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Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur

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LAW OF TREATIES

[Agenda item 3]

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Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur

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CONTENTS

	<i>Page</i>
INTRODUCTION	
A. The basis of the present report	6
B. The scope and arrangement of the present group of draft articles	6
PART III. APPLICATION, EFFECTS, REVISION AND INTERPRETATION OF TREATIES	
<i>Section I. The application and effects of treaties</i>	7
Article 55: <i>Pacta sunt servanda</i>	7
Commentary	7
Article 56: The inter-temporal law	8
Commentary	9
Article 57: Application of treaty provisions <i>ratione temporis</i>	10
Commentary	10
Article 58: Application of a treaty to the territories of a contracting State	12
Commentary	12
Article 59: Extension of a treaty to the territory of a State with its authorization	15
Commentary	15
Article 60: Application of a treaty concluded by one State on behalf of another	16
Commentary	16
Article 61: Treaties create neither obligations nor rights for third States	17
Commentary	17
Article 62: Treaties providing for obligations of rights of third States	19
Commentary	20
Article 63: Treaties providing for objective régimes	26
Commentary	27
Article 64: Principles of a treaty extended to third States by formation of international custom	34
Commentary	34
Article 65: Priority of conflicting treaty provisions	34
Commentary	35
Article 65A: The effect of breach of diplomatic relations on the application of treaties	44
Commentary	44
Article 66: Application of treaties to individuals	45
Commentary	45
<i>Section II. The amendment and revision of treaties</i>	
Article 67: Proposals for amending or revising a treaty	47
Article 68: Right of a party to be consulted in regard to the amendment or revision of a treaty	47
Article 69: Effect of an amending or revising instrument on the rights and obligations of the parties	47
Commentary	47

CONTENTS (*continued*)

	Page
<i>Section III. Interpretation of treaties</i>	
Article 70: General rules	52
Article 71: Application of the general rules	52
Article 72: Effective interpretation of the terms	53
Article 73: Effect of a later customary rule or of a later agreement on interpretation of a treaty	53
Commentary	53
Article 74: Treaties drawn up in two or more languages	62
Article 75: Interpretation of treaties having two or more texts or versions	62
Commentary	62

Introduction

A. *The basis of the present report*

1. At its fourteenth and fifteenth sessions the Commission provisionally adopted parts I and II of its draft articles on the law of treaties, consisting respectively of twenty-nine articles on the conclusion, entry into force and registration of treaties and twenty-five articles on the invalidity and termination of treaties.¹ In adopting parts I and II the Commission decided, in accordance with articles 16 and 21 of its Statute, to submit them, through the Secretary-General, to Governments for their observations. At its fifteenth session the Commission decided to continue its work on the law of treaties at its next session, and to take up at that session the questions of the application, interpretation and effects of treaties. The Special Rapporteur accordingly now submits to the Commission his third report dealing with these aspects of the law of treaties.

2. In considering the effects of treaties on third States and the application of conflicting treaties, the Special Rapporteur came to the conclusion that the Commission might find it desirable to study the question of the revision of treaties in conjunction with its study of those two topics. As the Commission has not yet taken up this question nor assigned any specific place to it in the law of treaties, the Special Rapporteur decided to insert in this report a section on the revision of treaties immediately after that dealing with the application and effects of treaties.

3. The revision and the interpretation of treaties are topics which have not been the subject of reports by any of the Commission's three previous Special Rapporteurs on the law of treaties. The topic of the application of treaties, on the other hand, was the subject of a full study by Sir Gerald Fitzmaurice in his fourth and fifth reports in 1959 and 1960.² However, owing to the pressure of other work the Commission was not then able to take up its examination of those reports. The Special Rapporteur has

naturally given full consideration to those reports in drafting the articles on the application of treaties now submitted to the Commission.

4. As to the particular question of conflicts between treaties, this was discussed by Sir H. Lauterpacht in successive reports in 1953³ and 1954⁴ in the context of the validity of treaties, and again by Sir G. Fitzmaurice in his third report⁵ in 1958 in the same context. The present Special Rapporteur also examined this question in the context of "validity" in his second report,⁶ presented to the Commission at its fifteenth session, but in that report he suggested that the question ought rather to be considered in the context of the "application" of treaties. The Commission, without in any way prejudging its position on the point, decided to postpone its consideration of the question of conflicts between treaties until its sixteenth session, when it would have before it the present report, covering the application of treaties.⁷ The Special Rapporteur, for reasons explained in the commentary to article 65 of the present report, felt it advisable to submit to the Commission a fresh study of this question oriented to the "application" rather than to the "validity" of treaties.

B. *The scope and arrangement of the present group of draft articles*

5. The present group of draft articles thus covers the broad topics of (a) application and effects of treaties (including conflicts between treaties), (b) the revision of treaties, and (c) the interpretation of treaties; and the articles have correspondingly been arranged in three sections dealing with these topics. As stated in paragraph 18 of its report for 1962⁸ and recalled in

¹ *Yearbook of the International Law Commission*, 1953, vol. II, p. 156.

² *Yearbook of the International Law Commission*, 1954, vol. II, p. 133.

³ *Yearbook of the International Law Commission*, 1958, vol. II, pp. 27 and 41.

⁴ *Yearbook of the International Law Commission*, 1963, vol. II, p. 53, article 14 and commentary.

⁵ *Ibid.*, p. 189, para. 15.

⁶ *Yearbook of the International Law Commission*, 1962, vol. II, p. 160.

⁷ *Yearbook of the International Law Commission*, 1962, vol. II, pp. 159 *et seq.*, and 1963, vol. II, pp. 189 *et seq.*

⁸ *Yearbook of the International Law Commission*, 1959, vol. II, pp. 37-81, and 1960, vol. II, pp. 69-107.

paragraph 12 of its report for 1963,⁹ the Commission's plan is to prepare three groups of the draft articles covering the principal topics of the law of treaties and, when these have been completed, to consider whether they should be amalgamated to form a single draft convention or whether the codification of the law of treaties should take the form of a series of related conventions. The Special Rapporteur has therefore prepared the present draft in the form of a third self-contained group of articles closely related to those in parts I and II, which have already been transmitted to Governments for their observations. However, in accordance with the Commission's decision at its fifteenth session, the Special Rapporteur has not given the articles in the present group a separate set of numbers, but has numbered them consecutively after the last article of part II—the first article being numbered 55.

6. "Application of treaties" overlaps to a certain extent with two topics which are the subject of separate studies by the Commission and which it has assigned to other Special Rapporteurs, namely, the responsibility of States and the succession of States and Governments.¹⁰ In the case of the responsibility of States, the problem that faced the Special Rapporteur on the law of treaties was how far he should go into the legal liability arising from a failure to perform treaty obligations. This question involves not only the general principles governing the reparation to be made for a breach of a treaty but also the grounds upon which a breach may or, alternatively, may not be justified or excused, e.g. self-defence, reprisals, deficiencies in the internal law of the State, etc. From the point of view of State responsibility the breach of a treaty obligation does not appear to be materially different from the breach of any other form of international obligation; and the Special Rapporteur concluded that, if he were to deal with the principles of responsibility and of reparation in the draft articles on the law of treaties, it would be found that he had covered a substantial part of the law of State responsibility. To do this would not, he considered, be in accord with the decisions of the Commission regarding its programme of work. The present group of draft articles does not therefore contain detailed provisions regarding the principles of responsibility or of reparation for a failure to perform treaty obligations. Instead, there is a general provision in the first article—article 55—laying down the principle of State responsibility for breach of a treaty as one of the facets of the *pacta sunt servanda* rule and at the same time incorporating in this rule by reference the justifications and exemptions admitted in the law of State responsibility. In the case of State succession, the overlap relates to the question of the effects of treaties on third States. Here again, although the area of the overlap may be somewhat smaller, to examine how far successor States may constitute exceptions to the *pacta tertiis nec nocent nec prosunt* rule would be to deal with a major point of principle which is of the very essence of the topic of

State succession. Consequently, this aspect of the effects of treaties on third States has been omitted from the Special Rapporteur's study of that subject.

7. In this part, as in parts I and II, the Special Rapporteur has sought to codify the modern rules of international law on the topics with which the report deals. On some questions, however, the articles formulated in the report contain elements of the progressive development as well as of the codification of the applicable law.

Part III. Application, effects, revision and interpretation of treaties

SECTION I: THE APPLICATION AND EFFECTS OF TREATIES

Article 55.—*Pacta sunt servanda*

1. A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.
2. Good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.
3. The obligations in paragraphs 1 and 2 apply also —
 - (a) to any State to the territory of which a treaty extends under article 59; and
 - (b) to any State to which the provisions of a treaty may be applicable under articles 62 and 63, to the extent of such provisions.
4. The failure of any State to comply with its obligations under the preceding paragraphs engages its international responsibility, unless such failure is justifiable or excusable under the general rules of international law regarding State responsibility.

Commentary

(1) The articles so far adopted by the Commission in parts I and II do not contain any formulation of the basic rule of the law of treaties, *pacta sunt servanda*; and the appropriate place in which to state the rule appears to be at the beginning of the present part dealing with the application and effects of treaties. At this date in history it hardly seems necessary to adduce authority or precedents to support or explain the principle of the binding character of treaties¹¹ which is enshrined in the preambles to both the Covenant of the League and the Charter of the United Nations. On the other hand, in commenting upon the rule it may be desirable to underline a little that the obligation to observe treaties is one of good faith and not *stricti juris*.

⁹ *Yearbook of the International Law Commission*, 1963, vol. II, p. 189.

¹⁰ *Ibid.*, p. 224, paras. 55 and 61.

¹¹ See the full discussion of the principle *pacta sunt servanda* in the commentary to article 20 of the *Harvard Research Draft*, *A.J.I.L.*, 1935, Special Supplement, p. 977; J.L. Kunz, *A.J.I.L.*, 1945, pp. 180-197; C. Rousseau, *Principes généraux du droit international public* (1944), pp. 355-364.

(2) The rule *pacta sunt servanda* is itself founded upon good faith and there is much authority for the proposition that the application of treaties is governed by the principle of good faith.¹² So far as the Charter is concerned, Article 2, paragraph 2, expressly provides that Members are to "fulfil in good faith the obligations assumed by them in accordance with the present Charter". In its opinion on *Admission of a State to Membership in the United Nations*,¹³ the Court, without referring to Article 2, paragraph 2, said that the conditions for admission laid down in Article 4 did not prevent a Member from taking into account in voting "any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article". Again, speaking of certain valuations to be made under Articles 95 and 96 of the Act of Algeciras, the Court said in the *Rights of United States Nationals in Morocco* case:¹⁴ "The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith". Similarly, the Permanent Court, in applying treaty clauses prohibiting discrimination against minorities, insisted in a number of cases¹⁵ that the clauses must be so applied as to ensure the absence of discrimination in fact as well as in law; in other words, the obligation must not be evaded by a merely literal application of the clauses. Numerous other instances where international tribunals have insisted upon good faith in the interpretation and application of treaties could be mentioned, but it must suffice to give one precedent from the jurisprudence of arbitral tribunals. In the *North Atlantic Coast Fisheries Arbitration* the Tribunal, dealing with Great Britain's right to regulate fisheries in Canadian waters in which she had granted certain fishing rights to United States nationals by the Treaty of Ghent, said:¹⁶

"From the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the treaty."

(3) Paragraph 1 of the article accordingly provides that a treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms. It has also been thought desirable to continue with the words "in the light of the generally accepted rules of international law governing the interpretation of treaties", not as a qualification of but as an addition to the rule. The reason is that "interpretation" is an essential element in the application of treaties. Moreover, divergent interpretations are one of the main problems in the application of treaties, and it seems desirable to connect the obligation of good faith with the interpretation of the treaty no less than with

its performance. Pending the Commission's decision whether or not to codify the rules for the interpretation of treaties, it seems sufficient here to refer to the "general rules of international law governing the interpretation of treaties".

(4) The Commission has already recognized in article 17, paragraph 2, of the present articles¹⁷ that even before a treaty comes into force a State which has established its consent to be bound by the treaty is under an obligation of good faith to "refrain from acts calculated to frustrate the objects of the treaty, if and when it comes into force". *A fortiori*, when the treaty is in force the parties are under an obligation of good faith to refrain from such acts. Indeed, when the treaty is in force such acts are not only contrary to good faith but also to the undertaking to perform the treaty according to its terms which is implied in the treaty itself. Paragraph 2 of the present article therefore provides that a party must refrain from "any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects".

(5) Paragraphs 1 and 2 apply the rule *pacta sunt servanda* to the actual parties to the treaty, and that is the way in which the rule is usually formulated. The question, however, arises as to the application of the rule to States which, though not parties, are subject to the régimes of the treaty or to certain of its provisions either by an extension of the treaty to their territory under article 59 or under one of the exceptions to the *pacta tertiis* rule recognized in articles 62 and 63. It seems logical that paragraphs 1 and 2 should apply to these States to the extent to which they are subject to the régime of the treaty; and paragraph 3 so provides.

(6) As recalled in the introduction to this report, the Commission is undertaking a separate study of the general principles of State responsibility, which will therefore be formulated in another set of draft articles. Although, in consequence, the inclusion in the present articles of detailed provisions regarding the impact of the principles of State responsibility upon the rule *pacta sunt servanda* would appear to be inappropriate, some reference to them is necessary, because they obviously may mitigate the rigour of the rule in particular cases. It further seems necessary to lay down somewhere in the draft article the principle, however self-evident, that failure to carry out obligations undertaken in a treaty engages the State's responsibility. These considerations also arise with respect to third States in any case where they may be bound by the obligations of a treaty. Accordingly, there has been added in paragraph 4 a general provision covering the question of the responsibility of the State in the event of a failure to perform a treaty and incorporating by reference any exceptions or defences that may be applicable under the general rules governing State responsibility.

Article 56. — The inter-temporal law

1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.

¹² See especially Bin Cheng, *General Principles of Law*, chapter 3.

¹³ I.C.J. Reports, 1948, p. 63.

¹⁴ I.C.J. Reports, 1952, p. 212.

¹⁵ E.g. *Treatment of Polish Nationals in Danzig*, P.C.I.J. (1932), Series A/B, No. 44, p. 28; *Minority Schools in Albania*, P.C.I.J. (1935), Series A/B, No. 64, pp. 19-20.

¹⁶ (1910) U.N.R.I.A.A. Vol. XI, p. 188. The Tribunal also referred expressly to "the principle of international law that treaty obligations are to be executed in perfect good faith".

¹⁷ Yearbook of the International Law Commission, 1962, vol. II, p. 175.

2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.

Commentary

(1) Article 56 concerns the impact of the "inter-temporal law" upon the application of treaties. This law was formulated by Judge Huber in the *Island of Palmas* arbitration¹⁸ as follows:

"..... a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."

The context in which Judge Huber made this observation was the discovery and occupation of territory and the changes which have taken place in this branch of international law since the Middle Ages. But treaties also are "juridical facts" to which the inter-temporal law applies.

(2) Well-known instances of the application of the inter-temporal law to treaties are to be found in the *Grisbadarna*¹⁹ and in the *North Atlantic Coast Fisheries*²⁰ arbitrations. In the former the land boundary between Norway and Sweden had been established by treaty in the seventeenth century. Disputes having arisen in the early years of the present century concerning certain lobster and shrimp fisheries, it became necessary to delimit the course of the boundary seaward to the limit of territorial waters. The Tribunal declined to use either the median-line or thalweg principles for delimiting the maritime boundary under the treaty, on the ground that neither of these principles had been recognized in the international law of the seventeenth century. Instead, it adopted the principle of a line perpendicular to the general direction of the land as being more in accord with the "notions of law prevalent at that epoch". So too in the *North Atlantic Coast Fisheries* arbitration the Tribunal refused to interpret a treaty by reference to a legal concept which did not exist at the time of its conclusion. The Treaty of Ghent of 1818 had excluded United States nationals from fishing in Canadian "bays", and thereafter disputes constantly arose as to what exactly was the extent of the waters covered by the words "bays". The Tribunal, in interpreting the language of the 1818 Treaty, excluded from its consideration the so-called ten-mile rule for bays,²¹ which had not made its appearance in international practice until twenty-one years after the conclusion of the treaty.²² The inter-temporal law was also applied to a treaty by the International Court of Justice in the case of *Rights of Nationals of the United States of America*

in *Morocco*.²³ Called upon to determine the extent of the consular jurisdiction granted to the United States by treaties of 1787 and 1836 and to construe for that purpose the expression "any dispute", the Court said: "It is necessary to take into account the meaning of the word 'dispute' at the times when the two treaties were concluded".

(3) Paragraph 1 of the article therefore formulates for the purposes of the law of treaties the primary principle of the inter-temporal law as enunciated by Judge Huber in the passage cited above, and as applied in the cases just mentioned. This aspect of the inter-temporal law may, it is true, appear to be a rule for the interpretation as much as for the application of treaties. But "interpretation" and "application" of treaties are closely inter-linked, and it is considered convenient to deal with the inter-temporal law in the present section because its second aspect, which is covered in paragraph 2 of the Article, is clearly a question of "application" rather than of "interpretation".

(4) In the *Island of Palmas* arbitration Judge Huber emphasized that the inter-temporal law results in another and no less important rule:

"The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law."

Applying this rule, he held that even if the mere discovery of *Palmas* could be considered to have conferred on Spain a full and perfect title under the law of the seventeenth century, it would not constitute a good title today unless Spain's sovereignty had been maintained in accordance with the requirements of the modern law of effective occupation. What this rule means in the law of treaties is that the application of a treaty must, at any given time, take account of the general rules of international law in force at that time. If certain problems may arise as to the exact relation between the two branches of the inter-temporal law, the second rule appears to be no less valid than the first. Indeed, article 45 of part II of these articles, which was adopted by the Commission at its fifteenth session,²⁴ and under which a treaty may become void in consequence of the emergence of a new peremptory norm of general international law, is simply a particular application of the second rule.

(5) Paragraph 2 therefore completes and limits the rule in paragraph 1 by providing that, although the provisions of a treaty are to be interpreted in the light of the law in force when it was drawn up, the application of the treaty, as so interpreted, is governed by the general rules of international law in force at the time when the treaty is applied. The formulation of this provision is not free from difficulty, because it is here that the problem of the relation between the two branches of the inter-temporal law arises. The problem

¹⁸ (1928) *U.N.R.I.A.A.* vol. II, p. 845.

¹⁹ (1909) *U.N.R.I.A.A.* vol. XI, pp. 159-160.

²⁰ (1910) *U.N.R.I.A.A.* vol. XI, p. 196.

²¹ "So-called" because in the *Anglo-Norwegian Fisheries* case the International Court rejected the pretensions of this "rule" to be a customary rule of international law; *I.C.J. Reports*, 1951, p. 131.

²² Cf. the *Abu Dhabi Arbitration* (*International Law Reports*, 1951, p. 144), where Lord Asquith, as arbitrator, refused to interpret an oil concession granted in 1938 by reference to the continental shelf doctrine, which only made its appearance in international law a few years later.

²³ *I.C.J. Reports*, 1951, p. 189.

²⁴ (1928) *U.N.R.I.A.A.*, vol. II, p. 845.

²⁵ *Yearbook of the International Law Commission*, 1963, vol. II, p. 211.

may be illustrated by reference to the *Grisbadarna* and *North Atlantic Coast Fisheries* arbitrations. In the *Grisbadarna* arbitration the object of the seventeenth-century treaty had been to settle definitively the boundary between the two countries, and the tribunal, in effect, held that the parties must have intended to settle their maritime frontier on seventeenth-century principles, i.e. by a line perpendicular to the general direction of the land. But this treaty did not purport to fix the width of the territorial sea of the two countries, and it seems clear that the application of the treaty delimitation of the frontier at any given time would follow the evolution of the general rules of international law in force concerning the extent of the territorial sea. The reason why, on the other hand, a change in the general rules of international law from the principle of the perpendicular line, to the line of equidistance would not modify the application of the treaty with respect to the maritime frontier is that the treaty was intended by the parties to constitute a definitive settlement of their boundary—in other words, to have dispositive and final effects on the basis then agreed. Similarly, in the *North Atlantic Coast Fisheries* arbitration the Treaty of 1818 was intended to be a definitive settlement, as between Canada and the United States, of the areas exclusively reserved to Canadian fisheries, and the meaning attached by the parties in 1818 to the word “bays” would therefore be decisive as to the dispositive effects of the Treaty. At that date, the rules of international law regarding bays were not yet formed, and the Tribunal held that by the word “bays” the parties had intended the popular and geographical, *not legal*, concept of “bays”. If, however, there had been a recognizable legal concept of a bay at that date and the Tribunal had concluded that the parties intended the word “bay” to have its legal meaning, a nice question of interpretation would have arisen. Did the parties mean “bays as then understood and delimited in international law” or did they mean “any waters then or in future considered by international law to be bays under the sovereignty of a coastal State”? In the latter case, the application of the treaty would “follow the conditions required by the evolution of the law”, to use Judge Huber’s phrase; but in the former case it would not. Having regard to the evolution which has been taking place in the law regarding coastal waters and the continental shelf, the problems discussed in the previous paragraph cannot be dismissed as academic.

(6) The solution proposed in paragraph 2 is that for purposes of interpretation, the law in force at the time of the conclusion of the treaty prevails. But, the interpretation of the treaty having been ascertained in accordance with that law, the application of the treaty, as so interpreted, is subject to the law in force at the date of application.

*Article 57. — Application of treaty provisions
ratione temporis*

1. Unless a treaty expressly or impliedly provides otherwise, its provisions apply to each party only with respect to facts or matters arising or subsisting while the treaty is in force with respect to that party.

2. On the termination or suspension of the operation of a treaty, its provisions remain applicable for the purpose of determining the rights and obligations of the parties with respect to facts or matters which arose or subsisted whilst it was in force.

Commentary

(1) Articles 23 and 24 of part I deal with the entry into force of a treaty, while articles 38 to 45 of part II deal with its termination. The present article concerns the related but distinct problem of the temporal scope of the provisions of a treaty that is in force. It is implicit in the very concept of a treaty’s being in force that it should govern the relations of the parties with respect to all facts or matters which occur or arise during the period while it is in force and which fall within its provisions. But it is a question as to whether and to what extent a treaty may apply to facts or matters which (i) occurred or arose before it came into force and (ii) occur or arise after it has terminated.

(2) *Prior facts or matters.* The rights and obligations created by a treaty cannot, of course, come into force until the treaty itself is in force, either definitively or provisionally under article 24. But there is nothing to prevent the parties from giving a treaty, or some of its provisions, retroactive effects if they think fit.²⁶ It is essentially a question of the intention of the parties. The general rule is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms. This rule was endorsed and acted upon by the International Court of Justice in the *Ambatielos* case,²⁷ where the Greek Government contended that under a treaty of 1926 it was entitled to present a claim based on acts which had taken place in 1922 and 1923. The Greek Government, recognizing that its argument ran counter to the general principle that a treaty does not have retroactive effects, sought to justify its contention as a special case by arguing that during the years 1922 and 1923 an earlier treaty of 1886 had been in force between Greece and the United Kingdom containing provisions similar to those of the 1926 Treaty. This argument was rejected by the Court, which said:

“To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.”

A good example of a treaty having such a “special clause” or “special object” necessitating retroactive interpretation is to be found in the *Mavrommatis*

²⁶ Subject to any general rule restricting retrospective legislation, such as that involved in the maxim *nullum crimen sine lege*.

²⁷ (Jurisdiction), I.C.J. Reports, 1952, p. 40.

Palestine Concessions case.²⁸ The United Kingdom contested the Court's jurisdiction on the ground, *inter alia*, that the acts complained of had taken place before Protocol XII to the Treaty of Lausanne had come into force, but the Court said:

"Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the Contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII is that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses of the Protocol for the protection of the rights recognized therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection. The Court therefore considers that the Protocol guarantees the rights recognized in it against any violation regardless of the date at which it may have taken place."

(3) The non-retroactivity principle has come under consideration in international tribunals most frequently in connexion with jurisdictional clauses. When the treaty is purely and simply a treaty of arbitration or judicial settlement, the jurisdictional clause will normally provide for the submission to an international tribunal of "disputes", or specified categories of "disputes", between the parties. Then the word "disputes" according to its natural meaning is apt to cover any dispute which *exists* between the parties after the coming into force of the treaty. It matters not either that the dispute concerns events which took place prior to that date or that the dispute itself arose prior to it; for the parties have agreed to submit to arbitration or judicial settlement all their *existing* disputes without qualification. Thus, being called upon to determine the effect of Article 26 of the Palestine Mandate, the Permanent Court said in the *Mavromatis Palestine Concessions* case:²⁹

"The Court is of opinion that in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself, where it is laid down that "any dispute whatsoever ... which may arise" shall be submitted to the Court. The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above."

The reservations and limitations of jurisdiction to which the Court there referred are clauses restricting the acceptance of jurisdiction to disputes "arising after the entry into force of the instrument and with regard to situations or facts subsequent to that date". In a

later case — the *Phosphates in Morocco* case³⁰ the Permanent Court referred to these clauses as having been "inserted [in arbitration treaties] with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court ... of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise". In substance this statement is, of course, true. But in the present connexion it needs to be emphasized that the Court was not, strictly speaking, correct in implying that a treaty which provides for acceptance of jurisdiction with respect to "disputes" between the parties is one which has "retroactive effects"; because the treaty, for the very reason that it cannot have retroactive effects, applies only to *disputes* arising or *continuing to exist* after its entry into force. What the limitation clauses really do is to limit the scope of the acceptance of jurisdiction to "new" disputes rather than to deprive the treaty of "retroactive effects".³¹

(4) On the other hand, when a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause. The reason is that the "disputes" with which the clause is concerned are *ex hypothesi* limited to "disputes" regarding the interpretation and application of the substantive provisions of the treaty which, as has been seen, do not normally extend to matters occurring before the treaty came into force. In short, the disputes clause will only cover pre-treaty occurrences in exceptional cases, like Protocol XII to the Treaty of Lausanne,³² where the parties have expressly or by clear implication indicated their intention that the substantive provisions of the treaty are to have retroactive effects. Thus no such intention is to be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Commission of Human Rights has accordingly held in numerous cases that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question.³³

²⁸ *P.C.I.J.* (1938) Series A/B, No. 74, p. 24.

²⁹ The application of the different forms of clause limiting *ratione temporis* the acceptance of the jurisdiction of international tribunals has not been free from difficulty and the case-law of the two World Courts now contains a quite extensive jurisprudence on the matter. Important although this jurisprudence is in regard to the Court's jurisdiction, it concerns the application of particular treaty clauses, and the Special Rapporteur does not consider that it calls for detailed examination in the context of the general law of treaties.

³⁰ See paragraph (2) of this commentary.

³¹ See *Yearbook of the European Convention of Human Rights* (1955-1957), pp. 153-159; (1958-1959), pp. 214, 376, 382, 407, 412, 492-494; (1960), pp. 222, 280, 444; and (1961), pp. 128, 132-145, 240, 325.

²⁸ *P.C.I.J.* (1924) Series A, No. 2, p. 34.

²⁹ *Ibid.*, p. 35.

(5) The fact that a matter first arose prior to the entry into force of a treaty does not, however, prevent it from being caught by the provisions of the treaty if the matter still continues to arise after the treaty has come into force. The non-retroactivity principle can never be infringed by applying a treaty to matters that arise when the treaty is in force, even if they first began at an earlier date. Thus, while the European Commission of Human Rights has not considered itself competent to inquire into the propriety of legislative, administrative or judicial acts completed and made final before the entry into force of the European Convention, it has not hesitated to assume jurisdiction where there were fresh proceedings or recurring applications of those acts after the Convention was in force. In the case of *De Becker*,³⁴ for example, the applicant had been convicted by Belgian military courts prior to the entry into force of the European Convention of collaboration with the enemy, and had in consequence been automatically deprived for life of certain civil rights by the operation of article 123 *sexies* of the Belgian Penal Code. The Commission, while underlining its lack of competence to inquire into the judgements of the military courts, admitted *De Becker's* application in so far as it related to the continuing deprivation of his civil rights after Belgium became a party to the Convention. The matter that was held to fall under the jurisdiction of the Commission was not the conviction of the applicant as a collaborator, but the compatibility of article 123 *sexies* of the Penal Code with the Convention after its entry into force with respect to Belgium. The mere continuance of a situation after a treaty comes into force does not suffice to bring the fact which produced that situation within the régime of the treaty. The matter claimed to fall under the provisions of the treaty must itself occur or arise after the treaty came into force. Accordingly, the European Commission has expressly held in other cases that the mere fact that the applicant is still serving his sentence does not have the effect of bringing under the provisions of the Convention the judicial proceedings which are the source of that sentence, when the judgement was already final before the Convention came into force.³⁵

(6) It scarcely needs to be pointed out that the non-retroactivity principle discussed in the preceding paragraphs and embraced in the present article is quite independent of the question of the non-retroactive effect of "ratification" dealt with in article 23, paragraph 4, of part I. That provision, as pointed out in the Commentary to article 23, simply negatives the idea that a "ratification", when it takes place, brings the treaty into force for the parties retroactively as from the date of signature. The non-retroactivity principle dealt with in the present article is a general principle excluding the application of treaties to facts or matters antecedent to their entry into force, by whatever process this may take place.

(7) *Subsequent facts or matters.* Equally, a treaty is not to be considered as having any effects with regard

to facts or matters occurring or arising after its termination, unless a contrary intention is expressed in the treaty or is clearly to be implied from its terms. A fact or matter which occurs or arises after the termination of a treaty is not brought within its provisions merely because it is a recurrence or continuation of a fact or matter which occurred or arose during the period of the treaty and was then governed by its provisions.

(8) *Paragraph 1* of the article accordingly states that, unless a treaty expressly or impliedly provides otherwise, the application of its provisions is limited for each party to facts or matters arising or subsisting while the treaty is in force with respect to the party in question.

(9) *Paragraph 2*, underlines that the termination of a treaty or the suspension of its operation does not put an end to the rights and obligations of the parties under the treaty with respect to facts or matters which arose or subsisted whilst it was in force. The point almost goes without saying, but it seems desirable to state it in order to prevent any misunderstanding and to avoid any appearance of inconsistency with the provisions of article 53 regarding the legal consequences of the termination of treaties.

Article 58. — Application of a treaty to the territories of a contracting State

A treaty applies with respect to all the territory or territories for which the parties are internationally responsible unless a contrary intention

(a) is expressed in the treaty;

(b) appears from the circumstances of its conclusion or the statements of the parties;

(c) is contained in a reservation effective under the provisions of articles 18 to 20 of these articles.

Commentary

(1) Sometimes the provisions of a treaty expressly relate to a particular territory or area, e.g. the Antarctic Treaty;³⁶ and in that event the territory or area in question is undoubtedly the object to which the treaty applies. But this is not what the territorial application of a treaty really signifies, nor in such a case is the application of the treaty confined to the particular territory or area. The "territorial application" of a treaty signifies the territories which the parties have purported to bind by the treaty and which, therefore, are the territories affected by the rights and obligations set up by the treaty. Thus, although the enjoyment of the rights and the performance of the obligations contained in a treaty may be localized in a particular territory or area, as in the case of Antarctica, it is the territories with respect to which each party contracted in entering into the treaty which determine its territorial scope.

(2) The territorial application of a treaty is essentially a question of the intention of the parties. Some treaties contain clauses dealing specifically with their territorial scope. For example, certain League of Nations treaties

³⁴ See *Yearbook of the European Convention of Human Rights* (1958-1959), pp. 230-235.

³⁵ E.g. Application No. 655/59; *Yearbook of the European Convention of Human Rights* (1960), p. 284.

³⁶ Dated 1 December 1959; text in *United Nations Treaty Series*, vol. 402.

concerning opium were specifically restricted to the Far Eastern territories of the contracting States.³⁷ Other cases are the so-called "colonial" and "federal" clauses,³⁸ by which it is sought to make special provision regarding the application of a treaty to the dependent territories of a colonial Power, or for its application to the component territories of a federal State. Again, treaties, although they do not deal specifically with the question, may indicate their territorial scope by reason of their subject-matter, their terms or the circumstances of their conclusion. For example, when the Ukraine and Byelorussia are signatories to a treaty as well as the USSR, the implication is that the territorial scope of the latter's signature is restricted to the other thirteen States of Soviet Union. Where the intention of the parties as to the territorial scope of the treaty has, in one way or another, been made clear, that intention necessarily determines the matter.

(3) The object of the present article is to provide a rule to cover the cases where the intention of the parties concerning the territorial scope of the treaty is not clear. If regard is had only to the "metropolitan" territories of the contracting States, there seems to be complete agreement that in entering into a treaty a State is to be presumed to intend to engage its responsibility with respect to all the "metropolitan" territories over which it has sovereignty. Thus, one writer on the law of treaties formulates the general principle as follows:³⁹

"En règle générale, le traité international déploie ses effets sur l'ensemble du territoire soumis à la compétence plénière (souveraineté) de l'Etat, si l'on suppose celui-ci doté d'une structure simple ou unitaire. En d'autres termes, il y a coïncidence exacte entre la sphère d'application spatiale du traité et l'étendue territoriale soumise à la souveraineté étatique."

And the same writer points out that French treaties are automatically applicable to the whole of metropolitan France, that is to continental France and to the adjacent islands, including Corsica. A recent English work⁴⁰ on the law of treaties also states:

"The treaty, however, may be of such a kind that it contains no obvious restriction of its application to any particular geographical area, e.g. a treaty of extradition, or a treaty undertaking to punish genocide, or the slave traffic, or abuse of the Red Cross emblem; in such a case the rule is that, subject to express or implied provision to the contrary, the treaty applies to all the territory of the contracting party."

Indeed, this book adds the words "whether metropolitan or not", but the question of non-metropolitan

territories is more controversial and will receive detailed consideration in paragraphs (6)-(9) below.

(4) The rule that a treaty is to be presumed to apply with respect to all the territories under the sovereignty of the contracting parties means that each State must make its intention plain, expressly or by implication, in any case where it does not intend to enter into the engagements of the treaty on behalf of and with respect to all its territory. Such a rule seems to be essential if contracting States are to have any certainty and security as to the territorial scope of each other's undertakings. That this is the rule acted upon in State practice is borne out by the fact that States intending to contract with respect to all the metropolitan territory under their sovereignty do not usually specify that they are so doing. They rely upon the general presumption to that effect, and mention particular territories only when there are special reasons for doing so. This is well illustrated by the practice of the United Kingdom with regard to the Channel Islands and the Isle of Man, which have their own systems of law and government. Formerly, these several islands were regarded as belonging to the metropolitan territory of the United Kingdom, and no special mention was normally made of them in United Kingdom treaty practice.⁴¹ But the large measure of autonomy possessed by these islands led in 1950 to a change in the practice. "Metropolitan" treaties of the United Kingdom are now either made in the name only of Great Britain and Northern Ireland⁴² or the treaty defines the territory to which it applies in such a way as to limit its application to Great Britain and Northern Ireland.⁴³ Where the island governments desire to be included in such treaties they are specially mentioned;⁴⁴ and in treaties of a general character which provide for extension to non-metropolitan territories, they now appear amongst the latter.⁴⁵ They are covered by the signature of the United Kingdom only when there is nothing to indicate that it does not extend to all the territories for which the United Kingdom is internationally responsible; in other words, when the presumption operates.⁴⁶

(5) Similarly, it was the very fact that a State will normally be presumed to enter into the engagements of

³⁷ See Lord McNair, *op. cit.*, p. 118, note 2; this note is correct as to the former but not as to the present practice.

³⁸ E.g. Agreement between the Government of Great Britain and Northern Ireland and the USSR on Relations in the Scientific, Technological, Educational and Social Fields 1963-1965 (United Kingdom Treaty Series No. 42 of 1963).

³⁹ E.g. the Convention of 1961 between Austria and Great Britain for the Reciprocal Recognition and Enforcement of Foreign Judgments defines the United Kingdom as comprising England and Wales, Scotland and Northern Ireland (United Kingdom Treaty Series No. 70 of 1962).

⁴⁰ E.g. an Exchange of Notes with Honduras for the Abolition of Visas refers to the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man (United Kingdom Treaty Series No. 62 of 1962).

⁴¹ E.g. European Convention of Human Rights and Fundamental Freedoms of 1950; Geneva Convention of 1956 on Taxation of Motor Vehicles (United Kingdom Treaty Series No. 43 of 1963); International Wheat Agreement of 1962 (United Kingdom Treaty Series No. 15 of 1963).

⁴² E.g. The Geneva Convention of 1958 on the High Seas (United Nations Treaty Series, Vol. 450).

³⁷ E.g. Geneva Agreement of 11 February 1925 concerning the Suppression of the Manufacture of, Internal Trade in, and Use of Prepared Opium, *League of Nations, Treaty Series*, vol. 51; Hudson, *International Legislation*, vol. III, p. 1580.

³⁸ See examples in the United Nations *Handbook of Final Clauses* (ST/Leg/6), pp. 81-90.

³⁹ C. Rousseau, *Principes généraux du droit international public* (1944), p. 379.

⁴⁰ Lord McNair, *Law of Treaties* (1961), pp. 116 and 117.

a treaty with respect to all its territory that led some federal States to seek the insertion of a "federal" clause in treaties which deal with matters reserved under their constitutions to the component states of the federation. The aim of this type of clause is to prevent those provisions of the treaty which concern matters falling within the competence of the individual component states from becoming binding upon the federation until each component state has taken the necessary legislative action to ensure the implementation of those provisions. Under the Constitution of the International Labour Organisation conventions drawn up by that Organisation are subject to such a clause. "Federal" clauses also appear in a number of other kinds of multilateral treaty, though in recent years opposition has developed in the United Nations to their use in multilateral instruments drawn up within or under the auspices of the Organisation.

(6) The question remains as to whether any different rule obtains in the case of territories not geographically part of or adjacent to the principal territory of the State. In one case⁴⁷ the Supreme Court of Cuba, when declining to apply a Cuban-United States commercial treaty of 1902 to Philippine products, said: "The generally recognized custom in the international agreements of colonizing nations or of those possessing separate territories of different ethnic unity, was to refer to such possessions either by name, when making such treaties, or to extend the provisions to all such possessions by a provision in the treaty". The same view was expressed in 1944 by the French writer cited in paragraph (3) of this commentary:⁴⁸ "Réserve faite de l'hypothèse où, par son objet, un traité concerne exclusivement des colonies, les traités conclus par un Etat ne s'étendent pas de plein droit à ses colonies." This statement seems, however, to have been based primarily upon the position of France's overseas territories under the pre-1946 French Constitution and on the jurisprudence of French tribunals, although this jurisprudence was to some extent divided on the point. At any rate, in a later work⁴⁹ the same writer has explained that under the post-war French Constitution: "Sauf précisions spéciales, un instrument de ratification 'au nom de la République Française' s'étend à tous les territoires visés à l'Article 60 de la Constitution, c'est-à-dire à la France métropolitaine, aux départements et aux territoires d'outre-mer."

(7) State practice does not, in fact, appear to justify the conclusion that a treaty applies to overseas territories only if they are specifically mentioned in the treaty. On the contrary, it seems to have been based on the opposite hypothesis, i.e. that a treaty automatically embraces all the territories of the contracting parties unless a contrary intention has been expressly stated or can be inferred. Denmark, for example, seems from quite early times to have con-

sidered it necessary to provide specifically for the exclusion of her overseas possessions whenever she desired to limit the scope of her engagements to Denmark itself. This practice, it happens, came under the notice of the Permanent Court in the *Eastern Greenland* case:⁵⁰

"In order to establish the Danish contention that Denmark has exercised in fact sovereignty over all Greenland for a long time, Counsel for Denmark have laid stress on the long series of conventions—mostly commercial in character—which have been concluded by Denmark and in which, with the concurrence of the other contracting Party, a stipulation has been inserted to the effect that the convention shall not apply to Greenland. In date, these conventions cover the period from 1782 onwards... In many of these cases, the wording is quite specific; for instance, Article 6 of the Treaty of 1826 with the United States of America: 'The present Convention shall not apply to the Northern possessions of His Majesty the King of Denmark, that is to say, Iceland, the Faroe Islands and Greenland'."

Similarly, it was only because British treaties were presumed to apply to all territories for which Great Britain was internationally responsible that she began about 1880 to ask for the insertion of the so-called "colonial" clause in treaties dealing with commerce or internal affairs.⁵¹ The growing autonomy of Canada, Australia, New Zealand and other territories made it unacceptable for Great Britain to commit them to be bound by these treaties without their concurrence in the text of the treaty. Accordingly, at this date there began to appear in many treaties, both bilateral and multilateral, a clause providing that the treaty was not to apply to overseas territories unless and until notification had been given to that effect.⁵² It is true that these clauses have equally often been framed in an affirmative form, authorizing the parties to "extend" the application of the treaty to non-metropolitan territories or to declare the treaty applicable with respect to them.⁵³ But these affirmative forms of the clause do not seem to have been based on a view that, in the absence of any territorial application clause, the operation of the treaty would have been confined to metropolitan territory. On the contrary, they seem to have been designed to negative by implication the automatic application of the treaty to non-metropolitan territories and to provide in its place a convenient procedure for the piecemeal extension of the treaty

⁵⁰ *P.C.I.J.* (1933) Series A/B No. 53, at p. 51.

⁵¹ See generally J. E. S. Fawcett, *British Yearbook of International Law* (1949), vol. 26, pp. 93-100; Lord McNair, *Law of Treaties* (1961), pp. 116-119.

⁵² E.g. Anglo-Italian Treaty of Commerce and Navigation of 1883 (Hertslet, *Commercial Treaties*, vol. XV, p. 776; Geneva Convention of 1923 for the Simplification of Customs Formalities (*League of Nations Treaty Series*, vol. 30; Hudson, *International Legislation*, vol. II, pp. 1118-1119). Twenty treaties with clauses of this kind negating the application of the treaty to overseas territories are listed by Rousseau, *Principes généraux du droit international public* (1944), p. 385.

⁵³ E.g. the Convention of 1886 for the Protection of Literary and Scientific Works (*British and Foreign State Papers*, vol. 77, p. 28); and for modern examples see the United Nations *Handbook of Final Clauses* (ST/Leg/6), pp. 81-84 and 87-89.

⁴⁷ Reciprocity Treaty (Philippine Islands) case, 1929-30, *Annual Digest of International Law Cases*, Case No. 231.

⁴⁸ C. Rousseau, *Principes généraux du droit international public* (1944), p. 381.

⁴⁹ C. Rousseau, "L'évolution du droit public", *Etudes en l'honneur d'Achille Mestre* (1956), p. 490; see also the same writer in *Droit international public* (1953), p. 45.

to these territories as and when any necessary consents of the autonomous governments were obtained. In any event, the general understanding today clearly is that, in the absence of any territorial clause or other indication of a contrary intention, a treaty is presumed to apply to all the territories for which the contracting States are internationally responsible.⁶⁴ That this is the general understanding appears from the statements of delegates in debates on the colonial clause in the United Nations,⁶⁵ while the Secretariat of the United Nations has more than once stated that it is upon this view of the law that the Secretary-General bases his practice as depositary of multilateral agreements.⁶⁶ Thus, paragraph 138 of the Secretariat memorandum on succession of States in relation to treaties of which the Secretary-General is depositary (A/CN.4/150) summarizes the United Nations practice as follows: "If there is no provision on territorial application action has been based on the principle, frequently supported by representatives in the General Assembly, that the treaty was automatically applicable to all the dependent territories of every party."

(8) The territorial scope of a treaty, as previously stated, is essentially a question of the intention of the parties, and in recent years the insertion of territorial application clauses in certain multilateral treaties has met with opposition.⁶⁷ However, the present article is concerned only with the cases where the parties have not made any special provision, either expressly or impliedly, in regard to the territorial scope of the treaty and, for the reasons given above, it is thought that the appropriate and generally accepted rule in such cases is that the treaty applies to all the territories for which the contracting States are internationally responsible. It is this rule, therefore, which is expressed in the article.

Article 59. — Extension of a treaty to the territory of a State with its authorization

The application of a treaty extends to the territory of a State which is not itself a contracting party if —

- (a) the State authorized one of the parties to bind its territory by concluding the treaty;
- (b) the other parties were aware that the party in question was so authorized; and

⁶⁴ See Lord McNair, *Law of Treaties* (1961), pp. 116 and 117; S. Rosenne, *Recueil des Cours de l'Académie de droit international* (1954), vol. II, pp. 374 and 375.

⁶⁵ See *Summary of Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/Leg/7), p. 49; cf. also the contention of the United Kingdom that the absence of such a clause would make it necessary for her to delay acceptance of the treaty with respect to her metropolitan territory until the assent of non-metropolitan territories had been obtained.

⁶⁶ See *Summary of Practice, etc.* (ST/Leg/7), paras. 102-103; *Succession of States in relation to General Multilateral Treaties of which the Secretary-General is Depositary in Yearbook of the International Law Commission, 1962*, vol. II, p. 115, paras. 73 and 74 and p. 123, para. 138.

⁶⁷ See Yuen-li Liang, *AJIL*, 1951, p. 108; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp. 309-316.

(c) the party in question intended to bind the territory of that State by concluding the treaty.

Commentary

(1) The previous article covers the application of a treaty to a State's own territories. The present Article deals with the different case of the application of a treaty made by one State to the territory of another State by reason of an authority conferred by the latter upon the former to include its territory within the régime of the treaty. When one State delegates to another authority to enter into a treaty or into certain categories of treaties on its behalf, it is possible to envisage two different solutions. The intention may be to constitute the State on whose behalf the treaty is concluded an actual party to the treaty, or it may merely be to bring that State within the treaty régime under the umbrella of the State negotiating the treaty. The latter type of case appears to be essentially one of the "territorial application" of treaties, and it is this type with which the present Article deals.

(2) The commercial and customs treaties of Liechtenstein are a good example of the cases covered by this Article. The Swiss-Liechtenstein Treaty of 1923 for the incorporation of Liechtenstein in the Swiss Customs Territory⁶⁸ provided in article 7:

"En vertu du présent traité, les traités de commerce et de douane conclus par la Suisse avec des Etats tiers s'appliqueront dans la Principauté de la même manière qu'en Suisse, sous réserve des engagements qui résultent pour la Suisse de traités déjà en vigueur."

In article 8 there was an undertaking by Liechtenstein not to conclude treaties on its own account, and the article then continued:

"La Principauté de Liechtenstein autorise la Confédération Suisse à la représenter dans les négociations qui auront lieu avec les Etats tiers, pendant la durée du présent traité, en vue de la conclusion de traités de commerce et de douane, et à conclure ces traités avec pleins effets pour la Principauté."

The combined result of these two articles clearly is that an express authority is conferred upon Switzerland to conclude commercial and customs treaties having territorial application to Liechtenstein; and that is the way in which these articles seem to have been interpreted in the bilateral treaty-practice of the two States. The commercial and customs treaties of Switzerland apply equally in Liechtenstein.

(3) Application of a treaty to the territory of a State not an actual party to the treaty in consequence of a delegation of treaty-making authority also appears to occur in the case of some treaties made by international organizations, where the treaty is concluded not merely for the organization as such but also for the individual member States. Thus, article 228 of the Treaty of 1957 establishing the European Economic Community,⁶⁹ after providing for the conclusion of certain types of

⁶⁸ *League of Nations Treaty Series*, vol. 21, p. 232.

⁶⁹ *United Nations Treaty Series*, vol. 298 [English translation].

agreements by the Community through its Council, states: "Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States." This article would appear to make the Community itself the party to the agreements which it concludes and the Member States territories to which the agreements apply. Article 206 of the Treaty of 1957 establishing the European Atomic Energy Community⁶⁰ also provides that this Community may conclude certain types of agreement but does not make any statement as to the binding effects of the agreements. However, it seems that Euratom treaties, though regarded as made by the Community alone, apply automatically in the territories of the Member States. The Agreements of 1958 for Co-operation between Euratom and the United States of America⁶¹ for example, actually defines the term "parties" as meaning the Government of the United States and Euratom, whereas the detailed provisions of the treaty clearly assume that the treaty will be binding on the territories of the Member States.⁶² In drawing attention to these cases the Special Rapporteur does not wish to be understood as taking any definite position in regard to the territorial application of treaties concluded by organizations. The cases are mentioned merely for the purpose of illustrating the possible significance of the principle formulated in this article in connexion with the treaties of international organizations.

(4) A nice question may sometimes, however, arise as to whether a delegation of authority has the effect of extending the territorial application of the treaty to the State conferring the authority or whether it constitutes that State an actual party to the treaty. The treaties made by Belgium for the Belgo-Luxembourg Economic Union, for example, do not appear to fall under the present article; they appear rather to fall under the next article, which concerns cases where a State does not itself participate in the conclusion of a treaty but becomes an actual party to it through the agency of another State. Article 5 of the Belgo-Luxembourg Convention of 1921⁶³ for establishing the Economic Union contained a clause under which Belgium undertook to try and bring about the extension of *existing* Belgian economic and commercial treaties to Luxembourg. It then provided: "Les futurs traités de commerce et accords économiques seront conclus par la Belgique au nom de l'Union douanière." If this language may be a little equivocal on the point now under discussion, treaty practice seems to show that Luxembourg is itself a party to "Union" treaties concluded by Belgium under that article. Thus, the preamble to a Commercial Agreement between the Union and Mexico in 1950⁶⁴ reads: "Le Gouvernement belge, agissant tant en son nom qu'au nom du Gouvernement luxembourgeois en vertu d'accords existants." The question whether the case is to be considered as one of territorial

application or participation through an agent would seem essentially to depend on the intention of the States concerned and of the other parties to the treaty. The present article, as already pointed out, is confined to cases of the territorial application of a treaty made by one State to the territory of another in virtue of a delegated authority to make the treaty so applicable.

(5) The article therefore lays down that when a party (i.e. either a State or an organization) to a treaty is duly authorized by a State to bind that State's territory, and the other parties are aware of the authorization, the treaty applies to the territory of that State, provided always that such was the intention of the party in question.

Article 60. — Application of a treaty concluded by one State on behalf of another

1. When a State, duly authorized by another State to do so, concludes a treaty on behalf and in the name of the other State, the treaty applies to that other State in the capacity of a party to the treaty. It follows that the rights and obligations provided for in the treaty may be invoked by or against the other State in its own name.

2. Similarly, when an international organization, duly authorized by its constituent instrument or by its established rules, concludes a treaty with a non-member State in the name both of the organization and of its Member States, the rights and obligations provided for in the treaty may be invoked by or against each Member State.

Commentary

(1) The difference between the cases covered by this article and those dealt with in the previous article has already been referred to in paragraph (4) of the commentary to the previous article. In the cases here in question one State gives its consent to a treaty through the agency of another, with the intention of becoming a party to the treaty. The concept of agency has received comparatively little development in the law of treaties. The multiplicity of international conferences today and the volume of international intercourse has made it not uncommon for one State to use the services of another for the conclusion of a treaty, more especially a treaty in simplified form.⁶⁵ But when this occurs, what usually happens is that one State lends the services of its diplomatic agent to another State for the purpose of the conclusion of a treaty by him in the name of that other State. The other State, by the issue of "full powers" or other credentials, invests the diplomatic agent with its authority to conclude the treaty, and the diplomat, for the purposes of the treaty, has the character of a diplomatic agent of that State. This is not, of course, a case of one State acting for another, and it is not the kind of agency with which the present article is concerned.

⁶⁰ *Ibid* [English translation].

⁶¹ *United Nations Treaty Series*, vol. 335 and vol. 338.

⁶² See generally P. Pescatore, *Recueil des Cours de l'Académie de droit international*, 1961, vol. II, pp. 133-137.

⁶³ *League of Nations Treaty Series*, vol. IX.

⁶⁴ *United Nations Treaty Series*, vol. 188.

⁶⁵ See, for example, the incident mentioned by H. Blix. *Treaty-Making Power*, p. 12, where a Norwegian delegate signed a Convention on behalf both of Norway and Sweden. Commonwealth States on occasions use the services of United Kingdom representatives in this way.

(2) The commercial and economic treaties of the Belgo-Luxembourg Economic Union were mentioned in paragraph (4) of the commentary to the previous article as examples of treaties made by one State through the agency of another. Although the instances may not be numerous,⁶⁶ the expanding diplomatic activity of States and the variety of their associations with one another may lead more frequently to cases where one State acts for another in the conclusion of a treaty. Accordingly, it seems desirable to provide for this contingency in the draft articles on the law of treaties.

(3) *Paragraph 1* of the article therefore provides for such cases as the commercial and economic treaties entered into by the Belgo-Luxembourg Union by recognizing the possibility of a State's becoming an actual party to a treaty through another State's conclusion of the treaty on its behalf. In such cases it would seem only logical that, being a party, the former State may invoke the treaty, and be liable to have the treaty invoked against it, in its own name.

(4) The question may also be posed as to how far the institution of "agency" may play a rôle in cases where treaties are concluded by international organizations on behalf of their members. In paragraph (3) of the commentary to the previous article reference was made to treaties concluded by the European Economic Community and by Euratom where the principle of territorial application appears to be contemplated rather than that of agency. It is easy, however, to imagine cases, especially in the economic sphere, where the Organization intends to conclude a treaty with a third State on behalf of its Member States in such a manner as to place them individually in the position of parties to the treaty.

(5) Two recent judgements of the International Court, in the *South West Africa* cases⁶⁷ and in the *Northern Cameroons* case,⁶⁸ have been concerned with the rights of members of an organization under treaties concluded pursuant to a provision contained in the constitution of the organization. In the *South West Africa* cases the complexity of the legal acts creating the Mandate gave rise to sharp divisions in the Court as to its legal basis, some Judges considering that it was constituted by a treaty, others that it resulted from a legislative act by the Council of the League. The majority of the Court upheld both the character of the Mandate as a "treaty in force" and the right of two States to avail themselves of a provision in the Mandate conferring a right upon "Members of the League of Nations". But it is not easy to discern in the judgements exactly what legal relation the Court considered the two States to have to the treaty. One Judge, it is true, placed himself squarely upon the principle of *stipulation pour autrui*, rejecting the idea that the plaintiff States could be considered "parties" to the Mandate. The other

Judges in the majority did not push their analysis of the legal position to the point of indicating whether they regarded the two States as "parties", either directly or indirectly, to the Mandate treaty, or as beneficiaries of a *stipulation pour autrui*, or as entitled to exercise the right conferred by the Mandate on some other basis connected with their membership of the Organization. In the *Northern Cameroons* case the legal basis of the Trusteeship Agreement was less complex and received little examination from the majority of the Judges, while the Court decided the case on a special ground. Although references were made in the main judgement and in individual opinions to the rights of Members of the United Nations under the Agreement, these references were in terms which left open the question of the true juridical relation of Members of the Organization to the Agreement. These two cases do not therefore provide any clear guidance on this issue; and in any event, whether or not the treaties in these cases are properly to be considered as having been made by the Organization, the treaties were made with Members of the Organization. Such treaties raise special problems of the law governing international organizations which it seems advisable to leave for consideration by the Commission in connexion with its study of the relations between States and inter-governmental organizations. Accordingly, paragraph 2 of the present article is confined to treaties made by organizations with third States.

(6) *Paragraph 2* therefore provides that the same result will follow as in paragraph 1 when an organization contracts with a third State not merely on behalf of the organization as a collective legal person but also on behalf of its Member States individually.

Article 61. — Treaties create neither obligations nor rights for third States

1. Except as provided in article 62 and 63, a treaty applies only between the parties and does not

(a) impose any legal obligations upon States not parties to the treaty or modify in any way their legal rights;

(b) confer any legal rights upon States not parties to the treaty.

2. Paragraph 1 is without prejudice to any obligations and rights which may attach to a State with respect to a treaty under part I of these articles prior to its having become a party.

Commentary

(1) There appears to be almost universal agreement that the rule laid down in paragraph 1 of this article — that a treaty applies only between parties — is the fundamental rule governing the effect of treaties upon third States.⁶⁹ It appears originally to have been derived

⁶⁶ In the light of the Court's statement in the case of the *Rights of United States Nationals in Morocco* that even during the Protectorate Morocco retained her personality as a State (*I.C.J. Reports*, 1962, pp. 185 and 188), it may be that there was an element of "agency" in the treaties concluded by France on behalf of Morocco during the Protectorate.

⁶⁷ *I.C.J. Reports*, 1962, p. 319.

⁶⁸ *I.C.J. Reports*, 1963, p. 15.

⁶⁹ Professor G. Scelle, stressing the difference in character between treaties and private law contracts, went so far as to object to the application between States of the principle *pacta tertiis nec nocent nec prosunt*, a principle devised for the private law contractual relations of individuals (*Précis de droit des gens*, tome II, 1934, pp. 345-346 and 367-368). But he is alone in disputing the validity in international law of the *pacta tertiis* principle as a general principle of the law of treaties.

from Roman law in the form of the well-known maxim *pacta tertiis nec nocent nec prosunt* — agreements neither impose obligations nor confer benefits upon third parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States. Moreover, treaties have special characteristics which distinguish them in important respects from civil law agreements, and it seems more correct today to regard the rule that a treaty applies only between the parties as an independent rule of customary international law. Whatever may be its basis, there is abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists. Indeed, so clearly established is the general rule that it is thought sufficient for the purposes of the present report to draw attention to some of the principal pronouncements of international tribunals in which the rule has been recognized. These pronouncements cover both aspects of the rule — the imposition of obligations and the conferment of rights.

(2) *Obligations.* International tribunals have been extremely firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose any obligation on States which are not parties to them nor modify in any way their legal rights without their consent. That this is the position with regard to bilateral treaties was considered by Judge Huber in the *Island of Palmas* case⁷⁰ to be elementary. Dealing with a supposed recognition of Spain's title to the island in treaties concluded by that country with other States, he said: "it appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the 'Philippines' could not be binding upon" the Netherlands.⁷¹ Again, dealing with the possible effect on the Netherlands' titles of the Treaty of Paris of 1898 concluded between Spain and the United States, he said: ⁷² "Whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers"; and in a later passage⁷³ he emphasized that "the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers". According to Judge Huber, therefore, treaties concluded by Spain with the United States or with other third States were *res inter alios acta* which could not, as treaties, be in any way binding upon the Netherlands.

(3) In the case of the *Free Zones of Upper Savoy and the District of Gex*⁷⁴ it was a major multilateral treaty — the Versailles Peace Treaty — which was in question, and France took the position that article 435 of the Treaty had had the effect of abolishing the free customs zones set up between herself and Switzerland under territorial arrangements drawn up at the Congress of Vienna in 1815. The Permanent Court found that

article 435 could not in fact be read as providing for the automatic abolition of the free zones; but it then added:

"even were it otherwise, it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it."

In the *River Oder Commission* case⁷⁵ the Permanent Court declined to regard a general multilateral treaty of a law-making character — the Barcelona Convention of 1921 on the Régime of Navigable Waterways of International Concern — as binding upon Poland, which was not a party to the treaty. The facts of that case make the precedent a particularly strong one. The Treaty of Versailles in establishing an international régime for the River Oder had provided for the supersession of this régime by a new one "to be laid down in a general convention drawn up by the Allied and Associated Powers, and approved by the League of Nations". Although Poland was a party to the Treaty of Versailles, and although the Barcelona Convention was the "general convention" provided for in the Treaty and had been signed by Poland, the Court held that the general convention was not binding upon her because she had failed to ratify it. Nor in the *Eastern Carelia* case⁷⁶ did the Permanent Court take any different position with regard to the Covenant of the League of Nations itself. Called upon to consider the effect of Article 17 on the obligations of a non-member State respecting the pacific settlement of disputes, the Court said:

"As concerns States not Members of the League, the situation is quite different; they are not bound by the Covenant. The submission of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent. Such consent, however, has never been given by Russia."

Similarly, the present Court has held in the case of the *Aerial Incident of 27 July 1955*⁷⁷ that Article 36, paragraph 5, of the Statute of the Court, which is an integral part of the Charter of the United Nations, was "without legal force so far as non-signatory States were concerned", and could not affect the position of States which were not Members of the United Nations at the time when the Permanent Court ceased to exist.

(4) *Rights.* The leading statement of the rule that a treaty does not normally confer any rights upon non-parties is perhaps that of the Permanent Court in the case of certain *German Interests in Polish Upper Silesia*.⁷⁸ In that case Poland sought to claim rights under the Armistice Convention of the First World War and under the Protocol of Spa, although not a signatory to either of these instruments. Her argument was that she ought to be considered as having tacitly

⁷⁰ (1928) *U.N.R.I.A.A.* vol. II, p. 831.

⁷¹ *Ibid.*, p. 850.

⁷² *Ibid.*, p. 842.

⁷³ *Ibid.*, p. 870.

⁷⁴ *P.C.I.J.* (1932) Series A/B No. 46, p. 141; and see also (1929) Series A No. 22, p. 17.

⁷⁵ *P.C.I.J.* (1929) Series A No. 23, pp. 19-22.

⁷⁶ *P.C.I.J.* (1923) Series B/5, pp. 27-28.

⁷⁷ *I.C.J. Reports*, 1959, p. 138.

⁷⁸ *P.C.I.J.* (1926) Series A No. 7.

adhered or acceded to them. To this argument the Court replied :

"The instruments in question make no provision for a right on the part of other States to adhere to them. It is, however, just as impossible to presume the existence of such a right — at all events in the case of an instrument of the nature of the Armistice Convention — as to presume that the provisions of these instruments can *ipso facto* be extended to apply to third States. A treaty only creates law as between the States which are parties to it ; in case of doubt, no rights can be deduced from it in favour of third States."

In that case, it will be observed, Poland did not claim as a third-party beneficiary of the substantive rights created by the Armistice Convention and the Protocol of Spa. She claimed rather to have had a third-party right to adhere or accede to the treaties, and by that means to have become entitled to enforce them. The Court, however, said categorically that a treaty only creates law between the parties and that, in case of doubt as to the intentions of the parties, no right, whether a substantive right or a right to become a party, can be deduced from a treaty in favour of a third State.

(5) Examples of the application of this rule to substantive rights can readily be found in the jurisprudence of arbitral tribunals. Thus, in the *Pablo Nájera* arbitration⁷⁹ the question arose whether Mexico, which was not a Member of the League of Nations, could invoke Article 18 of the Covenant for the purpose of contesting France's right to bring a claim before the Tribunal under a Franco-Mexican Convention of 1924. Article 18 prescribed that every treaty entered into by any Member of the League should forthwith be registered with the Secretariat and should not be binding until so registered. Mexico contended that France, not having registered the 1924 Convention, could not put it forward as a valid treaty in her relations with Mexico. This contention was rejected by the tribunal, which said that a non-member State was "tout à fait étranger à l'engagement contracté par les membres" and that Mexico was not therefore entitled to invoke a provision of the Covenant against France. Similarly, in the *Clipperton Island*⁸⁰ arbitration the arbitrator held that Mexico was not entitled to invoke against France the provision of the Act of Berlin requiring notification of occupations of territory, *inter alia*, on the ground that Mexico was not a signatory to that Convention. In the *Forests of Central Rhodope* case⁸¹ Greece made a claim on behalf of Greek nationals whose property rights in the forests of Rhodope had been set aside by Bulgaria. The forests in question had been ceded by Turkey to Bulgaria in 1913 by the Treaty of Constantinople subject to the express provision that property rights, real or personal, acquired before the cession, were to be respected. Greece was not a party to that treaty, but after the First World War the Treaty of Neuilly, to which both she and Bulgaria were parties, provided

that transfers of territory under this treaty were not to prejudice the private rights protected under the Treaty of Constantinople. The arbitrator, whilst upholding Greece's claim on the basis of the provision in the Treaty of Neuilly, went out of his way to say : "jusqu'à la mise en vigueur du Traité de Neuilly le Gouvernement hellénique, n'étant pas signataire du Traité de Constantinople, n'avait pas de base juridique pour faire une réclamation appuyée sur les stipulations matérielles de ce Traité".

(6) The general question as to how far the rule *pacta tertiis nec nocent nec prosunt* admits of exceptions in international law, which is one of some difficulty, is dealt with in the next article. The object of paragraph 2 of the present article is simply to point out and to safeguard certain apparent exceptions to the rule which are found in the treaty-making processes dealt with in part I of these articles. The most obvious case, perhaps, is the right attaching to a State under articles 8 and 9 to become a party to a treaty in the drawing up of which it had no hand. But the treaty-making procedures used for multilateral treaties make it quite normal for a State to have obligations and rights with respect to a treaty to which it is not yet a party. Thus, under articles 11, 16 and 17 a State may be under a certain obligation of good faith with respect to a treaty to which it has not yet become a party, while under other articles it may have certain procedural rights and obligations relating to ratification, accession, acceptance, approval, reservations, registration, the correction of errors, etc. The truth is that in international law a State is frequently in the position of not being a party to a treaty and of yet not being entirely a stranger to it. Whether the obligations and rights of the State in these cases flow from the treaty itself or from another form of implied agreement linked to the treaty may be a question. But it seems desirable in the present article, in order to avoid any possibility of inconsistency, to make a general reservation regarding any obligations or rights which may attach to a State under part I with respect to a treaty prior to its having become a party. Paragraph 2 so provides.

Article 62. — *Treaties providing for obligations or rights of third States*

1. A State is bound by a provision of a treaty to which it is not a party if —

(a) the parties to the treaty intended that the provision in question should be the means of creating a legal obligation binding upon that particular State or a class of States to which it belongs ; and

(b) that State has expressly or impliedly consented to the provision.

2. Subject to paragraph 3, a State is entitled to invoke a right provided for in a treaty to which it is not a party when —

(a) the parties to the treaty intended that the provision in question should create an actual right upon which that particular State, or a class of States to which it belongs, could rely ; and

(b) the right has not been rejected, either expressly or impliedly, by that State.

⁷⁹ (1928) *U.N.R.I.A.A.*, vol. V, p. 466.

⁸⁰ (1931) *U.N.R.I.A.A.*, vol. II, p. 1105.

⁸¹ (1933) *U.N.R.I.A.A.*, vol. III, pp. 1405-1417.

3. The provision in question may be amended or revoked at any time by the parties to the treaty without the consent of the State entitled to the right created thereby, unless —

(a) the parties to the treaty entered into a specific agreement with the latter with regard to the creation of the right ; or

(b) a contrary intention appears from the terms of the treaty, the circumstances of its conclusion or the statements of the parties.

4. A State exercising a right created by a provision of a treaty to which it is not a party is bound to comply with any conditions laid down in that provision or elsewhere in the treaty for the exercise of the right.

Commentary

(1) If the question is not free from controversy, there is much authority for the view that certain exceptions to the rule *pacta tertiis nec nocent nec prosunt* are admitted in modern international law. Some writers support this view by pointing to the exceptions to the rule now admitted in the law of contract in many countries, and by suggesting that stipulations in favour of third parties ought today to be regarded as a "general principle of law recognized by civilized nations" susceptible of application under Article 38, paragraph 1 (c) of the International Court's Statute. Pertinent analogies undoubtedly exist in national systems of contract law, while private law concepts such as the *stipulation pour autrui* and the "trust" have clearly influenced the thinking of international judges and lawyers regarding the effects of treaties on third States. But it is by no means clear that the admission of exceptions to the *pacta tertiis* rule in State practice or in the jurisprudence of international tribunals has been based directly upon an analogy from private law rather than upon the consent of States and the requirements of international life. Thus, in accepting the idea that a treaty may create a right in favour of a third State in the *Free Zones* case, the Permanent Court was content to say: "There is, however, nothing to prevent the will of sovereign States from having this object and this effect".⁸² Furthermore, owing to the great difference between States and individuals as contracting parties, and to the special character of treaty-making procedures, some caution seems necessary in applying to treaties principles taken from national systems of contract law. Accordingly, the Special Rapporteur considers that, while taking due note of the analogies which exist in national systems of contract law, the Commission should base its proposals on State practice and on the jurisprudence of international tribunals.

(2) The present article seeks to lay down the general conditions under which a State may become subject to an obligation or entitled to a right under a treaty to which it is not a party. It does not cover the question whether certain kinds of treaty are to be regarded as having "objective" effects. This question, it is true, overlaps to some extent with the matters falling under

the present article. But it raises special problems which it seems more convenient to deal with in a separate article.

(3) *Paragraph 1* deals with the case of *obligations* and formulates the general conditions under which a State may become subject to an obligation under a treaty to which it is not a party. The primary rule, as already seen in the previous article, is that the parties to a treaty cannot *impose* an obligation on a third State or modify its legal rights in any way without its consent. This rule is one of the bulwarks of the independence and equality of States, and paragraph 1 does not depart from it. On the contrary, the paragraph specifies that under this article the consent of a State is always necessary if it is to be bound by a provision contained in a treaty to which it is not a party. Under the paragraph, two conditions have to be fulfilled before a third State can become bound: first, the parties to the treaty must have intended the provision in question to be the means of creating a legal obligation affecting that State or a category of States to which it belongs; and secondly the third State must have consented to the provision either expressly or by implication. No doubt, it may be said that when these conditions are fulfilled there is, in effect, a second collateral agreement between the parties to the treaty, on the one hand, and the third State on the other; and that the true juridical basis of the third State's obligation is not the treaty but this collateral agreement. However, even if the matter is viewed in this way, the case remains one where a provision of a treaty concluded between certain States is directly binding upon another State without the latter's becoming a party to the treaty itself. Accordingly, it seems appropriate to deal with the case under the present article as a form of exception to the *pacta tertiis* rule.

(4) The application of the rule contained in paragraph 1 is well illustrated by the Court's approach to article 435 of the Treaty of Versailles in the *Free Zones* case.⁸³ By that article the parties to the Treaty of Versailles declared that certain provisions of treaties, conventions and declarations and other supplementary acts concluded at the end of the Napoleonic wars with regard to the neutralized zone of Savoy "are no longer consistent with present conditions"; took note of an agreement reached between the French and Swiss Governments to negotiate the abrogation of the stipulations relating to this Zone; and added that those stipulations "are and remain abrogated". Switzerland, having been a neutral in the 1914-1918 war, was not a party to the Treaty of Versailles, but the text of the article had been referred to her before the conclusion of the Treaty. The Swiss Federal Council had further addressed a Note⁸⁴ to the French Government informing it that Switzerland found it possible to "acquiesce" in article 435, but only on certain conditions. And one of these conditions was that the Federal Council made the most express reservations as to the statement that

⁸² *P.C.I.J.* (1932) Series A/B, No. 46, p. 147.

⁸³ *P.C.I.J.* (1929) Series A, No. 22, pp. 17-18; *P.C.I.J.* (1932) Series A/B, No. 46, at p. 141.

⁸⁴ The text of the relevant part of this Note was annexed to article 435 of the Treaty of Versailles.

the provisions of the old treaties, conventions, etc., were no longer consistent with present conditions, and said that it would not wish its acceptance of the article to lead to the conclusion that it would agree to the suppression of the régime of the free zones. Failing to arrive at any agreement with Switzerland for the abolition of the free zones, France brought the matter before the Court, where she contended that the provisions of the old treaties, conventions, etc., concerning the free zones had been abrogated by article 435. In rejecting this contention, the Permanent Court pointed out⁸⁵ that Switzerland had not accepted that part of article 435 which asserted the obsolescence and abrogation of the free zones:

"Whereas, in any event, Article 435 of the Treaty of Versailles is not binding on Switzerland, which is not a Party to this Treaty, except to the extent to which that country has itself accepted it; as this extent is determined by the note of the Swiss Federal Council of May 5th, 1919, an extract from which constitutes Annex 1 to this article; as it is by this action and by this action alone that the Swiss Government has "acquiesced" in the "provisions of Article 435", namely "under the conditions and reservations" which are set out in the said note;".

Having regard to Switzerland's express rejection in her Note of the view that the régime of the free zones was inconsistent with present conditions, and her refusal to agree to their suppression, the Court held that she was not bound by the declaration of their abrogation in article 435 of the Versailles Treaty.

(5) Paragraph 2 deals with the case of *rights*, and formulates the conditions under which a State will be entitled to invoke in its favour a provision of a treaty to which it is not a party. These conditions are both more complex and more controversial than those formulated in paragraph 1 for the creation of an obligation binding upon a third State. The reason is that the question of the need for the consent of the third State presents itself in a somewhat different light under paragraph 2. The parties to a treaty cannot, in the nature of things, *impose* a right on a third State because a right, even when effectively granted, may always be disclaimed or waived. Consequently, under paragraph 2 the question is not whether the third State's consent is required so as to protect it against encroachment upon its independence, but whether its "acceptance" of the provisions is an essential condition of its acquiring the right. Further, if the view is taken that the treaty provision is by itself enough to establish the third State's right, a question also arises as to whether the parties to the treaty are or are not afterwards entitled to revoke or modify the right without the third State's consent.

(6) A number of writers,⁸⁶ including the authors of both the principal text-books on the law of treaties,

maintain that, leaving aside treaties of an "objective" character, a treaty cannot of its own force create an actual *right* in favour of a third State. Broadly, the view of these writers is that, while a treaty may certainly confer, either by design or by its incidental effects, a *benefit* on a third State, the latter can only acquire an actual right through some form of collateral agreement between it and the parties to the treaty. In other words, they hold that a right will be created only when the treaty provision is intended to constitute an offer of a right to the third State which the latter has accepted. Similarly, for these writers it goes without saying that, in the absence of such a collateral agreement, the parties to a treaty are completely free, without obtaining the consent of the third State, to abrogate or amend the provision creating the benefit in its favour. They take the position that neither State practice nor the pronouncements of the Permanent Court in the *Free Zones* case⁸⁷ furnish any clear evidence of the recognition of the institution of *stipulation pour autrui* in international law.

(7) Another group of writers,⁸⁸ which includes the three previous Special Rapporteurs on the law of treaties, takes a quite different position. Broadly, the view of these writers is that there is nothing in international law to prevent two or more States from effectively creating a right in favour of another State by treaty, if they so intend; and that it is always a question of the intention of the parties in concluding the particular treaty. According to them, a distinction has to be drawn between a treaty in which the intention of the parties is merely to confer a benefit on a third State and one in which their intention is to invest it with an actual right. In the latter case, these writers hold that the third State acquires a legal right to invoke directly and on its own account the provision conferring the benefit, and does not need to enlist the aid of one of the parties to the treaty in order to obtain the execution of the provision. This right is not, in their opinion, conditional upon any specific act of acceptance by the third State — any collateral agreement between it and the parties to the treaty. On the other hand, they consider that normally the right exists only so long as the provision creating it is kept in force by the parties to the treaty, who remain free to abrogate or amend it as and when they think fit, without obtaining the consent of the third-party beneficiary. These writers maintain that, on the whole, modern treaty practice confirms the recognition in international law of the principle that a treaty may confer an enforceable right on a State not a party to it; and they maintain that express authority for the application of this principle in international law is to be found in the judgement of the Permanent Court in the *Free Zones* case and in other international decisions.

⁸⁵ P.C.I.J. (1932), Series A/B, No. 46, p. 147.

⁸⁶ E.g. J. L. Brierly, *Law of Nations* (5th edition), pp. 251-252; Sir H. Lauterpacht, *Development of International Law by the International Court* (1958), pp. 306-310; Sir G. Fitzmaurice, Fifth report on the law of treaties, *Yearbook of the International Law Commission*, 1960, vol. II, pp. 81 and 102-104; E. Jiménez de Aréchaga, "Treaty stipulations in favor of third States", *A.J.I.L.* (1956), pp. 358-387; *Harvard Research Draft*, pp. 924-937.

⁸⁷ P.C.I.J. (1932), Series A/B, No. 46, p. 141.

⁸⁸ E.g. C. Rousseau, *Principes généraux du droit international public* (1944), pp. 468-477; Lord McNair, *Law of Treaties* (1961), pp. 309-312; Podestá Costa, *Manual de Derecho Internacional Público*, para. 157; Salvioi, *Recueil des Cours de l'Académie de droit international*, vol. 46 (1933), pp. 29-30.

(8) The present Special Rapporteur considers that the view of the second group should be the one accepted by the Commission. Admittedly, the State practice, taken by itself, may not be very conclusive and the earlier practice may even seem to incline towards the position of the first group. But the more recent practice and the jurisprudence of international tribunals appear, on balance, to justify the position taken by the second group.

(9) Some of the pre-League of Nations precedents commonly cited in the present connexion are clearly cases where there was no intention on the part of the contracting States to confer a right, as distinct from an incidental benefit, on the interested third States; for example, the recognition of the exclusive right of the signatories to the Treaty of Berlin of 1878 to enforce the minorities provisions of that Treaty.⁸⁸ The same appears to be true of the provision in the Treaty of Prague, the abrogation of which by Austria and Prussia without the consent of Denmark has sometimes been represented as a decisive refutation of the idea that treaties may confer actual rights on third States.⁸⁹ By article 5 of this Treaty Austria transferred all her rights over Holstein and Schleswig to Prussia, subject to a reservation that, if the inhabitants of Northern Schleswig voted by a plebiscite in favour of union with Denmark, that area should be ceded to Denmark, which was not a party to the Treaty. In 1878, Austria and Prussia abrogated the provision relating to the plebiscite without referring to Denmark, and most jurists have considered them entitled to do so. In point of fact, the provision had been inserted in the Treaty at the request of France, not of Denmark, and there does not seem to have been any basis for imputing to Austria and Prussia an intention to confer a right on Denmark. Prussia, however, in reply to Denmark's protest, simply stated that Austria alone was entitled to invoke the Treaty of Prague; and at that date this reply would probably have been regarded by legal opinion as a sufficient answer to any State claiming to invoke the provision of a treaty to which it was not a party — except possibly in the case of some treaties having the character of "international settlements". Indeed, even in this instance Denmark based her protest on the Treaty's having been accepted by all Europe as part of its public order, rather than on a claim to third-party rights under the Treaty.⁹¹

(10) Nevertheless, the treaty-practice of the pre-League of Nations period showed numerous examples of treaties concluded by the leading Powers which contained provisions for the general benefit: treaties for the regulation of international rivers and of maritime canals and waterways, treaties of guarantee, treaties of neutralization and treaty provisions for the protection of minorities.⁹² If in most cases the intention of the

Powers concerned may have been to reserve to themselves the enforcement of these treaties, there were some treaties, like those opening maritime canals or international rivers to vessels of all flags, which seemed to establish something very like a right of user in States not parties to them. Whether these treaties created rights in favour of non-parties or only conferred benefits, or whether they were rather the starting-point of a practice which gave rise to a customary right of user are questions which are controversial, and their discussion belongs rather to the next article. Their relevance here is that the existence of these forms of international régime probably made it easier for jurists and States later on to accept the idea that actual rights might be created by a treaty in favour of a State not a party to it.

(11) The territorial changes after the First World War, the growing interdependence of States and the development of international organization led to the conclusion of further treaties containing provisions designed to serve either the general interest or the interests of individual States or, indeed, the interests not of States but of groups of individuals. The Versailles Treaty, for example, contained provisions for the equal treatment of vessels of all flags on certain international rivers,⁹³ for free passage through the Kiel Canal,⁹⁴ for the maintenance of free zones in certain German ports,⁹⁵ for the cession of part of Schleswig to Denmark,⁹⁶ and for the grant of certain rights to Switzerland.⁹⁷ So, too, the other Peace Treaties and the Mandate Agreements contained stipulations in favour of non-parties and also of minority groups.

(12) During the League period the question whether a State may claim rights under a treaty to which it is not a party came up for judicial consideration on a number of occasions. In the *German Interests in Polish Upper Silesia*, *Austro-German Customs Union* and other cases mentioned in paragraphs (4) and (5) of the commentary to the previous article, there was no stipulation in the treaty in favour of the third State, and the Court rejected its claim under the *pacta tertiis* rule. In the *Aaland Islands* affair⁹⁸ there was equally no mention of Sweden in the Convention of 1856 concluded between France, Great Britain and Russia for the neutralization of those islands. But Sweden was one of the States most directly interested in the demilitarization of the islands, and she invoked the Convention in 1920 in her dispute with Finland before the Council of the League. This dispute having been referred to a Committee of Jurists for an advisory opinion on the legal issues, Sweden's claim to be a third-party beneficiary under the 1856 Convention came before the Committee. The latter upheld the Swedish claim on this point, not on the ground of a stipulation in

⁸⁸ See R. F. Roxburgh, *International Conventions and Third States* (1917), chapter V.

⁸⁹ See R. F. Roxburgh, *op. cit.*, pp. 42-44; C. Rousseau, *Principes généraux du droit international public* (1944), pp. 470-471.

⁹¹ See *Harvard Research Draft*, p. 928.

⁹² See Roxburgh, *op. cit.*, pp. 56-95.

⁹³ Articles 332 and 335.

⁹⁴ Article 380.

⁹⁵ Article 328.

⁹⁶ Article 109.

⁹⁷ Articles 358 and 374.

⁹⁸ League of Nations, *Official Journal*, Special Supplement No. 3 (October 1920), p. 18; see also *Harvard Research Draft*, pp. 927-928.

favour of a third State but on the ground of the objective nature of the Convention, i.e. under the principle laid down in the next article. Nevertheless, even when rejecting Sweden's claim to be the beneficiary of a *stipulation pour autrui*, the Committee recognized the possibility of creating a right by treaty in favour of a third party:

"As concerns Sweden, no doubt she has no contractual right under the provisions of 1856 as she was not a signatory Power. Neither can she make use of these provisions as a third party in whose favour the contracting parties had created a right under the Treaty, since — though it may, generally speaking, be possible to create a right in favour of a third party in an international convention — it is clear that this possibility is hardly admissible in the case in point, seeing that the Convention of 1856 does not mention Sweden, either as having any direct rights under its provisions, or even as being intended to profit indirectly by the provisions . . .".

The Committee, it seems from this passage, declined to regard Sweden as the possessor of a third-party right only because there was no indication in the particular case of any intention on the part of the contracting States to create such a right in her favour.

(13) The question of third-party rights under treaties came up again in the *Free Zone* case,⁹⁹ and was debated at length on two separate occasions in the course of the long proceedings in that case. As the two judgements in that case have given rise to somewhat divergent interpretations of the views of the Permanent Court regarding stipulations in favour of third States, a short examination of the salient points in those judgements is necessary. Three separate free customs zones had been created by various treaties, declarations and acts concluded in 1814-1815 in connexion with the settlement of the frontiers of Switzerland and its neutralization, and Switzerland claimed that under these treaties, declarations and acts she possessed legal rights to the three zones which it was not competent for the parties to the Treaty of Versailles to abrogate by article 435 of that Treaty. The facts concerning the free zones were somewhat complicated, owing to their having been created by a considerable number of interlocking instruments. As to the two zones of Upper Savoy — the Sardinian zone and the zone of St. Gingolph — the Court had no doubt that Switzerland was either directly or indirectly an actual party to the relevant instruments and therefore had *contractual* rights of which the Treaty of Versailles could not deprive her without her consent. The position in regard to the third zone — the zone of Gex — was less clear, but after reviewing the various instruments the Court arrived at the conclusion that the creation of that zone also was a result of an agreement between Switzerland and the Powers, including France, and that the agreement "conferred on this zone the character of a contract to which Switzerland is a party". At the first stage of the proceedings in 1929 the Court, which was not then called upon to render a definitive judgement

on the case,¹⁰⁰ contented itself with adding: ¹⁰¹ "the Court, having reached this conclusion simply on the basis of an examination of the situation of fact in regard to this case, need not decide as to the extent to which international law takes cognizance of the principle of 'stipulations in favour of third parties'." Having regard to the very clear reservation of the point in this passage, the Special Rapporteur does not think that the Court's Order of 1929 can be treated as an acceptance of a general doctrine of the effectiveness of stipulations in favour of third States to create actual rights. What the Court did in this Order was to hold that instruments to which France had been a party contained a provision for the creation of the free zone in favour of Switzerland, that these instruments had been formally communicated to Switzerland and that the provision concerning the free zone had been accepted by her. This seems to constitute an acquisition of a third-party right by a collateral agreement, not by a simple *stipulation pour autrui*.

(14) Three of the twelve judges, however, dissented from the Court's conclusions and, in consequence, felt called upon to consider Switzerland's secondary claim to a right created on the principle of *stipulation pour autrui*. Of these judges two — Judge Nyholm¹⁰² and Judge *ad hoc* Dreyfus¹⁰³ — rejected altogether the principle of *stipulation pour autrui* as being inadmissible in international law; and they took the position that it is only through a collateral agreement with the parties to the treaty that a third State can acquire an actual right to the execution of one of its provisions. The third, Deputy-Judge Negulesco,¹⁰⁴ also expressed the view that a collateral agreement is necessary for the creation of a third-party right. But he further said that, if the principle of *stipulation pour autrui* were regarded as admissible in international law, it still could not be applied in a case where the stipulation did not mention the name of the State to be benefited; and that in any event such a stipulation would always be revocable by the parties to the treaty without the consent of the third State.

(15) France and Switzerland having failed to arrive at an agreement, final judgement¹⁰⁵ was given in the case by a Court composed of seven of the judges¹⁰⁶ who had participated in the previous decision and four new judges. The Court re-examined the case *de novo*, and by a majority of six to five arrived at the same conclusions as those of the majority in 1929, finding that Switzerland had *contractual* rights to all three zones. The Court said that, in consequence, it "need not consider the legal nature of the Gex Zone from the point

⁹⁹ *P.C.I.J.* (1929) Series A, No. 22; and *P.C.I.J.* (1932) Series A/B, No. 46.

¹⁰⁰ The parties were still hopeful of arriving at an agreement upon a new régime for the three zones in question and the object of the Court's Order was merely to indicate to the parties the result of its deliberations on the question whether article 435 had or had not abrogated the free zones.

¹⁰¹ *P.C.I.J.* (1929), Series A, No. 22, p. 20.

¹⁰² *Ibid.*, pp. 26-27.

¹⁰³ *Ibid.*, pp. 43-44.

¹⁰⁴ *Ibid.*, pp. 36-38.

¹⁰⁵ *P.C.I.J.* (1932), Series A/B, No. 46.

¹⁰⁶ Including Mr. Dreyfus, the Judge *ad hoc*.

of view of whether it constitutes a stipulation in favour of a third party". Nevertheless, it went on to examine that question, saying that if the matter were to be envisaged from this aspect, it would be necessary to make the following observations: ¹⁰⁷

"It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such."

The Court further found that in the case before it the instruments relating to the Gex zone and the circumstances in which they were drawn up established that "the intention of the parties had been to create in favour of Switzerland a right, on which that country could rely, to the withdrawal of the French customs zones behind the political frontier".

(16) Judges Negulesco ¹⁰⁸ and Dreyfus ¹⁰⁹ again dissented. Both, however, directed their opinions to other aspects of the case, only Judge Dreyfus stating, *en passant*, that he adhered to his previous opinion concerning the abrogation of the stipulations creating the free zones. Another judge, one of the new members, dissented without giving reasons. The remaining dissentients, Judges Altamira (one of the majority in 1929) and Hurst (a new member), although basing their dissent on a quite different part of the case, concluded their joint opinion with the following observation: ¹¹⁰

"In conclusion, we wish to make every reservation in regard to a theory seeking to lay down, as a principle, that rights accorded to third Parties by international conventions, to which the favoured State is not a Party, cannot be amended or abolished, even by the States which accorded them, without the consent of the third State; such a theory would be fraught with so great peril for the future of conventions of this kind now in force, that it would be most dangerous to rely on it in support of any conclusion whatever."

This observation, it seems clear, does not contest the Court's proposition that a treaty may create an actual right in favour of a State not a party to it if such was the intention of the Contracting States; on the contrary, it seems to assume the correctness of that proposition. What these two judges questioned in their reservation was rather the theory of the irrevocable character of a *stipulation pour autrui* which had been put forward by Switzerland and not disavowed by the Court in the above-quoted passage of its judgement.

(17) The Court, it is true, rested its recognition of Switzerland's rights to the free zones primarily upon contractual agreements between her and the Powers in 1814-1815. But, as appears in paragraph (15) above, it also stated in clear enough terms that a treaty may create an actual right in favour of a third State if such is the intention of the parties; and went on to make an express finding of fact that the parties to the 1814-1815 instruments had had that intention. Accordingly, to see in the *Free Zones* case a precedent supporting the doctrine of stipulations in favour of third parties in international law seems to be entirely justifiable.¹¹¹ On the other hand, it is a precedent which leaves some points in that doctrine undefined: (a) did the Court, when it spoke of an "actual right" in favour of the third State "which the latter has accepted as such", mean that there must be some form of "acceptance" of the stipulation before it can create a "right"; and (b) did it consider, as Judges Hurst and Altamira seem to have feared, that a right resulting from a third-party stipulation is in every case irrevocable except with the consent of the beneficiary State?

(18) The peace treaties concluded after the Second World War all contain provisions¹¹² by which the defeated State, on behalf of itself and its nationals, waived all claims arising directly out of the war etc. against any of the United Nations which, without going to war, had broken off relations with that State and co-operated with the Allied and Associated Powers. These provisions constitute stipulations in favour of third parties, since the beneficiary States, not having been at war with the defeated State in question, are not parties to the treaty; and in two instances discussion has arisen as to their legal effect.¹¹³ The first was in 1947, when the former owners of an Italian ship, the *S.S. Fausto*, which had been requisitioned by Uruguay during the war, instituted a claim for compensation in the Uruguayan courts. Uruguay, not having declared war on Italy, was not a party to the Italian Peace Treaty, but the Government was held to be entitled to invoke the waiver clause in article 76 of that Treaty as a bar to the claim.

(19) The second instance was in 1948, when the effect of the waiver clause in article 29 of the Finnish Peace Treaty became the subject of debate internally in the United States, a country which had not been at war with Finland and was not a party to that Treaty.¹¹⁴

¹¹¹ Sir G. Fitzmaurice, *Yearbook of the International Law Commission*, 1960, Vol. II, p. 103; Sir H. Lauterpacht, *Development of International Law by the International Court*, pp. 306-308; J. L. Brierly, *Law of Nations*, 5th edition, pp. 251-252; E. Jiménez de Aréchaga, *A.J.I.L.* (1956), pp. 341-344; *Harvard Research Draft*, p. 935; M. Lachs *Recueil des Cours de l'Académie de droit international* (1937), Vol. 92, pp. 313-314. The reasons given by C. Rousseau, *Principes généraux du droit international public*, pp. 473-477, and by Lord McNair, *Law of Treaties*, 1961, pp. 311-312 for taking a contrary view do not appear to be convincing.

¹¹² Finland (art. 29), Italy (art. 76), Bulgaria (art. 28), Hungary (art. 32), Roumania (art. 30).

¹¹³ See E. Jiménez de Aréchaga, *A.J.I.L.* (1956), pp. 338-357.

¹¹⁴ *Ibid.*; and see House of Representatives, Committee on Foreign Affairs, Report No. 1457, *Settlement of Certain Finnish Claims* (October 1949).

¹⁰⁷ *P.C.I.J.* (1932), Series A/B, No. 46, pp. 147-148.

¹⁰⁸ *Ibid.*, p. 186.

¹⁰⁹ *Ibid.*, p. 200.

¹¹⁰ *Ibid.*, p. 185.

Numerous Finnish ships had been requisitioned during the war in United States ports, and the claims of the Finnish owners to compensation clearly fell within article 29 of the Peace Treaty. On the other hand, for reasons of foreign policy the executive branch of the Government preferred not to enforce the waiver and informed the Finnish Government through the diplomatic channel that the United States was "not disposed to invoke in this instance" the provisions of article 29. At the same time the Department of State explained the Government's action in a press announcement as follows: "As the United States is not a signatory of the Finnish Peace Treaty it occupies the status of a third-party beneficiary, with respect to article 29, and thus may choose whether or not it will claim the rights offered". The Comptroller General's Department then challenged the power of the executive branch to dispose of the rights of the United States under article 29 of the Treaty without the authority of Congress. Remarking that "it seems established that a country having the status of a third State to a treaty may nevertheless acquire rights and benefits thereunder if the signatory Powers clearly indicate an intention to create rights in favour of such a State", the Comptroller General argued that article 29 had of its own force had the effect of releasing the United States from its obligations with respect to the Finnish ships. On this basis, he considered that the "reinstatement" of this obligation involved an exercise of the treaty-making power requiring the authority of Congress. In reply the State Department took the position that article 29 did not, by itself, vest any rights in the United States, saying: "Since the United States was not a party to the treaty of peace with Finland, the United States had no legal right to benefit therefrom unless it performed some affirmative act indicating acceptance of the benefit". In support of this position it referred to the *Free Zones* case, underlining the words in the judgement "*which the latter has accepted as such*" and interpreting them as requiring an act of acceptance by the third State to perfect its third-party rights. It also relied on article 9 of the Havana Convention on Treaties of 1928¹¹⁶ which reads: "The acceptance or non-acceptance of provisions in a treaty, for the benefit of a third State which was not a contracting party, depends exclusively upon the latter's decision." Finally, it pointed to the specific "assumption" by Congress in 1921 of the benefits conferred upon the United States by the Treaty of Versailles, to which it was not a party, and the United States Government's Note of 10 August 1922 informing the German Government that the United States did not intend to press any claims falling within paragraphs (5)-(7) of the Annex to article 244 of that Treaty, as further evidence of the need for an act of acceptance. In fact, the precedents cited by the Department of State appear to be equally consistent with a view that a treaty provision in favour of a third State suffices to create its "right", but that the third State is completely free to take up or reject the right as it thinks fit. In the event, the question of the Finnish ships was disposed of by legislative

action and no final conclusion was reached on the issue of the legal effect of third-party stipulations.¹¹⁸

(20) Further instances of the recognition of third-party rights can be found in treaties intended to create objective international régimes, for example in treaties establishing freedom of navigation through maritime canals, in Mandate and Trusteeship Agreements and in the Charter of the United Nations itself.¹¹⁷ Whether these instances ought to be regarded simply as particular applications of the principles contained in the present article or as a special category falling under a separate principle is a question upon which it will be necessary for the Commission to take a position. But they are certainly cases of rights created by treaty in favour of third States and, if the Commission should not favour making a special category of treaties intended to have objective effects, it would be necessary to cover these cases in the present Article.

(21) The formulation of the rule in paragraph 2 is based upon the interpretation of the judgement in the *Free Zones* case which has been given above. Accordingly, under paragraph 2 (a), the creation of a third-party right is made dependent upon the condition that the parties to the treaty should have had a specific intention to confer an "actual right", as distinct from a mere benefit, upon a State or category of States. Paragraph 2 (a) rejects the view, expressed by Deputy-Judge Negulesco in his dissenting opinion in the *Free Zones* case, that the treaty must have designated the beneficiary State by name. This view seems indefensible on principle, since the relevant question is whether the parties had a specific intention to create a right, and if such an intention is proved it must have its appropriate effects.¹¹⁸ In the *Free Zones* case itself Switzerland was not mentioned in the instrument by which France accepted the obligation to withdraw her customs line behind the political frontier. In any event, it is perfectly normal in most systems of law to have beneficiaries designated by description or as a class, and treaty practice shows that this is also perfectly normal in international law. The *stipulations pour autrui* in the Peace Treaties discussed in paragraphs

¹¹⁶ The Committee on Foreign Affairs, it is true, observed in its report: "The Committee wishes to record its doubts that third-party action, independent of the assent of this Government, can properly vest rights in this Government. The doctrine that a sovereign can involuntarily become a beneficiary through third-party action implies the obverse—that a sovereign can involuntarily be divested of rights by third-party action. Looked at in this light, the proposition becomes mischievous in the Committee's judgement." But as one commentator has pointed out, the Committee was clearly wrong in thinking that the second proposition is in any way implied in the first; see E. Jiménez de Aréchaga, *AJIL* (1956), p. 355.

¹¹⁷ E.g. Article 32 gives a non-member State the right to be invited to participate in the discussion in the Security Council of a dispute to which it is a party; and Article 35 gives non-members the right to bring before the Security Council or General Assembly certain categories of disputes to which they may be parties.

¹¹⁸ See *Harvard Research Draft*, p. 935; E. Jiménez de Aréchaga, *AJIL* (1956), p. 356; Sir G. Fitzmaurice, *Yearbook of the International Law Commission*, 1960, vol. II, p. 103.

¹¹⁹ Text in Supplement to *AJIL*. 22 (1928).

(18) and (19) above were of this kind, e.g. "any of the United Nations whose diplomatic relations with Finland were broken off during the war and which took action in co-operation with the Allied and Associated Powers". So too were article 8 of the South West Africa Mandate and article 19 of the Trusteeship Agreement for the Cameroons, which have recently been before the International Court in the *South West Africa* cases and in the *Northern Cameroons* case.¹¹⁹

(22) Paragraph 2 (b) is based on the view that the intention of the parties to the treaty is sufficient of itself to create the third-party right without the conclusion of a collateral contract between them and the third State.¹²⁰ It is not thought that in the *Free Zones* case the words "which the latter has accepted as such" were intended by the Court to convey that no right comes into existence at all under the treaty without a specific act of acceptance by the third State.¹²¹ Sometimes there may be a specific acceptance of the right by the third-party beneficiary as in the *Free Zones* case. But in other cases, such as the clauses of the Peace Treaties waiving claims against any of the United Nations or treaties opening canals or rivers to freedom of navigation, there is nothing in the nature of a specific acceptance; there is merely a reliance on or exercise of the right. No doubt, anyone who invokes or seeks to exercise a right accepts it by implication. But it seems somewhat artificial and not in accord with the realities of the situation¹²² to regard these cases as cases of rights created by collateral agreement rather than as a reliance on or exercise of an already created right. As already pointed out, there is no question of the *imposition* of the right on the third State, since it is under no obligation to make use of the right. The true position, it is thought, is that so long as the particular provision remains in force the third State possesses the right of which it may or may not avail itself as it thinks fit. It may waive, or refrain from using, the right on a particular occasion or it may reject the right altogether. If it does the latter, the right is, of course, destroyed and can then only be re-established by a new agreement. In other words, the right is always exercisable by the third State unless it has been expressly or impliedly rejected by that State; and this is the rule proposed in paragraph 2 (b).

(23) Paragraph 3 lays down that in cases falling under this Article a *stipulation pour autrui* is subject to amendment or termination at the will of the parties to a treaty, subject to two exceptions. The revocability or irrevocability of the stipulation must, it is thought, be essentially a question of the intention of the parties. Giving all due weight to the warning of Judges Altamira and Hurst on this point in the *Free Zones* case,¹²³ it

seems difficult to see why the parties to a treaty should be regarded as incompetent to confer an irrevocable right on a third State, if that is what they clearly intended to do. The most that it seems right to say is that, unless there is evidence to the contrary, the parties are to be presumed to have intended to retain in their own hands the power to amend or to terminate the treaty without obtaining the consent of the third State. *Pace* Judges Hurst and Altamira, the *Free Zones* case was a case in which it was reasonable on the facts to hold, as the majority of the Court apparently did hold, that the parties intended the *stipulation pour autrui* in favour of Switzerland to be irrevocable except with her consent; for the stipulation was linked to a territorial rearrangement intended to establish an enduring international settlement of the frontiers of Switzerland. Furthermore, it was a case where there was clear evidence of a specific collateral agreement between the parties to the treaty and the third-party beneficiary with respect to the creation of the right, and in such cases the consent of the third State would seem necessary, in principle, for the modification or revocation of the collateral agreement, unless otherwise provided in this agreement. Accordingly, paragraph 3 of the article states that the *stipulation pour autrui* is subject to amendment or revocation without the consent of the third State except where (a) there was a specific collateral agreement or (b) there is evidence that the parties to the treaty intended otherwise.

(24) Paragraph 4 underlines that a State invoking a right as a third-party beneficiary may only do so subject to any conditions regarding its exercise laid down either in the particular provision or elsewhere in the treaty. This may be self-evident, but still needs to be stated. A third-party beneficiary, even in a case where there is a specific agreement between it and the parties, is in no sense itself a party to the treaty. By exercising the right it does not put itself in the same position as a party with respect to the treaty as a whole. But it is subject to all the terms and conditions of the treaty relating to the exercise of the right.

Article 63. — *Treaties providing for objective régimes*

1. A treaty establishes an objective régime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question.

2. (a) A State not a party to the treaty, which expressly or impliedly consents to the creation or to the application of an objective régime, shall be considered to have accepted it.

(b) A State not a party to the treaty, which does not protest against or otherwise manifest its opposition to the régime within a period of X years of the registration of the treaty with the Secretary-General of the

¹¹⁹ See paragraph (12) of the commentary to the next article.

¹²⁰ See E. Jiménez de Aréchaga, *A.J.I.L.* (1956), pp. 351-355.

¹²¹ See Sir H. Lauterpacht, *The Development of International Law through the International Court*, p. 306; Judge Jessup in his separate opinion in the *South West Africa* cases, *I.C.J. Reports*, 1962, p. 410.

¹²² See E. Jiménez de Aréchaga, *A.J.I.L.* (1956), pp. 351-355.

¹²³ See *supra* para. (16).

United Nations, shall be considered to have impliedly accepted the régime.

3. A State which has accepted a régime of the kind referred to in paragraph 1 shall be —

(a) bound by any general obligations which it contains ; and

(b) entitled to invoke the provisions of the régime and to exercise any general right which it may confer, subject to the terms and conditions of the treaty.

4. Unless the treaty otherwise provides, a régime of the kind referred to in paragraph 1 may be amended or revoked by the parties to the treaty only with the concurrence of those States which have expressly or impliedly accepted the régime and have a substantial interest in its functioning.

Commentary

(1) The previous Special Rapporteur's treatment of the question of the effects of treaties on third States in his fifth report was very comprehensive.¹²⁴ Approaching the matter from the point of view of a "code", his draft was divided into three groups of articles. The first group, which was of an introductory character, contained the basic rule, *pacta tertiis nec nocent nec prosunt*. The second dealt with the cases where a treaty may have effects *in detrimentum tertiis* and the third with the cases where it may have effects *in favorem tertiis*. The second group consisted of ten articles and the third group eleven, so that there were no less than twenty-one separate articles directed to special cases of the effects of treaties on third States. Some of the points dealt with in these twenty-one articles are covered in the present report in a compressed form in article 62. Others, such as the right to become a party to a treaty, belong to other parts of the draft articles, according to the scheme now being followed by the Commission. Again, the second and third groups each contain an article relating to "unilateral declarations", whereas the Commission by its definition of a "treaty" in article 1 (a) has excluded purely unilateral declarations from the scope of its draft articles on the law of treaties. Even so, there remain a number of points in Sir Gerald Fitzmaurice's draft articles which require examination.

(2) In his second and third sections dealing respectively with the effects of treaties *in detrimentum tertiis* and *in favorem tertiis* Sir Gerald Fitzmaurice included articles¹²⁵ entitled "Case of customary international law obligations/rights mediated through the operation of law-making or norm-enunciating treaties". At the same time, he emphasized that these articles described a process rather than laid down a rule. Strictly speaking, he said, the treaty binds the parties alone, but may prove to be a vehicle for the general acceptance of a specific formulation of a norm of customary law, and then non-parties become bound by the customary rules which it contains, though not by the treaty itself. He conceded that the material source of the obligations

and rights of third States under this "process" is custom, not the legal effect of the treaty as such. Nevertheless, he considered that the process should be given a place amongst the rules concerning the legal effects of treaties on third States. The role played by custom in expanding the effects of law-making treaties beyond the contracting States is certainly important, and the inclusion of provisions on this point in the comprehensive form of code envisaged by the previous Special Rapporteur was, no doubt, appropriate. But in the draft convention on the law of treaties that is now in contemplation it seems necessary to separate more sharply those obligations and rights which are generated by the treaty itself from those which are generated through the grafting of an international custom onto the provisions of a treaty. Where the latter process occurs, it is not strictly a case where the treaty has legal effects for third parties ; it is rather a case where principles formulated in a treaty are binding upon other States as being an embodiment of the accepted customary law, although the treaty itself is not binding upon them. Treaty and custom are distinct sources of law, and it seems undesirable to blur the line between them in setting out the legal effects of *treaties* upon States not parties to them. It is therefore thought preferable in a draft convention on the law of treaties not to include positive provisions regarding the role of custom in expanding the effects of law-making treaties, but merely to note and recognize it in a general reservation. Such a "saving" reservation is formulated in article 64.

(3) If general law-making treaties are excluded, the main question is the extent to which treaties, or particular classes of treaties, can be said to have "objective" effects so as to create legal obligations and rights for third States. The previous Special Rapporteur dealt with this question under three main rubrics : (1) "Cases of the use of maritime or land territory under a treaty or international régime" (articles 14 and 26 of his draft) ; (2) "General duty of all States to respect and not impede or interfere with the operation of lawful and valid treaties entered into between other States" (article 17) ; and (3) "General duty of all States to recognize and respect situations of law or of fact established under lawful and valid treaties" (articles 18 and 29). As the present Special Rapporteur does not feel able to adopt his predecessor's approach to this admittedly difficult and controversial question, some preliminary explanations are necessary.

(4) The crux of this whole question is the range of treaties either creating international régimes for the use of a waterway or piece of land or attaching a special régime to a particular territory or locality ; in other words, treaties providing for the navigation of international rivers or waterways, for the neutralization or demilitarization of particular territories or localities, for mandates or trusteeships of particular territories, for the establishment of a new State or international organization, treaties of cession and boundary treaties, etc. The previous Special Rapporteur, as appears from the first rubric, dealt with treaties concerning the use of maritime or land territory as a separate case. Although thinking it necessary to make special mention of them

¹²⁴ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 72-107.

¹²⁵ Articles 16 and 28.

in a separate article, he rejected the view taken by some jurists that they form a class of treaties which, by their very nature, have "objective" effects, that is, effects *erga omnes*. Other treaties creating international régimes he placed under the third rubric — "general duty to recognize and respect situations of law or fact established under lawful and valid treaties". These treaties also he declined to regard as treaties which *by their very nature* have objective effects, while "not denying that in the result they do". He explained that to him it seemed preferable to reach this result :

"... not on the esoteric basis of some *mystique* attaching to certain types of treaties, but simply on that of a general duty for States — which can surely be postulated at this date (and which is a necessary part of the international order if chaos is to be avoided) to respect, recognize and, in the legal sense, accept, the consequences of lawful and valid international acts entered into between other States, which do not infringe the legal rights of States not parties to them in the legal sense".¹²⁶

The second rubric appears to be a more generalized version of the principle upon which the third is based. It is framed in terms applicable to all treaties and affirms that all States are under a duty not to interfere with or impede the due performance and execution of lawful treaties to which they are not parties, except where the treaty deprives them of their legal rights or imposes disabilities upon them without their consent. The hesitation of the present Special Rapporteur to follow the scheme of his predecessor is due to doubts as to the validity of the general principles formulated in the second and third rubrics and doubts as to his treatment of international régimes governing the use of maritime or land territory.

(5) As to the second rubric, the general duty there predicated for all States to respect and not impede the operation of lawful treaties, even when limited to treaties not impairing their rights or imposing disabilities upon them, seems to go beyond the existing law. Nor is it easy to see exactly what this duty would entail in many cases, e.g. in the case of political, commercial or fiscal treaties. The existing rule seems rather to be that, in principle, a treaty is *res inter alios acta* for a State not a party to it. If article 17 of the Commission's draft articles qualifies this rule to some extent in the case of a State which has participated in the drawing up of a treaty but has not become a party to it, that is because a State which is in this position is not a total stranger to the treaty. In fact, in adopting that article, the Commission seems to have assumed that in general a State which is not a party to a treaty is under no obligation with respect to it.

(6) A similar doubt arises in regard to the existence in international law of the general duty, predicated in the third rubric. It may freely be conceded that certain kinds of treaty, e.g. treaties creating territorial settlements or régimes of neutralization or demilitarization, treaties of cession and boundary treaties, either have

or acquire an objective character. But the question is whether this objective character derives from such a general duty to recognize and respect situations of law or of fact established under a lawful and valid treaty, or from the particular nature of the treaty, or from the subsequent recognition or acquiescence of other States, or indeed from a combination of these elements. There are, it is thought, two obstacles to admitting the general duty predicated in the third rubric as an explanation of the objective effects of treaties creating international settlements or régimes. First, there is the difficulty of reconciling such a duty with the principle that, in general, a treaty is *res inter alios acta* for other States. Secondly, if there does exist such a general duty to recognize and respect situations of law resulting from treaties concluded between other States, it is not easy to explain why any difference should be made between one type of treaty and another in this connexion. Every treaty sets up a situation of law between the contracting parties, and in that sense every treaty creates an "international régime". Yet the general opinion certainly is that the question of "objective effects" arises only with regard to certain categories of treaties. The previous Special Rapporteur himself seems to have felt this difficulty, because he limited the application of the duty in his draft article (article 18) to "situations or facts established by lawful and valid treaties *tending by their nature to have effects erga omnes*"; and he went on to list the "more important types of treaties producing effects of this kind". Clearly, the "mystique attaching to certain types of treaties" is not altogether absent from the draft article.

(7) The previous Special Rapporteur dealt with treaties concerning the use of maritime or land territory as a special case, on the ground that, unlike other international régime, they involve an active element. The third State makes use of the international canal, river, etc., and if it does so, must conform to the conditions laid down in the treaty for that user. It is, of course, a fundamental principle of law that no one may at the same time claim to enjoy a right and to be free of the obligations attaching to it. Certainly, this principle may be advanced as an explanation of the duty which rests upon a State making use of an international canal, river, etc., to comply with the provisions of the treaty regulating such user. But it does not explain the third State's *right* of user, nor does it answer the question whether, quite apart from cases of actual use of the canal, river, etc., the third State may be under a general obligation to respect the international régime established by the treaty. The previous Special Rapporteur was not very specific as to the third State's *right* of user, and did not establish any particular connexion between these cases and the principle of *stipulation pour autrui*, which he included in another article. In general, he seems to have regarded the right in these cases as based upon a compound of treaty régime, implied consent and custom.

(8) The present Special Rapporteur feels that to make a special case of treaties providing for the use of maritime or land territory on the ground of the "active" element present in them and to subsume them under a different principle from other forms of inter-

¹²⁶ *Yearbook of the International Law Commission, 1960, vol. II, p. 98, para. 71.*

national régime affecting the use of territory may sometimes appear a little artificial. The Antarctic Treaty,¹²⁷ for example, provides in article 2 for a right of use for scientific investigation; but in article 1 it also provides for a demilitarization régime which goes beyond, and is independent of, the use of Antarctica for scientific purposes. Similarly, article 1 of the Suez Canal Convention¹²⁸ contains an absolute prohibition on the "blockade" of the canal which is independent of the use of the canal. Again, the Montreux Convention¹²⁹ establishes a mixed régime, being in part a régime providing for the use of the Straits [of the Bosphorus and the Dardanelles] and in part one forbidding or limiting their use by military vessels. Furthermore, however relevant and important in these cases may be the principle, that a State exercising a right must conform to the conditions attaching to it, the question of the existence of a general duty to respect and a general right to invoke the international régime set up by the treaty appears to the present Special Rapporteur to be one which is wider than that principle; and this question appears not to be essentially different in cases concerning the use of maritime or land territory from that which arises in the case of demilitarization or neutralization treaties. The intention of the parties in both types of case is to set up a régime applicable *erga omnes* and the crucial point is whether that intention has special effects in the law of treaties or whether any general régime that may result is to be regarded as essentially a *customary* régime built around the treaty.

(9) State practice furnishes considerable evidence of the admission in international law of a concept of international régimes or settlements affecting territory or waterways and applicable *erga omnes*; but the evidence is not equally clear as to the legal process by which they come into existence.¹³⁰ Numerous nineteenth-century treaties, for example, provided for the free navigation of particular European rivers, and these régimes were regarded as conferring rights on third States. Similarly, the Berlin Act of 1885 provided for a régime of free navigation on the Rivers Congo and Niger.¹³¹ Many of these treaties have been replaced or revised, but the régimes of free navigation have been maintained in the new or revised instruments, and today it is possible to regard these rivers as subject to customary régimes. But from the beginning the treaties themselves seem to have been regarded as having created the international régimes in question. Thus, within two years of the conclusion of the Berlin Act of 1885 and before it was reasonable to speak of any "custom", the United States, which was not a party to that Act, contested the legality of a decree of the Congo

State as being incompatible with the régime of free navigation, without its right to do so being challenged.¹³²

(10) The Suez Canal Convention of 1888 has in some of its aspects had a chequered history,¹³³ but it cannot be doubted that the Convention had, or came to have, the effect of creating an international régime of free navigation, applicable *erga omnes* subject to the conditions which it laid down. From the earliest days it seems to have been recognized that for the purposes of the régime of free passage there was no difference between signatories and non-signatories;¹³⁴ and in 1956, when the Suez Canal Company was nationalized, Egypt emphasized that this régime of free navigation through the Canal would not be affected. No doubt, where a régime of this kind has been maintained for three-quarters of a century, custom as well as treaty may be invoked as its basis. But the fact is that States have throughout treated the Convention as the legal source of the international régime. The position in regard to the Panama Canal differs in two respects from that in the case of the Suez Canal. First, the Hay-Pauncefote Treaty of 1901 was bilateral. Second and more important, the *travaux préparatoires* show that, while the treaty provides for freedom of navigation and prohibits blockade of the Canal or belligerent acts within it, the intention to confer an "actual right" of passage on third States, as distinct from a mere privilege, was lacking on the part of the United States; and they also show that Great Britain was doubtful whether the neutralization provisions could be made effective against third States unless it was expressly laid down that observance of those provisions should be a condition of free passage.¹³⁵ It is unnecessary to go further into the question as to what today is the actual status of this Canal, which the United States has in the past asserted not to be subject to a general *right* of passage but which the Permanent Court treated in the *Wimbledon* case¹³⁶ as an example of an artificial waterway "permanently dedicated to the use of the whole world". It suffices to point out that such doubts as may exist concerning the régime of the Panama Canal under the Hay-Pauncefote Treaty are caused by the asserted absence of any original intention in the Treaty to confer an "actual right" on third States. In the *Wimbledon* case itself the Permanent Court was concerned with the effect of articles 380-385 of the Treaty of Versailles on the status of the Kiel Canal. The principal provision was that in article 380, which declared: "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on

¹²⁷ See R. F. Roxburgh, *International Conventions and Third States*, pp. 49-50.

¹²⁸ Apart from recent events, the technical position with regard to the entry into force of the Conventions was obscured by British reservations.

¹²⁹ Great Britain so informed the United States in 1898 during the Spanish-American War; Buell, *Revue générale de droit international public* (1936), vol. 51, p. 57.

¹³⁰ See R. F. Roxburgh, *International Conventions and Third States*, pp. 63-70, where the relevant *travaux préparatoires* are set out.

¹³¹ *P.C.I.J.* (1923), Series A/1, p. 28.

¹²⁷ *United Nations Treaties Series*, vol. 402.

¹²⁸ Convention of Constantinople of 29 October 1888.

¹²⁹ Of 20 July 1936.

¹³⁰ See generally R. F. Roxburgh, *International Conventions and Third States*; C. Rousseau, *Principes généraux du droit international public* (1944), pp. 477-484.

¹³¹ See Oppenheim, *International Law* (1961), vol. 1, pp. 465-474; Fauchille, *Traité de droit international public* (1925), tome I, sections 525-531; T. O. Elias, *A.J.I.L.* (1963), pp. 873-882.

terms of entire equality". The Court said that the terms of this article were categorical, and went on : ¹³⁷

"It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world."

In later passages ¹³⁸ the Court emphasized the "intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international régime" and, as previously indicated, spoke of the great maritime canals as artificial waterways permanently *dedicated* to the use of the whole world. If the language of the judgement is taken at its face value, the Court certainly seems to have regarded the international status of the Canal as having been established by the force of the treaty itself, without the aid of custom or recognition. Moreover, in subordinating Germany's obligations as a neutral in the Russo-Polish war to her obligations under the international régime, the Court gave the international régime precedence over the interests of a third State — Russia — in the observance by Germany of her obligations as a neutral. In appreciating the implications of the Court's language, however, it has to be borne in mind that all the parties in the case were parties to the Versailles Treaty, so that the Court may not have addressed itself to the question of the interests of third States so fully as it might otherwise have been required to do.

(11) Treaties concluded in the general interest for the neutralization or demilitarization of specific territories or localities constitute an analogous form of "international régime" or "international settlement". If their purpose is primarily negative — the prohibition of military activity — they create an international status for the territory the maintenance of which may be of vital interest to third States as well as to the parties themselves. The classic example is the permanent neutralization of Switzerland by the agreements concluded in 1815 at the Congress of Vienna. Although on one occasion France contended that the neutrality régime was only facultative so far as Switzerland herself and Sardinia were concerned, the general character of the régime established by the agreements as part of the "public order of Europe" does not seem to have been questioned. The same can be said of the neutralization of Belgium in 1831 by article 7 of the Treaty of London. As to demilitarization, the most significant precedent is the opinion given by the Committee of Jurists to the Council of the League concerning Sweden's right to invoke the demilitarization provisions of the Aaland Islands Convention, of which mention has already been made in paragraph (12) of the Commentary to the previous article.¹³⁹ By this Convention, concluded in 1856 between Russia, France and Great Britain, Russia

which was then the territorial Power, undertook that the Aaland Islands would not be fortified nor any military or naval base maintained or created there. In 1920, Sweden, as a State directly affected, claimed to be entitled to hold Finland, now the territorial Power, to compliance with the demilitarization régime imposed upon the Islands by the Convention. The Committee of Jurists, as pointed out in the commentary to the previous article, expressly refused to treat the case as one of *stipulation pour autrui* by reason of the absence of any *particular* intention to benefit Sweden, but nevertheless upheld her claim on the ground of the objective nature of the Convention. On the latter point the Committee said : ¹⁴⁰

"Nevertheless by reason of the objective nature of the settlement of the Aaland Islands question by the Treaty of 1856, Sweden may, as a Power directly interested, insist upon compliance with the provisions of this Treaty in so far as the contracting parties have not cancelled it. This is all the more true owing to the fact that Sweden has always made use of it [the right] and [it] has never been called in question by the signatory Powers."

And in another passage it explained :

"These provisions were laid down in European interests. They constituted a special international status relating to military considerations, for the Aaland Islands. It follows that until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them."

Reference has already been made in paragraph (8) above to the Antarctic Treaty as an example of a treaty providing at once for demilitarization and for freedom of user. This Treaty was drawn up in 1959 by twelve States, which included amongst their number all those States having pretensions to territorial competence with respect to Antarctica. The Treaty provides for periodic meetings of representatives of the parties to formulate and recommend measures in furtherance of the objectives of the Treaty and it also provides for a right of accession. Although the parties evidently contemplated that States desiring to use Antarctica for scientific purposes would normally accede to the Treaty, their intention to create an objective legal régime for Antarctica seems clear, both from the Preamble to the Treaty and from the objective formulation of the basic principles of the régime in articles 1 and 2. Moreover, in article 10 each contracting party undertakes to exert appropriate efforts, consistent with the Charter, to the end that no one engages in any activity in Antarctica contrary to the purposes of the Treaty.

(12) Mandates and trusteeships represent another kind of international régime affecting territory which the International Court has treated as possessing an objective character. Thus, in its advisory opinion on the *International Status of South West Africa* the Court said : ¹⁴¹

¹³⁷ *Ibid.*, p. 22.

¹³⁸ *Ibid.*, pp. 23 and 28.

¹³⁹ See generally F. de Visscher, *Revue de droit international et de législation comparée*, 3rd Series (1921), vol. 2, p. 262.

¹⁴⁰ *League of Nations Official Journal*, Special Supplement No. 3 (October 1920), p. 18.

¹⁴¹ *I.C.J. Reports*, 1950, p. 132; see also the Separate Opinion of Judge McNair, pp. 153-155.

"The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilisation . . . The international rules regulating the Mandate constituted an international status for the Territory recognised by all the Members of the League of Nations, including the Union of South Africa."

In its recent judgement in the *South West Africa* cases (Preliminary Objections),¹⁴² the Court again spoke of the Mandate as constituting "a new international institution" and as "a special type of instrument composite in nature and instituting a novel international régime"; and it upheld the claim of Ethiopia and Liberia to be entitled to invoke the right conferred upon Members of the League to bring a dispute as to the application of the Mandate before the Court. Again, in the even more recent *Northern Cameroons* case,¹⁴³ the Court seems to have acted on the same view of the nature of a Trusteeship Agreement, and to have been ready in principle to concede the right of any Member of the United Nations to invoke a jurisdictional clause in a Trusteeship Agreement for the purpose of referring a question concerning its application to the Court. These cases are somewhat special, owing to the particular character of the Mandate and Trusteeship agreements, the conclusion of which involved decisions respectively by the Council of the League and the General Assembly. Certain judges¹⁴⁴ were, in consequence, inclined to regard Mandates and Trusteeships as régimes established by legislative act of the Council or General Assembly, rather than by Treaty. The majority, however, seemed disposed to regard them as agreements concluded by the organ in question on behalf of the Organization and its Members.¹⁴⁵ Whatever is considered to be the correct juridical explanation of Mandates and Trusteeships, the members of the particular organization are not wholly strangers to the transaction establishing the régime. On the contrary, they are parties to the instrument — the Covenant and the Charter respectively — from which the organ's authority to establish the régime was derived, and they are members of the organization supervising the implementation of the régime. Even so, the emphasis placed by the Court on the effect of Mandates and Trusteeships in establishing an international *status* or *institution* is significant.

(13) The common elements which are present in the several categories of treaties discussed in the preceding paragraphs are that in all of them the parties intend *in the general interest to create a régime of general obligations and rights for a region, territory or locality which is subject to the treaty-making competence of one or more of them*. It is the fact that one or more of the parties has a particular competence with respect to the subject-matter of the treaty which differentiates these cases from the case of general law-making treaties. In the latter case no one State has any greater com-

petence than another with respect to the subject-matter of the treaty; and for this reason it is not possible to attribute the same measure of objective effect to the treaty.

(14) A case of a different kind, since it does not relate to any particular territory or area, is that of general international organizations. In its opinion in the case of *Reparation for Injuries suffered in the Service of the United Nations*, the Court, having found that the United Nations possesses international personality, expressly held that this personality was of an objective character not limited to the parties to the Charter. It said: ¹⁴⁶

"Fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognized by them alone, together with capacity to bring international claims."

It is true that the non-member State in question — Israel — had not in fact said anything to indicate that it contested the objective existence or personality of the United Nations. But the Court's pronouncement in the above passage is entirely general in its terms, and appears to lay down that under international law the legal personality of the United Nations is opposable to a non-member independently of its recognition by the latter. As the Court gave no other explanation of its reasons for attributing objective effects to the legal personality of the United Nations created by the Charter, it is not easy to deduce from its decision the precise nature of the principle on which it relied. However, the emphasis which it placed on the fact that the founding States represented the "vast majority of the members of the international community" and the importance which it gave to the intentions of the contracting States in holding that the Organization had legal personality and capacity to act on the international plane suggests that the Court may have deduced the objective character of the personality of the Organization from the intention of the founding States to create an organization of a universal character. As to the competence of the contracting States to invest the Organization with objective personality, the Court gave no other explanation than the fact that they represented the "vast majority of the members of the international community". In the *Aerial Incident* case¹⁴⁷ (Israel v. Bulgaria) this fact was not regarded by the Court as sufficient to clothe Article 35 (5) of the Statute of the Court with objective effects. Whether the Court would have pronounced in favour of the objective character of the United Nations in the *Reparations* opinion if it had been confronted by a State refusing to "recognize" the Organization can only be a matter for speculation. On the face of it, the Court has ruled that a general international organization is a special form of international settlement and that a vast majority of the members of the international community have the necessary competence to give such an organization objective personality.

¹⁴² *I.C.J. Reports*, 1962, pp. 329 and 331.

¹⁴³ *I.C.J. Reports*, 1963, p. 29.

¹⁴⁴ See joint dissenting opinion of Judges Spender and Fitzmaurice, *I.C.J. Reports*, 1962, pp. 474-479.

¹⁴⁵ See *South West Africa* cases, *I.C.J. Reports*, 1962, p. 331.

¹⁴⁶ *I.C.J. Reports*, 1949, p. 185.

¹⁴⁷ *I.C.J. Reports*, 1959, pp. 136-138.

(15) Other treaties frequently mentioned as having objective effects are treaties for the cession of territory, boundary treaties, etc.¹⁴⁸ These treaties, it is true, create territorial settlements between the parties which produce objective effects in general international relations. Thus, a treaty of cession or a boundary treaty affects the application territorially of any treaty afterwards concluded by either contracting party with another State, and the application of the general rules of international law with regard to such matters as territorial waters, air space, nationality, etc. But it is the dispositive effect of the treaty — the situation which results from it — rather than the treaty itself which produces these objective effects. These treaties differ from the other categories of treaties previously discussed in that their purpose is to regulate the particular interests of the parties rather than to establish a general régime in the general interest. Other States, no doubt, may be affected — even to an important extent — by the conclusion of the treaty, but they are affected by the treaty only incidentally, not by the direct application of the provisions of the treaty itself. Nor have the parties manifested any intention that other States should have or acquire any right or interest in the treaty, and other States cannot, in consequence, derive from the treaty any legal title for claiming a *locus standi* with regard to the maintenance or revision of the settlement established by the treaty. Accordingly, while not wishing to minimize in any way the importance of the dispositive effects of these forms of territorial settlement, the Special Rapporteur doubts whether it would be appropriate to include them in the present article.

(16) The opinion of writers is divided as to the conclusions to be drawn from State practice and the jurisprudence of international tribunals. Some writers¹⁴⁹ take the view that, strictly speaking, no treaty can be regarded as having, by its very nature, objective effects upon third States. Where a treaty is generally accepted as being a source of obligations and rights for third States, they consider that this is not due to any objective effects of the treaty but is the result of a gradual formation of an international custom through acquiescence in the treaty. Other writers,¹⁵⁰ though cautious as to the precise process by which this occurs, are more inclined to recognize that certain categories of treaties, intended by the parties to operate *erga omnes*, produce objective effects. The previous Special Rapporteur, as pointed out in paragraphs (4) to (6) of the present commentary, was not disposed to recognize that any special categories of treaties are inherently of a legislative character. Summarizing his own attitude in paragraph 71 of his fifth report, he said:¹⁵¹

“The considerable lack of enthusiasm evinced over the supposedly inherently legislative effect of some

kinds of treaties is evidence of a certain uneasiness at the idea. Exactly which classes have this effect, and why and how? It is easy to see that some treaties trigger off, so to speak, a law-making process. Again, some treaties are valid as against third States because the latter actively avail themselves of the treaty. It is less easy to see why others, even if they do embody ‘international settlements’, should be regarded as having an automatic effect *erga omnes*.”

Nevertheless, by introducing the doctrine of a general duty to respect lawful treaties and to recognize and respect situations of law or fact established under lawful treaties, he went near to admitting by the back door the concept which he rejected at the front.

(17) The present Special Rapporteur, as will be apparent from the preceding paragraphs and from the commentary to the previous article, has felt considerable doubts and hesitations on the whole question of exceptions to the rule *pacta tertiis nec nocent nec prosunt*. One possible solution would be for the Commission to limit its proposals to the statement of the *pacta tertiis* rule in article 61 and to the *stipulation pour autrui* exceptions formulated in article 62; and to leave aside all other cases as being essentially cases of custom or recognition not falling within the purview of the law of treaties. However, this solution scarcely accounts for the undoubted fact that certain kinds of treaties do appear to create objective régimes, if not at once, at least after only a brief interval. The present Special Rapporteur shares the doubts of his predecessor as to whether States are yet prepared to regard any treaty as being automatically binding upon them regardless of their opposition to it. But this leads him also to doubt whether States would be any more ready to accept the concept of a general duty to respect or recognize a treaty to which they might be opposed; in other connexions¹⁵² the notion of a legal duty to recognize has been the subject of acute differences of opinion. On the other hand, it seems to the Special Rapporteur that, on the evidence examined in this commentary, there may be a case for attributing special effects to treaties where the parties both have territorial competence with respect to the subject-matter of the treaty and have the intention to create a general régime in the general interest. A possible solution in these cases, it is thought, may be to have recourse to the principle of tacit recognition — tacit assent — the importance of which in the law of treaties was recognized by the International Court in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁵³

(18) The present article has therefore been formulated on the basis that treaties intended by the parties to provide a general régime for particular regions, States, territories, etc., constitute a special category of treaties which, in the absence of timely opposition from other States, will be considered to have objective effects with regard to them. Paragraph 1 of the article defines the category of treaties which falls under its provisions,

¹⁴⁸ See Lord McNair, *Law of Treaties* (1961), pp. 256-259.

¹⁴⁹ E.g. R. F. Roxburgh, *International Conventions and Third States*, pp. 81-82; *Harvard Research Draft*, pp. 922-923.

¹⁵⁰ E.g. Lord McNair, *Law of Treaties* (1961), chapter XIV; C. Rousseau, *Principes généraux du droit international public* (1944), pp. 462-464 and 477-484; M. Lachs, *Recueil des Cours de l'Académie de droit international*, 1957, vol. II, pp. 315-317.

¹⁵¹ *Yearbook of the International Law Commission*, 1960, vol. II, p. 98.

¹⁵² Recognition of States and Governments.

¹⁵³ *I.C.J. Reports*, 1951, p. 21.

and the essential elements of the definition are: (i) the intention of the parties must be to create general rights and obligations in the general interest relating to a particular region, State, territory, etc., and (ii) the parties must include amongst their number the State or States having territorial competence with reference to the subject-matter of the treaty or, at least, that State or States must have expressly assented to the provisions creating the régime. The limitation to cases where the territorial Power participates in or consents to the creation of the régime is important from two points of view. First, it protects the territorial Power against any attempt by others to impose the régime upon it without its consent. Secondly, it excludes from the article cases where the parties have a general treaty-making competence with respect to the subject-matter of the treaty but no greater competence in the matter than any other State; in other words, it excludes law-making treaties concerned with general international law or with areas not subject to the exclusive jurisdiction of any State. Reasons for regarding any objective régimes that may result from such treaties as deriving their force more from "custom" than from the treaty have already been given in paragraph (3) of this commentary. While recognizing that there is some similarity between the two cases, the Special Rapporteur considers that under the present article the treaty provisions themselves more directly constitute the legal source of the régime.

(19) The definition in paragraph 1 does not, therefore, include treaties dealing with the high seas or with outer space, or with particular areas of the high seas or outer space. It does not, for example, cover the Geneva Conventions of 1958 on the Régime of the High Seas and on Fishing and Conservation of the Living Resources of the High Seas;¹⁵⁴ nor does it cover the Nuclear Test-Ban Treaty. These treaties belong to the category of general law-making treaties rather than to the category of treaties with which this article deals. The rules which they contain may come to be regarded as general rules of international law either through the number of accessions¹⁵⁵ or through general acceptance as custom. In some cases, as in that of the Nuclear Test-Ban Treaty, this may happen rapidly. But more often it is a gradual process and conventions like the Geneva Convention on Fishing and Conservation of Living Resources show how difficult it would be to place these treaties under the present article.

(20) The limitation to cases where the parties have territorial competence also excludes from the scope of the present article the case of treaties creating international organizations. Although the case of the objective personality of international organizations may be analogous to the cases covered in the present article, the principle involved is not thought to be precisely the same as that on which the present article rests. The question of the objective personality of organizations seems to contain a larger and more definite element

of "recognition" than do cases under the present article. True, cases under the present article can be, and sometimes are, dealt with in terms of recognition; but it seems entirely legitimate to view these cases as instances of acceptance of treaty provisions. Furthermore, it would be difficult to formulate satisfactory provisions concerning the objective effects of treaties creating international organizations without anticipating and prejudging in some measure the work of the Commission on the relations between States and inter-governmental organizations, which it has entrusted to another Special Rapporteur.¹⁵⁶ Certainly, the pronouncement of the International Court in the *Reparations for Injuries* case cited in paragraph (14) of this commentary leaves too much room for argument as to what exactly was the principle on which it acted for it to be possible simply to recast the opinion of the Court in the form of a draft article dealing with the objective effects of treaties.¹⁵⁷ The Special Rapporteur accordingly considers that this point should be omitted from the present articles and left to be dealt with at some future date as part of the law of international organization.

(21) Paragraph 2 (a) lays down the general principle that where an intention to create an objective régime of the kind defined in paragraph 1 is present, any State which expressly or impliedly assents to its creation or to its execution will be considered as having accepted the general provisions of the régime. This is not to say that the State becomes a party to the treaty; it becomes subject to the general provisions—the provisions intended to operate *erga omnes*—and that is all. Treaties of this kind not infrequently contain guarantee clauses or other provisions intended to operate only between the contracting parties, so that the distinction between being a party to the treaty and being subject to the provisions of the general régime is an important one.

(22) Paragraph 2 (b), in order to take account of the objective effects apparently attributed to these treaties in some cases by the World Court, and in order to remove doubts, tentatively proposes that, as in the case of reservations, the Commission should set a time-limit after which tacit assent should be conclusively presumed from the absence of any apparent opposition to the régime provided for in the treaty. The length of the period would be a matter for decision after obtaining the views of Governments, but a period of the order of five years seems not unreasonable.

(23) Paragraph 3 spells out in terms of obligations and rights the consequences of the acceptance of an objective régime. It emphasizes again that it is only the *general* obligations and rights of the treaty to which the third State becomes subject. At the same time paragraph 2 (b) makes it clear that any exercise

¹⁵⁴ *United Nations Conference on the Law of the Sea, Official Records*, United Nations publication, Sales No. 58.V.4, vol. II.

¹⁵⁵ As in the case of the Kellogg-Briand Pact and the Nuclear Test-Ban Treaty.

¹⁵⁶ Mr. El-Erian; see *Yearbook of the International Law Commission*, 1962, vol. II, p. 192, para. 75.

¹⁵⁷ Cf. G. Schwarzenberger, *International Law*, vol. 1, 3rd edition, pp. 128-130; Finn Seyersted, *Objective Personality of Inter-governmental Organizations* (1963); Bindschedler, "Die Anerkennung im Völkerrecht", *Archiv des Völkerrechts*, IX (1961-1962), pp. 387-388.

of a right by a third State under the régime is subject to the terms of the treaty as a whole; for the treaty may contain provisions which, although they do not relate directly to the régime itself, are intended to govern the whole operation of the treaty. The mere fact that certain provisions of a treaty may constitute an objective régime does not mean that they are to be regarded as independent of the rest of the treaty.

(24) *Paragraph 4* deals with the delicate question of the competence of the parties to modify or terminate the régime. Some treaties creating objective régimes, as for example the Montreux Convention and the Antarctic Treaty, contain specific provisions regarding the procedure for their amendment. In that event, the procedure laid down in the treaty would seem necessarily to determine the question of the right to participate in any decision to modify or terminate the régime. Other treaties, such as the Suez Canal Convention and the Versailles Treaty, do not contain any such provisions, and the question whether third States interested in the functioning of the régime are to have any voice in its amendment or termination is one of considerable importance. In the case of *stipulation pour autrui* it has been proposed in the previous article that the parties should remain free to amend or revoke the right unless its creation was a matter of express agreement with the third State or the parties can be shown to have intended the right to be irrevocable. In cases falling under the present article, however, the intention of the parties to create a general régime in the general interest seems to justify a rule more favourable to third States. Furthermore, the growing interdependence of States seems to make it desirable that at any rate those States which are substantially interested in the functioning of the régime should be allowed a voice in its amendment or termination.

(25) This seems to have been the general opinion of States at the time of the Suez Canal crisis of 1956, when invitations were sent by two of the parties to the 1888 Convention to twenty-four States to attend the London Conference for the purpose of considering the possible revision of the operating arrangements for the Canal.¹⁵⁸ Those responsible for the invitations purported to justify them on the ground that these States were either parties to the Convention or "largely concerned in the use of the Canal". The President of Egypt, in rejecting the invitation, strongly criticized the manner of the invitations and the actual selection of the States to whom they were sent, but he did not question the right of interested States to be consulted. On the contrary, he expressly said: "Egypt is ready to co-operate with the other Governments signatories of the Constantinople Agreement of 1888 to meet us at a conference to which other Governments whose ships use the Canal would be invited." Similarly, although the actual list of States invited was sharply criticized by some States at the London Conference, the complaint was that more, not fewer, States making substantial use of the Canal ought to have been invited.

¹⁵⁸ See generally E. Hoyt, *The Unanimity Rule in the Revision of Treaties* (1959), pp. 234-241; *The Suez Canal Problem*, Department of State Publication 6392.

Whether the Canal-using States were regarded as having a right to a voice in the drawing up of the new agreement or only a right to be consulted was not made clear; but the latter appears to have been the general assumption.

(26) Admittedly, in the past, even parties to general régimes have not always been invited to participate in their revision. But the Commission can only propose the rule which seems to it correct in principle, and the rule suggested in paragraph 4 is that third States substantially interested in the functioning of the régime should be regarded as entitled to participate in any decision to amend or terminate an objective régime. This would not give them any say in the modification of provisions of the treaty which do not affect the functioning of the régime. But if their interest in the régime is to be taken into account in connexion with its revision, a right to participate in the new agreement would seem to be more satisfactory than a mere right to be consulted.

Article 64. — Principles of a treaty extended to third States by formation of international custom

Nothing in articles 61 to 63 is to be understood as precluding principles of law laid down in a treaty from becoming applicable to States not parties thereto in consequence of the formation of an international custom embodying those principles.

Commentary

The operation of "custom" in extending the effects of law-making treaties to third States has already been discussed in paragraph (2) of the commentary to the previous article. Although law-making treaties are, no doubt, the most important and commonest cases where this process occurs, it is not confined to such treaties. Purely contractual treaties may have the same result if principles which they formulate are subsequently endorsed and acted on by other States. However, for the reasons given in the commentary to the preceding article, it is not thought appropriate to deal with the extension of the effects of treaties through the growth of custom as a true case of the legal effects of treaties on third States. The proper course, it is thought, is simply to reserve the point, emphasizing that nothing in the preceding articles is to be taken as precluding the extension of principles contained in a treaty to third States as a result of the formation of an international custom embodying those principles.

Article 65. — Priority of conflicting treaty provisions

1. Subject to Article 103 of the Charter of the United Nations, the obligations of a State which is a party to two treaties whose provisions are in conflict shall be determined as follows.

2. Whenever it appears from the terms of a treaty, the circumstances of its conclusion or the statements of the parties that their intention was that its provisions should be subject to their obligations under another treaty, the first-mentioned treaty shall be applied so far as possible in a manner compatible with the

provisions of the other treaty. In the event of a conflict, the other treaty shall prevail.

3. (a) Where all the parties to a treaty, either with or without the addition of other States, enter into a further treaty which conflicts with it, article 41 of these articles applies.

(b) If in such a case the earlier treaty is not to be considered as having been terminated or suspended under the provisions of article 41, the earlier treaty shall continue to apply at between the parties thereto, but only to the extent that its provisions are not in conflict with those of the later treaty.

4. When two treaties are in conflict and the parties to the later treaty do not include all the parties to the earlier treaty —

(a) as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty prevails ;

(b) as between States parties to both treaties, the later treaty prevails ;

(c) as between a State party to both treaties and a State party only to the later treaty, the later treaty prevails, unless the second State was aware of the existence of the earlier treaty and that it was still in force with respect to the first State.

Commentary

(1) The legal effects of conflicts between treaties were examined at some length by the Special Rapporteur in his previous report¹⁵⁹ in the commentaries to his draft articles 14 and 19, where he dealt with them in the contexts respectively of the "invalidity" and of the "termination" of treaties. In those commentaries he took the position that : (i) conflicts between treaties in cases where the parties to the later treaty do not include all the parties to the earlier one appear to raise questions of priority rather than of invalidity (article 14) ; and (ii) a conflict between two treaties where all the parties to the earlier treaty are also parties to the later treaty raises only the question of the amendment or termination of the earlier treaty (article 19).

(2) As to the first category of case — where the parties to the later treaty do not include *all* the parties to the earlier — the Commission discussed the Special Rapporteur's proposals at its 685th, 687th and 703rd meetings.¹⁶⁰ The majority of the Commission were inclined to share his view that, leaving aside the case of conflict with a rule of *jus cogens*, which is an independent principle, the fact that a treaty is incompatible with the provisions of an earlier treaty binding upon some of its parties does not deprive the later treaty of validity ; and that, accordingly, this type of case raises primarily questions of priority and of State responsibility. Some members, however, although agreeing that this was true as a general rule, were not

convinced that it necessarily held good in every case. In particular, these members expressed doubts as to the validity of a treaty which conflicts a prior treaty neutralizing or demilitarizing a territory or embodying a political settlement of great importance. During the discussion reference was also made to : (i) clauses found in certain treaties, e.g. Article 103 of the Charter, which claim priority for their provisions over those of any other treaty ; (ii) clauses found in some treaties dealing specifically with their relation to previous treaties ; and (iii) possible cases of conflict between treaties having entirely different parties. Another point mentioned was the relation of the question of conflicts between treaties to that of the revision of treaties. In general, the Commission felt that these cases of conflict with prior treaties raised questions of considerable complexity and that it would be in a better position to arrive at firm conclusions concerning them after receiving the Special Rapporteur's report on the application of treaties. It accordingly decided¹⁶¹ to adjourn its consideration of these cases until its sixteenth session and to settle at that session the appropriate position in which to place them in its draft articles on the law of treaties.

(3) As to the second category of case — where all the parties to the earlier treaty are also parties to the later — the Commission recognized that there is always a preliminary question of construction of the two treaties in order to determine the extent of their incompatibility and the intentions of the parties with respect to the maintenance in force of the earlier treaty. Some members of the Commission considered that for this reason this type of case ought not to be dealt with under the head of "implied termination of treaties" but should be covered in the present report under the head of "application of treaties". The Commission, however, decided that, even if there were a preliminary question of interpretation in these cases, there was still the question of the conditions under which that interpretation should be regarded as leading to the conclusion that the treaty has been terminated. Accordingly, it examined this question in the context of the termination of treaties, and adopted an article — article 41 — providing for the implied termination of a treaty as a result of the subsequent conclusion of another treaty conflicting with it. The Commission also decided provisionally, and subject to reconsideration at its sixteenth session, to retain the article in the section dealing with termination of treaties.¹⁶²

(4) Thus, the Commission has decided that at its forthcoming session it will re-examine both categories of conflicts between treaties in connexion with its discussion of the application of treaties. At the fifteenth session¹⁶³ the Special Rapporteur explained that, although not himself persuaded that invalidity ever results from mere conflict with an earlier treaty, he had felt bound to include the question in his section on

¹⁵⁹ Second report on the law of treaties, in *Yearbook of the International Law Commission*, 1963, vol. II, pp. 53 and 71.

¹⁶⁰ For the summary records of those meetings, see *Yearbook of the International Law Commission*, 1963, vol. I.

¹⁶¹ *Yearbook of the International Law Commission*, 1963, vol. II, p. 189, para. 15.

¹⁶² *Ibid.*, p. 204, commentary to article 41.

¹⁶³ *Yearbook of the International Law Commission*, 1963, vol. I, summary record of the 685th meeting, para. 53.

the invalidity of treaties because the last two Special Rapporteurs and both the modern textbooks on the law of treaties dealt with the question of conflicts between treaties in the context of invalidity. The draft article—article 14—and commentary submitted to the Commission at that session were therefore oriented towards a discussion of the validity of treaties which conflict with earlier treaties. This being so, and as the question is now to be examined by the Commission in connexion with the application of treaties, the Special Rapporteur believes that it will be helpful to the Commission if he submits a new draft article and commentary on conflicts between treaties which is oriented more to the application than to the validity of treaties. This also has the advantage of making it possible to submit proposals to the Commission which take account of points made in the discussion of this topic at the previous session.

(5) The question of conflicts between treaties, considered from the point of view of “application of treaties”, has close connexions both with the provisions of articles 61 to 63 concerning the legal effects of treaties on third States and with the revision of treaties. Thus, the principle that a treaty cannot impose obligations on a third State or deprive it of its legal rights is of paramount importance in those cases of conflict where the parties to the later treaty do not include all the parties to the earlier one. Accordingly, if the Commission should arrive at the conclusion that conflict with an earlier treaty is not a cause of nullity except when the conflict is with a rule of *jus cogens*, there will be an obvious convenience in dealing with conflicts between treaties here immediately after the articles concerned with the legal effects of treaties on third States. As to the link with “revision of treaties”, a revising instrument is all too frequently another treaty the parties to which do not include all the parties to the earlier treaty, so that the revision gives rise to a case of conflict between treaties. Indeed, it can safely be said that the majority of conflicts between treaties are the product of such revisions. Consequently, there may also be advantage in examining the question of “conflicts between treaties” in close proximity to “revision” which the Special Rapporteur has therefore dealt with in the next section.

(6) The draft article (article 14) submitted by the Special Rapporteur in his previous report¹⁶⁴ contained in paragraph 3 (b) a rule repeating textually Article 103 of the Charter, which states: “In the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.” Paragraph 4 of the draft also made a general reservation concerning cases where a treaty conflicts with a provision of another treaty that embodies a rule having the character of *jus cogens*, in which event the treaty conflicting with that provision was to be void under another article. The suggestion was made at the fifteenth

session¹⁶⁵ that both these rules—Article 103 of the Charter and the invalidity of a treaty conflicting with a *jus cogens* provision—should be moved up to the head of the article in order to emphasize their overriding character. While agreeing in principle with the suggestion, the Special Rapporteur doubts whether it is necessary in paragraph 1 of the present article to do more than proclaim the priority of Article 103 of the Charter over the general provisions formulated in the article.

(7) The Commission has already specified in articles 37 and 45, adopted at its fifteenth session, that a treaty which conflicts with a peremptory norm of general international law having the character of *jus cogens* is void, and this provision clearly applies whether or not that norm has its origin in customary law or in a treaty provision. If one of two conflicting treaties is void, it is not a treaty in force and there is no question of its application. It does not therefore seem necessary to repeat the *jus cogens* rule in the present article, which concerns the application of treaties.

(8) As to Article 103 of the Charter, the application of the rule which it contains is in terms confined to the obligations of Members of the United Nations, while the Court itself has held that the Charter, viewed simply as a treaty, is not binding upon non-members.¹⁶⁶ In consequence, doubt exists as to what exactly is the effect of Article 103 where the treaty which is in conflict with the Charter has been concluded with a non-member. Some authorities,¹⁶⁷ it is true, have been ready to see in Article 103 a provision which gives priority to the Charter over any treaty concluded by a Member which is inconsistent with its obligations under the Charter, even to the extent of overriding the rights of non-members. The more general opinion,¹⁶⁸ however, seems to be that, while Article 103 precludes the Member State from executing the treaty which is inconsistent with the Charter, the non-member remains entitled to hold the Member responsible for a breach of the treaty. Moreover, as pointed out in the present Special Rapporteur's previous report,¹⁶⁹ the very language of Article 103 makes it clear that it prescribes the *priority* of the Charter, not the *invalidity* of treaties conflicting with it. Having regard to the nearly universal membership of the United Nations and to the special place occupied by the Charter in the international law

¹⁶⁵ M. Lachs, *Yearbook of the International Law Commission*, 1963, vol. I, summary record of the 687th meeting, paras. 4 and 14.

¹⁶⁶ *Aerial Incident Case (Israel v. Bulgaria)*, *I.C.J. Reports*, 1959, p. 138.

¹⁶⁷ E.g. P. Guggenheim, *Traité de droit international*, vol. I, p. 147; Lord McNair, *Law of Treaties* (1961), p. 218, but only, it seems, with regard to subsequent treaties; cf. Oppenheim, *International Law* (eighth edition by Lauterpacht), vol. I, p. 896, footnote 1.

¹⁶⁸ E.g. Sir G. Fitzmaurice, third report, *Yearbook of the International Law Commission*, 1958, vol. II, p. 43, and fourth report, *Yearbook of the International Law Commission*, 1959, vol. II, p. 62; J. Leca, *Les Techniques de revision des Conventions Internationales* (1961), pp. 182-187.

¹⁶⁹ Paragraph 10 of the commentary to article 14, in *Yearbook of the International Law Commission*, 1963, vol. II, p. 55.

¹⁶⁴ *Yearbook of the International Law Commission*, 1963, vol. II, p. 54.

of today, it is considered to be entirely justifiable to recognize in the present article the overriding character of Article 103 of the Charter with respect to any treaty obligations of Members that conflict with their obligations under the Charter. But in doing so it may be advisable for the Commission simply to rest on the language of Article 103 and not to seek to draw from it conclusions as to the effect of the Article on treaties concluded by Members with non-members. The question was discussed in the meetings of the Collective Measures Committee¹⁷⁰ but was not resolved. Clearly, where the conflict is with a Charter provision like Article 2, paragraph 4, which embodies a rule of *jus cogens*, the conflicting treaty will be void under article 37 of the present articles with respect to a non-member no less than with respect to a Member. Moreover, the near universality of the membership of the United Nations has greatly reduced the area for the application of Article 103.

(9) Accordingly, for the reasons that have been given, *paragraph 1* simply provides that the rules laid down in the present article for regulating conflicts between treaties are subject to Article 103 of the Charter.

(10) The practice of inserting a clause in a treaty for the purpose of determining the relation of its provisions to those of other treaties entered into by the contracting States appears to be on the increase, and is clearly to be recommended whenever there is a possibility of a conflict. These clauses are of various kinds, some of which do not appear to do more than confirm the general rules of priority contained in paragraphs 3 and 4 of this article. For example, a clause such as that found in article 234 of the Treaty establishing the European Economic Community¹⁷¹ and in article 14 of the Convention of 25 May 1962 on the Liability of Operators of Nuclear Ships,¹⁷² which disavows any intention to disregard the rights of third States under existing treaties, merely confirms the general rule *pacta tertiis non nocent*, which is expressed in paragraph 4. Similarly, a clause such as that in article 18 of the Universal Copyright Convention of 1952,¹⁷³ providing that as between States parties to Pan-American Copyright Conventions the convention which is later in time is to prevail, merely confirms the general rule expressed in paragraph 3 of the present article. Nor does a clause like article 73, paragraph 2, of the Vienna Convention of 1963 on Consular Relations,¹⁷⁴ which recognizes the right to *supplement* its provisions by bilateral agreements, appear to touch the rules concerning conflicts between treaties; for it merely confirms the legitimacy of bilateral agreements which deal with the same subject and do not derogate from the obligations of the

general Convention. Certain other clauses do, however, appear to influence the operation of the general rules, and therefore to require special mention.

(11) A number of treaties contain a clause in which the contracting States declare either that the treaty is not incompatible with, or that it does not affect, their obligations under another designated treaty or, alternatively, under other treaties generally. Thus, many treaties¹⁷⁵ concluded during the period of the League of Nations had clauses providing that nothing contained in them was to be regarded as imposing upon the parties obligations inconsistent with their obligations under the Covenant. A similar clause disavowing any incompatibility with the Charter is to be found in a number of treaties which set up regional organizations.¹⁷⁶ Among other examples are: article 17 of the Universal Copyright Convention of 1952, which disavows any intention to affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works; article 30 of the Geneva Convention of 1958 on the High Seas¹⁷⁷ and article 73 of the Vienna Convention on Consular Relations,¹⁷⁸ both of which disavow any intention to override existing treaties. These clauses, in so far as they cover existing treaties concluded by the contracting States with third States, merely confirm the general rule *pacta tertiis non nocent*. But these clauses go beyond that rule, because they affect the priority of the respective treaties as between parties to both treaties, and because in some cases they concern the relationship between the treaty and *future* treaties concluded by a contracting State with a third State. These clauses appear to amount to a declaration of intention that the treaties which contain them are to give way before either another designated treaty or generally before any other treaties of the contracting States. In other words, these clauses appear in any case of conflict to give priority to the other treaty, and therefore to be of decisive effect in the application of the two treaties. Accordingly, even if in particular instances the application of these clauses may not differ from the general rules of priority set out in paragraphs 3 and 4, it is thought that they should be made the subject of a special paragraph in the present article.

(12) *Paragraph 2* therefore provides that, whenever it appears that the intention of the parties to a treaty was that its provisions should be subject to their obligations under another treaty, the first-mentioned treaty is to be applied so far as possible in a manner compatible with the other treaty; but that, in the event

¹⁷⁰ See *Repertory of Practice of United Nations Organs*, United Nations publication, Sales No. 1955.V.2, vol. V, pp. 316-318; cf. also the *Report of the Blockade Committee of the League of Nations*, Document A.14, 1927, V., p. 86.

¹⁷¹ *United Nations Treaty Series*, vol. 298 [English translation].

¹⁷² *AJIL*, (1963), p. 275.

¹⁷³ *United Nations Treaty Series*, vol. 216.

¹⁷⁴ *United Nations Conference on Consular Relations, Official Records*, vol. II (A/CONF.25/16/Add.1), United Nations publication, Sales No. 64.X.1.

¹⁷⁵ See article 16 of the Statute of 1921 on the Régime of Navigable Waterways of International Concern (*League of Nations Treaty Series*, vol. 7); article 6 of the Pan-American Convention of 1936 on Good Offices and Mediation (*League of Nations Treaty Series*, vol. 188) and the further list of treaties cited in C. Rousseau, *Principes généraux du droit international public* (1948), pp. 789-790.

¹⁷⁶ E.g. article 10 of the Inter-American Treaty of Reciprocal Assistance, *United Nations Treaty Series*, vol. 21.

¹⁷⁷ *United Nations Conference on the Law of the Sea, Official Records*, United Nations publication, Sales No. 58.V.4, vol. II.

¹⁷⁸ See footnote 174 above.

of a conflict, the other treaty is to prevail. Normally, such an intention would be expressed in the treaty itself by means of a clause of the kind already described. It seems possible, however, that the parties might have discussed and agreed upon the relation between the treaty and their other treaty obligations in the course of the *travaux préparatoires* without actually providing for it in the treaty. It also seems possible that this might be done after the conclusion of the treaty in some form of mutual understanding as to the effect of the treaty. Consequently, paragraph 2 has been formulated in terms wide enough to cover these possibilities.

(13) Certain treaties contain a clause of the reverse type by which it is sought to give the treaty priority over another treaty incompatible with it. One form of such clause looks only to the past, and provides for the priority of the treaty over existing treaties of the contracting States which are in conflict with it. Another form looks only to the future, and specifically requires the contracting States not to enter into any future agreement which would conflict with its obligations under the treaty. Some treaties, like the Statute on the Régime of Navigable Waterways of International Concern,¹⁷⁹ contain both forms of clause; a few, like the Covenant (Article 20) and the Charter (Article 103), contain single clauses which look both to the past and the future. If Article 103 of the Charter is left out of the discussion for the reasons already indicated, it is clear that quite different legal considerations apply to clauses that look to the past from those which apply to clauses that look to the future.

(14) A clause purporting to override an *earlier* treaty presents no difficulty when all the parties to the earlier treaty are also parties to the treaty which seeks to override it. As the Commission pointed out in its commentary to article 41, adopted at its fifteenth session,¹⁸⁰ the parties to the earlier treaty are always competent to abrogate it, whether in whole or in part, by concluding another treaty with that object. That being so, when they conclude a second treaty incompatible with the first, they are to be presumed to have intended to terminate the first treaty or to modify it to the extent of the incompatibility, unless there is evidence of a contrary intention. Accordingly, in these cases the inclusion of a clause in the second treaty expressly proclaiming its priority over the first does no more than confirm the absence of any contrary intention and call for the application of the general rule contained in paragraph 3. When, on the other hand, the parties to a treaty containing a clause purporting to override an earlier treaty do not include all the parties to the earlier one, the rule *pacta tertiis non nocent* automatically restricts the legal effect of the clause. The later treaty, *clause or no clause*, cannot deprive a State which is not a party of its rights under the earlier treaty. Consequently, the insertion of such a clause is without any effect in modifying the application of the general rule in paragraph 4 (a), which

provides that in such cases the rights of the third State under the earlier treaty are to prevail. It is, indeed, clear that an attempt by some parties to a treaty to deprive others of their rights under it by concluding amongst themselves a later treaty conflicting with those rights would constitute an infringement of the earlier treaty. For this reason clauses of this kind are normally so framed as expressly to limit their effects to States parties to the later treaty. Article 14 of the Convention of 25 May 1962 on the Liability of Operators of Nuclear Ships,¹⁸¹ for example, provides:

"This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Conventions would be in conflict with it; however, nothing in this Article shall affect the obligations of contracting States to non-contracting States arising under such International Conventions."

Similarly, many treaties revising or amending earlier treaties provide for the supersession of the earlier treaty in whole or in part, but at the same time confine the operation of the revising instrument to those States which become parties to it.¹⁸² The effect of this clause is that the amendments come into force only for the parties to the later treaty in their relations *inter se*, while the earlier treaty remains applicable in their relations with States which are parties to the earlier but not to the later treaty.¹⁸³ In other words, as between two States which are parties to both treaties, the later treaty prevails, but as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty prevails. These are the rules laid down in paragraph 4 of the article, so that the insertion of this type of clause in no way modifies the application of the normal rules.

(15) When a treaty contains a clause purporting to override *future* treaties inconsistent with it, the clause can be of no significance if all the parties to the earlier treaty are also parties to the later one. Clause or no clause, when concluding the later treaty they are fully competent to abrogate or modify the earlier treaty which they themselves drew up. It is simply a question of what they intend by the provisions of the later

¹⁸¹ *AJIL*. (1963), p. 275.

¹⁸² Article 1 of all the United Nations Protocols amending League of Nations treaties declares: "The Parties to the present Protocol undertake that *as between themselves* they will, in accordance with the provisions of the present Protocol, attribute full legal force and effect to, and duly apply, the amendments to this instrument as they are set forth in the annex to the present Protocol". See, for example, Protocol of 1948 amending the International Convention of 1928 relating to Economic Statistics (*United Nations Treaty Series*, vol. 20); Protocol of 1953, amending the Geneva Slavery Convention of 1926 (*United Nations Treaty Series*, vol. 182). Cf. also article 59 of the Geneva Convention 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (*United Nations Treaty Series*, vol. 75).

¹⁸³ Clumsy drafting made the clause in the Geneva Convention of 1906 revising the 1864 Convention for the Amelioration of the Condition of the Wounded or Sick in Armies in the Field appear to lay down a slightly different rule; see 99 *British and Foreign State Papers*, p. 968. But the error does not appear in the 1929 and 1949 Conventions.

¹⁷⁹ Articles 13 and 18; *League of Nations Treaty Series*, vol. 7.

¹⁸⁰ *Yearbook of the International Law Commission*, 1963, vol. II, p. 203.

treaty, and the existence of the clause in the earlier treaty can hardly affect the answer to that question, once the later treaty is seen to contain provisions incompatible with the earlier one.

(16) More difficult and more important is the effect of such a clause in cases where the parties to the later treaty do not include all the parties to the earlier one. The clause in the earlier treaty may be so framed as to prohibit the parties from concluding with any State whatever a treaty conflicting with the earlier treaty; e.g. article 2 of the Nine-Power Pact of 1922 with respect to China.¹⁸⁴ Or it may refer only to agreements with third States, as in the case of article 18 of the Statute on the Régime of Navigable Waterways of International Concern:¹⁸⁵ "Each of the contracting States undertakes not to grant, either by agreement or in any other way, to a non-contracting State, treatment with regard to navigation over a navigable waterway of international concern which, as between contracting States, would be contrary to the provisions of this Statute". Or, again, the aim of the clause may be to prohibit the contracting States from entering into agreements *inter se* which would derogate from their general obligations under the convention.¹⁸⁶ As pointed out in his previous report,¹⁸⁷ it seems to the Special Rapporteur very doubtful whether any of these clauses can be said to modify the application of the normal rules for resolving conflicts between treaties. These clauses are certainly relevant in considering whether or not the later treaty is incompatible with the earlier one and may in that way affect their application. Some obligations contained in treaties are in the nature of things intended to apply generally to all the parties all the time. An obvious example is the Nuclear Test-Ban Treaty, and a subsequent agreement entered into by any individual party contracting out of its obligations under that treaty would manifestly be incompatible with the Treaty. Other obligations, however, such as those in the Vienna Convention on Consular Relations, are of a purely reciprocal kind, so that a bilateral treaty modifying the application of the Convention *inter se* the contracting States is perfectly compatible with its provisions. But the parties may in particular cases decide to establish a single compulsive régime in matters susceptible of being dealt with on a reciprocal basis, e.g. copyright or the protection of industrial property. The chief legal relevance of a clause asserting the priority of a treaty over subsequent treaties which conflict with it therefore appears to be in making explicit the intention of the parties to create a single

"integral" or "interdependent" treaty régime not open to any contracting out. In short, by expressly forbidding contracting out the clause predicates in unambiguous terms the incompatibility with the treaty of any subsequent agreement concluded by a party which derogates from the provisions of the treaty. But it is not believed that the mere insertion of such a clause can in any other respect give a treaty a higher sanctity or priority than attaches to it by the fact of its being earlier in point of time.

(17) Any treaty laying down "integral" or "interdependent" obligations not open to contracting out must be regarded as containing an implied undertaking not to enter into subsequent agreements which conflict with those obligations. The very fact that a State accepts obligations of that nature in a treaty implies also its acceptance of an obligation not to conclude any subsequent agreement conflicting with the treaty except with the consent of the other parties. If it does so, it violates its obligations to the other parties under the treaty and, by reason of the rule *pacta tertiis non nocent*, it cannot invoke the subsequent agreement to relieve it of its responsibility for that violation. In consequence, as between that State and any party to the earlier treaty which has not consented to the later treaty, the obligations of the earlier treaty prevail. This is the normal rule of priority formulated in paragraph 4 (a), and the insertion of a special clause in the earlier treaty claiming priority for its provisions merely confirms, and does not modify, the operation of that rule. The implications of taking any different view would really be quite inadmissible. Many treaties laying down the most fundamental "integral" or "interdependent" obligations do not contain any explicit undertaking against contracting out or any clause claiming special priority for their provisions. The Kellogg-Briand Pact, the Genocide Convention, and the Nuclear Test-Ban Treaty are examples, and it is impossible to suppose that the absence from such treaties of any explicit undertaking against contracting out and of any special priority clause weakens or affects their impact upon a subsequent agreement which is incompatible with their provisions. Accordingly, it is not believed that the presence or absence of a specific clause regarding future treaties has any bearing on the formulation of the rules governing the *priority* of conflicting treaties. This does not mean that such clauses are without any effect. But, as already pointed out, their relevance comes at an earlier stage in determining whether or not the prior treaty permits contracting out and whether accordingly the later agreement is or is not compatible with the prior treaty.

(18) It follows that for the reasons given in paragraphs (10) to (17) the Special Rapporteur does not think that any of the clauses found in treaty practice asserting the priority of a particular treaty over other treaties require special mention in the present article, apart from Article 103 of the Charter. *Viewing the matter simply as one of the application of treaties in force*, none of these clauses appears to modify the operation of the normal rules of priority formulated in paragraphs 3 and 4 of the article. In consequence,

¹⁸⁴ *League of Nations Treaty Series*, vol. 38: "The Contracting Powers agree not to enter into any treaty, agreement, arrangement, or understanding, either with one another, or, individually or collectively, with any Power or Powers which would infringe or impair the principles stated in paragraph 1."

¹⁸⁵ *League of Nations Treaty Series*, vol. 7.

¹⁸⁶ E.g. Article 15 of the 1883 Convention for the International Protection of Industrial Property (de Martens, *Nouveau Recueil général*, 2^e série, vol. X); article 20, the Berlin Convention of 1908 for the Protection of Literary Property (de Martens, *Nouveau Recueil général*, 3^e série, vol. IV).

¹⁸⁷ Second report on the law of treaties, in *Yearbook of the International Law Commission*, 1963, vol. II, pp. 57 and 58, paragraph 19 of the commentary to article 14.

the article does not contain any rule relating to the effect of these clauses. The real issue is a different one — the question, discussed in a preliminary way by the Commission at its fifteenth session, whether a subsequent agreement which conflicts with a treaty containing “integral” or “interdependent” type obligations is merely incapable of being invoked against parties to the earlier treaty or whether it is wholly void. This question, which again does not turn on the presence or absence of a special clause but on the nature of the obligations undertaken in the earlier treaty, is examined below in commenting upon paragraph 4 of the article.

(19) *Paragraph 3* deals with cases where all the parties to a treaty, whether with or without additional States, enter into a later treaty which conflicts with the earlier one. In short, it covers the same ground as article 41 adopted at the fifteenth session and raises the question which was then reserved by the Commission as to the appropriate place for article 41 in the draft articles on the law of treaties. The provisional decision of the Commission to characterize these cases as instances of implied termination of an earlier treaty by entering into a subsequent treaty is believed to be entirely justified. No doubt, the two treaties have to be interpreted and compared in order to determine whether the later treaty was intended to supersede or to leave in being the earlier treaty. But if the resulting conclusion is that supersession was intended, the earlier treaty must *ex hypothesi* be regarded as having been terminated by the later one, so that there are not two treaties in force and it is not a case of two conflicting treaty obligations. It is therefore proposed that article 41 should be retained in its present place in section III of part II, which deals with the termination of treaties.

(20) On the other hand, the fact that the question of the “implied termination” of the earlier treaty can be determined only after ascertaining the extent of the conflict between the two treaties does give these cases a certain connexion with the present article. It therefore seems desirable in any event to mention these cases in paragraph 3, with a cross-reference to article 41. But the Special Rapporteur believes that a minor modification of article 41 may be desirable, so as to transfer cases of a partial conflict between two treaties to the present article. Article 41 reads as follows:

*“Termination implied from entering
into a subsequent treaty*

“1. A treaty shall be considered as having been impliedly terminated in whole or in part if all the parties to it, either with or without the addition of other States, enter into a further treaty relating to the same subject-matter and either:

“(a) The parties in question have indicated their intention that the matter should thereafter be governed by the later treaty; or

“(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

“2. However, the earlier treaty shall not be

considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty.”

As at present drafted, the opening phrase of paragraph 1 speaks of termination “*in whole or in part*”, but the distinction between total and partial termination (or suspension) is not continued in the drafting of the rest of the article. Some modification of the wording of the rest of that article might therefore be necessary in any case. However, the Special Rapporteur is inclined to think that the appropriate course may be to eliminate the words “*in whole or in part*” from article 41 and to assign to the present article cases of partial conflict in which there does not appear to be any intention to terminate the earlier treaty.

(21) Sub-paragraph (a) of paragraph 3 therefore provides, in effect, that, where there is evidence of an intention that the later treaty should govern the whole matter, or where the two treaties are not capable of being applied at the same time, article 41 applies and terminates the treaty. Sub-paragraph (b), on the other hand, provides that, where article 41 (as amended by the deletion of the words “*in whole or in part*”) does not terminate it, the earlier treaty continues to apply but only to the extent that it does not conflict with the later treaty.

(22) *Paragraph 4* deals with cases where some, but not all, the parties to a treaty participate in the conclusion of a new treaty which conflicts with their obligations under the earlier treaty. In such cases the rule *pacta tertiis non nocent* precludes the later treaty from depriving the other parties to the earlier treaty of their rights under that treaty. Then, if the question is viewed simply as one of the priority of the obligations and rights of the interested States and of State responsibility for breach of treaty obligations, the applicable rules appear to be fairly clear. These are the rules formulated in paragraph 4 of this article, under which —

(a) in the relations between a State that is a party to both treaties and a State that is a party only to the earlier treaty, the earlier treaty prevails (*pacta tertiis non nocent*);

(b) in the relations between two States that are parties to both treaties, the later treaty prevails (i.e. the later treaty applies to these States *inter se*, simply because it is a more recent expression of their wills in their mutual relations);

(c) in the relations between a State that is a party to both treaties and a State that is a party only to the later treaty, the later treaty prevails, unless the second State was aware of the existence of the earlier treaty and that it was still in force for the other State.

The rules in sub-paragraphs (a) and (b) can hardly be open to doubt, as they are the assumed basis of law upon which many revisions of multilateral treaties, including the United Nations Protocols for revising League of Nations Treaties, have taken place.¹⁸⁸ As to

¹⁸⁸ See Resolutions of the General Assembly concerning the Law of Treaties, document A/CN.4/154, in *Yearbook of the International Law Commission*, 1963, vol. II, pp. 1-36.

sub-paragraph (c), it seems clear that a State which has entered into both treaties is in principle liable, as between itself and parties to the later treaty, for any failure to perform its obligations under that treaty. Some authorities,¹⁸⁹ however, consider that the parties to the later treaty are not entitled to invoke the treaty against that State if they themselves were aware that in concluding the later treaty it was violating its obligations under the earlier one. This view seems correct in principle, and the general rule in sub-paragraph (c) has been so formulated.

(23) The critical question remains whether it is correct to deal with all these cases exclusively as questions of priority and of State responsibility for breach of treaty obligations or whether in some instances the later treaty is to be considered void. This question was discussed by the Special Rapporteur at some length in paragraphs (6) to (30) of the commentary to article 14 of his second report,¹⁹⁰ where he also summarized and examined the views of the two previous Special Rapporteurs. Here it is proposed only to repeat paragraphs (14) to (19) of the commentary, which explain the considerations that led the present Special Rapporteur not to suggest a rule predicating the complete nullity of a treaty in case of conflict with an earlier treaty, even if of an "integral" or "interdependent" type. The next six paragraphs which follow are therefore taken from the Special Rapporteur's previous report.¹⁹¹

(24) Treaties today serve many different purposes; legislation, conveyance of territory, administrative arrangement, constitution of an international organization, etc., as well as purely reciprocal contracts; and, even if it can be accepted that the illegality of a contract to break a contract is a general principle of law — a point open to question — it does not at all follow that the principle should be applied to treaties infringing prior treaties. The imperfect state of international organization and the manifold uses to which treaties are put seem to make it necessary for the Commission to be cautious in laying down rules which brand treaties as illegal and void. This is not to say that to enter into treaty obligations which infringe the rights of another State under an earlier treaty does not involve a breach of international law involving legal liability to make redress to the State whose rights have been infringed. But it is another thing to say that the second treaty is void for illegality and a complete nullity as between the parties to it.

(25) The attitude adopted by the Permanent Court in the *Oscar Chinn* and *European Commission of the Danube* cases hardly seems consistent with the existence in international law of a general doctrine invalidating treaties entered into in violation of the provisions of a prior treaty. In the *Oscar Chinn* case¹⁹² the earlier

treaty was the General Act of Berlin of 1885, which established an international régime for the Congo Basin. That treaty contained no provision authorizing the conclusion of bilateral arrangements between particular parties; on the contrary it contained a provision expressly contemplating that any modification or improvement of the Congo régime should be introduced by "common accord" of the signatory States. Nevertheless in 1919 certain of the parties to the Berlin Act, without consulting the others, concluded the Convention of St. Germain whereby, as between themselves, they abrogated a number of the provisions of the Berlin Act, replacing them with a new régime for the Congo. The Court contented itself with observing that, no matter what interest the Berlin Act might have in other respects, the Convention of St. Germain had been relied on by both the litigating States as the source of their obligations and must be regarded by the Court as the treaty which it was asked to apply. Admittedly, the question of the legality of the Convention of St. Germain had not been raised by either party. But the question was dealt with at length by Judges Van Eysinga and Schücking in dissenting judgements¹⁹³ and had, therefore, evidently been debated within the Court. Moreover, these Judges had expressly taken the position that the question of the validity or invalidity of the treaty was not one which could depend on whether any Government had challenged its legality, but was a question of public order which the Court was bound itself to examine *ex officio*. In these circumstances, it is difficult to interpret the Court's acceptance of the Convention of St. Germain as the treaty which it must apply, as anything other than a rejection of the doctrine of the absolute invalidity of a treaty which infringes the rights of third States under a prior treaty.

(26) The line taken by the Court in its advisory opinion on the *European Commission of the Danube*¹⁹⁴ was much the same. The Versailles Treaty contained certain provisions concerning the international régime for the Danube, including provisions concerning the composition and powers of the European Commission for that river; at the same time it looked forward to the early conclusion of a further convention establishing a definitive status for the Danube. A further convention was duly concluded, the parties to which did not comprise all the parties to the Treaty of Versailles but did include all the States which were concerned in the dispute giving rise to the request for the advisory opinion. In this case the question of the capacity of the States at the later conference to conclude a treaty modifying provisions of the Treaty of Versailles was raised in the arguments presented to the Court, which pronounced as follows:

"In the course of the present dispute, there has been much discussion as to whether the Conference which framed the Definitive Statute had authority to make any provisions modifying either the composition or the powers and functions of the European Commission, as laid down in the Treaty of Versailles,

¹⁸⁹ E.g. Lord McNair, *Law of Treaties* (1961), p. 222.

¹⁹⁰ *Yearbook of the International Law Commission*, 1963, vol. II, pp. 55-60.

¹⁹¹ The first sentence of paragraph (14) of the previous commentary is omitted.

¹⁹² *P.C.I.J.* (1934), Series A/B, No. 63.

¹⁹³ *Ibid.*, pp. 132-136 and 148-150; see also Judge Hurst's explicit reference to the question, pp. 122-123.

¹⁹⁴ *P.C.I.J.* (1927), Series B, No. 14.

and as to whether the meaning and the scope of the relevant provisions of both the Treaty of Versailles and the Definitive Statute are the same or not. But in the opinion of the Court, as all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Conference under Article 349 of the Treaty of Versailles."¹⁸⁵

Here again, it is difficult not to see in the Court's pronouncement a rejection of the doctrine of the absolute invalidity of a later treaty which infringes the rights of third States under a prior treaty.¹⁸⁶ The *Mavrommatis Palestine Concessions* case¹⁸⁷ was, it is true, a somewhat different type of case, but it also appears to proceed on a basis quite inconsistent with the idea that a later treaty will be void to the extent that it conflicts with an earlier multilateral treaty.

(27) In its advisory opinion on the *Austro-German Customs Union*¹⁸⁸ the Court was only called upon to consider the compatibility of the Protocol of Vienna with the Treaty of St. Germain; it was not asked to pronounce upon the legal consequences in the event of its being found incompatible with the earlier treaty. In two cases concerning Nicaragua's alleged violation of the prior treaty rights of Costa Rica and Salvador by concluding the Bryan-Chamorro Pact with the United States, the Central American Court of Justice considered itself debarred from pronouncing upon the validity of the later treaty in the absence of the United States, over which it had no jurisdiction. It therefore limited itself to holding that Nicaragua had violated her treaty obligations to the other two States by concluding a later inconsistent treaty with the United States.

(28) International jurisprudence is not perhaps entirely conclusive on the question whether and, if so, in what circumstances, a treaty may be rendered void by reason of its conflict with an earlier treaty. Nevertheless, it seems to the present Special Rapporteur strongly to discourage any large notions of a general doctrine of the nullity of treaties infringing the provisions of earlier treaties;¹⁸⁹ and it accordingly also lends point to the hesitations of Sir G. Fitzmaurice in admitting any cases of nullity where the conflict is with an earlier treaty of a "mutual reciprocating type".

¹⁸⁵ *Ibid.*, p. 23.

¹⁸⁶ The more so as two Judges, Nyholm and Negulesco, took a different line from the Court, holding that any provision of the Statute which conflicted with the Treaty of Versailles would be "null"; *ibid.*, pp. 73 and 129.

¹⁸⁷ *P.C.I.J.* (1924), Series A, No. 2.

¹⁸⁸ *P.C.I.J.* (1931), Series A/B, No. 41.

¹⁸⁹ See G. Schwarzenberger, *International Law*, pp. 482-487; and see also article 18 of the Havana Convention of 1928 on Treaties (Supplement to *A.J.I.L.* 22 (1928)); Harvard Law School Research in *International Law*, part III, *Law of Treaties*, p. 1207 which provided: "Two or more States may agree that their relations are to be governed by rules other than those established in general conventions concluded by them with other States".

(29) The two cases of nullity tentatively suggested by him,²⁰⁰ although they are supported by the Harvard Research Draft, hardly seem consistent with the attitude of the Court in the *Oscar Chinn* and *European Commission of the Danube* cases. In the former case there was an express stipulation that any modifications of the Berlin Act should be by "common accord", yet the Court considered it sufficient that no State had challenged the Convention of St. Germain. It does not seem that the Court would have adopted any different view if the stipulation had taken the form of an express prohibition against contracting out of the treaty otherwise than by "common accord". It is also arguable that there is implied in every multilateral treaty an undertaking not to violate its provisions by entering into inconsistent bilateral agreements.²⁰¹ Accordingly, it hardly seems justifiable to provide, as a special case, that a later treaty shall be void if it conflicts with a prior treaty which contains an express prohibition against inconsistent bilateral agreements. An undertaking in a treaty not to enter into a conflicting treaty does not, it is thought, normally affect the treaty-making capacity of the States concerned, but merely places them under a contractual obligation not to exercise their treaty-making powers in a particular way. A breach of this obligation engages their responsibility; but the later treaty which they conclude is not a nullity. Similarly, if the general view be adopted — as it was by the previous Special Rapporteur — that a later treaty concluded between a limited group of the parties to a multilateral treaty is not normally rendered void by the fact that it conflicts with the earlier treaty, his second tentative exception to the rule does not appear to justify itself. This exception concerned cases where the later treaty "necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty". The question of nullity does not arise at all unless the later treaty materially conflicts with the obligations of the parties under the earlier treaty. Can it make any difference whether the infringement of those obligations is direct or indirect, if it is the logical effect of the later treaty? Of course, if the later treaty is susceptible of different interpretations or is capable of performance in different ways, it may not be possible to know whether there is any conflict with the earlier treaty until the later treaty has been interpreted and applied by the States concerned. But if it is in fact interpreted and applied in a manner which violates the earlier treaty, can it reasonably be differentiated from a treaty whose terms *unambiguously* violate the earlier treaty?

(30) Further examination of the jurisprudence of the Court and of State practice has only served to confirm the Special Rapporteur in his belief that under the existing law and practice conflicts between treaties of whatever type are regarded as raising questions of the priority rather than of the validity of treaties. Close

²⁰⁰ See paragraph 13 of the commentary to article 14, in the present Special Rapporteur's second report on the law of treaties, in *Yearbook of the International Law Commission*, 1963, vol. II, p. 56.

²⁰¹ See the general discussion of this point in paragraphs (16) and (17) above.

study of the judgements of the Court and of individual judges in the *Oscar Chinn*²⁰² and *European Commission of the Danube*²⁰³ cases makes it crystal clear that in both cases the Court had fully considered the question of the impact of the earlier treaty on the validity of the later one and deliberately dealt with the rights of the States before the Court in each case on the basis of the validity of the later treaty as between the parties to it — i.e. it applied the *inter se* principle. True, in neither case was the validity of the later treaty being challenged in the proceedings by a party to the earlier treaty, but the dissenting judges pointed out that, if the later treaties were in law to be considered as objectively affected with nullity, it was a question to be raised *proprio motu* by the Court. An analogous question arose, if in somewhat special circumstances, before the present Court in the *Norwegian Loans* case²⁰⁴ when France filed an application based upon a Declaration under the Optional Clause containing a so-called “automatic” or “self-judging” reservation and Norway invoked the reservation instead of challenging the validity of the Declaration itself. The Court expressly declined to examine whether the French reservation was compatible with Article 36, paragraph 6, of the Statute of the Court, saying:²⁰⁵

“The validity of the reservation has not been questioned by the Parties. It is clear that France fully maintains its Declaration, including the reservation, and that Norway relies upon the reservation.

“In consequence, the Court has before it a provision which both parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court.”

In short, the Court was content to rest on the *inter se* agreement of the two States reached in the proceedings before it, without examining the compatibility of that agreement with the prior treaty. If this decision has not commended itself to some judges and commentators, it is primarily because of the *jus cogens* character which they consider that paragraph 6 of Article 36 of the Statute possesses.

(31) In both the *Oscar Chinn* and the *European Commission of the Danube* cases the later treaty was concluded for the purpose of replacing or revising a treaty creating an international régime for an international river; and there are a number of further precedents in State practice with regard to the revision of treaties which appear to support the relativity of obligations principle applied by the Court in those cases. Thus the successive revisions in 1923, 1928, 1945 and 1956 of the international régime for Tangier evoked protests from certain States which considered that their rights or interests under earlier instruments had been disregarded; but the treaties came into force *inter se* the contracting States. Similarly, the revisions of the Danube régime in 1921 and in 1948 evoked strong objections from interested States; but the régimes came into effect *inter se* the contracting States,

as the Court itself held with regard to the 1921 Convention. The United States, it is true, in its protest²⁰⁶ regarding the Belgrade Convention of 1948, declared that it did not recognize that Convention “as having any valid international effect”, and stated that it would consider the 1921 Statute still to be in force for the entire Danube River. But it may be doubted whether the terms of this protest reflected a view of the absolute nullity of the 1948 Convention *inter se* the contracting States so much as a view that the new Convention was to be considered as completely without effect *vis-à-vis* the States which refused to recognize it.²⁰⁷ The list of treaties revising international régimes which have first come into force on an *inter se* basis could well be extended — e.g. the Montreux Convention for the Straits.²⁰⁸ The Special Rapporteur, in mentioning these historical instances, is not to be understood as expressing any opinion as to the legality or illegality of the acts of the States concerned. The precedents are referred to simply as corroborating the conclusion drawn from the jurisprudence of the Court that conflicts between treaties of whatever kind are to be determined under the existing law on the basis of the relative priority — the relative operation — of the different treaties as between the interested States.

(32) As the previous Special Rapporteur pointed out,²⁰⁹ chains of multilateral treaties dealing with the same subject-matter are extremely common, and are based on the assumed possibility of some of the parties to a treaty concluding a new treaty modifying or superseding the earlier one in their relations *inter se*, while leaving it in force with respect to States which do not become parties to the new treaty. It is the exception rather than the rule for all the parties to the first treaty to become parties to the revising instrument, and until the state of international relations permits a much larger acceptance of majority decisions, the *inter se* principle is likely to remain an essential instrument for bringing treaty situations up to date. Moreover, multilateral treaties creating “interdependent” or “integral” type obligations are the very classes of treaty in which a “chain” of instruments is found, e.g. the Hague Conventions, the Geneva Conventions on prisoners of war, etc., the “river” Conventions and large numbers of technical Conventions. Accordingly, as already emphasized, it seems necessary to be very cautious in proclaiming the absolute nullity of any type of agreement purely on the ground of its conflict with an earlier one.

(33) To attach the sanction of nullity to an agreement is to deny that the parties possessed any competence under international law to conclude it. If in any given

²⁰² P.C.I.J. (1934), Series A/B, No. 64.

²⁰³ P.C.I.J. (1927), Series B, No. 14.

²⁰⁴ I.C.J. Reports, 1957, p. 9.

²⁰⁵ *Ibid.*, pp. 25-27.

²⁰⁶ For the text of the protest, see H. W. Briggs, *Law of Nations*, p. 277; similar protests were made by the United Kingdom, France, Italy, Greece and Belgium.

²⁰⁷ It is true, however, that this was a case where it was scarcely feasible simultaneously to operate the régime of 1948 *inter se* the parties and the régime of 1921 *vis-à-vis* the States which objected to the 1948 Convention.

²⁰⁸ See E. Hoyt, *The Unanimity Rule in the Revision of Treaties*, pp. 162-176.

²⁰⁹ In his third report, *Yearbook of the International Law Commission*, 1958, vol. II, document A/CN.4/115, para. 88.

case such a lack of competence results from the conclusion of a prior treaty, it is suggested that it will be because of the subject-matter of the obligations and not because of their "integral" or "interdependent" character alone. As pointed out in the present Special Rapporteur's second report,²¹⁰ "integral" or "interdependent" obligations may vary widely in importance. Some, although important enough in their own spheres, may deal with essentially technical matters; while others deal with matters of vital public concern, such as the maintenance of peace, nuclear tests, traffic in women and children or in narcotics. Some of the rules laid down in treaties touching these matters may be of a *jus cogens* character, and the Commission has made specific provision in articles 37 and 45 for the nullity of treaties which conflict with such rules. The Special Rapporteur doubts whether the Commission should go beyond that unless it is prepared to specify particular categories of treaties as treaties conflict with which will entail the nullity of a later treaty; and in that event the Commission will virtually have specified those treaties as laying down rules of *jus cogens*.

(34) For the above reasons the Special Rapporteur adheres to the view that paragraph 4 of the present article should be based on the relative priority, rather than the nullity, of the conflicting treaties. To do so is not to condone the conclusion of a treaty the effect of which is to violate obligations under an earlier treaty; nor is it to authorize departures from the rules concerning the consents required for the revision of treaties. If a State in concluding a treaty sets aside its obligations to another State under an earlier treaty without the latter's consent, it engages its international responsibility for the breach of the earlier treaty. But it is believed that in the present condition of international law the matter is to be resolved on the plane of the legal responsibility and not of the competence of the offending State.

(35) Accordingly, the article does not provide for any exceptions to the rules stated in paragraph 4, other than the general exceptions of conflict with a rule of *jus cogens* and conflict with an obligation of Members of the United Nations under the Charter.

Article 65A. — The effect of breach of diplomatic relations on the application of treaties

Subject to article 43 the severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty and, in particular, their obligation under article 55.

Commentary

(1) During the Commission's fifteenth session, when the question of the effect of the breach of diplomatic relations was raised in the discussion of articles 21 and 22 of the Special Rapporteur's second report,²¹¹

²¹⁰ Yearbook of the International Law Commission, 1963, vol. II, p. 59, commentary to article 14, para. 26.

²¹¹ Yearbook of the International Law Commission, 1963, vol. II, pp. 77 and 79.

the Commission agreed to the Special Rapporteur's suggestion that the matter should be examined in connexion with the application of treaties.²¹²

(2) This article contemplates only the situation which arises when diplomatic relations are severed between two parties to a treaty, whether bilateral or multilateral, between which normal diplomatic relations had previously subsisted. For the reasons stated in paragraph 14 of the Commission's report for 1963,²¹³ the question of the effect upon treaties of the outbreak of hostilities — which may obviously be a case when diplomatic relations are severed — is not being included in the draft articles on the law of treaties. Similarly, the problems arising in the sphere of treaties from the absence or withdrawal of recognition, which were mentioned in the 726th meeting, do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either that of succession of States and Governments, which is excluded from the present discussion for the reasons indicated in paragraph 6 of the introduction to the present report, or that of recognition of States and Governments, which the Commission, in 1949, decided to include in its provisional list of topics selected for codification.²¹⁴

(3) The effect of the severance of diplomatic relations upon treaties was examined by the previous Special Rapporteur, Sir Gerald Fitzmaurice. Article 5 (iii) of his second report²¹⁵ stated that the existence of a dispute or disagreement between the parties, or a state of strained relations, or the fact that diplomatic relations had been broken off between them, were not recognized grounds for the termination or suspension of the operation of a treaty. Then in paragraph (34) of his commentary the previous Special Rapporteur pointed out that if any of those happenings do affect the treaty relationships between the parties, it will be *aliunde*, by reason of circumstances with which the breaking off of diplomatic relations may be connected, but which are independent of it. He also maintained that any practical difficulties in implementing the treaty that might occur could be met by using the good offices of another State, or by appointing a protecting State. In article 4 of his fourth report,²¹⁶ dealing with the obligatory character of treaties, he repeated that, *inter alia*, the circumstance that diplomatic relations had been broken off could not in itself justify non-performance of a treaty obligation, and he referred to his previous commentary on the matter.

(4) There is wide support for the general proposition that the severance of diplomatic relations does not in

²¹² Yearbook of the International Law Commission, 1963, vol. I, see summary record of the 697th meeting, para. 56.

²¹³ Yearbook of the International Law Commission, 1963, vol. II, p. 189.

²¹⁴ Yearbook of the International Law Commission, 1949, p. 281.

²¹⁵ Yearbook of the International Law Commission, 1957, vol. II, p. 42.

²¹⁶ Yearbook of the International Law Commission, 1959, vol. II, p. 54.

itself lead to the termination of treaty relationships between the States concerned, and the Special Rapporteur is not aware of any authority for the contrary proposition. The Commission itself, as already recalled in paragraph (1), was unwilling to deal with this matter in the context of the termination of treaties, and this position corresponds with that of many authorities who do not include the breach of diplomatic relations in their discussion of the grounds for the termination or suspension of the operation of treaties.²¹⁷ That the breaking off of diplomatic relations does not as such affect the operation of the rules of law dealing with other aspects of international intercourse is recognized, for instance, in article 2 (3) of the Vienna Convention on Consular Relations of 1963 which provides: "The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations": while the Vienna Convention on Diplomatic Relations of 1961 contains an article — article 45 — dealing specifically with the rights and obligations of the parties in the event that diplomatic relations are broken off. It therefore seems correct to state that in principle the mere breaking off of diplomatic relations does not of itself affect the continuance in force of the treaty, or the continuance of the obligation of the parties to apply it in accordance with the rule *pacta sunt servanda*.

(5) On the other hand, the effect of the severance of diplomatic relations on the continued operation of the treaty must be considered in the light of the decisions already reached by the Commission on the termination and suspension of the operation of treaties. In those cases where the execution of the treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties the question of the termination or of the suspension of the operation of the treaty clearly arises.²¹⁸ True, it has been suggested²¹⁹ that in practice difficulties in implementing the treaty could be overcome by using the good offices of another State or by appointing a protecting State. No doubt in many cases this might be so. But a State does not appear to be under any obligation to accept the good offices of another State, or to recognize the nomination of a protecting State in the event of a severance of diplomatic relations, and articles 45 and 46 of the Vienna Convention on Diplomatic Relations of 1961 expressly require the consent of the receiving State in either case. Furthermore, that Convention does not define what is included within the scope of the protection of the interests of

a third State. It therefore seems necessary to recognize that cases of supervening impossibility of performance may occur in consequence of the severance of diplomatic relations.

(6) If the severance of diplomatic relations should render it impossible for the treaty to be performed, then article 43 of part II of these draft articles would be applicable, and the impossibility of performance could be invoked as a ground for terminating the treaty or, as the case might be, for suspending its operation. In either case the treaty would remain in operation until lawfully terminated or suspended in accordance with the procedures laid down in section V of part II. Then the position of the parties would be governed by article 53 or article 54, whichever was appropriate.

(7) The article accordingly provides that, subject to article 43 (supervening impossibility of performance), the severance of diplomatic relations between parties to a treaty does not affect the legal relations established between them by the treaty and, in particular, their obligation under article 55 (*pacta sunt servanda*). The expression "severance of diplomatic relations" has been used in preference to the expression "breaking off of diplomatic relations" found in article 45 of the Vienna Convention of 1961 on Diplomatic Relations. The former expression is thought to be the better one and it is used not only in Article 41 of the Charter, but also in article 2 (3) of the Vienna Convention of 1963 on Consular Relations.

Article 66. — Application of treaties to individuals

Where a treaty provides for obligations or rights which are to be performed or enjoyed by individuals, juristic persons, or groups of individuals, such obligations or rights are applicable to the individuals, juristic persons, or groups of individuals in question:

(a) through the contracting States by their national systems of law;

(b) through such international organs and procedures as may be specially provided for in the treaty or in any other treaties or instruments in force.

Commentary

(1) The controversial nature of the question whether or to what extent an individual may be regarded as a subject of international law requires no emphasis,²²⁰ but the Special Rapporteur does not think that there is any need for the Commission to become involved in this controversy in considering the points dealt with in the present article. Whatever answer may be given to that question, the application of treaties with respect to individuals under the existing rules of international law appears to be fairly well defined. In general they are applied to individuals through the contracting States and through the instrumentality of their respective national legal systems. If there had been no exceptions

²¹⁷ Included in this category are Rousseau, *Principes généraux du droit international public*, tome I (1944); Academy of Sciences of the USSR, Institute of State and Law, *International Law* (1961); the American Law Institute, *Restatement of the Law, The Foreign Relations Law of the United States*, proposed official draft (1962).

²¹⁸ Harvard Law School, *Research in International Law*, part III, Law of Treaties, pp. 1055-1066. And cf. McNair, *Law of Treaties*, 1961, pp. 672-676.

²¹⁹ By the previous Special Rapporteur, in the passage cited in paragraph (3) of this commentary, and again by several members in the Commission's 726th meeting (for summary record of that meeting see *Yearbook of the International Law Commission*, 1964, vol. I).

²²⁰ See the present Special Rapporteur's review of the question in *Recueil des Cours de l'Académie de droit international*, 1962, vol. 2, pp. 192-229.

to this rule, it may be questioned whether there would be any need in the present articles for an article concerning the application of treaties with respect to individuals. But that is not the case.

(2) On the contrary, there are a number of well known examples of treaties which have provided special international tribunals or procedures for applying to individuals rights or obligations arising under treaties. Thus, the Convention of 1907 setting up the Central American Court of Justice gave that Court jurisdiction over cases between a Government and a national of another State, if the cases were of an international character or concerned alleged violations of a treaty or convention.²²¹ Article 304 of the Treaty of Versailles provided for the establishment of Mixed Arbitral Tribunals to deal with disputes concerning the payments of debts alleged to be owed by Germany to Allied nationals, restitution of Allied property, etc.; and individuals were to have direct access to these tribunals. Similar tribunals were provided for in other peace treaties after the First World War, and a large number of claims were submitted by individuals to these international tribunals under the treaties.²²² Another example is the Upper-Silesian Arbitral Tribunal created under the German-Polish Convention of 1922 for the protection of minorities and the safeguarding of property rights.²²³ The Charter itself, in Article 87 (b), provides for the right of the General Assembly and Trusteeship Council to accept petitions from inhabitants of Trusteeship Territories. Again, the European Convention on Human Rights and Fundamental Freedoms provides in article 25 for the grant to individuals of a right to refer complaints regarding alleged violations of human rights directly to the European Commission of Human Rights.²²⁴ Finally, if the national or international character of war crimes jurisdiction may in general be controversial, the Nuremberg and Tokyo Charters appear clearly to have been treaties which were intended by their parties to establish international machinery for dealing with the international obligations of individuals.²²⁵

(3) Some authorities²²⁶ interpret the Permanent Court's Opinion on the *Jurisdiction of the Courts of Danzig*²²⁷ as recognizing that international rights and obligations can be directly conferred or imposed on individuals by treaty. Others have doubted whether it has this significance.²²⁸ But, whatever may be the true juridical relation between the individual and the treaty in the examples mentioned in the preceding paragraph,

the treaty operates upon the individual not only through his national system of law but also through the international procedures prescribed in the treaty, and in that sense there seems to be an application of the treaty directly to him. At any rate, without going further into the matter, the Special Rapporteur has prepared the present article in order that the Commission may consider whether or not it wishes to include an article dealing with the application of treaties to individuals.

(4) *Paragraph 1* of the article simply states that, where a treaty provides for obligations or rights relating to individuals, the treaty is applicable to them (a) through the Contracting States and their national systems of law, and (b) through such international organs and procedures as may be specially provided for in the treaty or in any other treaties in force. True, sub-paragraph (a) embodies a general rule applicable to customary as well as treaty obligations, but sub-paragraph (b) is essentially concerned with the application of treaty provisions and it is this sub-paragraph that may call for mention of the application of treaties to individuals.

(5) The previous Special Rapporteur in his fourth report²²⁹ dealt with the effects of treaties on individuals from a somewhat different angle. He included two articles in that report concerning treaties involving respectively obligations and benefits for private individuals; and he formulated them in terms of the duty of the Contracting State to ensure the effective application of the treaty to the individuals in good faith on the *internal* plane. Having regard to the emphasis placed in the Charter and other instruments on human rights, there is a certain attraction in the idea of underlining a State's obligation to make treaty provisions regarding individuals effective by taking the necessary measures on the internal plane. But to spell out the obligation of the contracting State in that way would do little more than repeat the *pacta sunt servanda* rule in the particular context of treaties affecting individuals. Clearly, the duty of a State to take the necessary measures on the internal plane to implement its treaty obligations is a general one. Accordingly, if an article were to be included formulating this obligation for the case of individuals, it would be necessary to have a further article laying down the obligation in general terms for all treaties requiring any form of action on the internal plane, as indeed Sir G. Fitzmaurice's fourth report did. The present Special Rapporteur recognizes to the full the importance of the principles that a State must take effective measures in its internal law to fulfil its treaty obligations, and that a State may not plead the deficiencies of its internal law in justification of a failure to perform its treaty obligations. But both these principles are general principles of State responsibility which apply to any form of international obligation and, under the Commission's plan of codification, it seems to the Special Rapporteur that their formulation belongs to the responsibility of States rather than to the law of treaties. For the purposes of the law of treaties it is clear that both principles are implicit in

²²¹ See M. Hudson, *Permanent Court of International Justice*, p. 49.

²²² See the ten volumes of the *Recueil des Tribunaux Arbitraux Mixtes*.

²²³ See Steiner and Gross v. Polish State, 1927-28 *Annual Digest of International Law Cases*, Case No. 188.

²²⁴ See *Yearbook of the European Commission of Human Rights*, 1955-57.

²²⁵ L. B. Sohn, *Cases and Materials on United Nations Law*, p. 858.

²²⁶ E.g. Sir H. Lauterpacht, *Development of International Law through the International Court*, p. 173.

²²⁷ P.C.I.J. (1928), Series B, No. 15, pp. 16-24.

²²⁸ Lord McNair, *Law of Treaties* (1961), p. 337.

²²⁹ *Yearbook of the International Law Commission*, 1959, vol. II, pp. 49 and 78 and 79.

and covered by the *pacta sunt servanda* rule formulated in article 55. Accordingly, the Special Rapporteur has felt that he should refrain from including these principles in the present report, either in a general article covering all treaty obligations or in the present article dealing with the application of treaties to individuals. It is for this reason that the present article does not underline the duty of States to take the necessary measures on the internal plane to make the application of treaties with respect to individuals effective.

SECTION II: THE AMENDMENT AND REVISION OF TREATIES

Article 67. — Proposals for amending or revising a treaty

Subject to the provisions of the treaty —

(a) a party may at any time notify the other parties, either directly or through the depositary, of a proposal for its amendment or revision ;

(b) the other parties are bound to consider in good faith, and in consultation with the party concerned, what action, if any, should be taken in regard to the proposal.

Article 68. — Right of a party to be consulted in regard to the amendment or revision of a treaty

1. Every party has the right to be notified of any proposal to amend or revise the treaty and to be consulted with regard to the conclusion of any instrument designed to amend or revise it.

2. Paragraph 1 does not apply to an amendment by which certain of the parties propose to modify the application of the treaty as between themselves alone, if such amendment of the treaty as between the parties in question —

(a) does not affect the enjoyment by the other parties of their rights under the treaty ;

(b) does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole ; and

(c) is not prohibited by the treaty.

3. Except in so far as the treaty may otherwise provide, the rules laid down in part I of these articles apply to the conclusion and entry into force of any instrument designed to amend or revise a treaty.

Article 69. — Effect of an amending or revising instrument on the rights and obligations of the parties

1. An instrument amending or revising a treaty does not affect the rights or obligations under the treaty of any party which does not become a party to the amending or revising instrument unless —

(a) the treaty itself otherwise provides ; or

(b) the constitution of an international organization lays down a different rule for treaties concluded within the organization.

2. The bringing into force of an amending or revising instrument *inter se* the parties thereto may not, however, be considered by any other party as a violation of its rights under the treaty if, after having been notified and consulted in conformity with article 68, paragraph 1 —

(a) it took part in the adoption of the amending or revising instrument ; or

(b) it made no objection to the proposed amendment or revision, though not taking part in the adoption of that instrument.

3. (a) Subject to paragraphs 1 and 2, the effect of an instrument amending or revising a treaty on the rights and obligations of the parties to the treaty is governed by articles 41 and 65 of these articles.

(b) If the bringing into force of an amendment or revision of a treaty between some only of its parties constitutes a violation of the treaty *vis-à-vis* the other parties, the other parties may terminate or suspend the operation of the treaty under the conditions laid down in article 42.

Commentary

(1) A number of the rules contained in previous articles touch one aspect or another of the revision of treaties. The right of denunciation or withdrawal dealt with in articles 38 and 39 furnishes a means by which a party may apply pressure for the amendment or revision of a treaty which it considers to be out of date or defective. The provisions of articles 43 and 44 regarding the termination of treaty clauses by reason of a supervening impossibility of performance or a fundamental change of circumstances may, under the principle of separability laid down in article 46, have the effect of amending a treaty by operation of law. Article 61, paragraph 1, protects a State from having its rights under a treaty modified by a later treaty unless it is a party to the later treaty or has consented to the modification in question. Articles 62 and 63 contemplate that in certain special cases a State not a party to a treaty may be entitled to be consulted with regard to the amendment of particular provisions which create legal rights in its favour. Even more important, however, are articles 41 and 65, which deal with the effect of a later treaty upon an earlier treaty covering the same subject-matter : for this is precisely the situation which exists when a treaty is concluded, either between all or some of the parties to an earlier treaty, for the purpose of amending or revising the earlier treaty. Article 41 contemplates cases where there is an implied termination of the early treaty in whole or in part ; while article 65 provides for the relative priority of the two treaties as between all the parties to them, in cases where the earlier treaty is not to be considered as having been terminated in whole or in part under article 41.

(2) The substantive aspects of the revision of treaties are to a large extent covered by the above-mentioned articles. Moreover, since the instrument for carrying out the deliberate amendment of a treaty is a new treaty, the procedural aspects of revision are to a large extent covered by the provisions of part I relating to the conclusion, entry into force and registration of treaties. The question remains, however, as to whether

there are any rules specifically concerned with the revision of treaties which require to be given a place in the draft articles.

(3) Most of the authorities appear to take the view that, however desirable it may be for orderly processes of revision to be developed, the amendment and revision of treaties is still essentially a political question. One modern text-book, for example, states :²³⁰

"As a question of law, there is not much to be said upon the revision of treaties. It frequently happens that a change in circumstances may induce a Government on political grounds to accede to the request of another Government for the termination of a treaty and for its revision in the light of new circumstances. But, as a matter of principle, no State has a legal right to demand the revision of a treaty in the absence of some provision to that effect contained in that treaty or in some other treaty to which it is a party ; a revised treaty is a new treaty, and subject to the same limitation, no State is legally obliged to conclude a treaty. Accordingly, treaty revision is a matter for politics and diplomacy . . ."

A similar emphasis on the political character of the process of revision is to be found amongst members of a Committee of the Institute of International Law which examined the modification of collective treaties in 1960.²³¹ Members of this Committee, while stressing the importance of inserting in multilateral treaties appropriate legal provisions to facilitate their future revision, showed no disposition to recognize any specific rules regarding the revision process in international law.

(4) The basic principle being that the rights of each individual State under a treaty may not be modified without its consent, and there being no international organ invested with general authority to legislate with respect to the revision of treaties, it is scarcely surprising that recourse has been had to expedients such as the *rebus sic stantibus* doctrine and the *inter se* principle for the purpose of achieving the revision of a treaty régime considered to be out of date or otherwise unsatisfactory. Under the so-called Concert of Europe the leading Powers tended to assume a mandate to revise the major political treaties in the general interest and not infrequently concluded new treaties without obtaining the consent of all the parties to the previous treaties. The creators of the League of Nations recognized the problem presented by the need for the peaceful revision of situations established by treaty and its bearing on the maintenance of peace. They provided in Article 19 of the Covenant that the Assembly might "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world." But, although much was said and written during the League period concerning the importance of providing for the peaceful revision of out-of-date or burdensome treaties, Article 19 was from first to last a dead-letter. As to the Charter, if Article 14 contains

a general provision empowering the General Assembly to consider measures for the peaceful adjustment of any situation regardless of its origin, there is nowhere any mention of the revision of treaties as a specific function of the United Nations. And in point of fact both during the League of Nations and United Nations periods instances have been common enough of treaties affecting particular territories, rivers or waterways, being replaced or revised by treaties concluded by the States most directly concerned without all the parties to the previous treaties having been consulted.²³²

(5) On the other hand, the development of international organization and the tremendous growth of multilateral treaty-making has made a considerable impact on the revision of treaties. In the first place, the revision of many multilateral treaties is now a matter which concerns an international organization. This is clearly the case where the treaty is the constituent instrument of an organization or where the treaty, like international labour conventions, is drawn up within an organization. But it is also to some extent the case where the treaty is concluded under the auspices of an organization and the secretariat of the organization is made the depositary for executing its procedural provisions. In all these cases the drawing up of an amending or revising instrument ceases to be something which can be effected by some Powers only and is automatically caught up in the machinery of the organization or in the functions of the depositary. As a result, the right of each individual party to be consulted with regard to the amendment or revision of the treaty is safeguarded. In the second place, the proliferation of multilateral treaties has led to an increased awareness of the importance of making provision in advance, in the treaty itself, for the possibility of its future revision.²³³ In the third place, the expedient of *inter se* agreements has been increasingly employed for revising multilateral treaties, especially technical conventions, as between those States willing to accept the revision while at the same time leaving in force the existing régime with respect to the other parties to the earlier treaty.²³⁴

(6) The Secretariat's *Handbook of Final Clauses*²³⁵ distinguishes between clauses for the amendment and clauses for the revision of treaties, the former concerning particular proposals for changing individual provisions of the treaty and the latter concerning proposals for a general review of the whole treaty. If this distinction has a certain convenience, it is not one which is made uniformly in the State practice, and the legal process appears to be the same in both cases. The amendment and revision clauses found in multilateral treaties take a great variety of forms, as appears from the examples given in the *Handbook of Final Clauses*²³⁶ and from a recent analysis of revision clauses in a report

²³⁰ See E. C. Hoyt, *The Unanimity Rule in the Revision of Treaties* (1959), chapters 3-6.

²³¹ See *Annuaire de l'Institut de droit international* (1961), vol. I, pp. 95-153.

²³² E. C. Hoyt, *op. cit.*, pp. 28-51.

²³³ ST/LEG/6, pp. 130 and 150. Articles 108 and 109 of the Charter also distinguish between the procedures for "amending" and "reviewing" the Charter.

²³⁴ *Ibid.*, pp. 130-152.

²³⁵ Lord McNair, *Law of Treaties* (1961), p. 534.

²³⁶ See *Annuaire de l'Institut de droit international* (1961), vol. I, pp. 229-291.

to the Institute of International Law.²³⁷ Despite their variety, many amendment and revision clauses are far from dealing comprehensively with the legal aspects of revision.²³⁸ Some, for example, merely specify the conditions under which a proposal for amendment or revision may be put forward, without providing for the procedure for considering it. Others, while also specifying the procedure for considering a proposal, do not deal with the conditions under which an amendment or revision may be adopted and come into force, or do not define the exact effect on the parties to the existing treaty. As to clauses regarding the adoption and entry into force of an amendment or revision, some require its acceptance by all the parties to the treaty, but many admit some form of qualified majority as sufficient. In general, the variety of the clauses makes it difficult to deduce from the practice the development of customary rules regarding the amendment and revision of multilateral treaties.

(7) History furnishes many instances of treaty régimes amended or revised by a new treaty concluded between some only of the parties to the earlier treaty.²³⁹ Sometimes the assent of the other parties was afterwards obtained to the amendment or revision. Not infrequently, however, the new treaty was brought into force simply on an *inter se* basis. Sometimes, the other parties made protests against the conclusion of the new treaty and reserved their rights under the earlier one. These cases raise the question of the priority of conflicting treaty obligations which is dealt with in article 65 and may also raise a question of State responsibility. But the use of *inter se* agreements now appears to be an established technique for the amendment and revision of multilateral treaties. Quite apart from the frequent recourse to *inter se* agreements by groups of Powers for revising territorial settlements and régimes for international rivers or waterways, the *inter se* technique is now a normal method of revising general multilateral treaties. Indeed, reliance on the *inter se* technique for the revision of general multilateral treaties is almost inevitable owing to the improbability that all the parties to the original treaties will take the necessary steps to ratify or otherwise give their consent to the new treaty. Thus, in 1906 the Geneva Convention of 1864 for the Amelioration of the Condition of Wounded in Armies in the Field was revised by a new Convention which expressly provided that, when duly ratified, it should supersede the 1864 Convention in the relations between the contracting States, but that the 1864 Convention should remain in force in the relations of parties to that Convention who did not ratify the new Convention. A similar provision was inserted in the Hague Convention of 1907 on the Laws and Customs of War on Land, which revised the earlier Convention of 1899. There are numerous later examples of the same technique, notably the United Nations Protocols revising certain League of Nations Conventions. In a memorandum in 1951 the Legal Department of the United Nations

Secretariat, referring to a projected Convention for amending and consolidating agreements relating to narcotic drugs, commented:

"In the past . . . the entry into force of the amendments depended upon unanimous concurrence on the part of the old Parties. This rule has changed in the course of time and the modern view is that, even if the possibility of amendments coming into force as the result of a decision by a certain majority of the original contracting Parties was not contemplated in the initial Convention — and that was the case of the present international instruments on narcotic drugs — that fact did not prevent these amendments from coming into force. But in this instance one firm principle has emerged, which is that States which remain Parties to earlier instruments are bound by the texts of these instruments, without *ipso facto* being bound by the amendments."

(8) Plainly there is a considerable difference between the use of the *inter se* technique in cases where all the parties to the original treaty take part in the adoption of a new treaty providing for amendments to come into force *inter se* and its use in cases where some of the parties have no part in the drawing up of the amending treaty. In the former case the *inter se* revision takes place by consent, even if not all the parties ratify the new treaty; in the latter case it does not. It must, however, be admitted that in the past, revision through the conclusion of an *inter se* agreement has in many cases taken place without all the parties to the original even having been invited to participate in the revising instrument. The rule requiring the unanimous consent of all the original parties for revision, as one writer has said,²⁴⁰ has in the past been honoured more in the breach than in the observance; and this assessment of the practice in regard to *inter se* revision has been endorsed in a recent study of the subject.²⁴¹ The fact that *inter se* amendment often takes place without the concurrence of all the original parties was also noted — if in more cautious language — in the memorandum of the Legal Department of the Secretariat referred to in the previous paragraph:

"Over the years, ideas have changed concerning conditions which have to be fulfilled before international treaties can be amended. Whereas in the past the opinion used to be that multilateral conventions could not be amended except with the unanimous consent of all the original contracting Parties, the point has now been reached where the possibility of amending multilateral agreements with the concurrence of a more or less large number of the original parties is admitted."

It also noted that quite frequently States participate in the revision conference which were not parties to the original treaty.

(9) The diversity of State practice makes it difficult to frame a comprehensive system of rules regarding the

²³⁷ E. Giraud, *Annuaire de l'Institut de droit international* (1961), vol. I, pp. 95-103.

²³⁸ See C. W. Jenks, *ibid.*, pp. 254-264.

²³⁹ This is true both of "political" and of "non-political" treaties; see E. C. Hoyt, *op. cit.*, chapters 1-6.

²⁴⁰ P. C. Jessup, *A Modern Law of Nations*, p. 144.

²⁴¹ E. C. Hoyt, *The Unanimity Rule in the Revision of Treaties*, 1959, chapter VIII; see also Jean Leca, *Les Techniques de Revision des Conventions Internationales*, chapitre IV.

revision of treaties. Certain points, however, which seem to merit consideration, have been embodied in articles 67-69 in order that the Commission may decide whether or not to include them in the draft articles.

Article 67

(10) This article deals with the right of a party to a treaty to propose its amendment or revision to the other parties, and, secondly, with their obligation to give the proposal due consideration. No doubt, it can be said that the right to make a proposal goes without saying. But it may be desirable to include a provision on this point for two reasons. First, in the case of a multilateral treaty, it seems necessary to indicate whether it is open to the parties alone to make a proposal for its amendment or revision or whether it is also open to a State which took part in the adoption of the treaty to do so, although it has not yet become a party. It is conceivable that such a State might wish to propose an amendment in order to make possible its own ratification, acceptance or approval of the treaty. The general practice, however, seems to be to confine the right to propose an amendment or revision of the treaty to the parties. Admittedly, in the case of a treaty, like an international labour convention, concluded within an international organization for the purpose of fulfilling its purposes, it may be open to a member of the organization, as such, to propose an amendment or revision of the treaty. But the right will then derive from membership of the organization rather than from the law of treaties. The second reason is that treaties not infrequently contain provisions regulating the right to make proposals for their amendment or revision. Some require that the proposal should be put forward by a specified number or proportion of the parties, some only permit the making of a proposal after the lapse of a certain time, or after a stated date or event, or at periodical intervals or under specified conditions.²⁴² This being so, it seems desirable to state the general rule.

(11) The general rule, it seems to be agreed, is that, unless the treaty provides otherwise, any party may at any time present a proposal for its amendment or revision. Accordingly, sub-paragraph (a) states that "subject to the provisions of the treaty a party may at any time notify the other parties, either directly or through the depositary, of a proposal for its amendment or revision". The words "subject to provisions of the treaty" are used because the treaty, while not otherwise restrictive of the right to propose its amendment or revision, may prescribe procedural requirements for doing so.

(12) Sub-paragraph (b) lays upon the other parties to the treaty the obligation to examine the proposal in good faith and to consult with the party making it as to the action, if any, to be taken concerning the proposal. Admittedly, this is an imperfect obligation the observance or non-observance of which it may not always be easy to appreciate. Nevertheless, having regard to the problem which the revision of treaties presents in international law, it is thought useful to state

that the parties to a treaty are mutually bound to give due consideration to any proposal made by one of them for its amendment or revision.

Article 68

(13) Paragraph 1 of this article states that every party to a treaty has the right to be consulted with regard to any proposal for its amendment or revision and with regard to the conclusion of any instrument designed to amend or revise the treaty. This is a point upon which it seems important that the Commission should take a clear position. As already mentioned in paragraph (8) of this commentary, treaties have often in the past been amended or revised by certain of the parties without consultation with the others.²⁴³ This has led one recent writer²⁴⁴ to state: "Though they must be consulted if they are to be bound by a new agreement, the parties to a treaty have no general right to take part in all negotiations respecting revision. The question of which States should be invited to join in discussions of revision is practical rather than legal". Endorsing this conclusion, another authority²⁴⁵ has said: "Practice does not indicate that all the parties to an earlier treaty have any general right to take part in negotiations respecting revision, although they cannot be bound by some new treaty concluded without their participation or consent". Another recent writer²⁴⁶ has independently arrived at a similar conclusion: "*Il n'y a donc aucune obligation juridique de convoquer toutes les parties originales à une conférence préparatoire à un nouveau traité. Si une telle règle existait, ce serait sans doute un instrument puissant — propre à prévenir les conflits — ce serait aussi un facteur redoutable de stagnation*". Although recognizing that instances have been common enough in which individual parties to a treaty have not been consulted in regard to its revision, the Special Rapporteur does not think that the State practice necessarily leads to the conclusion reached by these writers or that the view expressed by them should be the one to be adopted by the Commission.

(14) If a group of parties has sometimes succeeded in effecting an *inter se* revision of a treaty without consulting the other parties, equally States left out of a revision have from time to time reacted against the failure to bring them into consultation as a violation of their rights as parties.²⁴⁷ Moreover, there are also numerous cases where the parties have, as a matter of course, all been consulted. A refusal to bring a particular party or parties into consultation has usually been a political decision taken on political grounds, and the question whether it was legally justified in the particular case has been left unresolved. All that the State practice

²⁴² See E. Giraud, *Annuaire de l'Institut de droit international* (1961), vol. I, pp. 108-123.

²⁴³ Well-known examples are the Conventions of 1923, 1928 and 1956 dealing with the status of Tangier, the revision of the Acts of Berlin (1885) and Brussels (1890) by the Treaty of St. Germain, the revision of the Treaty of Lausanne (1923) by the Montreux Convention (1936).

²⁴⁴ E. C. Hoyt, *op. cit.*, p. 250.

²⁴⁵ P. C. Jessup, in a foreword to E. C. Hoyt's book, at p. VII.

²⁴⁶ Jean Leca, *op. cit.*, p. 204.

²⁴⁷ E.g. Italy, the Soviet Union, Sweden, Spain at various times in regard to the revision of one of the Tangier treaties.

seems to show is that a revision effected by an *inter se* agreement without some of the parties having been consulted is not *void*, but raises a question of conflicting treaty obligations falling under article 65. Whether the conclusions of such an *inter se* agreement constitutes an infringement of the rights of the other parties under the treaty is another question. The answer to it may to some extent depend on the nature of the revision and on the particular facts of the case. For example, an agreement which supplements or varies the treaty as between particular parties without in any way prejudicing the rights of the other parties or the effective execution of the objects and purposes of the treaty may not constitute any breach of the rights of the other parties; and in such a case it may be that there is no obligation to consult the other parties with regard to the modification of the treaty *inter se* the particular parties. In general, however, the very nature of the legal relation established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty. The fact that this has not always happened in the past is not considered to be a sufficient reason for setting aside a principle which seems to flow directly from the obligation assumed by the parties to perform the treaty in good faith. There may be special circumstances when it is justifiable not to bring a particular party into consultation, as in the case of the General Assembly's omission to consult some of the parties to League of Nations treaties when drawing up the United Nations Protocols revising those treaties. But the general rule is believed to be that every party is entitled to be brought into consultation with regard to any amendment or revision of the treaty; and *paragraph 1* of article 68 so states the law.

(15) *Paragraph 2* of article 68 excepts from that general rule only such *inter se amendments* of a treaty as do not prejudice the rights of the other parties under the treaty and are not incompatible with the effective execution of the objects and purposes of the treaty as a whole. This exception is intended to cover only *inter se* agreements which either supplement and do not vary the application of the treaty or vary the application of provisions that operate bilaterally in the relations between one party and another and the operation of which between any two parties exclusively concerns those parties alone. Naturally, if the treaty expressly forbids "contracting out" the conclusion of any *inter se* agreement without consulting all the parties is inadmissible and *paragraph 2 (c)* so provides.

(16) *Paragraph 3* of article 68 specifies that, except in so far as the treaty may otherwise provide, the rules laid down in part I concerning the conclusion and entry into force of treaties apply to any instrument designed to amend or revise a treaty. It may be said that this does not need stating since an amending or revising instrument, being a treaty, necessarily falls under part I. Nevertheless, it is thought advisable to state the point for two reasons. First, it is today by no means uncommon for a multilateral treaty to contain provisions regulating the procedure for its future revision; and in that event the treaty provisions would naturally apply. Secondly, it seems desirable to leave no doubts as to

the application to amending or revising instruments of article 6 regarding the adoption of a text and of article 23 regarding the entry into force of a treaty. The rule of unanimity means that a party cannot be held bound by an amendment or revision to which it has not itself consented. It does not preclude the parties, when drawing up an amending or revising instrument, from deciding to apply a majority voting rule for the purpose of adopting its text or from providing that the instrument shall come into force upon a given number of ratifications, acceptances or accessions. For example, the United Nations Protocols were drawn up under the voting rules of the Organization and were expressed to come into force upon a limited number of ratifications; and there are many other examples.²⁴⁸

Article 69

(17) *Paragraph 1* of article 69 is for the most part simply an application to amending or revising instruments of the general rule in article 61 that a treaty does not impose any obligations upon a State not a party to it. Nevertheless, without *paragraph 1* the question might be left open as to whether by its very nature an instrument amending or revising a prior treaty has effects for parties to the treaty. Furthermore, the general rule in article 61 is sometimes displaced by a different provision laid down in the original treaty or by a contrary rule applied to treaties concluded within a particular international organization.²⁴⁹ Article 3 of the Geneva Convention on Road Traffic (1949),^{249a} for example, provides that any amendment adopted by a two-thirds majority of a conference shall come into force for all parties except those which make a declaration that they do not adopt the amendment. Article 16 of the International Convention of 1952 to Facilitate the Crossing of Frontiers for Goods Carried by Rail provides for amendments to come into force for all parties unless it is objected to by at least one-third. Article 52 of the IMCO Constitution²⁵⁰ contains a provision similar to that in the Road Traffic Convention as does also article 22 of the WHO Constitution²⁵¹ for regulations adopted by the WHO Assembly. *Paragraph 1* therefore states that an amending or revising instrument is not binding on a party which has not become a party to it unless a different rule is laid down in the treaty or in the Constitution of an organization for treaties concluded within the organization.

(18) *Paragraph 2* deals with situations which frequently arise in practice and for which it seems desirable to make express provision in the draft articles. Some of the parties, having been duly consulted, take part in the drawing up and adoption of an amending or revising instrument, but do not notify it or, alternatively, do not voice any objection to the proposed amendment or revision though refraining from taking part in the

²⁴⁸ See generally E. C. Hoyt, *op. cit.*, chapter 1.

²⁴⁹ See the *Handbook of Final Clauses*, pp. 135-148; E. Giraud, *Annuaire de l'Institut de droit international* (1961), vol. 1, pp. 139-149.

^{249a} *United Nations Treaty Series*, vol. 125.

²⁵⁰ *United Nations Treaty Series*, vol. 11.

²⁵¹ *United Nations Treaty Series*, vol. 14.

drawing up and adoption of the instrument. In the first of these situations it seems proper to infer that, by consenting to the adoption of the amending or revising instrument, the parties concerned have waived any right that they might have had to treat the bringing into force of the amendment or revision as a violation of their rights under the treaty. They may still invoke their rights under the earlier treaty in their relations with the other States, but may not contest the application of the amendment or revision as between the parties which have accepted it. It is also thought legitimate to make the same inference in the case of a State which, although invited to take part in the consideration of a proposed amendment or revision, does not do so while manifesting no objection to the proposal. Paragraph 2 is thought both to reflect the existing practice and to be desirable in order to regularize the position in *inter se* amendments or revisions of treaties carried out after due consultation with the other parties.

(19) *Paragraph 3 (a)* merely provides that, subject to the previous paragraphs, the legal effect of an amending or revising instrument is governed by articles 40, 41 (termination by subsequent agreement) and 65 (priority of conflicting treaty obligations). Article 40 needs to be mentioned because some revising instruments provide expressly for the revocation of the original treaty, although it is more common to leave the treaty in force in the relations of those of its parties which do not become parties to the revising instrument. On the other hand, if all the parties to the original treaty eventually become parties to the revising instrument, the question of the implied termination of the treaty under article 41 will arise. Where both instruments are in force at the same time, their legal effects for their respective parties depends upon which instrument is to prevail, and that is a question which falls under article 65. Indeed, many of the cases of the priority of conflicting treaty provisions covered by article 65 arise from *inter se* amendments or revisions of multilateral treaties where not all the parties to the treaty become parties to the amending or revising instruments.

(20) *Paragraph 3 (b)* raises the question of the right of a party to terminate or withdraw from the treaty when two or more of the other parties have brought into force *inter se* an amendment or revision of the treaty. At first glance it might seem that any party which declines to accept an amendment or revision should be allowed to withdraw from the treaty. If the amending or revising instrument were binding on such a party, that would, no doubt, be the appropriate rule. But, except in the comparatively rare case where the treaty or the law of an organization otherwise provides, the amending or revising instrument is not binding on a party which does not accept it. Again, there are often several parties to the treaty which fail to become parties to the instrument and account has to be taken of the rights and obligations of these parties under the treaty. Moreover, to admit a unilateral right of withdrawal in all cases might seriously detract from the usefulness in many fields of the present technique of progressive amendment of a multilateral treaty *inter se* without losing what was gained by acceptance of the original treaty. Accordingly, what paragraph 3 (b) proposes is

that parties to a treaty which do not accept an amendment or revision brought into force *inter se* by other parties may terminate or suspend the operation of the treaty only under the conditions laid down in article 42, i.e. in the case of a material breach of the treaty and by the common agreement of the parties victims of the breach.

SECTION III — INTERPRETATION OF TREATIES

Article 70. — General rules

1. The terms of a treaty shall be interpreted in good faith in accordance with the natural and ordinary meaning to be given to each term —

(a) in its context in the treaty and in the context of the treaty as a whole ; and

(b) in the context of the rules of international law in force at the time of the conclusion of the treaty.

2. If the natural and ordinary meaning of a term leads to an interpretation which is manifestly absurd or unreasonable in the context of the treaty as a whole, or if the meaning of a term is not clear owing to its ambiguity or obscurity, the term shall be interpreted by reference to —

(a) its context and the objects and purposes of the treaty ; and

(b) the other means of interpretation mentioned in article 71, paragraph 2.

3. Notwithstanding paragraph 1, a meaning other than its natural and ordinary meaning may be given to a term if it is established conclusively that the parties employed the term in the treaty with that special meaning.

Article 71. — Application of the general rules

1. In the application of article 70 the context of the treaty as a whole shall be understood as comprising in addition to the treaty (including its preamble) —

(a) any agreement arrived at between the parties as a condition of the conclusion of the treaty or as a basis for its interpretation ;

(b) any instrument or document annexed to the treaty ;

(c) any other instrument related to, and drawn up in connexion with the conclusion of, the treaty.

2. Reference may be made to other evidence or indications of the intentions of the parties and, in particular, to the preparatory work of the treaty, the circumstances surrounding its conclusion and the subsequent practice of parties in relation to the treaty, for the purpose of —

(a) confirming the meaning of a term resulting from the application of paragraph 1 of article 70 ;

(b) determining the meaning of a term in the application of paragraph 2 of that article ;

(c) establishing the special meaning of a term in the application of paragraph 3 of that article.

Article 72. — Effective interpretation of the terms
(ut res magis valeat quam pereat)

In the application of articles 70 and 71 a term of a treaty shall be so interpreted as to give it the fullest weight and effect consistent —

- (a) with its natural and ordinary meaning and that of the other terms of the treaty; and
- (b) with the objects and purposes of the treaty.

Article 73. — Effect of a later customary rule or of a later agreement on interpretation of a treaty

The interpretation at any time of the terms of a treaty under articles 70 and 71 shall take account of —

- (a) the emergence of any later rule of customary international law affecting the subject-matter of the treaty and binding upon all the parties;
- (b) any later agreement between all the parties to the treaty and relating to its subject-matter;
- (c) any subsequent practice in relation to the treaty evidencing the consent of all the parties to an extension or modification of the treaty.

Commentary

(1) The utility and even the existence of rules of international law governing the interpretation of treaties are questions which are not free from controversy.²⁵² One commentary²⁵³ on the law of treaties, for example, states:

"It seems evident that the prescription in advance of hard and fast rules of interpretation . . . contains an element of danger which is to be avoided. In their context . . . the rules . . . seem eminently reasonable and convincing. The difficulty, however, is that, detached from that context they still retain a certain fictitious ring of unassailable truth, and tend, as do all neatly turned maxims, to imbed themselves in the mind. The resulting danger is that the interpreter, well-versed in such rules, may approach his task with a mind partly made up rather than with a mind open to all evidence which may be brought before him. This is to misconceive the function of interpretation.

"The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some pre-existing specific intention of the parties with respect to every situation arising under a treaty . . . In most instances interpretation involves giving a meaning to a text — not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve.

This is obviously a task which calls for investigation, weighing of evidence, judgment, foresight, and a nice appreciation of a number of factors varying from case to case. No canons of interpretation can be of absolute and universal utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled."

(2) Similarly, a recent writer²⁵⁴ has said: "we are amongst those who are sceptical as to the value of those so-called rules and are sympathetic to the process of their gradual devaluation, of which indications exist. The many maxims and phrases which have crystallized out and abound in the textbooks and elsewhere are mere *prima facie* guides to the intention of the parties in a particular case". The first two²⁵⁵ of the Commission's Special Rapporteurs on the law of treaties in their private writings also expressed doubts as to the existence in international law of any technical rules for the interpretation of treaties.

(3) Another group of writers,²⁵⁶ although they may have reservations as to the obligatory character of certain of the so-called canons of interpretation, have shown less hesitation in recognizing the existence of some general rules for the interpretation of treaties. To this group belongs Sir G. Fitzmaurice, the previous Special Rapporteur²⁵⁷ on the Law of Treaties, who in his private writings has deduced six principles from the jurisprudence of the World Court which he regards as the major principles of interpretation. Moreover, in 1956 the Institute of International Law²⁵⁸ drew up a resolution in which it formulated, in somewhat cautious language, two articles containing a small number of basic principles of interpretation.

(4) Writers also differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to —

- (a) the text of the treaty as the authentic expression of the intentions of the parties;
- (b) the intentions of the parties as a subjective element distinct from the text; and
- (c) the declared or apparent objects and purposes of the treaty.

Some, like Sir H. Lauterpacht,²⁵⁹ place the main emphasis on the intentions of the parties and in consequence admit a liberal recourse to the *travaux préparatoires* and to other evidence of the intentions of the

²⁵² Lord McNair, *Law of Treaties* (1961), p. 366.

²⁵³ J. L. Briery, *Law of Nations* (6th ed.), p. 325. Sir H. Lauterpacht, *Rapport à l'Institut de droit international, Annuaire de l'Institut*, 1950, vol. 1, pp. 336-374.

²⁵⁴ E.g. C. Rousseau, *Principes généraux de droit international public* (1944), pp. 676 et seq.; Sir E. Beckett, *Annuaire de l'Institut de droit international*, 1950, vol. 1, pp. 435-444; V. M. Chourchalov, *Fundamental Questions in the Theory of International Law* (1959), pp. 383-402; C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), pp. 50 et seq.

²⁵⁵ *British Yearbook of International Law*, vol. 33 (1957), pp. 210-212.

²⁵⁶ *Annuaire de l'Institut de droit international*, 1956, p. 359.

²⁵⁷ *Annuaire de l'Institut de droit international*, 1950, pp. 377-402.

²⁵⁸ See Harvard Law School, *Research in International Law*, part III, Law of Treaties, article 19, p. 939.

²⁵⁹ *Ibid.*, p. 946.

contracting States as means of interpretation. Some²⁸⁰ give great weight to the objects and purposes of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. The majority of modern writers, however, insists upon the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means for correcting or, in limited measure, supplementing the text. It is this view which is reflected in the 1956 resolution of the Institute of International Law mentioned in the previous paragraph.

(5) The great majority of cases submitted to international adjudication involves the interpretation of treaties, and the jurisprudence of international tribunals is rich in references to principles and maxims of interpretation.²⁸¹ In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts; for example, those frequently referred to in their Latin forms, *ut res magis valeat quam pereat*, *contra proferentem*, *eiusdem generis*, *expressio unius est exclusio alterius*, *generalia specialibus non derogant*.²⁸² Treaty interpretation is, of course, equally part of the everyday work of Foreign Ministries and, if it is less easy to give chapter and verse than in the case of arbitral jurisprudence, it may safely be said that appeal to these principles and maxims of interpretation is no less frequent in State practice.²⁸³

(6) In short, it would be possible to find sufficient evidence of recourse to these principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But, as appears from the passages cited in paragraphs (1) and (2) above, the question posed by many jurists is rather as to the non-obligatory character of many of these principles and maxims; and it is a question which arises in national systems of law no less than in international law. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions which they employed in a document. Their suitability for use in any given case hinges on a variety of con-

siderations which have first to be appreciated by the interpreter of the document: the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory, and the interpretation of documents is to some extent an art, not an exact science.

(7) The position in regard to the methods of interpretation is somewhat analogous. The jurisprudence of international tribunals furnishes examples of all the different approaches to interpretation—textual, subjective and teleological. But it also shows that, if the textual method of interpretation predominates, none of these approaches is exclusively the correct one, and that their use in any particular case is to some extent a matter of choice and appreciation. This does not necessarily mean that there is no obligatory rule in regard to methods of interpretation; but it does mean that there is a certain discretionary element also on this point.

(8) Any attempt to codify the conditions for the application of principles whose appropriateness in any given case depends so much on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable for the reasons given in the passage cited in paragraph (1) above. The furthest that it would be safe to go would be a permissive provision simply stating that recourse may be had to the principles in question for the purpose of interpreting a treaty. But such a provision seems undesirable as there would be a danger that the inadvertent omission of a principle from the list might be thought to throw doubt upon its status even as a subsidiary aid to the interpretation of treaties. Accordingly, the choice before the Commission is believed to be either to omit the topic of interpretation of treaties altogether from the draft articles or to seek to isolate and to codify the comparatively few rules which appear to constitute the strictly legal basis of the interpretation of treaties. Admittedly, the task of formulating these rules is a delicate one, but the Commission may think it useful to attempt it. One reason is that the interpretation of treaties without arbitrariness and according to law is a necessary linch-pin of the *pacta sunt servanda* rule. Secondly, doctrinal differences concerning the methods of interpretation have tended to weaken the significance of the text as the expression of the will of the parties, and it seems desirable that the Commission should take a clear position in regard to the role of the text in treaty interpretation. Thirdly, a number of articles provisionally adopted by the Commission contain phrases such as "unless a contrary intention appears from the treaty" and the effect of these reservations cannot be properly appreciated if no indication is given in the draft articles as to whether this intention must appear on the face of the text or whether it may be established by reference to other evidence. It may

²⁸⁰ E.g. L. Cavaré, *Le droit international public positif*, vol. II, p. 94; Judge Alvarez in the *Reservations to the Genocide Convention case*, I.C.J. Reports, 1951, p. 53.

²⁸¹ See Sir G. Fitzmaurice, *British Yearbook of International Law*, vol. 28 (1951), p. 1, and vol. 33 (1957), p. 203; C. Rousseau, *Principes généraux de droit international public* (1944), pp. 676-764; and V. D. Degan, *L'Interprétation des accords en droit international*, pp. 76-148.

²⁸² See Hackworth, *Digest of International Law*, vol. 5, pp. 232-234; C. de Visser, *Problèmes d'interprétation judiciaire*, pp. 84-92 and 104-113; Lord McNair, *Law of Treaties* (1961), chapter 22.

²⁸³ Some instances may be found in chapters 20-22 of Lord McNair's *Law of Treaties*.

be added that the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties.

(9) The Special Rapporteur has accordingly prepared for the consideration of the Commission four draft articles dealing generally with the interpretation of treaties. These are articles 70-73, which are set out at the head of the present commentary. In addition, he has prepared two further articles dealing with the special problem of treaties which have plurilingual texts, a problem of increasing importance (see articles 74 and 75 below). Some writers in their exposition of the principles of treaty interpretation distinguish between law-making and other treaties.²⁸⁴ It is true that the character of a treaty may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case.²⁸⁵ But it is not thought necessary or appropriate to distinguish between law-making and other treaties for the purpose of formulating the general rules of interpretation—quite apart from the difficulties involved in making that distinction.

(10) Articles 70-73 take their inspiration from the 1956 resolution of the Institute of International Law²⁸⁶ and from Sir G. Fitzmaurice's formulation of the "major principles" of interpretation in an article on the law and procedure of the International Court published in 1957.²⁸⁷ The texts of the resolution and of Sir G. Fitzmaurice's formulation are therefore set out in the next two paragraphs for ease of comparison.

(11) *Resolution of the Institute of International Law.* "When a treaty is to be interpreted, States and international organizations and tribunals might be guided by the following principles:

"Article 1

"1. The agreement of the parties having been reached on the text of the treaty, the natural and ordinary meaning of the terms of that text should be taken as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in the context as a whole, in accordance with good faith and in the light of the principles of international law.
"2. However, if it is established that the terms employed should be understood in another sense, the natural and ordinary meaning of those terms is set aside.

"Article 2

"1. In the case of a dispute brought before an international tribunal, it will be for the tribunal, taking into account the provisions of article 1 to determine whether and to what extent other means of interpretation should be employed.

²⁸⁴ E.g. C. Rousseau, *Principes généraux de droit international public* (1944), p. 677.

²⁸⁵ E.g. the *contra proferentem* principle or the use of *travaux préparatoires*.

²⁸⁶ *Annuaire de l'Institut de droit international*, 1956, pp. 364-365.

²⁸⁷ *British Yearbook of International Law*, vol. 33 (1957), pp. 211-212.

"2. The following are among the legitimate means of interpretation:

"(a) consultation of the *travaux préparatoires*;

"(b) the practice followed in the actual application of the treaty;

"(c) the consideration of the objects of the treaty."

It will be noted that, whereas the preamble to the resolution contemplates that both articles should be applicable to interpretation by "States and international organizations and tribunals", article 2 is in terms restricted to interpretation by international tribunals. The rule in article 2 is certainly applicable also to interpretation by States and organizations and the drafting of the resolution is in this respect infelicitous.

(12) *Sir G. Fitzmaurice's formulation* (based on the jurisprudence of the World Court) —

"I. *Principle of actuality (or textuality).* Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.

"II. *Principle of the natural and ordinary meaning.* Subject to principle VI below, where applicable, particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur. This meaning can only be displaced by direct evidence that the terms used are to be understood in another sense than the natural and ordinary one, or if such an interpretation would lead to an unreasonable or absurd result. Only if the language employed is fundamentally obscure or ambiguous may recourse be had to extraneous means of interpretation, such as consideration of the surrounding circumstances, or *travaux préparatoires*.

"III. *Principle of integration.* Treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole.

"Subject to the foregoing principles

"IV. *Principle of effectiveness* (*ut res magis valeat quam pereat*). Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.

"V. *Principle of subsequent practice.* In interpreting a text, recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is.

"Footnote to this principle. Where the practice has brought about a change or development in the meaning of the treaty through a *revision* of its terms, by conduct, it is permissible to give effect to this change or development as an agreed revision but not as an interpretation of its original terms.

"VI. *Principle of contemporaneity*. The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded."

Article 70

(13) This article corresponds to article 1 of the Institute's resolution and to major principles I to III and VI in the Fitzmaurice formulation. It takes as the basic rule of treaty interpretation the primacy of the text as evidence of the intentions of the parties. It accepts the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate *ab initio* the intentions of the parties. While not excluding recourse to other indications of the intentions of the parties in appropriate cases, it makes the actual text the dominant factor in the interpretation of the treaty. The Institute of International Law adopted this — the textual — approach to treaty interpretation, despite its first Rapporteur's²⁶⁸ strong advocacy of a more subjective, "intentions of the parties", approach. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find cogent expression in the proceedings of the Institute.²⁶⁹ The textual approach, on the other hand, justifies itself by the simple fact that, as one authority²⁷⁰ has put it, "*le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties*". Moreover, the jurisprudence of the World Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by the Court as established law.²⁷¹ In particular, it has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not expressly or by necessary implication contain.²⁷²

(14) Paragraph 1 contains four separate principles. The first — interpretation in good faith — flows directly from the rule *pacta sunt servanda*. The second — natural and ordinary meaning of the terms — is the very essence of the textual approach; the parties are to be presumed to have that intention which appears from the natural and ordinary meaning of the terms used by them. The third principle — referred to by

Sir G. Fitzmaurice as the principle of integration — is one both of common sense and good faith; the natural and ordinary meaning of terms is not to be determined in the abstract but by reference to the context in which they occur. The second and third principles have repeatedly been affirmed by the World Court.²⁷³ Here it will suffice to cite the pronouncement of the International Court in its Opinion on the Competence of the General Assembly in the Admission of a State to the United Nations:²⁷⁴

"The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."

That the context is not merely the article or section of the treaty in which the term occurs, but also the context of the treaty as a whole, was stressed by the Permanent Court in an early Opinion:²⁷⁵

"In considering the question before the Court upon the language of the treaty, it is obvious that the treaty must be read as a whole, and that its meaning is not be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense."

And the Court has more than once had recourse to the statement of the objects of the treaty in the preamble for the purpose of interpreting a particular provision.²⁷⁶

(15) The fourth principle contained in paragraph 1 — Sir G. Fitzmaurice's principle No. VI, the principle of interpretation by reference to the linguistic usage current at the time of the conclusion of the treaty — is a reformulation of the first aspect of Judge Huber's "inter-temporal" law submitted to the Commission in article 56. After discussing that article at the 728th meeting²⁷⁷ the Commission postponed consideration of the principles involved, with a view to re-examining them in connexion with the rules of interpretation. Taking account of the views expressed at that meeting, the Special Rapporteur has included the first branch of the inter-temporal law in the present article.²⁷⁸ Sir G. Fitzmaurice, although recognizing the affinities of this principle with the "natural and ordinary meaning rule", preferred to treat it as an independent principle. But it constitutes one of the conditions for determining the natural and ordinary meaning²⁷⁹ and

²⁶⁸ Sir H. Lauterpacht. At the final discussion of the subject in 1956 Sir H. Lauterpacht, having been elected to the Court, was replaced by Sir G. Fitzmaurice who, in common with the majority of the members, favoured the textual approach.

²⁶⁹ See in particular Sir E. Beckett, *Annuaire* 1950, vol. 1, pp. 435-444; Max Huber, *Annuaire* 1952, vol. 1, pp. 198-202; and the deliberations in *Annuaire* 1952, vol. 2, pp. 369-382.

²⁷⁰ Max Huber, *Annuaire de l'Institut de droit international*, 1952, vol. 1, p. 199.

²⁷¹ See examples in V. D. Degan, *L'interprétation des accords en droit international*, pp. 79-83; and in *British Yearbook of International Law*, vol. 28 (1951), pp. 10-11 and vol. 33 (1957), pp. 212-214.

²⁷² E.g. in the *United States Nationals in Morocco case*, *I.C.J. Reports*, 1952, pp. 196 and 199.

²⁷³ See instances cited in V. D. Degan, *L'interprétation des accords en droit international*, pp. 96-98; and in *British Yearbook of International Law*, vol. 28 (1951), pp. 10-11 and 18.

²⁷⁴ *I.C.J. Reports*, 1950, p. 8.

²⁷⁵ *Competence of the ILO to Regulate Agricultural Labour*, *P.C.I.J.* (1922), Series B, Nos. 2 and 3, p. 23; and see Lord McNair, *Law of Treaties* (1961), pp. 381-382.

²⁷⁶ E.g. *United States Nationals in Morocco case*, *I.C.J. Reports*, 1952, pp. 183-184 and pp. 197-198.

²⁷⁷ For summary record see *Yearbook of the International Law Commission*, 1964, vol. I.

²⁷⁸ The second branch is included in article 73.

²⁷⁹ It is so treated in the resolution of the Institute of International Law.

therefore seems properly to belong to paragraph 1 of the present article. Instances of the application of this principle have been given in the commentary to article 56 and there is no need to repeat them here. The formulation of the principle has here been widened to cover not only the rules of international law but also the linguistic usage current at the time of the conclusion of the treaty. The application of the principle in the *United States Nationals in Morocco* case²⁸⁰ concerned linguistic usage rather than rules of law.

(16) *Paragraph 2* concerns cases where either the natural and ordinary meaning of the terms in their context does not give a viable result or for one reason or another the meaning is not clear. In these cases, and in these cases only, it is permissible to fix the meaning of the terms by reference to evidence or indications of the intentions of the parties outside the ordinary sense of their words. The World Court has frequently stated that, where the natural and ordinary meaning of the words is clear and makes sense in the context, there is no occasion to have recourse to other means or principles of interpretation. Many of these statements relate to the use of *travaux préparatoires*. The passage from the Court's Opinion on the Competence of the General Assembly in the Admission of a State to the United Nations, cited in paragraph (14) above, is one example, and another is its earlier Opinion regarding admission to the United Nations :²⁸¹

"The Court considers that the text is sufficiently clear ; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a Convention is sufficiently clear in itself".

Similarly, the Court has refused to admit principles such as *ut res magis valeat* and that favouring restrictive interpretation when to do so would run counter to the clear meaning of a text.²⁸² On the other hand, it has recognized that the "clear meaning" rule is not applicable if an interpretation on the basis of the natural and ordinary meaning of the terms "would lead to something unreasonable or absurd".²⁸³ This exception to the clear meaning rule must, it is thought, be considered as strictly limited to cases where the natural and ordinary meaning gives a result which *in the context* is objectively and manifestly absurd or unreasonable ; for otherwise it might unduly weaken the rule. The limited nature of this exception is confirmed by the rarity of the cases in which the Court has applied it. A recent instance is the *South West Africa* cases where, dealing with the contention that today there is no such thing as "another Member of the League" for the purposes of the South West Africa Mandate, the Court said : "This contention is claimed to be based upon

the natural and ordinary meaning of the words employed in the provision. But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, the purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it".²⁸⁴ The great bulk of the cases which fall under paragraph 2 are, of course, those where owing to its ambiguity or obscurity the meaning of a term is not clear. Admittedly, subjective elements may enter into the determination of the natural and ordinary meaning of a text and lead to different opinions as to its clarity. Some element of subjectivity is inherent in the process of interpretation and the general rule remains valid that only when interpretation in good faith leaves a real doubt as to the meaning is it permissible to set aside the natural and ordinary meaning of the terms of the treaty in favour of some other meaning.

(17) The question remains whether in cases falling under paragraph 2 there is any general principle which governs the determination of the meaning. The answer, it is suggested, is that (i) the term in question must still be interpreted in its context in the treaty and in the light of the objects and purposes of the treaty as a whole ; and (ii) subject to these controls, the meaning of the term is to be established by any relevant evidence or indications of the intention of the parties in using the term.

(18) *Paragraph 3* admits as an exception to the natural and ordinary meaning rule cases where it is established conclusively that the parties employed a particular term with a special meaning. The Court, while it has more than once recognized the existence of this exception, has stressed that only decisive proof of a special meaning will suffice to displace the natural and ordinary meaning.²⁸⁵

Article 71

(19) *Paragraph 1* of this article seeks to define what is comprised in the "context of the treaty as a whole" for the purposes of interpretation. This is important not only for the general application of the rules of interpretation but also, as pointed out above, for indicating the scope of the term "unless it appears from the treaty" which appears, in one form or another, quite frequently in these draft articles. That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment.²⁸⁶ More difficult is the question how far documents connected with the treaty are to be regarded as forming part of the "context of the treaty as a whole" for the purposes of interpretation. Paragraph 1 proposes that the documents which should be so regarded are : agreements arrived at between the parties as a condition of the conclusion of the treaty

²⁸⁰ *I.C.J. Reports*, 1952, p. 189.

²⁸¹ *I.C.J. Reports*, 1948, p. 63.

²⁸² E.g. *The Interpretation of the Peace Treaties* (second phase), *I.C.J. Reports*, 1950, p. 229 ; the *Wimbledon*, *P.C.I.J.* (1923), Series A, No. 1, pp. 24-25.

²⁸³ *Polish Postal Service in Danzig*, *P.C.I.J.* (1925), Series B, No. 11, p. 39 ; *Competence of the General Assembly in the Admission of a State to the United Nations*, *I.C.J.*, 1950, p. 8.

²⁸⁴ *I.C.J. Reports*, 1962, pp. 335-336. For another example, see *Designation of the Netherlands Workers Delegate to the ILO*, *P.C.I.J.* (1922), Series B, No. 1, p. 22.

²⁸⁵ *Eastern Greenland Case*, *P.C.I.J.* (1933), Series A/B, No. 53, p. 49 ; *Conditions of Admission to Membership of the United Nations*, *I.C.J. Reports*, 1947-48, p. 63.

²⁸⁶ See C. Rousseau, *Principes généraux de droit international public* (1944), pp. 717-719.

or as a basis for its interpretation, instruments or documents annexed to the treaty, and any other instruments related to, and drawn up in connexion with the conclusion of, the treaty. This is not to suggest that these documents are necessarily to be considered as an integral part of the treaty. Whether they are an actual part of the treaty depends on the intention of the parties in each case.²⁸⁷ What is proposed in paragraph 1 is that, for purposes of interpreting the treaty, the specified categories of documents should not be regarded as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity but as part of the context for the purpose of arriving at the natural and ordinary meaning of the terms of the treaty. Particularly important is the question whether an agreed statement or understanding as to the meaning of a provision prior to the conclusion of the treaty is to be considered as part of the context or merely as part of the *travaux préparatoires*. The majority of the Court adopted the latter view in *Conditions of Admission to Membership* case²⁸⁸ but the Special Rapporteur considers that the Commission should prefer the line taken by the Court in the *Ambatielos* case²⁸⁹ where it said: "The provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty."

(20) Paragraph 2 is permissive in character and recognizes the propriety of recourse to extraneous evidence or indications of the intentions of the parties for the purpose of: (a) *confirming* the natural and ordinary meaning of a term; (b) *determining* the meaning of an ambiguous or obscure term or of a term whose natural and ordinary meaning gives an absurd or unreasonable result; and (c) *establishing* the use of a term by the parties with a special meaning. Recourse to extraneous evidence for purposes (b) and (c) calls for no comments, as these points have already been covered. Recourse to it—and especially to *travaux préparatoires*—for the purpose of confirming the natural and ordinary meaning is more open to question, having regard to the consistent rejection by the Court of recourse to *travaux préparatoires* when the natural and ordinary meaning is clear. There is, however, a difference between examining and basing a finding upon *travaux préparatoires*, and the Court itself has more than once referred to them as confirming an interpretation otherwise arrived at from a study of the text.²⁹⁰ Moreover, it is the constant practice of States and tribunals to examine any relevant *travaux préparatoires* for such light as they may throw upon the treaty. It would therefore be unrealistic to suggest, even by implication, that there is any actual bar upon mere reference to *travaux préparatoires* whenever the meaning of the terms is clear.

(21) Under this article, therefore, *travaux préparatoires* are treated only as a subsidiary means of interpretation except in the case of a preparatory document coming within one of the categories mentioned in paragraph 1. Recourse to *travaux préparatoires* as a subsidiary means of interpreting the text, as already indicated, is frequent both in State practice and in cases before international tribunals.²⁹¹ Today, it is generally recognized that some caution is needed in the use of *travaux préparatoires* as a means of interpretation.²⁹² They are not, except in the case mentioned, an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties. Since *travaux préparatoires* are not, as such, an authentic means of interpretation but merely evidence, it is not thought that anything would be gained by trying to define them; indeed, to do so might only lead to the possible exclusion of relevant evidence. More delicate is the question whether, in regard to multilateral treaties, the article should authorize the use of *travaux préparatoires* only as between States which took part in the negotiations or, alternatively, only if they have been published. In the *River Oder Commission* case²⁹³ the Permanent Court excluded from its consideration the *travaux préparatoires* of certain provisions of the Treaty of Versailles on the ground that three of the States before the Court had not participated in the conference which prepared the Treaty of Versailles; and in making this ruling it expressly refused to differentiate between published and unpublished documents. It may be doubted, however, whether this ruling represents the actual practice in regard to multilateral treaties open to accession by States which did not attend the conference at which they were drawn up.²⁹⁴ Moreover, the principle behind the ruling is by no means so compelling as might appear from the language of the Court in that case. A State acceding to a treaty in the drafting of which it did not participate is perfectly entitled to ask to see the *travaux préparatoires*, if it wishes, before acceding. Nor, it is thought, would the rule be practically convenient, having regard to the many important multilateral treaties open generally to accession. These considerations apply to unpublished, but accessible, *travaux préparatoires* as well as to published ones; and in the case of bilateral treaties or "closed" treaties between small groups of States unpublished *travaux préparatoires* will usually be in the hands of all the parties. Accordingly, the

²⁸⁷ *Ambatielos* case (Preliminary Objection) *I.C.J. Reports*, 1952, pp. 43 and 75.

²⁸⁸ *I.C.J. Reports*, 1948, p. 63; but see Judge Azevedo's contrary opinion in the second *Admissions* case *I.C.J. Reports*, 1950, pp. 30-31.

²⁸⁹ (Preliminary Objection) *I.C.J. Reports*, 1952, p. 44.

²⁹⁰ See Lord McNair, *Law of Treaties* (1961), p. 44.

²⁹¹ For examples, see V. D. Degan, *L'interprétation des accords en droit international*, pp. 126-129; Lord McNair, *Law of Treaties* (1961), chapter 23; C. Rousseau, *Principes généraux de droit international public* (1944), pp. 738-739.

²⁹² See C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963).

²⁹³ *P.C.I.J.* (1929), Series A, No. 23.

²⁹⁴ See S. Rosenne, "Travaux préparatoires", *International and Comparative Law Quarterly* (1963), pp. 1378-1383.

Special Rapporteur suggests that it may be preferable not to make participation in the conference or publication the basis of formal restrictions upon the use of *travaux préparatoires*.

(22) Paragraph 2 also makes special reference to the circumstances surrounding the conclusion of the treaty. This broad phrase is intended to cover both the contemporary circumstances and the historical context²⁹⁵ in which the treaty was concluded.

(23) A third means of interpretation specially mentioned in the paragraph is the subsequent practice of the parties in relation to the treaty. The probative value of subsequent practice is well recognized.²⁹⁶ As Sir G. Fitzmaurice has said, while *travaux préparatoires* contain only the statement of the intention of the parties, subsequent practice shows the putting into operation of that intention.²⁹⁷ The use of this means of interpretation is well established in the jurisprudence of international tribunals and, more especially, of the World Court.²⁹⁸ The Court appears, in general, to put subsequent practice as a means of interpretation on the same basis as *travaux préparatoires* — as evidence to be used for confirming the natural and ordinary meaning or for ascertaining the meaning in cases of doubt. Thus in its opinion on the Competence of the ILO²⁹⁹ the Permanent Court said:

"If there was any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the treaty."

At the same time, the Court³⁰⁰ referred to subsequent practice in confirmation of the meaning which it had deduced from the text and which it considered to be unambiguous. Again in the *Interpretation of the Treaty of Lausanne opinion*,³⁰¹ it said:

"The facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they are calculated to throw light on the intention of the parties at the time of the conclusion of that treaty."

In the *Corfu Channel* case,³⁰² the International Court similarly said:

"The subsequent attitude of the parties shows that it has not been their intention, by entering into

the Special Agreement, to preclude the Court from fixing the amount of the compensation."

Other pronouncements of the World Court³⁰³ confirm that, in principle, subsequent practice is to be regarded as a subsidiary means of interpretation and it therefore seems right to place it in paragraph 2 alongside *travaux préparatoires*.

(24) As in the case of *travaux préparatoires*, the probative value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms. The practice of an individual State may, however, have special cogency when it relates to the performance of an obligation which particularly concerns that State. Thus, in the *Status of South West Africa Opinion*³⁰⁴ the Court said:

"Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."

Again, in the *Temple* case³⁰⁵ it held that the practice of one party to a bilateral treaty precluded it from afterwards contesting an interpretation of a particular clause to which it had apparently assented. Clearly, if the practice is not consistent, its probative value diminishes.³⁰⁶

(24a) Certain of the cases in which the Court has had recourse to subsequent practice have concerned the interpretation of the constitutions of international organizations.³⁰⁷ The most notable is its recent Opinion on *Certain Expenses of the United Nations*,³⁰⁸ in which the Court made a large use of the subsequent practice of organs of the United Nations as a basis for its findings on a number of points. The problem of the effect of the practice of organs of an international organization upon the interpretation of its constituent instrument raises an important constitutional issue as to how far individual Member States are bound by the practice. Although the practice of the organ as such may be consistent, it may have been opposed by individual Members or by a group of Members which have been outvoted.³⁰⁹ This special problem appears to relate to the law of international organizations rather than to the general law of treaties, and the Special

²⁹⁵ For an example, see *European Commission of the Danube*, P.C.I.J. (1927), Series B, No. 14, p. 57.

²⁹⁶ See Lord McNair, *Law of Treaties* (1961), chapter 24; C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, pp. 121-127.

²⁹⁷ *British Yearbook of International Law*, vol. 33 (1957), p. 223. In the *Russian Indemnity* case the Permanent Court of Arbitration said: "L'exécution des engagements est, entre Etats, comme entre particuliers, le plus sûr commentaire du sens de ces engagements", U.N.R.I.A.A., vol. XI, p. 421.

²⁹⁸ See examples in Lord McNair, *Law of Treaties* (1961), chapter 24; C. de Visscher, *op. cit.*, pp. 121-127 and V. D. Degan, *L'interprétation des accords en droit international*, pp. 130-132.

²⁹⁹ P.C.I.J. (1922), Series B, No. 2, p. 39.

³⁰⁰ *Ibid.*, pp. 40-41.

³⁰¹ P.C.I.J. (1925), Series B, No. 2, p. 24.

³⁰² I.C.J. Reports, 1949, p. 25.

³⁰³ E.g. the *Brazilian Loans* case, P.C.I.J. (1929), Series A, Nos. 20-21, p. 119.

³⁰⁴ I.C.J. Reports, 1950, pp. 135-136.

³⁰⁵ I.C.J. Reports, 1962, pp. 32-35.

³⁰⁶ In the *United States Nationals in Morocco* case the Court for this reason declined to be guided by the practice subsequent to the Act of Algiers, I.C.J. Reports, 1952, p. 210; four judges, however, finding less inconsistency in the practice accepted its probative value; see page 231.

³⁰⁷ E.g. the *Competence of the ILO Opinions*, P.C.I.J. (1922), Series B, Nos. 2 and 3, pp. 38-40; *Competence of the General Assembly regarding Admission*, I.C.J. Reports, 1950, p. 9; *Composition of the Committee of I.M.C.O.*, I.C.J. Reports, 1960, pp. 167 *et seq.*

³⁰⁸ I.C.J. Reports, 1962, at pp. 157 *et seq.*

³⁰⁹ The constitutional issue is examined in the separate opinion of Judge Spender in the *Expenses* case (at pp. 187 *et seq.*); and also, although less directly, by Judge Fitzmaurice (at pp. 201 *et seq.*).

Rapporteur suggests that it would not be appropriate to attempt to deal with it in the present articles.

(25) Subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty, at any rate when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement.³¹⁰ Furthermore, if the interpretation adopted by the parties diverges, as sometimes happens, from the natural and ordinary meaning of the terms, there may be a blurring of the line between the interpretation and the amendment of a treaty by subsequent practice. In the *Temple* case,³¹¹ for example, the boundary line acted on in practice was not reconcilable with the natural and ordinary meaning of the terms of the treaty and the effect of the subsequent practice was to amend the treaty. Again, in a recent arbitration between France and the United States regarding the interpretation of an Air Transport Service Agreement³¹² the Tribunal, speaking of the subsequent practice of the parties said:

"This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the rights that each of the parties could properly claim."^{312a}

And the Tribunal in fact found that the Agreement had been modified in a certain respect by the subsequent practice. Although, as already stated, the line may sometimes be blurred between interpretation and amendment through subsequent practice, legally the processes are quite distinct. Accordingly, the process of amendment through subsequent practice is dealt with in article 73 as an aspect of the inter-temporal law.

(26) Paragraph 2, although it makes special mention of *travaux préparatoires*, surrounding circumstances and subsequent practice, permits recourse to any other relevant evidence or indications of the intentions of the parties. Relevant here means relevant to the objective proof of the intentions of the parties regarding the meaning of the terms employed in the treaty.

Article 72

(27) The Special Rapporteur hesitated for two reasons to propose the inclusion of the principle of "effective" interpretation among the general rules. First, there is

some tendency to equate and confuse "effective" with "extensive" or "teleological" interpretation, and to give it too large a scope. Secondly, "effective" interpretation, correctly understood, may be said to be implied in interpretation made in good faith. On balance, however, it seems desirable to include the principle, properly limited, in the draft articles. Properly limited, it does not call for "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily implied in the terms. As one previous Special Rapporteur³¹³ has written, "The principle *ut res magis valeat quam pereat* does not mean that the maximum of effectiveness must be given to an instrument purporting to create an international obligation; it means that the maximum of effectiveness should be given to it consistently with the intention—the common intention—of the parties." Nor does it necessarily lead to an extensive rather than a restrictive view of the effects of the treaty, as is pointed out in a recent book:³¹⁴

"Une interprétation ne se conçoit comme extensive ou restrictive qu'en fonction d'un principe reconnu ou d'un degré de normalité généralement accepté. Quand donc on parle d'interprétation extensive ou restrictive, c'est la résultante d'un travail d'interprétation que l'on a en vue. Une interprétation extensive ou restrictive ne se dégage qu'après que l'interprète s'est convaincu que le sens naturel des termes employés reste en deçà ou va au-delà de la véritable intention des parties. Parler d'interprétation extensive ou restrictive comme de critères ou de présomptions, c'est anticiper sur les résultats du travail interprétatif et méconnaître le processus dynamique de toute interprétation."

(28) It is true that, when international tribunals have had recourse to the principle in their jurisprudence, it has usually been for the purpose of rejecting a restrictive interpretation which was being urged upon them by one of the parties.³¹⁵ But in most of these cases the restrictive interpretation was one which would have defected or largely defeated the intention of the parties as it appeared from the natural meaning of the terms of the treaty; and the interpretation adopted by the tribunal was an application, not an extension, of the natural meaning of the terms. Thus in its Opinion on the *Acquisition of Polish Nationality*³¹⁶ the Permanent Court, in rejecting a restrictive interpretation, said:

"If this were not the case, the value and sphere of application of the Treaty would be greatly diminished. But in the Advisory Opinion given with regard to the questions put concerning the German colonists in Poland, the Court has already expressed

³¹⁰ See the *Arbitral Award of the King of Spain*, I.C.J. Reports, 1960, p. 192; C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, p. 127.

³¹¹ I.C.J. Reports, 1962, pp. 32-33; and see Sir G. Fitzmaurice, *British Yearbook of International Law*, vol. 33 (1957), pp. 252-253.

³¹² Decided at Geneva on 22 December 1963, the arbitrators being R. Ago (President), P. Reuter and H. P. de Vries.

^{312a} American Society of International Law, *International Legal Materials—Current Documents*, vol. III, No. 4 (July 1964), p. 713.

³¹³ Sir H. Lauterpacht, *The Development of International Law by the International Court*, p. 229.

³¹⁴ C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, pp. 87-88.

³¹⁵ For the jurisprudence, see C. Rousseau, *Principes généraux du droit international public* (1944), pp. 680-683; V. D. Degan, *L'interprétation des accords en droit international*, pp. 103-106; C. de Visscher, *op. cit.* pp. 84-92.

³¹⁶ P.C.I.J. (1923), Series B, No. 7, pp. 16-17; see also *The Exchange of Greek and Turkish Populations*, P.C.I.J. (1925), Series B, No. 10, p. 25.

the view that an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible. In the present case it would be still less admissible since it would be contrary to the actual terms of the Treaty."

Similarly, in the *Corfu Channel* case³¹⁷ the present Court interpreting a Special Agreement said:

"It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a Special Agreement should be devoid of purport or effect."

And the Court referred to a previous decision of the Permanent Court to the same effect in the *Free Zones* case.³¹⁸

(29) If the principle of effective interpretation may be said to be implicit in the requirement of good faith, there are, it is thought, two reasons which may make it desirable to formulate it in a separate article. The first is that the principle has special significance as the basis upon which it is justifiable to imply terms in a treaty for the purpose of giving efficacy to an intention necessarily to be inferred from the express provisions of the treaty. The second is that in this sphere — the sphere of implied terms — there is a particular need to indicate the proper limits of the application of the principle if too wide a door is not to be opened to purely teleological interpretations. The point is of particular consequence in the interpretation of constituent treaties of international organizations and although those treaties, by their functional nature, may legitimately be more subject to teleological interpretations, there is evidently some limit to what may be deduced from them and still be considered "interpretation". The Court, which has by no means adopted a narrow view of the extent to which it is proper to imply terms in treaties, has nevertheless insisted that there are definite limits to the use which may be made of the principle *ut res magis valeat* for this purpose. Thus in the *Reparation for Injuries* Opinion, while deducing by implication from the language of the Charter the international personality of the United Nations and its capacity to bring international claims, it was careful to stress that this personality and capacity arose by necessary implication or necessary intendment from the terms of the Charter. Moreover, in its *Interpretation of the Peace Treaties* Opinion³¹⁹ it said:

"The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which . . . would be contrary to their letter and spirit."

And it emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty.

(30) In the light of the above considerations article 72 has been formulated so as to make the principle of

effectiveness subject to (a) the natural and ordinary meaning of the terms and (b) the objects and purposes of the treaty. This formulation, it is thought, while containing the principle of effectiveness within the four corners of the treaty, still leaves room for such measure of teleological interpretation as can legitimately be considered to fall within the legal boundaries of interpretation.

Article 73

(31) Article 73 concerns the second branch of the inter-temporal law which was included in article 56, paragraph 2, in more general terms and in the context of "application" of treaties. As already mentioned in paragraph (15) of this commentary, the Commission at its 728th meeting postponed consideration of the principles involved in that article with a view to re-examining them in the context of interpretation of treaties. The first branch of the inter-temporal law — the principle that the terms of a treaty are to be interpreted in the light of the rules of international law and of the linguistic usage current at the time of its conclusion — has, as explained in paragraph (15), been embodied in article 70, paragraph 1 (b). The second branch — the principle that the legal effects of a treaty, as of any other legal act, are influenced by the evolution of the law — now requires to be dealt with. Whereas the first branch of the inter-temporal law clearly concerns the interpretation of treaties, the second can be regarded either as a question of the interpretation of the treaty or of the application of the rules of international law to it.

(32) There appear to be three ways in which the law may evolve with effects upon the interpretation and application of the treaty: (a) emergence of a rule of customary law outside the treaty but affecting its subject matter; (b) the conclusion of a later agreement between parties to the treaty; and (c) development of a subsequent practice in the application of the treaty which evidences a tacit agreement amongst the parties to extend or modify the treaty. The rule proposed in article 73 provides that the interpretation at any time of the terms of a treaty must *take account of* any one of these possible alterations in the legal relations between the parties. The term "take account of" is used rather than "be subject to" or any similar term because, if the rule is formulated as one of interpretation, it seems better, at any rate in sub-paragraphs (a) and (b), to use words that leave open the results of the interpretation. Where a later rule of customary law emerges or a later agreement is concluded, the question may arise as to how far they ought to be regarded as intended to supersede the treaty in the relations between the parties — a question touched on, in the case of later agreements, in article 41. If the treaty was intended to create a special régime between the particular parties, they might not intend it to be displaced by the emergence of a new general régime created by treaty or custom. Accordingly, it seems prudent to state only the broad principle and not attempt to define its results. Otherwise, it would seem necessary to elaborate the provisions of the article considerably by reference to the possible differences in the intentions of the parties.

³¹⁷ *I.C.J. Reports*, 1949, p. 24.

³¹⁸ *P.C.I.J.* (1929), Series A, No. 22, p. 13.

³¹⁹ *I.C.J. Reports*, 1950, p. 229.

(33) *Sub-paragraph (a)*, which deals with the evolution of customary international law, has already been commented upon in paragraphs (4) and (5) of the commentary to article 56. It is true that those comments were made in the context of "application" of treaties. But they retain their general validity in the context also of interpretation and, as the Commission has already had a preliminary discussion of the problem, it is not thought necessary to add anything further here. *Sub-paragraph (b)*, deals with the effects of later treaties, a topic which has already come under prolonged examination by the Commission in connexion with articles 41 and 65. Here again, therefore, it is not thought necessary to add any further comments. As to *sub-paragraph (c)*, the question of a subsequent practice which evidences a tacit agreement amongst the parties to extend or modify the agreement has already been explored in paragraph (32) of the present commentary. No doubt, it might be possible to regard the subsequent practice as generating a special customary rule having its effects on the interpretation of the treaty, in which event the case would be more analogous to *sub-paragraph (a)*. It is believed, however, to be more appropriate and more usual to classify it as a case of variation of the treaty by tacit agreement.

Article 74. — Treaties drawn up in two or more languages

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the texts of the treaty are authoritative in each language except in so far as a different rule may be laid down in the treaty.

2. A version drawn up in a language other than one in which the text of the treaty was authenticated shall also be considered an authentic text and be authoritative if —

- (a) the treaty so provides or the parties so agree ;
- or
- (b) an organ of an international organization so prescribes with respect to a treaty drawn up within the organization.

Article 75. — Interpretation of treaties having two or more texts or versions

1. The expression of the terms of a treaty is of equal authority in each authentic text, subject to the provisions of the present article. The terms are to be presumed to be intended to have the same meaning in each text and their interpretation is governed by articles 70-73.

2. When a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity as to the meaning of the term is not removed by the application of articles 70-73, the rules contained in paragraphs 3-5 apply, unless the treaty itself provides that, in the event of divergence, a particular text or method of interpretation is to prevail.

3. If in each of two or more authentic texts a term is capable of being given more than one meaning

compatible with the objects and purposes of the treaty, a meaning which is common to both or all the texts is to be adopted.

4. If in one authentic text the natural and ordinary meaning of a term is clear and compatible with the objects and purposes of the treaty, whereas in another it is uncertain owing to the obscurity of the term, the meaning of the term in the former text is to be adopted.

5. If the application of the foregoing rules leaves the meaning of a term, as expressed in the authentic text or texts, ambiguous or obscure, reference may be made to a text or version which is not authentic in so far as it may throw light on the intentions of the parties with respect to the term in question.

Commentary

(1) The phenomenon of treaties drawn up in two or more languages has become increasingly familiar since 1919 and, with the advent of the United Nations, general multilateral treaties drawn up, or finally expressed, in five different languages have become not uncommon. When a treaty is plurilingual, there may or may not be a difference in the status of the texts for the purposes of interpretation. Each of the texts may have the status of an authentic text of the treaty ; or one or more of them may be merely an "official text", that is a text which has been signed by the negotiating States but not accepted as authoritative,³²⁰ or one or more of them may be merely an "official translation", that is a translation prepared by the parties or an individual Government or by an organ of an international organization. Whenever there are two or more texts a question may arise either as to what is the effect of a plurality of authentic texts on the interpretation of the treaty, or as to what recourse may be had to an official text or translation as an aid to the interpretation of the authentic text or texts of the treaty.³²¹

Article 74

(2) The first need clearly is to establish which of the texts are to be regarded as authentic and it is this point with which article 74 deals. Today the majority of more formal treaties contain an express provision determining the status of the texts. If there is no such provision, it seems to be generally accepted that each of the versions in which the text of the treaty was "drawn up" is to be considered authentic and, therefore, authoritative for purposes of interpretation.³²² In other words, the general rule is the equality of the languages and the equal authenticity of the texts in the absence of any provision to the contrary. In formulating this general rule *paragraph 1* refers to languages in which the text of the treaty has been "authenticated" rather than "draw up" or "adopted". This is to take account

³²⁰ E.g. the Italian text of the Treaty of Peace with Italy is "official", but not "authentic", since article 90 designates only the French, English and Russian texts as authentic.

³²¹ See generally a valuable study of the interpretation of plurilingual treaties by J. Hardy, *British Yearbook of International Law*, vol. 37 (1961), pp. 72-155.

³²² Lord McNair, *Law of Treaties* (1961), p. 61 ; L. Ehrlich, *Recueil des Cours de l'Académie de droit international* (1928), vol. IV, p. 98.

of article 7 of the present articles in which the Commission recognized "authentication of the text" as a distinct procedural step in the conclusion of a treaty even although, in the case of authentication by signature, the act of authentication may also have other functions.³²³

(3) The proviso "except in so far as a different rule may be laid down in the treaty" is necessary for two reasons. First, treaties sometimes provide expressly that only certain texts are to be authoritative, as in the case of the Peace Treaties concluded after the Second World War which make the French, English and Russian texts authentic while leaving the Italian, Bulgarian, Hungarian, etc. texts merely "official".³²⁴ Indeed, cases have been known where one text has been made authentic between some parties and a different text between others.³²⁵ Secondly, a plurilingual treaty may provide that in the event of divergence between the texts a specified text is to prevail. Indeed, it is not uncommon for a treaty between two States, because the language of one is not well-understood by the other or because neither State wishes to recognize the supremacy of the other's language, to designate a text in a third language as authentic and make it authoritative in case of divergence. A recent example is the Treaty of Friendship concluded between Japan and Ethiopia in 1957³²⁶ in Japanese, Amharic and French, article 6 of which makes the French text authentic *en cas de divergence d'interprétation*. A somewhat special case was that of the Peace Treaties of St. Germain, Neuilly and Trianon which were drawn up in French, English and Italian and which provided that in case of divergence the French text should prevail, except with regard to Parts I and XII, containing respectively the Covenant and the articles concerning the International Labour Organisation.

(4) Paragraph 2 covers the case of a version of the treaty which is not "adopted" or "authenticated" as a text in the sense of articles 6 or 7, but which is nevertheless prescribed by the treaty or accepted by the parties as authentic for purposes of interpretation. For example, a boundary treaty of 1897 between Great Britain and Ethiopia was drawn up in English and Amharic and it was stated that both texts were to be considered authentic.³²⁷ but a French translation was annexed to the treaty which was to be authoritative in the event of dispute. Paragraph 2 also provides for the possibility that, when a treaty is concluded within an organization, the organ concerned may, by resolution or otherwise, prescribe that texts shall be prepared in

other official languages of the organization and be considered authentic. The phrase "organ of international organization so prescribes" is intended to cover not only an express provision in the resolution adopting the text of the treaty, but also an implied authority to the depositary resulting from the practice of the organization. For it appears from the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties*³²⁸ that his usual practice, in the absence of any express provision in the treaty or in the resolution, is to prepare texts in all five official languages of the United Nations and consider them all as authentic. The practice is said not to have been uniform, and it may therefore be doubtful whether it amounts to an "established rule" of the Organization. But as no objection is taken to the practice when it is followed, it would seem that in these cases the General Assembly by implication authorizes and prescribes the making of the five texts authentic.

Article 75

(5) The plurality of the authentic texts of a treaty is always a material factor in its interpretation, since both or all the texts authoritatively state the terms of the agreement between the parties. But it needs to be stressed that in law there is only one treaty—one set of terms accepted by the parties and one common intention with respect to those terms—even when two authentic texts appear to diverge. In practice, the existence of authentic texts or versions in two or more languages sometimes complicates and sometimes facilitates the interpretation of a treaty. Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of the languages, the absence of a complete *consensus ad idem*, lack of sufficient time to co-ordinate the texts or unskilful drafting may result in minor or even major discrepancies in the meaning of the texts. In that event the plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty. On the other hand, when the meaning of terms is ambiguous or obscure in one language but it is clear and convincing as to the intentions of the parties in another, the plurilingual character of the treaty facilitates interpretation of the text the meaning of which is doubtful.

(6) The existence of more than one authentic text clearly introduces a new element—comparison of the texts—into the interpretation of the treaty. But it does not involve a different *system* of interpretation. Plurilingual in expression, the treaty remains a single treaty with a single set of terms the interpretation of which is governed by the same rules as unilingual treaties, that is, by the rules set out in articles 70-73. The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a

³²³ See the commentary to article 7.

³²⁴ See the Peace Treaties with Italy (article 90), Bulgaria (article 38), Hungary (article 42), Romania (article 40) and Finland (article 36).

³²⁵ Treaty of Brest-Litovsk of 1918 (article 10).

³²⁶ *United Nations Treaty Series*, vol. 325; see other examples mentioned by J. Hardy, *op. cit.*, pp. 126-128.

³²⁷ The treaty actually said "official", but it seems clear that in this instance by "official" was meant "authentic"; Hertslet, *The Map of Africa by Treaty* (3rd ed.), vol. 2, pp. 424-427; cf. the Convention for the Unification of Certain Rules concerning Collisions in Inland Navigation, Hudson, *International Legislation*, vol. 5, pp. 819-822.

³²⁸ ST/LEG/7, p. 8.

common meaning for the texts before preferring one to another. A term of the treaty may be ambiguous or obscure because it is so in all the authentic texts, or because it is so in one text only but it is not certain whether there is a difference between the texts, or because on their face the authentic texts seem not to have exactly the same meaning. But whether the ambiguity or obscurity is inherent in all the texts, or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts requires that every effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation.³²⁹

(7) *Paragraph 1* of article 75 accordingly states that (i) the expression of the terms is of equal authority in each authentic text (subject to the later provisions of the article); (ii) the terms are to be presumed to be intended to have the same meaning in each text, and (iii) their interpretation is governed by articles 70-73. *Paragraph 2* by implication requires recourse to the normal rules of interpretation in articles 70-73 as the first step in cases where a difference in the expression of a term results in ambiguity or obscurity. It admits the possibility of preference being given to one of the texts under the rules in paragraphs 3 and 4 of the article only when the ambiguity or obscurity has not been removed by the application of articles 70-73 or when the parties themselves expressly provide that in the case of divergence a particular text or method of interpretation is to prevail. Provisions of this kind are quite common and some more special examples of treaties which give decisive authority to a particular text in case of a divergence have already been mentioned in paragraph (3) of this commentary. A few treaties, while not designating a particular text as having decisive authority, prescribe the method of interpretation which is to prevail in case of a divergence. Thus, an Extradition Convention of 1869 between Austria, Hungary and Italy provided that, in case of divergence, the interpretation most favourable to the extradition of the accused should be followed. Provisions of this kind may raise a difficult problem as to the exact point in the interpretation process at which the provision should be put into operation. Should the "master" text be applied automatically as soon as the slightest difference appears in the wording of the texts? Or should recourse first be had to all, or at any rate some, of the normal means of interpretation in an attempt to reconcile the texts before concluding that there is a case of "divergence". The jurisprudence of international tribunals throws a somewhat uncertain light on the

solution of this problem.³³⁰ Sometimes the tribunal has simply applied the "master" text at once without going into the question whether there was an actual divergence between the authentic texts, as indeed the Permanent Court appears to have done in the case concerning the interpretation of the Treaty of Neuilly.³³¹ Sometimes, the tribunal has made some comparison at least of the different texts in an attempt to ascertain the intention of the parties.³³² This was also the method adopted by the Supreme Court of Poland in the case of the *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*³³³ and this method is regarded as correct in one recent textbook.³³⁴ The question is essentially one of the intention of the parties in inserting the provision in the treaty, and the Special Rapporteur doubts whether it would be appropriate for the Commission to try to resolve the problem in a formulation of the general rules of interpretation. Accordingly, it seems sufficient in paragraph 2 to make a general reservation of cases where the treaty contains this type of provision.

(8) *Paragraph 3* provides that, where there is a possibility of more than one meaning in each of the authentic texts, a meaning which is common to the texts is to be adopted. This provision gives effect to the rule of the equality of the texts where there is an ambiguity. Of course, if the ambiguity takes precisely the same form in each of the texts, it will not be resolved by this rule. There will remain an over-all ambiguity in the text which can only be resolved by making a presumption in favour of one or other interpretation.³³⁵ In the *Mavrommatis Palestine Concessions* case,³³⁶ the Permanent Court, indeed, was thought by some to go rather further when it said:

"Where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine and because the original draft of this instrument was probably made in English".

But, as has been pointed out by a recent writer,³³⁷ the Court does not necessarily appear to have intended by the first sentence of this passage to lay down as a

³²⁹ For the cases see J. Hardy, *op. cit.*, pp. 128-136.

³³⁰ *P.C.I.J.*, Series A, No. 3.

³³¹ E.g. *De Paoli v. Bulgarian State, Tribunaux arbitraux mixtes, Recueil des décisions*, vol. 6, p. 456.

³³² *Annual Digest of International Law Cases, 1929-1930*, Case No. 235.

³³³ Lord McNair, *Law of Treaties* (1961), p. 435.

³³⁴ Bearing in mind that this rule will only operate when recourse to *travaux préparatoires* and the other subsidiary means of interpretation mentioned in article 71 has failed to remove the ambiguity.

³³⁵ *P.C.I.J.* (1924), Series A, No. 2, p. 19.

³³⁶ J. Hardy, *op. cit.*, pp. 76-81, where there is a penetrating examination of this precedent.

³³⁷ See J. Hardy, *op. cit.*, pp. 91-111 for some of the relevant jurisprudence of international tribunals.

general rule that *the more limited interpretation* which can be made to harmonize with both texts is the one which must always be adopted. Restrictive interpretation was appropriate in that case. But the question whether in case of ambiguity a restrictive interpretation ought to be adopted is a more general one the answer to which hinges on the nature of the treaty and the particular context in which the ambiguous term occurs, as has clearly been explained in the commentary to article 72. The mere fact that the ambiguity arises from a difference of expression in a plurilingual treaty does not alter the principles by which the presumption should or should not be made in favour of a restrictive interpretation. Accordingly, while the *Mavrommatis* case³³⁸ gives strong support to the principle of conciliating, or harmonizing, the texts, it is not thought to call for a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts.³³⁹

(9) *Paragraph 4* provides that where the natural and ordinary meaning of one text is clear and compatible

³³⁸ Cf. *Venezuelan Bond cases*, Moore, *International Arbitrations*, vol. 4, p. 3623; and *German Reparations under Article 260 of the Treaty of Versailles* (1924), U.N.R.I.A.A., vol. I, pp. 437-439.

³³⁹ See also J. Hardy, *op. cit.*, pp. 113-115.

with the objects and purposes of the treaty, while that of the other is not, the clear meaning is the one to be adopted. Although a presumption in favour of a clear, as against an obscure, text is suggested as a matter of common sense, the Special Rapporteur had some hesitation in formulating it as a general rule. It is certainly not an absolute rule; and if reference to the *travaux préparatoires* or other extrinsic means shows what the obscure text was intended to mean, the equality of the texts is maintained and, if their meanings diverge, they must be reconciled.³⁴⁰ But it is believed that, *when after the application of the rules of interpretation in articles 70-73*, the meaning of one text is still obscure, it is legitimate to make a presumption in favour of the clearer text.

(10) *Paragraph 5* provides that if other means of interpretation have failed to solve the ambiguity or obscurity under the rules contained in the preceding paragraphs, then recourse may be had to non-authentic texts or versions for such light as they may throw on the matter. The proposal in effect is that non-authentic texts, versions or translations may be used as subsidiary evidence of the intention of the parties in the last resort.

³⁴⁰ For a discussion of the cases, see J. Hardy, *op. cit.* pp. 87-91.