CODIFICATION TREATIES AND PROVISIONS ON RECIPROCITY, NON-DISCRIMINATION OR RETALIATION

Should treaties which are drafted to codify and develop existing international law contain provisions permitting one party, in the name of reciprocity, to discriminate or retaliate against another party in applying the provisions of the treaty? Where most of the highly variegated states of the world have agreed on treaty provisions setting forth their reciprocal rights and obligations, it might be assumed that reciprocity has been built into the treaty and that its provisions are intended to be applied without discrimination. Should a violation of the treaty occur, principles of international law outside the treaty can be invoked in certain circumstances to justify retaliatory steps, although resort to more pacific methods of settling the dispute is usually possible. A distinction must be made, however, between methods of redress for violation of the treaty and the insertion in the treaty itself of a unilateral right to vary its application on the basis of a subjective determination that it is not being reciprocally applied by another party. Such a treaty provision appears to enshrine reciprocity in place of law, to provide that the agreed rules of international law carefully defined in the treaty are legally binding only so long as states do not exercise their ill-defined treaty right to vary their application on the basis of unilateral determinations.

These reflections are suggested by the provisions of Article 47 of the Vienna Convention on Diplomatic Relations of April 18, 1961,[1] and by the modified version set forth in Article 70 of the International Law Commission's draft on Consular Intercourse and Immunities, adopted by the Commission at its Thirteenth Session in 1961.[2] By Resolution 1685 (XVI), December 18, 1961, the United Nations General Assembly has decided to convoke an international conference of plenipotentiaries at Vienna in March, 1963, to draft an international convention on consular relations, taking the Commission's 1961 draft as the basis for its work. Questions as to the desirability of including provisions on reciprocity, non-discrimination or retaliation in a codification treaty are quite likely to be raised again at that conference and it may be useful to outline here some previous discussions of the issues.

Article 47 of the Vienna Convention on Diplomatic Relations of April 18, 1961, reads as follows:

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

[1] U.N. Doc. A/CONF. 20/13, April 16, 1961; 55 A.J.I.L. 1076 (1961). *Cf.* Ernest L. Kerley, "Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities," 56 A.J.I.L. 88–129 (1962). Although Kerley does not discuss the drafting of Art. 47, he makes reference to problems of non-discrimination and reciprocity on pp. 98–99.

[2] Report of the International Law Commission covering the Work of Its Thirteenth Session, 1961, U.N. Gen. Assembly, 16th Sess., Official Records, Supp. No. 9 (A/4843), p. 39; 56 A.J.I.L. 353 (1962).

2. However, discrimination shall not be regarded as taking place:
(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

This text closely follows Article 44 of the final draft of the International Law Commission on Diplomatic Intercourse and Immunities as adopted at its 10th Session in 1958.[3] Neither the Commission's provisional draft of 1957[4] nor the Special Rapporteur's draft of 1955[5] contained such an article. The reasons for this omission are not stated in the record, but may perhaps be due to the assumption that the traditional pattern of observance of the customary international law governing diplomatic privileges and immunities has developed largely because of the reciprocal nature of the institution. As Mr. Jaroslav Zourek later observed before the Commission:

> Diplomatic relations were of course based on reciprocity of treatment, but the Commission was preparing a draft convention, and by virtue of that convention reciprocity would be largely assured by the application of the rules of the convention. It would always be open to States which held that the terms of the convention were not being correctly applied to resort to the machinery of peaceful settlement provided for in the treaties to which they were parties.[6]

The issue was nevertheless raised before the International Law Commission because of the comments of certain governments on the Commission's provisional draft of 1957. In its observations, dated March 26, 1958, on the 1957 draft, the Netherlands Government suggested the insertion of "a general provision embodying the principle of reciprocity without, however, making the observance of a strict reciprocity a condition for diplomatic intercourse." It also took "the view that the articles of the Commission's draft do not interfere with the possibility of taking reprisals in virtue of the relevant rules of general international law,"

[3] 1958 I.L.C. Yearbook (II) 105 (Report of the Commission); 53 A.J.I.L. 289 (1959). Art. 44 of that draft reads as follows:

"NON-DISCRIMINATION

Article 44

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

"2. However, discrimination shall not be regarded as taking place:
(a) Where the receiving State applies one of the present rules restrictively because of a restrictive application of that rule to its mission in the sending State;
(b) Where the action of the receiving State consists in the grant, on the basis of reciprocity, of greater privileges and immunities than are required by the present rules."

[4] 1957 I.L.C. Yearbook (II) 133 ff. (Report of the Commission); 52 A.J.I.L. 180 ff. (1958).

[5] 1955 I.L.C. Yearbook (II) 9 ff. (Doc. A/CN.4/91, April 21, 1955, Report of A.E.F. Sandström).

[6] 1958 *ibid.* (I) 196 (467th Meeting).

but did not request the inclusion of any provision on that point. As for non-discrimination, the Netherlands Government believed that references to it in some articles might create the impression that it applied only to them, whereas "the principle of non-discrimination is a general principle on which the application of all the draft articles should be based."[7]

For other reasons, the United States Government, in its comments of February 24, 1958, objected to the provision for non-discrimination found in paragraph 2 of Article 7 of the Commission's 1957 draft, which provided that in certain circumstances a receiving state may "on a non-discriminatory basis, refuse to accept [diplomatic] officials of a particular category." This provision, observed the United States comment, "not only fails to mention the principle of reciprocity, but apparently contemplates that the receiving State must treat all foreign missions alike, without regard to how the sending State treats representatives of the receiving State."[8] The United States also objected to the requirement of non-discrimination implicit in Article 20 of the Commission's 1957 draft, which provided:

> Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

This article, commented the United States, appeared to sanction present restrictive practices of certain governments. Moreover:

> The latter part of the article would require that travel controls be applied without discrimination to diplomatic representatives of all States, including those which do not restrict the movements of representatives of the receiving State. The principle of reciprocity, however, is an integral factor in matters of this nature. It is believed that it would be preferable to have no article on the subject, rather than one so subject to arbitrary abuse.[9]

The International Law Commission gave consideration to these comments at its 453rd and 467th meetings on May 30 and June 19, 1958. Mr. Sandström, Special Rapporteur, suggested the drafting of "a special article enunciating the principles both of non-discrimination and of reciprocity," but the Commission voted, 12 to 1, "that the principle of non-discrimination be enunciated in a substantive article."[10] Mr. Sandström nevertheless drafted articles on both principles, the one intended to deal with reciprocity reading as follows:

> If a State applies restrictively a rule of this draft which is capable of being applied liberally or restrictively, then the other States shall not be bound, *vis-à-vis* that State, to apply it liberally.[11]

In the discussion which followed, Mr. Kisaburo Yokota observed with reference to the United States position that a state should be permitted to discriminate against another in the name of reciprocity:

[7] *Ibid.* (II) 124 (Annex to the 1958 Report of the Commission).
[8] *Ibid.* 134.
[9] *Ibid.* 136.
[10] *Ibid.* (I) 112 (453rd Meeting, May 30, 1958).
[11] *Ibid.* 194.

> The principle of reciprocity could not, however, apply in that case. The duty of non-discrimination was not optional but obligatory . . . it was not the principle of reciprocity which was involved but the right of reprisal.[12]

The choice confronting the drafters, as Mr. Grigory Tunkin had observed, was whether to enunciate the principle of non-discrimination or to enunciate the principle of reciprocity: enunciation of the latter in the draft "would lead in practice to discrimination as between missions accredited to the same State."[13] Reciprocity, said Mr. Zourek, was largely assumed in the draft as a whole; but some articles, like Article 7, which permitted the receiving state to limit the size of a mission, were based not on reciprocity but on particular circumstances in the receiving state and the particular needs of the sending state.[14] If a state voluntarily accorded to a particular foreign mission treatment more favorable than was required by the convention, it could ask for, but had no right to insist upon, reciprocal treatment.[15] Nevertheless, the Commission agreed that if two states, on a reciprocal basis, accorded each other's missions such favorable treatment, this should not be deemed to be discriminatory against other parties to the convention.[16]

If, on the other hand, a state accorded treatment falling short of the requirements of the convention, this was a violation of international law, and no principle of reciprocity entitled the injured state to commit a similar violation. If a right of reprisal or retaliation existed, it was not the principle of reciprocity which established it and governed its employment.[17] What seemed desirable, therefore, was to enunciate the principle of non-discrimination in the convention and omit references to reciprocity or retaliation.

However, the Commission attempted in Article 44 to deal in part with all three principles and produced, in Article 44, a hybrid of some ambiguity. After setting forth the rule of non-discrimination in paragraph 1, the article provides, in effect, in paragraph 2(a) that discrimination shall not be regarded as discrimination if justified as an act of retaliation which falls short of a violation of the convention; and in paragraph 2(b) that, in a case not falling within the scope of the convention (*i.e.*, where two states, on the basis of reciprocity, accord treatment more favorable than is required by the convention), the non-discrimination rule of the convention does not apply!

The Commentary on Article 44 is likewise ambiguous in implying that "no discrimination occurs" when discrimination is "justified by the rule of reciprocity"; in assuming that the application of a rule within "the strict terms of the rule" can properly be regarded as a "restrictive" application; and in the assumption with reference to paragraph 2(b)

[12] *Ibid. Cf.* similar view of Mr. Radhabinod Pal, *ibid.* 195.
[13] *Ibid.* 112.
[14] *Ibid.* 196.
[15] *Cf.* views of Mr. Yuen-li Liang, Secretary of the Commission, *ibid.* 197.
[16] Art. 44, par. 2(b).
[17] *Cf.* views of Mr. Liang and Mr. Tunkin, *loc. cit.* 197.

that it was necessary to state that the convention does not apply to acts which, by hypothesis, do not come within the scope of the convention.[18]

In the replies received from various governments only the United States Government expressed approval of this article. In its *note verbale* of June 10, 1959, the United States observed that Article 44 (which was labeled "non-discrimination" by the Commission) "embodies the principle of reciprocity in relations between States." It was regarded as meeting United States objections to provisions of the 1957 draft which required "that the receiving State shall not discriminate in the treatment it accords to the various diplomatic missions in its territory, and members of such missions."[19] Thus the article drafted by the International Law Commission to prevent discrimination was approved by the United States because, in the name of reciprocity, it authorized discriminatory treatment in certain situations.

The International Law Commission had an opportunity to reconsider its drafting of Article 44 when Mr. Zourek, Special Rapporteur, introduced it as Article 53 of the draft on Consular Intercourse and Immunities at the 548th meeting on May 27, 1960. Pointing out that "the principle of reciprocity had been deleted from previous articles of the draft" but had been "reintroduced through the back door" in paragraph 2(a), he suggested its deletion.[20] In reply to the argument that paragraph 2(a) did not deal with retaliation for a violation of the convention, but only for a restrictive application, Mr. Tunkin observed that "in so far as a rule of the draft itself allowed some latitude, a State would be applying the rule correctly if it availed itself of that latitude; the question of a restrictive or liberal application did not arise in that case."[21] Mr. Milan Bartoš thought it "difficult to see how such privileges and immunities as were necessary for the performance of consular functions could be subordinated to the condition of reciprocity."[22] At its 573rd meeting on June 28, 1960, the Commission, by a vote of 13–0–1, adopted an article on non-discrimination,[23] based on Article 44 of its draft on Diplomatic Intercourse and Immunities, but omitting paragraph 2(a), as follows:

Non-discrimination

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

2. However, discrimination shall not be regarded as taking place where the action of the receiving State consists in the grant, on a basis of reciprocity, of privileges and immunities more extensive than those provided for in the present articles.[24]

In its Commentary on this article, the Commission stated that, having had an opportunity to reconsider paragraph 2(a) of Article 44 of its

[18] *Ibid.* (II) 105.
[19] U.N. Doc. A/4164, Annex, p. 52.
[20] 1960 I.L.C. Yearbook (I) 146.
[21] *Ibid.* 147.
[22] *Ibid.* 150.
[23] *Ibid.* 312.
[24] Art. 64 of the Commission's provisional draft of 1960 on Consular Intercourse and Immunities, Report of the Commission covering the Work of Its Twelfth Session, 1960 (U.N. Doc. A/4425), pp. 34–35; 55 A.J.I.L. 300 (1961).

draft on Diplomatic Intercourse and Immunities, it now doubted whether it should be retained even in that draft. The attention of the 1961 Vienna Conference on Diplomatic Intercourse and Immunities was drawn to this change of position by the International Law Commission. Although representatives of eight states advocated deletion of paragraph 2(a) of Article 44, and only representatives of the United States, Italy and Viet Nam spoke for its retention, the Committee of the Whole decided to retain the provision by a vote of 30–20–19.[25] At the 10th plenary meeting on April 13, 1961, the Conference, after voting again to retain paragraph 2(a), adopted the article, which became Article 47 of the Vienna Convention,[26] by a vote of 61–0–9.[27]

The comment made by the Norwegian Government on January 30, 1961, although directed to Article 64 of the International Law Commission's 1960 draft on Consular Intercourse and Immunities, would likewise be pertinent to Article 47 of the Vienna Convention. The Norwegian Government observed:

> It is difficult to see any valid reasons for including the provisions of this article. They seem, at best, superfluous and might give rise to misconstructions.
>
> When the two paragraphs of the article are read in conjunction, it appears clearly that discrimination *per se* is unobjectionable. The less favoured State can only object if the privileges and immunities accorded . . . are less extensive than those laid down in the preceding articles. In this case, however, it is the non-compliance with these articles, not the discrimination, which affords the basis for a complaint.[28]

The case against including in a consular convention a provision that consular privileges and immunities should be based upon the principle of reciprocity was well stated by Mr. Zourek, Special Rapporteur, in his 3rd Report on Consular Privileges and Immunities:

> 2. It should be pointed out in the first place that many consular privileges and immunities are based on customary international law. Examples of these are the use of the national flag and of the State coat-of-arms, the inviolability of the consular premises and archives, and of the documents and official correspondence of the consulate, the freedom of communication of the consulate, the levying of consular fees and charges and the exemption from taxes and dues. Every State has a duty to respect the provisions in question, and the idea of reciprocity is irrelevant.
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> 3. Even in the case of provisions constituting wholly or partly a progressive development of international law—the draft does not distinguish the provisions which do from those which do not—the Commission, after due consideration, dropped the idea of a reciprocity

[25] U.N. Doc. A/CONF. 20/C.1/SR. 37 (afternoon meeting of March 30, 1961), pp. 5–9.

[26] See above, p. 475.

[27] U.N. Doc. A/CONF. 20/SR. 10, p. 8.

[28] U.N. Doc. A/CN.4/136, April 3, 1961, Comments by Governments on the 1960 draft articles on Consular Intercourse and Immunities, p. 22; Report of the International Law Commission covering the Work of Its Thirteenth Session, 1961 (U.N. Doc. A/4843), Annex I, p. 63.

clause. It took the view that all the provisions would be equally binding on all the contracting parties, with the consequence that the parties would all be on a footing of equality, which would make a reciprocity clause unnecessary.

4. The Commission applied the reciprocity concept to those consular privileges and immunities only *which are granted in addition* to those provided for in the present articles. . . .[29]

At its 13th Session, the International Law Commission again re-examined the question at its meeting of June 12, 1961. Although three members urged that Article 64 of the Commission's provisional draft on Consular Intercourse and Immunities be drafted to correspond to Article 47 of the Vienna Convention on Diplomatic Relations by re-inserting the retaliation or retorsion provision found in paragraph 2(a) of the latter, nine members opposed the inclusion of what one member referred to as "the worst paragraph in the Vienna Convention." The Chairman ruled that a large majority had spoken in favor of retention of the 1960 text of Article 64.

As adopted by the Commission in its final draft on Consular Relations in 1961, the text (now Article 70) reads as follows:

Article 70

Non-discrimination

1. In the application of the present articles, the receiving State shall not discriminate as between the States parties to this convention.

2. However, discrimination shall not be regarded as taking place where the receiving State, on a basis of reciprocity, grants privileges and immunities more extensive than those provided for in the present articles.[30]

It is this text which will come before the Vienna Conference of 1963 as a basis of discussion. In the writer's opinion it is preferable to the text of Article 47 of the Vienna Convention on Diplomatic Relations (reproduced at the beginning of this editorial) because it omits the provision contained in paragraph 2(a) of Article 47 which authorizes discriminatory or retaliatory practices on grounds of reciprocity—a practice which should not be sanctioned by treaty.

The question remains whether any of the provisions of Article 70 of the Commission's draft are necessary or desirable. If paragraph 1, setting forth the rule of non-discrimination in the application of the convention to its parties, were eliminated, would there be any question that the application of the provisions of the convention was nevertheless intended to be on a non-discriminatory basis? Could it be seriously argued that a treaty setting forth an agreed restatement and development of the law of consular privileges and immunities authorized, or was intended to permit, discrimination in its application, if it contained no provision on the subject?

The assumed necessity for paragraph 2 of Article 70 disappears, it is

[29] U.N. Doc. A/CN.4/137, April 13, 1961, p. 26. Italics in the original.

[30] Report of the International Law Commission covering the Work of Its Thirteenth Session, 1961 (U.N. Doc. A/4843), p. 39; 56 A.J.I.L. 353 (1962).

submitted, in the provision of Article 71, which declares that "The provisions of the present articles shall not affect conventions or other international agreements in force as between States parties to them," and the clear implication of its Commentary that this applies to future as well as to past consular treaties and agreements.[31] The granting of consular privileges and immunities more extensive than those provided for in the Commission's draft is not excluded by Article 70 when such privileges and immunities are granted on the basis of reciprocity, *i.e.*, at the least, on the basis of an implied agreement. The insertion in the convention of a provision relating to matters declared to be beyond its scope betrays confusion of thought: action outside the convention is not in "application" of its provisions, and whether or not such action is discriminatory cannot be determined by an admittedly inapplicable treaty.

The writer would answer in the negative the question posed in the opening sentence of this editorial.

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THE STATE OF SYRIA: OLD OR NEW?

Among events in the fall of 1961 was the reappearance on the international scene of a state of Syria. The result of a successful *coup d'état*, it marked the disruption in fact of the original United Arab Republic created by the union of Syria and Egypt in 1958 under the presidency of Gamal Abdel Nasser. One problem immediately raised by the change was whether the new Syrian Arab Republic of 1961 was or was not identical in international personality with the Republic of Syria which had existed prior to 1958. The answer was of practical concern because of its effect on Syria's position in the United Nations and on its international obligations in other respects.

The facts of the situation were briefly these. Early in the morning of September 28, 1961, a group of Syrian officers of the United Arab Republic's First Army seized the radio station and Army headquarters in Damascus. Styling themselves the "Supreme Arab Revolutionary Command of the Armed Forces," their avowed intent was "to end corruption and tyranny and to restore legal rights to the people."[1] At the outset there was apparently some hope that these goals might be achieved within the framework of the United Arab Republic; but after fruitless discussions during the day, followed by a denunciation of the group by President Nasser over Radio Cairo, the insurgents resolved to seek complete independence for the Syrian Region of the United Republic.

By the morning of September 29, the authority of the Revolutionary Command had been established in the principal cities and was spreading rapidly and without opposition throughout the rest of the country. By

[31] *Ibid.*

[1] Communiqué broadcast over Radio Damascus at 6:30 a.m., Sept. 28, 1961. The account in the text is based on contemporary press and radio reports, including Radio Damascus and Radio Cairo.