateral act, good faith negotiations must be pursued by the States or subjects concerned. If these negotiations do not succeed within a reasonable period of time, the solution envisaged by the relevant Article of Chapter III of the present Resolution is applicable.

Article 7: Plurality of successor States

1. In case of succession in which it is not possible to determine a single successor State, all the successor States will enjoy the rights or assume the obligations arising from the commission of an internationally wrongful act in an equitable manner, unless otherwise agreed by the States or subjects of international law concerned.
2. In order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.
3. Negotiations in good faith must be pursued by the successor States, with the goal of reaching a solution within a reasonable time.

Article 8: States or subjects of international law concerned

For the purposes of Articles 6 and 7, “States or subjects of international law concerned” are:

- a) in the case of an internationally wrongful act committed by the predecessor State, the injured State or subject of international law and all the successor States;
- b) in the case of an internationally wrongful act committed against the predecessor State, all the successor States.

Article 9: Internationally wrongful acts having a continuing or composite character performed or completed after the date of succession of States

1. When a successor State continues the breach of an international obligation constituted by an act of the predecessor State having a continuing character, the international responsibility of the successor State for the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.
2. When a successor State completes a series of actions or omissions initiated by the predecessor State defined in the aggregate as a breach of an international obligation, the international responsibility of the successor State for the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.
3. The provisions of the present Article are without prejudice to any responsibility incurred by the predecessor State if it continues to exist.

Article 10: Diplomatic protection

1. A successor State may exercise diplomatic protection in respect of a person or a corporation that is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of the predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.
2. A claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession of States by the successor State under the same conditions set out in paragraph 1 of this Article.
3. A claim in exercise of diplomatic protection initiated by a State against the predecessor State may be continued against the successor State if the predecessor State has ceased to exist. In the case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. When it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 7 apply *mutatis mutandis*.
4. Where the predecessor State continues to exist and the individual or corporation possesses the nationality of both the predecessor and the successor States, or the nationality of a third State, the question is governed by the rules of diplomatic protection concerning dual or multiple nationality.

CHAPTER III: PROVISIONS CONCERNING SPECIFIC CATEGORIES
OF SUCCESSION OF STATES

Article 11: Transfer of part of the territory of a State

1. With the exception of the situations referred to in the following paragraphs, the rights and obligations arising from an internationally wrongful act in relation to which the predecessor State has been either the author or the injured State do not pass to the successor State when part of the territory of the predecessor State, or any territory for the international relations of which this State is responsible, becomes part of the territory of the successor State.
2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State if there exists a direct link between the consequences of this act and the territory transferred and/or its population.
3. If particular circumstances so require, the obligations arising from an internationally wrongful act pass to the successor State when the author of this act was an organ of the territorial unit of the predecessor State that has later become an organ of the successor State.

Article 12: Separation of parts of a State

1. With the exception of the situations referred to in paragraphs 2 to 4 of the present Article, the rights and obligations arising from an internationally wrongful act in relation to which the predecessor State has been either the author or the injured State do not pass to the successor State or States when a part or parts of the territory of a State separate to form one or more States and the predecessor State continues to exist.
2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State or States if there exists a direct link between the consequences of this act and the territory or the population of the successor State or States.
3. If particular circumstances so require, the obligations arising from the commission of an internationally wrongful act by the predecessor State pass to the successor State when the author of that act was an organ of a territorial unit of the predecessor State that has later become an organ of the successor State.
4. If particular circumstances indicated in paragraphs 2 and 3 of this Article so require, the obligations arising from an internationally wrongful act committed before the date of succession of States are assumed by the predecessor and the successor State or States.
5. In order to determine an equitable apportionment of the rights or obligations of the predecessor and the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession of States, the need to avoid unjust enrichment and any other circumstance relevant to the case. The provisions of Article 7 apply *mutatis mutandis*.

6. The internationally wrongful act of an insurrectional or other movement which succeeds in establishing a new State on part of the territory of the predecessor State or in a territory under the administration of this latter State shall be considered an act of the new State under international law. Consequently, the predecessor State incurs no responsibility for the acts committed by the insurrectional or other movement.

Article 13: Merger of States

When two or more States unite and form a new successor State, and no predecessor State continues to exist, the rights or obligations arising from an internationally wrongful act of which a predecessor State has been either the author or the injured State pass to the successor State.

Article 14: Incorporation of a State into another existing State

When a State is incorporated into another existing State and ceases to exist, the rights or obligations arising from an internationally wrongful act of which the predecessor State has been the author or the injured State pass to the successor State.

Article 15: Dissolution of a State

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the rights or obligations arising from an internationally wrongful act in relation to which the predecessor State has been the author or the injured State pass, bearing in mind the duty to negotiate and according to the circumstances referred to in paragraphs 2 and 3 of the present Article, to one, several or all the successor States.

2. In order to determine which of the successor States becomes bearer of the rights described in the preceding paragraph, a relevant factor will in particular be the existence of a direct link between the consequences of the internationally wrongful act committed against the predecessor State and the territory or the population of the successor State or States.

3. In order to determine which of the successor States becomes bearer of the obligations described in paragraph 1, a relevant factor will in particular be, in addition to that mentioned in paragraph 2, the fact that the author of the internationally wrongful act was an organ of the predecessor State that later became an organ of the successor State.

Article 16: Newly independent States

1. When the successor State is a newly independent State, the obligations arising from an internationally wrongful act committed by the predecessor State shall not pass to the successor State.

2. When the successor State is a newly independent State, the rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State if that act has a direct link with the territory or the population of the newly independent State.

3. The conduct, prior to the date of succession of States, of a national liberation movement which succeeds in establishing a newly independent State shall be considered the act of the new State under international law.

4. The rights arising from an internationally wrongful act committed before the date of the succession of States by the predecessor State or any other State against a people entitled to self-determination shall pass after that date to the newly independent State created by that people.
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SESSION DE HYDERABAD – 2017

FINAL
3rd Commission
8 September 2017

THIRD COMMISSION

Provisional measures

Rapporteur : Lord Collins of Mapesbury

FINAL RESOLUTION

The Institute of International Law,

Considering that a broad comparison of the law and practice of international and national courts and tribunals indicates that the availability of provisional and protective measures (“provisional measures”) is a consistent element of that law and practice,

Considering that the law and practice of national courts are sufficiently uniform so as to give rise to general principles of law within the meaning of Article 38, paragraph (1), letter (c), of the Statute of the International Court of Justice,

Considering that the adoption of principles relating to the grant of provisional measures would contribute to the development of international law and national law,

Adopts the following guiding principles:

1. It is a general principle of law that international and national courts and tribunals may grant interim relief to maintain the *status quo* pending determination of disputes or to preserve the ability to grant final effective relief.¹

¹ There may be independent purposes of provisional measures that are expressly provided for in relevant instruments, such as the prevention of serious harm to the marine environment under Article 290, paragraph (1), of the United Nations Convention on the Law of the Sea or the prevention of damage to fish stocks under Article 31, paragraph (2), of the Agreement on Implementation of the Law of the Sea Convention with respect to straddling and highly migratory fish stocks, adopted on 4 August 1995.

2. Provisional measures are available if the applicant for such measures can show that: (a) there is a *prima facie* case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the risk of injury to the applicant outweighs the risk of injury to the respondent; and (d) the measures are proportionate to the risks.
3. In cases of special urgency an order may be made without hearing the respondent (*ex parte*), but the respondent is entitled to be notified promptly and to object to the order.
4. International courts and tribunals may make orders aimed at preventing the aggravation of the dispute.
5. In national legal systems an applicant for provisional measures is in principle liable to compensate the party against whom the measures are ordered if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court may order an undertaking or bond or other security to secure the respondent's right to compensation if it is ultimately decided that the order should not have been made.
6. An order for provisional measures made by an international or national court or tribunal is binding. It is subject to modification or discharge by the court or tribunal which made it.
7. An international or national court or tribunal may make such orders if it has *prima facie* jurisdiction over the merits.
8. A national court may make orders for provisional measures in relation to assets or acts within its territory even if a court in another country has jurisdiction over the merits. Such provisional measures may be ordered provided that they do not infringe upon the exclusive jurisdiction of foreign courts.
9. Where provisional measures are ordered by a national court with jurisdiction over the merits and the party to whom the order is addressed has been given notice of the order prior to enforcement, courts of other States should recognize such order and where possible lend their cooperation to enforce it.
10. In commercial arbitration proceedings, an application may be made to the courts of the State of the seat of the tribunal or the court of any other State in support of the effectiveness of provisional measures ordered in such proceedings.
11. These guiding principles are subject to particular provisions contained in the constituent instruments of international courts and tribunals, or in national law, as the case may be.

SESSION DE HYDERABAD – 2017

FINAL
12th Commission
9 September 2017

TWELFTH COMMISSION

Judicial Review of Security Council Decisions

Rapporteur: M. Rüdiger Wolfrum

Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions

FINAL RESOLUTION

The Institute of International Law,

Considering that according to Article 24, paragraph 2, of the Charter of the United Nations the Security Council shall “act in accordance with the Purposes and Principles of the United Nations” and that “the specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII”,

Considering the Declaration of the high-level meeting of the United Nations General Assembly on the rule of law at the national and international levels (A/RES/67/1* of 24 September 2012), paragraph 2 of which states that “the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities” and paragraph 29 of which emphasises that “we encourage the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are maintained and further developed”,

Recalling Security Council Resolution 2178 (2014) which reaffirms that Member States must ensure that “any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law”,

Bearing in mind that in general the rule of law includes a principle according to which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated,¹

Noting that already at its Amsterdam Session (1957), the Institute adopted a Resolution entitled “Judicial Redress Against the Decisions of International Organs” (*Annuaire*, Vol. 47-I), emphasising that “every international organization has the duty to respect the law and to ensure that the law be respected by its agents and officials [and] that the same duty is incumbent on States as members of such organs or organizations”,

Guided by the objective that the Institute should promote the rule of law as a leading principle for States and international organisations, including the United Nations and its main organs,

Recognising that the realisation of the rule of law, including the protection of human rights, is itself dependent on the maintenance of international peace and security,

Noting also that in several cases, judgments of national as well as regional courts having declared that national or European Union measures implementing targeted sanctions against individuals or entities have violated human rights, including the right to a fair trial, of those who have been targeted,

Noting, finally, that in the adoption of measures implementing targeted sanctions care has to be taken of the protection of the fundamental rights and freedoms, those being internationally shared values, of the persons concerned,

Adopts the following guiding principles:

CHAPTER I

GENERAL PROVISIONS

Article 1

Use of terms

For the purposes of this Resolution:

- (a) “Review” means an *ex post* examination of a decision or an act with a view to establishing whether this decision or act is in conformity with applicable law.

Review may take various forms. It may be judicial, administrative or internal, and may be direct or indirect.

¹ See the Annual Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616*), paragraph 6.

- (b) “Security Council decisions” means those pronouncements of the Council itself or of its subsidiary bodies, such as sanctions committees, which are binding upon Member States, non-Member States and other entities or individuals as the case may be, and which are to be implemented.
- (c) “Targeted sanctions” means those decisions adopted by the Security Council, sanctions committees, or any other subsidiary organ which oblige States to take such measures as provided for in the Security Council resolution concerned against individuals or private entities listed by the relevant sanctions committee.
- (d) “Implementation measures” means measures taken by States or regional organisations to implement the sanctions as prescribed by the relevant Security Council decisions.

Article 2
Scope

This Resolution is concerned with the review of measures implementing decisions of the Security Council in the field of targeted sanctions taken by States or regional organisations.

Article 3
Legal framework for Security Council decisions

1. The Security Council shall act in conformity with the Charter of the United Nations including provisions protecting human rights.
2. Considering that it is first and foremost for the Security Council to establish a procedure for listing and delisting which meets the standards of the Charter of the United Nations, including provisions protecting human rights, the Security Council should develop further procedures with a view to ensuring better protection of the rights of targeted individuals or entities.

Article 4
Review of Security Council decisions

1. The Charter of the United Nations does not provide for review of decisions of the Security Council by national or regional courts.
2. However, measures implementing targeted sanctions may be reviewed by national or regional courts. In the course of such review, those courts may interpret Security Council decisions.

CHAPTER II
MEASURES IMPLEMENTING TARGETED SANCTIONS OF THE SECURITY COUNCIL

Article 5

Decision of sanctions committees to list and delist

1. Sanctions committees shall fully respect the Charter of the United Nations including the provisions protecting human rights.
2. The decision of a sanctions committee to list or not to delist an individual or a private entity may not be reviewed directly by regional or national courts.
3. The bar to reviewing decisions of a sanctions committee as referred to in paragraph 2 does not preclude a review of implementation measures taken by States or regional organisations with a view to implementing such decisions.

CHAPTER III
LISTING AND DELISTING

Article 6

Improvement of listing and delisting procedures

Improvements in the listing or delisting procedure by the Security Council would be consistent with general principles of law and could, moreover, reduce the necessity felt by targeted individuals or entities to have recourse to national or regional courts.

Article 7

Ombudsperson procedure

1. The procedure, in particular the Ombudsperson procedure, established for delisting constitutes a valuable procedural innovation which provides, as far as delisting is concerned, a possible remedy for petitioners. It is primarily designed as a mechanism to assist sanctions committees in their decisions on delisting rather than to review the original decision on listing.
2. This procedure applies only to certain sanctions regimes but not to others which likewise target individuals and private entities with similar possible consequences for the enjoyment of human rights.
3. Accordingly, it is recommended that the Ombudsperson procedure be applied to all such regimes, present and future, when providing for the prescription of targeted sanctions, and that its procedure be rendered more transparent.
4. It is further recommended that the Office of the Ombudsperson be established as an independent, properly resourced institution.

Article 8

Further improvement of listing and delisting procedures

In accordance with Article 3, the Security Council should improve listing and delisting procedures. Such improvements may include for example:

- (a) strengthening of the internal review procedure by the Security Council;
- (b) establishment of a periodic review as to whether the conditions of the targeted sanctions on a particular individual or entity are still met;
- (c) leaving the implementing States or regional organisations some discretionary power concerning the implementation of the measures requested, by taking into consideration the circumstances of a particular case; and
- (d) improving the listing process involving the State of nationality and the State of residence in the process of a listing initiative by a third State.

**CHAPTER IV
REVIEW**

Article 9

Identifying individuals or entities for listing and delisting

1. Taking into account that the identification of individuals and entities for listing originates with the States taking such initiative, it will be noted that:

- (a) such process possibly leading to a listing should be transparent for the targeted individual or entity;
- (b) considering the possible human rights consequences of listing, such process shall respect international, regional and national human rights standards; and
- (c) the individual or entity should be provided with an opportunity to have the national or regional decision on their listing judicially reviewed according to the relevant national legal system.

2. These principles shall guide the authorities of the designating State, of the State of nationality or of the State of residence, as the case may be, if they are considering initiating or supporting the delisting of the individual or entity concerned.

3. The national authorities as well as the entities engaged in this process of listing and delisting shall take into account the object and purpose of targeted sanctions.

Article 10

Implementing targeted sanctions

1. In implementing targeted sanctions, States or regional organisations shall act in the fulfilment of their obligations under the Charter of the United Nations in respect of decisions of the Security Council.
2. This does not exclude that implementation measures undertaken by States or regional organisations may be reviewed as set forth in Article 4.

Article 11

Review by regional or national courts

1. Any judicial review of measures implementing targeted sanctions shall take into account the object and purpose of such sanctions. In this context, particular attention shall be paid to Article 103 of the Charter of the United Nations.
 2. Account should also be taken by any regional or national judicial review as to whether the petitioner has applied for delisting under the relevant delisting procedure. In particular, any recommendation of the Ombudsperson should be taken into consideration.
 3. Review of measures implementing Security Council decisions shall be consistent with all relevant provisions of the Charter of the United Nations, including in particular Articles 24, 25 and 103.
 4. In reviewing implementation measures and declaring them not to be in conformity with relevant human rights standards, the regional or national courts should take into account that their decision does not exempt the implementing State or regional organisation from its duty to meet its international obligations under the Charter of the United Nations. Such obligations remain valid.
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SESSION DE HYDERABAD – 2017

FINAL
16th Commission
9 September 2017

SIXTEENTH COMMISSION

Mass Migrations

Rapporteur : M. Maurice Kamto

FINAL RESOLUTION

The Institute of International Law,

Considering that international mass migration is one of the most striking phenomena of the contemporary world which profoundly affects individuals, peoples and States,

Recognising that migrants generally make a positive contribution to inclusive economic and social progress and sustainable development, but that forced displacements and irregular migratory flows often raise complex problems,

Recalling the principles proclaimed by the Charter of the United Nations and various instruments for the protection of human rights, of international humanitarian law and of refugee law which recognise the inherent dignity of the human person and the equal and inalienable rights of all members of the human family,

Recognising the legitimate right of States to control their borders and to exercise their sovereignty over entry and residence on their territory,

Recognising also that the situation of mass migrants requires special attention on the part of States and the international community in accordance with elementary considerations of humanity,

Recalling in this regard, in particular, the principles relating to the protection of the human person set out in the instruments concerning the fate of refugees and migrant workers and members of their families,

Considering the importance of solidarity among States and of international cooperation among the various actors involved in managing mass flows of migrants,

Considering further the need to take account of the capacity of each State to cope with a situation of mass migration,

Considering that, to the extent possible, States of origin must redress situations which generate mass migration,

Convinced of the need and usefulness of drawing up basic rules and proposals of international law relating to mass migration,

Considering in this regard the previous works of the *Institut* on various aspects of internal displacement of persons, in particular its Resolutions of Geneva (1892), Copenhagen (1897) and Bath (1950),

Recognising the importance of the endeavours undertaken during the past decades in certain regions of the world to broaden the protection of vulnerable or defenceless persons so as to encompass all those affected by mass migration,

Considering also Resolution A/RES/71/1, adopted by the United Nations General Assembly on 19 September 2016, on the New York Declaration for Refugees and Migrants,

Convinced of the need to strengthen the treaty framework governing mass migration,

Adopts the following Resolution:

PART ONE
SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1
Purpose

The purpose of this Resolution is to recall and contribute to the development of rules applicable to international mass migration.

Article 2
Scope of the present Resolution

This Resolution applies to migration and to mass migrants, whether they are entitled to refugee status or not, from the departure of the State of origin to entry into the host State.¹

Article 3
Definitions

For the purposes of the present draft Resolution, the following definitions shall apply:

- (a) “Mass migrants”, persons who collectively, in large number, leave their country for refuge or settlement in another country.

¹ In the present Resolution, the term “State” also refers, depending on the circumstances, to regional organisations to which their member States have transferred competence over migration matters.

- (b) “Transit State”, the State through which migrants pass or intend to pass, with no intention of finding refuge or settlement there, to get to a State of destination or reception.
- (c) “State of destination”, the State to which mass migrants intend to travel as final destination for their refugee claim or settlement, but of which they have not yet crossed the border.
- (d) “Host State”, the State where mass migrants have effectively found refuge or where they are present.
- (e) “State of origin”, the State of which the migrant is a national or in which that person has their habitual residence.

PART TWO

FREEDOM OF MOVEMENT OF MASS MIGRANTS

Article 4

Right to leave a country

Mass migrants have the right to leave any country, including their own, subject to restrictions imposed by law, necessary for national security, public order, public health or morals, or the rights and freedoms of others, and in accordance with the other rights recognised by the International Covenant on Civil and Political Rights.

Article 5

Right to return to one's own country

Mass migrants may not be arbitrarily deprived of the right to return to their country. The State of origin shall accept the return of migrants who are its nationals, or who have the right of permanent residence in its territory at the time of their removal.

PART THREE

OBLIGATIONS OF STATES

Article 6

Non-refoulement

1. Every State is bound by the obligation of non-refoulement. This obligation applies only to refugees, excluding economic mass migrants.
2. However, the benefit of the principle of non-refoulement may not be invoked by a refugee if there are reasonable grounds for regarding that person as a danger to the security of the country in which that person is, or if, having been convicted by a final judgment of a particularly serious crime or offence, that person constitutes a danger to the community of that country.
3. The principle of non-refoulement also applies to a vessel on the high seas.

Article 7

Duty to provide assistance

The transit State, the State of destination and the host State are duty-bound to assist mass migrants on the basis of elementary humanitarian considerations.

Article 8

Passage of mass migrants through the transit State

Without prejudice to the provisions of Article 4, the transit State should ensure the passage of mass migrants through the transit State. It may ensure the organisation of their transit, where appropriate in cooperation with the United Nations High Commissioner for Refugees, relief organisations and the State of destination.

Article 9

Non-discrimination

1. Mass migrants must be treated without discrimination, in accordance with international law.
2. Notwithstanding the provisions of paragraph 1, distinctions may be made between migrants on the basis of existing State legislation on entry and residence, provided that they pursue a legitimate and reasonable aim and are based on objective considerations.

Article 10

Conditions for removal of a refugee

1. A refugee shall not be removed by the host State, unless that State has reasonable grounds for regarding that person as a danger to its security, or if that person has been convicted by a final judgment of a particularly serious crime or offence and constitutes a danger to the community of that State.
2. The removal of the refugee in question is merely an option at the discretion of the host State, which is free to choose other less stringent options.

Article 11

Prohibition of collective removal of migrants

1. Collective removal of mass migrants is prohibited.
2. Collective removal means any measure by which the host State compels mass migrants as a group, not admitted to refugee status or asylum, to return to their country of origin or provenance, without an assessment of the particular situation of each of them.

PART FOUR
ASSISTANCE TO MASS MIGRANTS AT SEA

Article 12
Duty to render assistance at sea

1. States shall cooperate with each other to render assistance to mass migrants in danger or distress at sea.
2. Every State shall require ships flying its flag to render assistance to mass migrants in danger or distress at sea.
3. Every coastal State shall render assistance to mass migrants in danger or distress in maritime areas subject to its sovereignty.
4. States shall endeavour to render assistance to mass migrants in danger or distress in waters beyond their territorial seas.
5. This Article shall be applied in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea.
6. This Article is without prejudice to the provisions of Article 4.

PART FIVE
HUMAN RIGHTS OF MASS MIGRANTS

Article 13
Respect for human dignity and the principle of humanity

1. In managing the situation resulting from mass migration, States must respect and ensure respect for the human dignity of migrants. They must act in accordance with the principles of humanity, human rights law, refugee law and international humanitarian law.
2. To this end, the host State must determine the status of the migrants as expeditiously as possible. Pending determination of that status, the host State must provide access to education and training to mass migrants.

Article 14
Protection of life and prohibition of torture and inhuman or degrading treatment

Mass migrants may not be returned to a State where they are at risk of being subjected to torture or inhumane and degrading treatments, or to a State in which their lives are threatened by reason of, inter alia, their race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other reason not permitted under international law.

Article 15

Special situation of women, children and other vulnerable persons

1. In managing the situation resulting from mass migration, States must take into account the special situation of women, children and other vulnerable persons, in accordance with international law.
2. States that have not yet become Parties to the international conventions protecting these persons are encouraged to do so.

PART SIX

BURDEN-SHARING IN THE MANAGEMENT OF MASS MIGRATION

Article 16

Sharing the burden of receiving mass migrants with "safe countries"

1. In order to alleviate the burden of receiving mass migrants, a State may direct part of them to one or more "safe countries" which agree to accept them, in the framework of bilateral or multilateral arrangements.
2. In this respect, the concept of a "safe country" must be defined according to precise criteria agreed upon by States. The determination of a State as a "safe country" should be entrusted to an *ad hoc* international body which could be composed of representatives of main international bodies charged with matters of human rights, refugees, international migration and humanitarian affairs.

Article 17

Solidarity and common and shared responsibility

1. The management of mass migration requires solidarity of all States, taking into account their geographical situation, capacities and resources.
2. In particular, it entails the responsibility of States and/or international organisations which are at the origin of, or involved in, the situation that generates mass migration. The contribution of these States and/or organisations to the management of this situation must depend on the level of their involvement in its occurrence.

Article 18

Particular assistance to the host State

In view of the special efforts of the host State in the management of mass migration, it is entitled to adequate assistance from the international community with regard to the burden it bears in the interest of mankind. Such assistance must take particular account of the situation in which a mass influx of migrants is likely to constitute a threat to the stability of the host State through the disorganisation of its social institutions and structures.

Article 19

Responsibility for internationally wrongful acts

If the cause of mass migration is unlawful, the responsible State and/or international organisation are subject to the regime of international responsibility for internationally wrongful acts.

PART SEVEN

**COOPERATION BETWEEN STATES AND WITH RELIEF AND
REFUGEE ASSISTANCE BODIES**

Article 20

Coordination and cooperation

In the management of the situation resulting from mass migration, States shall cooperate and coordinate their actions among themselves and with international organisations and competent non-governmental organisations.

Article 21

Readmission agreements

States are encouraged to conclude agreements for the readmission of mass migrants who are not admitted to the host State in order to ensure an organised return of these mass migrants, respecting their human dignity and their rights.

PART EIGHT

**STRENGTHENING THE CONVENTIONAL FRAMEWORK
GOVERNING MASS MIGRATION**

Article 22

Conclusion of a legal framework instrument on mass migration

States are encouraged to negotiate a basic legal instrument, of a universal character, governing direct cooperation between States of origin and host States of mass migration flows, including temporary migratory flows.
