Still another type of reference to the general law is that in the 1962 Constitution of Pakistan authorizing the Central Legislature of that country to make laws concerning "offenses against the law of nations."[16] There is comparable wording in Article I, Section 8, paragraph 10, of the United States Constitution. This clause was utilized to sustain an indictment under a statute in a situation where the power of Congress to enact a criminal law was questioned.[17]

International law is of course applicable *between* states even without any express constitutional provisions making it a part of national law. Such provisions may have utility in situations where more than one construction of municipal enactments might reasonably be followed, or where (as in cases affecting aliens) the limits of national legislative power are in question. The device of relating international law in general (or some part of it) to municipal law through express wording obviously does not relieve tribunals or legislatures from the continuing task of determining what the rules of international law are. Direct or indirect references in constitutions to such an international organization as the United Nations underline the increasing prominence which the principal organization has come to have in the international legal system.

In general, the newly emergent states of Asia and Africa whose constitutions have been examined do not therein *explicitly* challenge the body of rules that comprise international law on the ground that these rules are the product of imperialism or colonialism. Much, obviously, depends upon those who interpret the provisions which make reference to international law or some parts of it. A realistic view would seem to be that the "international law habit" will not necessarily be effectively promoted through mere wording in national constitutions. What is accomplished under the types of clauses that have here been noted seems more likely to depend upon the constructive approach, vision and good faith of rulers and judges rather than upon the skill of draftsmen.

ROBERT R. WILSON

LEGAL ASPECTS OF THE PANAMA CASE

On February 4, 1964, the representative of Panama on the Council of the Organization of American States presented a request for a Meeting of Consultation of Foreign Ministers under the Treaty of Reciprocal Assistance. The basis of the invocation of the Rio Treaty was alleged to be "an unprovoked armed attack" on January 9–10 against the territory and civil population of Panama, made by the armed forces of the United States stationed in the Canal Zone, leaving several Panamanians dead and more than a hundred wounded and creating "a situation that endangers peace in America."

[16] Art. 132 and Third Schedule, par. (f). The paragraph immediately following lists foreign and extraterritorial jurisdiction, admiralty jurisdiction, and offenses committed on the high seas and in the air.

[17] United States *v.* Arjona, 120 U. S. 479 (1887).

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At an earlier meeting of the Council on January 10 it had been agreed by the parties to have recourse to the services of the Inter-American Peace Committee, and the Council elected Chile to replace the United States. The Committee, now consisting of representatives of Argentina, Colombia, Dominican Republic, Venezuela, and Chile, undertook its task promptly, taking the first available plane for Panama and immediately holding interviews with the President of Panama and other officials. The task of the Peace Committee was not primarily one of investigation of the facts occurring on January 9–10, although the Committee did find that the riots were due to profound sentiments of nationalism in Panama, in which "Castro elements" participated, and that the North American inhabitants of the Zone had not contributed to solving the problem of living together in the region.

But in spite of strenuous efforts to bring the parties together, restore diplomatic relations and start discussion of the various problems created by the Canal, the proposals of the Peace Committee were frustrated by the insistence of the Panamanian Government that the bases of agreement to "negotiate" the issues, in the English text "discuss," must be understood to mean a "revision of the Treaty of 1903."[1] This the representatives of the United States were unwilling to agree to, stating that, while they were ready to discuss everything relating to the Treaty of 1903, they could not pledge themselves in advance to revise it. The result was that the Peace Committee was unable to bring about a solution; and when on February 4 the representative of Panama on the Council asked for a Meeting of Consultation, the Peace Committee considered that its functions had terminated.

At an earlier Meeting of the Council on January 31 the representative of Panama had asked for a Meeting of Consultation under the Rio Treaty, charging an aggression on the part of the United States; and the Council was now meeting on February 4 to decide upon the request. The representative of Panama renewed the charges made at the earlier meeting and the representative of the United States contested them as before. No facts were before the Council to determine responsibility for the events of January 9–10, the charges of the representative of Panama and the denial of the representative of the United States remaining no more than statements for the record.

Could a Meeting of Consultation under the Rio Treaty be called under such circumstances? Article 6 of the Rio Treaty[2] provides that a meeting of the Organ of Consultation may be called by reason of "an aggression which is not an armed attack" only if "the inviolability or the integrity of the territory or the sovereignty or political independence" of the American state should be affected by it. The condition in Article 6 was clearly intended to prevent summoning the Ministers of Foreign Affairs

[1] Text of 1903 Treaty in 3 A.J.I.L. Supp. 130 (1909). For other treaties pertaining to the Panama Canal, see Appendix to 1913 Proceedings, American Society of International Law 283–309.

[2] Text in 43 A.J.I.L. Supp. 53 (1949).

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unless the situation was sufficiently serious to justify the inconvenience to which they would be put. Did it appear that the alleged aggression had met the conditions of Article 6? It was quite clear that it had not; at any rate no conclusion could be drawn, since the facts asserted by Panama and contested by the United States were not before the Council.

But at this point political motives took precedence over technical interpretations of the Rio Treaty. Here was the powerful United States accused by a small state of aggression! It would never do to deny the small state the protection of the Rio Treaty. The representative of Argentina, among others, made it clear that in voting for the Meeting of Consultation there was no question of a commitment as to where the fault lay, the important thing was to bring about a settlement. The representative of Chile alone protested the application of the Rio Treaty, which he contended was directed towards serious situations involving, as the treaty said, the independence and sovereignty of the state, not a mere temporary riot that had long since terminated. The representative of the United States, although not entitled to vote on the draft resolution, explained that he shared the doubts of the representative of Chile whether the Rio Treaty was the appropriate mechanism, noting that the real issue which divided Panama and the United States was not the alleged act of aggression. While he failed to specify what the "real issue" was, it was obvious to all from the report of the Peace Committee that the revision of the Treaty of 1903 was the actual objective of the Panama claim. But inasmuch as he was anxious for the fullest investigation of the facts, and it had been made clear by those who had spoken in favor of invoking the Rio Treaty that it was not to be "taken in any sense as a judgment on the charges made," he was agreeable to the invocation of the treaty in accordance with the terms of the resolution.

The draft resolution was then adopted by a vote of 16 to 1, and the Council was now competent to act provisionally as Organ of Consultation and to put into effect procedures and practical measures which neither the Peace Committee nor itself as Council could have undertaken. In its provisional capacity the Council then met in closed session as a Committee of the Whole, and authorized the Chairman to appoint five of its members to act as a committee of investigation and conciliation. It should be noted that a larger majority of two-thirds will be required to take decisions under the Rio Treaty, in contrast to the mere majority required to call the Organ of Consultation. The new committee, bearing the ponderous name of Special Delegation of the General Committee of the Organ of Consultation in the Conflict between Panama and the United States, consists of the representatives of Paraguay (Chairman), Brazil, Costa Rica, Mexico, and Uruguay.

Query, was the invocation of the Rio Treaty necessary as the only means by which the Council could be given competence to take the necessary measures to bring the parties together and, if need be, impose a settlement or at least prevent a conflict? The competence of the Council under the Charter is limited; but it can be as broad as required when the Council

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is acting provisionally under the Rio Treaty, that is, for the period until the Organ of Consultation meets. The Peace Committee was limited under its Statute to bring about a settlement to which both parties would agree. Beyond that it could not go. Again, there were numerous treaties of arbitration and conciliation available, but they could be put into effect only with the co-operation of the parties in dispute. The Pact of Bogotá, adopted at the Conference of 1948, carried some degree of compulsory character, but it had not been ratified by the United States, and in any case its procedures would have been too complicated for prompt action. It would seem that the Council, when confronted with the dispute, could have appointed on its own initiative a committee to determine the facts of the case as a necessary condition of deciding whether the Organ of Consultation should be called. But conceding this point, which is not in line with the general practice of the Council, the competence of the Council would then have come to an end. In consequence, the invocation of the Rio Treaty on February 4 would appear to have been, if not necessary, the most expedient means of giving to the Council the competence needed to meet the situation.

Has the precedent of invoking the Rio Treaty for a situation less than an act of aggression involving the independence and territorial integrity of a state weakened the treaty as the chief instrument of maintaining law and order in the Hemisphere? That it may lead to other cases of appeal for minor controversies is of little consequence. The Council can readily dispose of them when they arise. On the other hand, the inter-American security system lacks what might be called a procedure of summary jurisdiction. In the formulation of the draft of the Rio Treaty it was clear that the delegates to the Conference at Quitandinha were unwilling to give to the Council in Washington any such powers to maintain the peace as had been given two years earlier to the Security Council of the United Nations. In cases of emergency, where important and urgent problems were at issue, a Meeting of Foreign Ministers, described as the Organ of Consultation, must be called.

But here a curious situation has developed which has made it possible for the Council to waive the restrictions upon its powers which the framers of the Rio Treaty believed it necessary to impose. Article 6 of the Rio Treaty provides that, when the conditions for the invocation of the treaty have been met, "the Organ of Consultation shall meet immediately" to agree upon the measures to be taken. The word "immediately" must now be interpreted to mean "in due time," for the practice of the Council has been, as in the present case, to fix the date and place of the meeting as may appear convenient (*oportunamente*). In a number of cases the Council, given by the invocation of the treaty the competence to act provisionally, has in fact been able to meet the threat to the peace, and then has called off the Meeting of Consultation without so much as apologizing to the Foreign Ministers for keeping them in a state of technical expectation. The explanation is simple: that a situation may appear for the moment to justify invoking the Rio Treaty and then later be brought to

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a solution by the provisional measures taken by the Council, thus sparing the Foreign Ministers the long trip confronting them, and, as might be expected, without protest on their part. Convenient as this rule of what might be called customary law has been, it is doubtful whether a formal amendment of the Rio Treaty to that effect would obtain the necessary support.

One more item of interest: The Charter of the Organization of American States provides in Article 39 that a Meeting of Foreign Ministers may also be held to consider "problems of an urgent nature and of common interest to the American States,"[3] and a number of such meetings have been held, the last being at Santiago, Chile, in 1959. The Panama situation could clearly have been included under this provision and a strained interpretation of the Rio Treaty avoided. But in cases under Article 39, where the urgency of the problem does not imply an immediate threat to the peace, the Council is not given the power to act provisionally and the Ministers themselves must meet in response to the invocation. Obviously, therefore, the Council will be hesitant to call a Meeting of Consultation under Article 39 unless the circumstances justify an actual assembly of the Foreign Ministers; and obviously also the provision of Article 39 is of no use in meeting situations calling for prompt action.

With respect to the Treaty of 1903, which the Government of Panama insists on revising, the question might be raised whether the treaty has not long since lost in part its bilateral character and become, in respect to the United States, an obligation to all the world. The governments of other states, American and non-American, have come to rely upon the service of the Canal as an essential part of their foreign commerce. To raise the tolls of the Canal for other purposes than the necessary and proper administration of the Canal, as, for example, to pay an unreasonable rental for the use of the Zone, would be a wrong to the nations using the Canal which they might properly resent. Where a treaty confers privileges upon third states, even without the assumption of any obligations on their part, the rule of prescription may well apply. It is in accord with the general principles of international law that prescriptive rights may be acquired after a long period of use during which states have adjusted their commerce to the facilities at first freely offered them.[4]

Whether a particular memorandum of June 15, 1962,[5] setting forth an agreement between President Kennedy and President Chiari, constitutes an obligation to reconsider the Treaty of 1903 is of little consequence. The treaty has already been revised several times, the latest formal revision being the Treaty of 1955, which increased the rental of the Zone and removed a number of the minor complaints in respect to the employment

[3] Text in 46 A.J.I.L. Supp. 43 (1952).

[4] See Roxburgh, International Conventions and Third States, for the views of publicists; also Harvard Research Draft on Law of Treaties, Art. 18, 29 A.J.I.L. Supp. 661 (1935).

[5] See Washington Post, Feb. 9, 1964, p. A 14.

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of Panamanians and the relations between the Zone and the City.[6] It would appear that there is still a case for the adjustment of other grievances and irritations resulting from two communities of unequal social standards and different national traditions living side by side, and it may well be a fair criticism of the United States that too little effort has been made to relieve the tensions that made possible the unhappy events of January 9–10. This aspect of the problem is clearly included in the statements of the representative of the United States on the Council.

But the adjustment of these grievances, more or less serious as they may be, is not the question at issue, which is the administration of the Canal as a public service to all the world. Behind the Treaty of 1903 is the Hay-Pauncefote Treaty, by which the United States gave a pledge that the Canal would be "open and free to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality," implying that the Canal was not to be used as a mere instrument of transit for the benefit of the United States, but was to be administered as a public service for the commerce of all the world. As an international public utility, its administration should only be changed in the presence of clear evidence that some other form of joint or common administration would make the Canal a more efficient public utility, including obviously the security of the Canal. Thus far, no evidence has been brought forward to that effect. Larger interests are at stake in the revision of the Treaty of 1903 than the appeasement of the nationalistic feelings of the people of Panama.

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[6] See editorial, "The Treaty of 1955 between the United States and Panama," 49 A.J.I.L. 543 (1955).

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