**Recommendation 79 (1955)**[1]

# Draft European Convention for the Peaceful Settlement of Disputes

Parliamentary Assembly

The Assembly,

Having been consulted by the Committee of Ministers on the text of a draft European Convention for the peaceful settlement of disputes (Document 271), prepared in the light of the Assembly's Recommendations 56 (1950) and 36 (1952) ;

Reaffirming its conviction that the acceptance by the Member States of the Council of Europe of far-reaching obligations in relation to the peaceful settlement of disputes will strengthen European unity and international security,

Welcomes the draft Convention submitted by the Committee of Ministers as a step forward in that direction, as it provides that the obligation to submit to judicial settlement the disputes listed in Article 3, paragraph 2, of the Statute of the International Court of Justice shall hereafter be recognised by all signatories ;

Notes, however, that the Committee on Legal and Administrative Questions, having re-examined the draft Convention with particular regard to the comments made by the Swedish Government and the Swedish Representatives to the Assembly, has deemed it necessary to propose a number of amendments, many of which are of considerable importance ;

Approves the amendments submitted by the Committee on Legal and Administrative Questions ;

Recommends that the Report of the Committee on Legal and Administrative Questions appended hereto be submitted by the Committee of Ministers to the Government Experts responsible for drafting the Convention with a view to a final revision of the text, and expresses the hope that the signature and entry into force of the Convention will take place at an early date and thus constitute a further stage in the formation of a united Europe.

Report of the Committee on Legal and Administrative Questions[2]proposing a number of amendments to the draft European Convention for the Peaceful Settlement of Disputes submitted by the Committee of Ministers to the Assembly for an Opinion (Document 271)

By letter dated 15th September, 1954 the Committee of Ministers requested the opinion of the Assembly on the draft European Convention for the peaceful settlement of disputes (Document 271).

Your Committee on Legal and Administrative Questions notes with pleasure that, in general, the authors of the draft Convention have, to a large extent, taken into account the comments made by the Assembly Representatives at the joint meeting held on the 15th May, 1953, between your Committee's Sub-Committee

1. This Recommendation was adopted by the Assembly at its 10th Sitting, on 9th July, 1955 (see Doc. 356, draft Recommendation of the Committee on Legal and Administrative Questions).
2. This Report was unanimously approved by the Committee on Legal and Administrative Questions on the 19th April, 1955.

and the Sub-Committee of the Committee of Experts appointed by the Committee of Ministers. In view of the importance of the question and of the difficulties involved, however, your Committee deemed it advisable to reconsider the whole of the draft Convention and to submit the following amendments thereto.

*CHAPTER I*

*Judicial Settlement*

*Article 1*

Delete the words " all international legal disputes " and substitute the words " all disputes with regard to which the parties are in conflict as to their respective rights " instead thereof.

Statement of reasons. Your Committee would like to omit as a definition of justiciable disputes the words " all international legal disputes ". It still prefers the terminology used in the Locarno Agreements which was later used in the Geneva General Act for the pacific settlement of international disputes of the 26th September, 1928, namely " all disputes with regard to which the parties are in conflict as to their respective rights ". Moreover, the words used in the English and French version of the draft Convention do not correspond.

The terminology proposed by the Committee of Ministers is open to objection. In the French version, the word " juridique " appears to be superfluous as it precedes the words " relevant du droit international ", unless it is to be interpreted as a limitation on the latter words. In that case how is the word " juridique " to be understood ? There is anyhow a risk that these words may lead to uncertainty as to their interpretation.

If, as seems probable, the authors of the draft Convention did not intend to alter the categories of justiciable disputes as defined in the 1928 Geneva General Act, brought up to date in 1949, there is every advantage in retaining a terminology which has been in force for twenty-five years and whose meaning has been made clear by international opinion and practice.

*CHAPTER II*

*Conciliation*

*Article 5, paragraph 1*

Replace this paragraph by the following :

" When a dispute arises falling within the scope of Article 4, it shall be brought either before a permanent conciliation commission, previously established by the parties concerned, or, in the absence of such commission, before an ad hoc conciliation commission which shall be established within a period of three months from the date on which a request for such establishment is made by one party to the other party. "

Statement of reasons. Article 5, paragraph 1, of the draft Convention provides that conciliation shall be carried out by an ad hoc commission set up by the parties concerned. A number of Member States of the Council of Europe have, however, already set up permanent conciliation commissions. These are mentioned in Article 19 of the draft Convention, but that Article merely provides that where such a commission is already in existence, the High Contracting Parties " reserve the right to entrust the functions set out in this chapter " to these commissions. This leaves open the question whether, in cases where a permanent conciliation commission already exists, the application of the requesting State should not normally be referred to such commission. Your Committee believes that it is desirable to state in the Convention that this should be so. It is therefore proposed that Article 19 should be deleted and that Article 5 should provide for the possibility of making use of permanent conciliation commissions.

*Article 5, paragraph 2*

Delete this paragraph. Statement of reasons. Article 5, paragraph 2, deals with the important question of the effect of the new Convention on the Convention for the protection of Human Rights and Fundamental Freedoms signed at Rome on the 4th November, 1950, and the Protocol thereto signed at Paris on the 20th March, 1952, hereinafter referred to as the " Rome Convention " and " Paris Protocol ".

The significance of this paragraph is not clear.

Is it merely desired to recall that according to Article 24 of the Rome Convention " any High Contracting Party may refer to the [European] Commission [of Human Rights], through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party " and that, in accordance with Article 28, it is the duty of the European Commission of Human Rights, after having ascertained the facts, to endeavour to secure a friendly settlement ? In that case, the draft Convention in its

present form has the disadvantage of appearing to make it a prior condition for the lodging of a complaint with the European Commission of Human Rights that both parties concerned should agree to this procedure whereas, according to Article 24 of the Rome Convention, any High Contracting Party can exercise this right individually.

A comparison between Article 5, paragraph 2, and Article 18 of the draft Convention, however, would appear to show that it was not intended to affect the operation of the machinery provided for in the Rome Convention, but rather to make it possible for disputes not arising out of alleged violations of the said Convention to be referred to the European Commission of Human Rights in the capacity of a conciliation commission. The Committee on Legal and Administrative Questions feels unable to approve this proposal. In the first place, the validity of such a proposal is doubtful because the Parties to the new Convention for the peaceful settlement of disputes might not necessarily be the same as the Parties to the Rome Convention and it would not be possible to amend the competence of the European Commission of Human Rights as originally defined in the Rome Convention. In the second place, it would appear undesirable to entrust, even on an optional basis, the task of effecting a friendly settlement in international disputes of all kinds to a commission whose members were appointed for the limited purpose of protecting individual rights.

For all these reasons, your Committee recommends that Article 5, paragraph 2, and the whole of Article 18 should be deleted, it being understood that the important question of the relation between the new Convention and the Rome Convention must be defined in Chapter IV. Proposals in this connection are set out below.

*Article 12, paragraph 1*

After the words " unless it decides unanimously to the contrary, shall, " add the words " subject to the provisions of Article 15. "

Statement of reasons : see Article 15.

*Article 15*

Replace this Article by the following :

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute and to endeavour to bring the parties to an agreement.
2. The Commission may therefore, if it deems it expedient, collect by means of enquiry or otherwise information supplementary to that provided by the parties concerned. In such case, the examination of witnesses or other investigations shall be recorded in the procès-verbal, a copy of which shall be sent to the parties.
3. The Commission may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it and lay down the period within which they are to make their decision. The Commission shall state in the final procès-verbal whether the parties have come to an agreement and, if appropriate, the terms of such agreement. No mention shall be made in the procès-verbal of whether the Commission's decisions were taken unanimously or by a majority vote.
4. The Commission may also, but only with the consent of the parties, express an opinion on the questions in dispute.
5. The proceedings of the Commission shall, unless the parties otherwise agree, be terminated within six months from the date on which the dispute shall have been brought before the Commission. "

Statement of reasons : Your Committee gave careful consideration to Article 15 of the draft Convention, in the course of which doubt arose as to the precise extent of the task of the Conciliation Commission and also as to the manner in which the results of its work should be recorded.

According to Article 15, paragraph 1, " the task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement... " Certain members of the Committee felt that these words imply that the task of the Conciliation Commission is two-fold, comprising, on the one hand, the elucidation of the facts, in particular by means of enquiry, and, on the other hand, an attempt to bring the parties to an agreement. The failure of the second part of the Conciliation Commission's task cannot deprive the parties of any results achieved during the first part, in particular the statements made in evidence or even the opinion expressed by the Commission as regards the conclusions to be drawn from the information

collected. Thus, although the final procès verbal cannot indicate the proposed terms of an agreement which have not been accepted by the parties, it does not follow that the procès verbal should not or must not include the information collected or even the opinion of the Commission on the facts in dispute.

This view finds solid support in the provision in Article 12, paragraph 1, of the draft Convention according to which, in regard to enquiries, the Commission shall, unless it decides unanimously to the contrary, act in accordance with the provisions of Part III of the Hague Convention for the pacific settlement of international disputes, of the 18th October, 1907. Article 35 of this Convention provides expressly that the report of a commission of enquiry shall include a statement of facts.

Other members of the Committee on Legal and Administrative Questions feared that the essentially conciliatory nature of the procedure provided for in Chapter II of the draft Convention might be prejudiced if judicial significance were to be attached to the evidence collected by the commission in the course of its investigations.

Thirdly, the intermediate view was put forward that, although one cannot altogether leave out the possibility of the Commission being required to report on facts in dispute, as provided for in Part III of the 1907 Hague Convention, it would appear preferable, in view of the conciliatory function of the Commission, to provide that the Commission shall only have the competence so to report as a result of a specific agreement between the parties concerned.

But, on the other hand when, in the absence of such agreement, the Commission finds cause, as provided for in Article 15 of the draft Convention, to collect with a view to exercising its conciliatory function useful information, in particular by means of enquiry, it would appear excessive to deprive the parties, in case of failure to reach a friendly settlement, of the benefit of the evidence so collected by the Conciliation Commission either by means of enquiry or by examination of a locality or from expert opinion, etc.

A majority of the Committee eventually accepted this view.

In Article 12 of the draft Convention, then, after the words " unanimously to the contrary, shall " the words " subject to the provisions of Article 15 " should be added.

*Article 18*

Delete this paragraph.

Statement of reasons : See Article 5, paragraph 2.

*Article 19*

Delete this paragraph.

Statement of reasons : See Article 5, paragraph 1.

*CHAPTER III*

*Arbitration*

Your Committee on Legal and Administrative Questions devoted considerable time to Chapter III of the draft Convention.

The object of this Chapter is to complete the machinery for peaceful settlement by submitting to compulsory settlement even those disputes which arise out of conflicts of interests and not conflicts as to respective rights. The difficulties involved in this undertaking have been underlined by the Swedish Foreign Minister, M. Unden, in a memorandum which was submitted to the Committee of Ministers and brought to the notice of your Committee. Your Committee studied this memorandum with particular care, as it was inspired by an international lawyer who, in 1928, took a leading part in the drafting of the Geneva General Act for the pacific settlement of international disputes, which already contained the far-reaching provisions reproduced in the draft Convention and criticised in the memorandum. This criticism is undoubtedly strengthened by the fact that, although during the past thirty years compulsory arbitrations has been accepted by a number of States, the great majority of them have felt unable to accept such compulsory settlement and it is even more serious that in practice no dispute of a non-justiciable nature has ever been settled in this manner.

The realistic Swedish proposals, which have been re-examined in your Committee, are based on these considerations. They aim essentially at modifying the obligation to submit to compulsory arbitration by the addition of a saving clause which provides that any State may, for reasons of expediency, refuse to submit to this procedure in a particular case. The application of this clause would be within the competence of the Committee of Ministers.

Without ignoring the great value of these suggestions, your Committee on Legal and Administrative Questions felt that it could not accept the responsibility of recommending generally such a considerable limitation of the field of application which certain States, rightly or wrongly, have so far believed it possible to assign to compulsory arbitration.

Thus, it is within the framework of the reservations provided for in Chapter IV of the draft Convention that your Committee has felt able in some degree to follow the Swedish proposals by means of the provisions set out below.

Having thus provisionally disposed of this question, the Committee on Legal and Administrative Questions considers it useful to recommend the three following amendments to Chapter III of the draft Convention.

*Article 21*

Replace this article by the following :

" The High Contracting Parties shall submit to arbitration all disputes which may arise between them other than those mentioned in Article 1 and in respect of which the parties have been unable to agree, either because the parties have by mutual agreement decided not to have prior recourse to conciliation or because conciliation has failed."

Statement of reasons : The proposed amendment only affects the form of this Article. It would appear preferable and clearer to indicate expressly in the text, rather than by means of a reference, that the disputes to which Chapter III applies are, in principle, those which are not comprised within Article 1 of the Convention. Article 21 could also usefully mention the two cases in which arbitral settlement of such disputes must be resorted to, i.e. absence of any previous resort to conciliation and failure of conciliation.

*Article 22*

Insert the following paragraph before the existing paragraph :

" 1. The application submitted by one party to the other shall specify the subject of the claim which it desires to submit to the arbitrators, the grounds on which such claim is based and the name of the arbitrator nominated by that party. "

Statement of reasons : The proposed amendment is one of procedure. It appears expedient, in dorer to speed up the constitution of the arbitral tribunal, to require the State which desires to resort to this procedure to mention in its initial application both the name of the arbitrator nominated by it and also a summary account of the claim which it desires to submit to the arbitrators.

*Article 28*

Replace this article by the following :

" If no special agreement has been made, or if nothing is laid down in the special agreement, or if no provisions to the contrary are contained in a reservation made by one or other of the parties at the time of the deposit of its instrument of ratification, the arbitral tribunal shall decide ex æquo et bono. "

Statement of reasons : The third amendment proposed to Chapter III of the draft Convention concerns the substance of arbitration.

According to Article 28 " if nothing is laid down in the special agreement or no special agreement has been made, the tribunal shall decide ex æquo et bono within the framework of the general principles of international law, while respecting the contractual obligations and the final decisions of international tribunals which are binding on the parties. "

This provision, which was already included in the 1928 Geneva General Act for the pacific settlement of international disputes brought up to date in 1949, has from the beginning been the target of strong criticism. A number of writers have held that it is a contradiction in terms, as claims submitted to arbitration have necessarily for object a change of existing law and are therefore incapable of solution if the arbitrators are compelled to follow the existing law.

Although certain members of the Committee considered this view to be extreme, they were unanimous in recognising that the present text of Article 28 would take away from the provisions of Chapter III a good deal of their usefulness.

At the most, it would perhaps be possible to provide that the parties might, when making their declaration of acceptance of arbitration, limit in the manner proposed the freedom of decision of the arbitrators.

*CHAPTER IV*

*General Provisions*

*Article 29, sub-paragraph (b)*

Delete this sub-paragraph.

Statement of reasons : Article 29 of the draft Convention provides in sub-paragraph (b) that the provisions of the Convention shall not apply to " disputes concerning questions which by international law are solely within the domestic jurisdiction of States ". The Committee on Legal and Administrative Questions is in some doubt as to the desirability of this limitation. In its view, such limitation is superfluous as regards judicial settlement, the International Court of Justice having no jurisdiction in the case of applications not based on law, which, by definition, sets aside those relating to questions which international law leaves to the exclusive competence of States.

Nor does the proposed limitation appear to be advisable as regards conciliation. Certain States may believe it to be in their interests to allow an attempt at conciliation even in the case of disputes whose subject is within their exclusive competence. Your Committee sees no reason why the Convention should render this impossible. Likewise in the case of arbitration the possibility mentioned above cannot be entirely left out and must lead to the same conclusions. No doubt the majority of States will prefer, in general, not to expose themselves to the risks of arbitration or even to the inconvenience of conciliation as regards questions within their exclusive competence. It is, however, sufficient to authorise them to make reservations in this respect.

*Article 30*

Add the following paragraph :

" In particular, this Convention shall in no way affect the application of the provisions of the Convention for the protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950, and the Protocol thereto signed at Paris on 20th March, 1952, in respect of the settlement of any dispute between High Contracting Parties concerning an alleged violation of the said Convention or the Protocol thereto."

Statement of reasons : Article 30 of the draft Convention concerns the relation between the new Convention and the provisions of previous conventions which may bind certain Contracting Parties as regards the settlement of disputes arising between them.

As stated elsewhere in this report, there is some doubt as to how far the draft Convention affects the Convention for the protection of Human Rights and Fundamental Freedoms and Protocol thereto.

As it appears desirable that no change should be made at the present time to the obligations undertaken by Member States of the Council of Europe in this respect, it is proposed that the above paragraph be added to Article 30.

*Article 31, paragraph 2*

Replace this paragraph by the following :

" If a decision with final effect has been pronounced in the State concerned, it will no longer be possible to resort to any of the procedures laid down in this Convention after the expiration of a period of two years from the date of the aforementioned decision."

Statement of reasons : Article 31 contains in paragraph 2 the following idea : it provides that, in the case of a dispute the subject of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, it would only be possible to lodge an application after a decision with final effect has been pronounced and only on condition that the party which desires to resort to any of the procedures laid down in this Convention notify the other party of its intention within a period of one year from the date of the aforementioned decision.

There is a certain contradiction between the texts of these two paragraphs as paragraph 2 appears to exclude all possibility of resorting to the procedures of the Convention so long as a decision with final effect has not been pronounced on any appeal lodged by the interested party in the country concerned. Paragraph 1, on the contrary, makes it possible for the dispute to be raised on the international plane within a reasonable time when no decision with final effect has been taken in the State concerned.

In order to avoid this contradiction, it would appear preferable to amend the second paragraph of Article 31. Moreover, the words " notify the other party of its intention... to resort " are vague and do not exclude the possibility of considerable new delays. It would appear desirable to limit the period within which an objection may be lodged ; but in that case the time-limit could be increased to two years.

*Article 37*

(i) Add the following words at the beginning of the first sentence : " Without prejudice to the provisions of Article 28 concerning the principles which the arbitral tribunal shall be authorised to apply."

(ii) Add a new paragraph 1 A as follows :

" A High Contracting Party may also exclude from the field of application of Chapter II or Chapter III of this Convention disputes concerning questions which by international law are solely within the domestic jurisdiction of States or disputes affecting their vital interests. "

Statement of reasons : Article 37 deals with the important question of reservations.

As was mentioned above, your Committee on Legal and Administrative Questions wish to see a number of amendments made to this Article :

*a.* first, it would be desirable to refer to the right of the parties contained in the amended text of Article 28 to limit the power of the arbitrators to decide ex æquo et bono by means of a reservation to the effect that the arbitrators should conform to the principles of law, to contractual obligations or to judicial decisions ;

*b.* secondly, it is necessary to provide that the High Contracting Parties may refuse to submit to arbitration or conciliation disputes which according to international law are within their exclusive competence, it being understood that, as provided for in Article 40 of the draft Convention, the application of this reservation would be subject to the jurisdiction of the International Court of Justice ;

*c.* thirdly, it would be desirable to authorise those States sharing the views of the Swedish Government to make acceptance by them of compulsory arbitration subject to a reservation refusing such arbitration in the case of a dispute affecting their vital interests. The application of this reservation would he within the competence of the Committee of Ministers. Finally, it would be desirable to determine how this competence would be exercised.

As regards the competence to be exercised by the Committee of Ministers it would be preferable to deal with it in Article 40 of the draft Convention.

*Article 40*

Replace this Article by the following :

1. Objections relating to the interpretation or application of this Convention or to declarations of acceptance, including possible reservations, and objections concerning the nature of disputes may be submitted by one or other party to the International Court of Justice within three months of the notification by one party to the other of its intention to resort to conciliation or arbitration. Any such objections made after this period shall be decided upon by the body before which the dispute has been brought.

2. Notwithstanding the above provision, an objection concerning the claim by one of the parties that the dispute submitted to arbitration or conciliation by the other party affects the vital interests of the former party and that, in accordance with a reservation made to that effect, arbitration or conciliation is not therefore appropriate may, within the same period, only be submitted by one or the other parties to the Committee of Ministers of the Council of Europe. The latter may, by a two-thirds majority of the representatives entitled to sit in the Committee, either declare that the objection is without foundation, and in that case refer the dispute for settlement by arbitration, or recognise the objection as partly or wholly valid. In the former case it may determine the limits within which the arbitral tribunal may be authorised to decide provided that even in this case the Committee of Ministers may either instruct the parties to take provisional measures in order to avoid the aggravation of their international relations or authorise the arbitral tribunal to lay down such a modus vivendi.

3. Objections lodged in accordance with the above-mentioned provisions shall have the effect of suspending the conciliation or arbitration proceedings concerned until the decision of the International Court of Justice or of the Committee of Ministers,"

Statement of reasons : The following comments arise in connection with Article 40 :

1. The first use of the word " disputes " ; in this Article is likely to give rise to confusion. This Article does not refer to any new dispute but rather to an objection concerning a point of competence or procedure, in other words, an objection which is additional to the dispute itself.

2. It would be better to avoid the possibility of conciliation or arbitration being impeded by belated objections of competence or of procedure or, worse, by a series of such objections leading to a succession of appeals to the International Court of Justice or the Committee of Ministers.

The above considerations have led your Committee on Legal and Administrative Questions to propose that Article 40 of the draft Convention should be replaced by the above text.