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LAW OF TREATIES

[Item 2 of the agenda for the seventeenth session]

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

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Introduction

1. At the first part of its seventeenth session the Commission re-examined the articles on the conclusion, entry into force and registration of treaties contained in part I of its draft articles on the law of treaties, which it had prepared at its fifteenth session[1] and submitted to Governments for their observations. The Commission provisionally adopted revised texts of twenty-five articles. One of these (article 3 (*bis*)) was an article in part II (article 48), relating to treaties which are constituent instruments of international organizations or which have been drawn up within international organizations, which it decided to include among the "general provisions" at the beginning of the draft articles. The Commission deleted four articles and postponed until the resumption of its seventeenth session in January 1966 its decision on articles 8, 9 and 13, relating respectively to participation in a treaty, opening of a treaty to the participation of additional States and accession.

[1] *Yearbook of the International Law Commission, 1962*, vol. II, p. 159.

2. At the first part of the session the Commission also had before it the Special Rapporteur's observations and proposals regarding the revision of the first three articles of part II, articles 30-32 (A/CN.4/177/Add.2). Owing to shortage of time, however, the Commission was unable to begin its re-examination of these articles.

3. At the second part of the session, therefore, the main task of the Commission will be to re-examine the whole of part II of the draft articles and to conclude its re-examination of articles 8, 9 and 13.

The basis of the present report

4. The basis of the present report is the same as that set out in paragraph 5 of the Special Rapporteur's fourth report (A/CN.4/177), namely, the written replies of Governments, the comments of delegations in the Sixth Committee of the General Assembly and the observations and proposals of the Special Rapporteur resulting therefrom. The comments of Governments and delegations on part II of the draft articles are contained in the

two mimeographed volumes of Secretariat document A/CN.4/175 and in addenda 1-4 to that document.[2]

5. The Commission, for reasons of convenience, is re-examining the draft articles in the same general order as that in which they were provisionally adopted at the fourteenth, fifteenth and sixteenth sessions. In paragraph 27 of its report on the work of the first part of its seventeenth session, however, the Commission has recognized that, in rearranging the draft articles as a single convention, it will be necessary to give further consideration to the order in which the various articles should be placed. The Special Rapporteur, in paragraph 7 of his fourth report (A/CN.4/177), has already expressed the view that in the final draft the articles concerning observance, interpretation and application of treaties should be placed before those concerning invalidity and termination, i.e. before the present part II. This view is based on a number of different considerations. First, to place the rules concerning invalidity and termination immediately after conclusion, entry into force and registration may seem to give too much importance to grounds of nullity and termination and to give *pacta sunt servanda* the appearance almost of a residuary rule. Secondly, termination ought logically to follow, not precede, application of treaties, and it is at the same time convenient to deal with invalidity in juxtaposition to termination. Thirdly, termination has affinities with modification of treaties, which also should logically follow, not precede, application. Fourthly, there is some advantage in stating the rules regarding interpretation of treaties early rather than late in the draft articles, since these rules affect the meaning to be given to certain other articles.

6. The final structure and order to be given to the draft articles was not a matter of great moment in re-examining part I, because most of the articles contained in that part find their natural place at the beginning of the draft. The Commission may prefer not to arrive at any settled conclusions on this matter until its re-examination of the draft articles is further advanced. Nevertheless, in approaching the re-examination of parts II and III it seems desirable for the Commission to have in its mind a general perspective, however provisional, of the probable structure and order of the articles which it will ultimately adopt; for in these parts the arrangement of the different topics may in some cases influence the drafting of the articles.

7. The general arrangement of the draft articles which the Special Rapporteur tentatively envisages for their ultimate form is as follows: part I—"General provisions", consisting of articles 0, 1, 2 and 3 (*bis*); part II—"Conclusion, entry into force and registration of treaties", consisting of articles 3, 4 and the remaining articles of the existing part I; part III—"Observance and interpretation of treaties", consisting of article 55 (*pacta sunt servanda*) and articles 69-73; part IV—"Application of treaties", consisting of articles 56-64; part V—"Invalidity, termination and suspension of the operation of treaties", consisting of articles 30-54 (except article 48, which is now article 3 (*bis*), and subject to certain other qualifications; part VI—"Modification of treaties", consisting of articles 65-68.

The structure, title and arrangement of the present part II

8. *Structure.* In paragraph 7 of his fourth report, the Special Rapporteur had tentatively suggested that invalidity and termination, procedure for invoking a ground of nullity, termination, etc., and the legal consequences of termination, nullity, etc., should be divided into four separate parts. After further reflection and after studying the comments of Governments on part II, the Special Rapporteur considers it preferable to adhere to the present structure under which these four topics are all included in one part. In the first place, although invalidity and termination are quite separate topics, they raise a number of common problems, e.g. separability, *préclusion*, procedure for invoking a ground of invalidity or termination, and the legal consequences which follow; and it is accordingly convenient for purposes of drafting to deal with the two topics in one part. In the second place, a number of Governments have expressed concern regarding the danger to the security and stability of treaties which the articles on invalidity and termination may involve; and to devote four separate parts to these topics may seem to exaggerate their role in the law of treaties. It therefore seems better to combine invalidity and termination in one part as at present.

9. *Title.* The existing title of the present part II, which reads "Invalidity and termination of treaties", does not fully cover the contents of the part, which also deals with the suspension of the operation of treaties. Accordingly, it seems preferable to call the part: "Invalidity, termination and suspension of the operation of treaties".

10. *Arrangement of the articles.* The emphasis placed by Governments in their replies—and indeed by members of the Commission during the fifteenth session—on the need to safeguard the security and stability of treaties leads the Special Rapporteur to think that it may be advisable to place certain of the articles which limit or regulate the right to invoke grounds of invalidity, termination or suspension before, rather than after, the substantive articles dealing with these grounds. It will then be made apparent at the outset of the part dealing with invalidity and termination that specific rules restrict the freedom of States to have recourse to grounds of invalidity and termination for the purpose of resiling from their treaty obligations. The desirability of putting these rules before, rather than after, the substantive articles dealing with the grounds of invalidity and termination is also indicated by the fact that in their comments on fraud and error certain Governments have advocated the imposition of a time-limit on invoking these grounds, without apparently taking into account the relevance of article 47 regarding the loss of a right to allege grounds of invalidity or termination as a result of waiver or *préclusion*.

[2] Addendum 5, containing comments submitted later by the Governments of Pakistan and Yugoslavia, was issued on 23 February 1966. The written comments by Governments are reproduced in this volume (see annex to document A/6309/Rev.1).

11. The Special Rapporteur accordingly suggests that the present part should begin with a section entitled "General rules" and comprising: article 30 (Presumption as to the validity, continuance in force and operation of a treaty); article 49 (Authority to denounce, terminate or withdraw from a treaty or suspend its operation); article 46 (Separability of treaty provisions); article 47 (Loss of a right to invoke a ground of invalidity, termination or suspension).

12. A number of Governments have underlined the importance which they attach to the possibility of independent adjudication with regard to the matters dealt with in certain of the articles. This question was much discussed at the fifteenth session and ultimately the Commission adopted in article 51 a general provision regarding the procedure for invoking a ground of invalidity, termination, etc., which represented the highest measure of common agreement in the Commission on the solution of disputes concerning the application of the articles in the present part. The question therefore arises whether to transfer this article also to section 1. There is, however, a larger question as to whether the procedure laid down in article 51 should be given a more general application to all disputes concerning the application of the present article. This question is examined in the Special Rapporteur's observations on article 51, which he has preferred not to deal with among the general articles in section 1.

Revision of part II of the draft articles in the light of the comments of Governments

Title—Invalidity, termination and suspension of the operation of treaties

Proposal of the Special Rapporteur

The Special Rapporteur, for the reason given in paragraph 9 of the introduction to this report, proposes that the title of the part should be enlarged so as to cover "suspension of the operation of treaties", which is one of the topics dealt with in this part.

SECTION 1 : THE TITLE

Proposal of the Special Rapporteur

The existing title to section 1 is "General provision" and the sole article which the section contains is article 30. The Special Rapporteur, in accordance with his observations in paragraphs 9 and 10 of the introduction, proposes that the section should now be entitled "General rules" and should include four articles (articles 30, 49, 46 and 47). The title "General *rules*" is proposed because there is already a title "General provisions" at the beginning of the draft articles.

Article 30.—Presumption as to the validity, the continuance in force and operation of a treaty

The observations and proposals of the Special Rapporteur regarding this article are contained in addendum 2 to his fourth report (A/CN.177/Add.2).

Article 49.—Authority to denounce, terminate or withdraw from a treaty or suspend its operation

Comments of Governments

Portugal. The Portuguese Government expresses its general acceptance of the principle that the power of a person to represent his State for denouncing, terminating, withdrawing from or suspending the operation of a treaty should be governed by the same rules as those laid down in article 4 for concluding a treaty.

United Kingdom. The United Kingdom Government observes that article 4 made a distinction in certain circumstances between, on the one hand, authority to negotiate, draw up and authenticate a treaty and, on the other, authority to sign; but that it did not employ the word "conclude", which is found in article 49. The result, in its view, is to leave it uncertain whether under article 49 the rule applicable to authority to denounce is that relating to authority to negotiate, draw up and authenticate or that relating to authority to sign.

United States. In the view of the United States Government, article 49 constitutes a useful clarification of the position regarding authorization, or evidence of authorization, in the cases covered by the article.

Cypriot delegation. The Cypriot delegation agrees that the rules laid down in article 4 should also apply to evidence of authority to perform acts with regard to the nullity of a treaty.[3]

Observations and proposals of the Special Rapporteur

1. The point made by the United Kingdom as to the lack of precision in the present formulation of article 49 appears to be well-founded. Moreover, article 4, which article 49 applies *mutatis mutandis*, has itself undergone extensive revision at the first part of the seventeenth session, so that article 49 would in any event require reconsideration.

2. The rules governing the authority of a person to represent the State in the negotiation and conclusion of treaties are now expressed in article 4 in terms of the cases in which the production of an instrument of full powers is required. This does not, however, appear to make them any less suitable for application in the context of article 49. The real problem, as the comment of the United Kingdom indicates, is whether to apply the rules governing negotiation or those governing signature—or perhaps those governing the expression of consent to be bound.

3. The Special Rapporteur suggests that it may be necessary to differentiate between: (*a*) evidence of authority to invoke a ground of invalidity, termination, etc., which may be regarded as an opening of negotiations for the converse purpose of annulling or terminating a treaty, and (*b*) evidence of authority to carry out the definitive act of annulling, terminating, etc., a treaty which may be regarded as the expression of the State's will *not* to be bound. In other words, it may be necessary to make the parallel between article 49 and article 4

[3] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 783rd meeting, para. 24.

even closer by providing different rules for the *negotiation* of the annulment, termination, etc., of a treaty and for the performance of the act expressing definitely the will of the State not to be bound. This would seem to be at once more logical and more consistent with principle.

4. Accordingly, the Special Rapporteur proposes that article 49 should be revised to read as follows:

Evidence of authority to invoke or to declare the invalidity, termination or suspension of the operation of a treaty

1. The rules laid down in article 4 regarding evidence of authority to represent a State for the purpose of negotiating a treaty apply also to representation for the purpose of invoking a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty.

2. The rules laid down in article 4 regarding evidence of authority to represent a State for the purpose of expressing its consent to be bound by a treaty apply also to representation for the purpose of expressing the will of a State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty.

Article 47. — Loss of a right to allege the nullity of a treaty as a ground for terminating or withdrawing from a treaty

Comments of Governments

Israel. The Government of Israel makes four points with regard to this article. First, it observes that the word "nullity", which occurs in the opening phrase, is not in fact used in any of the articles to which reference is made in the present article. Secondly, it draws attention to the fact that the case of a right to require the suspension of the operation of a treaty is omitted from the article. Thirdly, it expresses the view that, the principle of article 47 being one of general application, the article should distinguish between that general principle and the specific concept of tacit consent as employed in part I of the draft articles (see paragraph 2 of its comments on part I). Fourthly, it feels that the drafting of the opening phrase of the article could be simplified by being worded more positively on the following lines:

"A State may not rely upon articles 31[4] to 35 and 42 and 44 if that State, after having become aware of the facts giving rise to the application of those articles, shall have elected by conduct or otherwise to consider itself bound...".

This text would also, it suggests, have the advantage of making redundant the specific reference to "waiver", which it feels to be a complicating factor in the article, and of avoiding the phrase "debarred from denying", which it feels to be awkward. It further suggests that the commentary should make it clear that the "election" of the State under the article would be presumed after the lapse of a reasonable period of time, the period being dependent on all the circumstances of the case.

Jamaica. Although not making any point in regard to the present article, the Jamaican Government in its comments on article 33 expresses the opinion that a defrauded party should take steps to invalidate its consent to the treaty within a stated time after the discovery of the fraud; and that, if it does not, it should be deemed to have subsequently acquiesced in the fraud.

Netherlands. The Netherlands Government considers that this article should be made applicable also to article 31 (failure to comply with provisions of internal law). In its view, restricting the plea of invalidity follows inherently from the primacy of international law. It further queries whether article 47 should not also apply to cases under article 36 (coercion of a State by the threat or use of force). On the assumption, however, that the word "force" in article 36 means only "armed agression", the Netherlands Government is prepared to concur in the view that article 36 should not be brought within the rule in article 47.

Portugal. While generally approving the principle contained in the article, the Portuguese Government calls attention to what it feels must be an inexactitude in the text where the draft refers to articles 32 to 35 rather than to articles 31 to 34. Having noted that the principle can be relevant only when the application of a treaty is dependent on the attitude of the parties, it points out that article 35 (personal coercion of a representative) provides for the absolute nullity of the treaty, not for a right to invoke the fact of coercion; and it does not see how article 35 can be affected by the principle in the present article. At the same time, since article 31 (provisions of internal law regarding competence to enter into treaties) provides that the validity of consent may be disputed by a State whose representative acted in manifest violation of its domestic law, it does not understand why that article should be excluded from the operation of the principle.

Sweden. The Swedish Government considers that this article is an indispensable complement to the rest of the draft; and that it should be extended to cover cases falling under article 31.

United States. The United States Government expresses the view that provisions along the lines of article 47 are essential to prevent abuses of the rights set forth in the articles to which it refers. Indeed, it suggests that the article should be placed earlier in the draft, in front of the articles to which it applies, or, alternatively, that each of those articles should contain an express reference to article 47, in order to avoid any risk of their being interpreted out of context. It also suggests that the text would be clearer if it used the phrases "articles 32 through 35" and "articles 42 through 44" instead of "articles 32 to 35" and "articles 42 to 44". In addition, in its comments on articles 33 (fraud) and 34 (error) it suggests the desirability of laying down specific time-limits for invoking those grounds of invalidity.

Salvadorian delegation. The Salvadorian delegation remarks that in the Spanish text the word "*perdida*" used in the title has no specific legal meaning and should be replaced. It further draws attention to paragraph (5) of the commentary, where the Commission states that the governing consideration for the application of the principle contained in the present article would be that of good faith, and that the principle would not operate

[4] In its comments on article 31 the Government of Israel suggests that that article also should be subject to the application of the general rule contained in the present article.

if the State in question had not been aware of the facts giving rise to the right, or had not been in a position freely to exercise its right to invoke the nullity of the treaty. It thinks that this consideration requires careful study if it is not to give rise to serious errors. [5]

Observations and proposals of the Special Rapporteur

1. *Place and scope of the article.* The Special Rapporteur, in paragraph 10 of the introduction to this report, has suggested that the present article should be placed in section 1 as a "general rule". The reason is that the article appears to affect the operation of all the articles which recognize rights to invoke particular grounds of invalidity or termination. If it does not affect cases of "*jus cogens*" falling under articles 36, 37 and 45, that is only because these articles provide for the automatic avoidance of the treaty in those cases. One advantage of transferring article 47 to section 1 is that it will indicate at the outset that a right to invoke the invalidity or termination of a treaty is not unrestricted and that the security and stability of treaty relations are also to be taken into account. Otherwise, it might be desirable, as one Government has suggested, to make express reference to the rule in article 47 in each of the articles which are subject to it.

Article 47, as at present formulated, does not apply to article 31, which relates to invalidity on the ground of a failure to comply with a provision of internal law. A number of Governments, in comments on this article or on article 31, have questioned the omission of article 31 from the operation of the rule in article 47, and the Special Rapporteur is of the opinion that article 31 clearly ought to be brought within that rule.

2. The Government of Israel's objection to the use of the word "nullity" is well-founded, since the Commission in drafting articles 31-35 decided to speak of "invalidation" of the consent rather than of the "nullity" of the treaty. It is therefore desirable here, as in article 30, to replace the word "nullity", in the title and in the opening phrase, by "invalidity" in order to bring the language into line with that used in the substantive articles. The same Government's point that the article omits to cover cases of "suspension of the operation of a treaty" is also well-founded and has to be taken into account in revising the text.

3. The Government of Israel's suggestion that the article should distinguish between the general principle which it contains and "the specific concept of tacit consent as employed in part I" seems, however, to raise unnecessary problems. Admittedly, the rule formulated by the Commission regarding "tacit consent" to reservations, which now appears in paragraph 5 of article 19 of the revised draft, may be viewed as a rule concerning the loss of a right to object to a reservation. It is also true that the rule in the present article can be viewed as one concerning implied consent to accept a treaty, or part of a treaty, which might otherwise not be binding by reason of a ground of invalidity, termination, or suspension. But although similar legal concepts may underlie paragraph 5 of article 19 and the provisions of the present article, that does not seem to call for nice distinctions of principle to be drawn between the two cases in the present article, however appropriate it might be to do so in a code. Article 19, paragraph 5, formulates a special rule for the special context of reservations, and there seems to be no need to refer to it or distinguish it when formulating an analogous but not identical rule in the different contexts of invalidity and termination.

4. The Special Rapporteur also has doubts about the same Government's suggestion for simplifying the drafting of the opening phrase of the article. If this suggestion were adopted, it would be necessary, before the rule would operate, to establish affirmatively that the State in question had "elected by conduct or otherwise to consider itself bound by the treaty". Although the broad scope of the rule might not be very different, its content would have been slightly modified. It is not quite the same thing to be required to show affirmatively that a State has by its conduct actually elected to accept something as it is to be required to show that it is precluded by its conduct from denying that it has so elected. Article 47 was intended by the Commission to apply to certain grounds of invalidity and termination a rule giving effect to the principle of *préclusion* (estoppel) found in cases such as that concerning the *Temple of Preah Vihear*. In the *Temple* case the rule was expressed by the Court in negative form: "Thailand is now precluded by her conduct from asserting that she did not accept it". [6] The effect of the principle of *préclusion* may equally be stated in positive form in terms of an implied agreement to be bound notwithstanding a right originally to invoke a particular ground of invalidity or termination. In some cases there may be evidence of an actual agreement. [7] But, having regard to the nature of the principle of *préclusion*, it seems desirable, if the article were to be framed in an affirmative form, to refer specifically to cases both of express agreement and of agreement implied from conduct. The term "waived the right" used in sub-paragraph (*a*)—a term familiar in this context in common law systems—was, of course, designed to cover cases of express agreement. Though no "complicating factor" is thought to be introduced by this term, it may be preferable to use a more mundane expression.

5. Two Governments, in their comments on articles 33 (fraud) or 34 (error), have suggested that a specific time-limit should be stated within which the right to invoke the ground of invalidity must be exercised; and the Government of Israel has suggested that the commentary should make it clear that the election of a State to be bound would be presumed after the lapse of a reasonable period of time, the period being dependent on all the circumstances of the case. The Commission, it is true, has thought it appropriate to lay down a specific time-limit of one year in the particular case of the right to

[5] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 782nd meeting, para. 7.

[6] *I.C.J. Reports 1962*, p. 32.

[7] In the *Temple* case, in addition to applying the principle of *préclusion*, the Court held that there had been an actual acceptance of the erroneous map.

object to reservations. But there the context within which the principle of *préclusion* or tacit consent operates is well-defined and limited. Article 47, however, covers a variety of cases in which the context for the operation of the principle may differ widely; e.g. the case of a fundamental change of circumstances is quite different from that of fraud or error. Moreover, even within each class of case the circumstances may vary almost infinitely. Accordingly, it does not seem either possible to lay down a general time-limit for all cases or advisable to attempt to lay down a particular time-limit for each ground of invalidity, termination or suspension. No doubt, as the Government of Israel implies, the fundamental concept is that a State must invoke a ground of invalidity, termination or suspension within a reasonable period of time, having regard to all the circumstances of the particular case. But the Commission has manifested a certain aversion to formulating rules expressly in terms of what is "reasonable". On the other hand, in article 17 it has had recourse to the concept of "undue delay", and may find this expedient an appropriate solution also in the present article.

6. The basic problem is whether the rule should be stated in the terms of a *préclusion* or in terms of an implied agreement. The Special Rapporteur is inclined to think that, if article 47 is transferred to section 1 as a "general rule", it may be better to formulate it in terms of an implied agreement. In that event and in the light of the foregoing observations the title and the text might be revised to read as follows:

Relinquishment of the right to invoke a ground of invalidity, termination, withdrawal or suspension

A State may not invoke any ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 31 to 35 inclusive or articles 42 to 44 inclusive if, after becoming aware of the facts giving rise to such ground, the State:

(*a*) shall have agreed to regard the treaty as valid or, as the case may be, as remaining in force; or

(*b*) must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid or, as the case may be, as remaining in force.

Article 46.—Separability of treaty provisions for the purposes of the operation of the present articles

Comments of Governments

Israel. The Government of Israel considers that article 32 should be included among the articles covered by the rule laid down in the present article.

Netherlands. The comments of the Netherlands Government are set out in an annex to its reply, and are expressed in a form which makes it difficult to present an exact analysis of them. While approving of the inclusion of the article, the Netherlands Government appears to make the following main points. First, it considers that the rule in article 46 should be made applicable to further articles, e.g. articles 31, 32, 36, 37 and 39. Secondly, it considers that both the "objective" and the "subjective" tests of separability contained in paragraph 2 of the article involve certain difficulties. As to the "objective" test in paragraph 2(*a*), it says that cancellation of part of a treaty, although it might not "interfere with the operation of the remaining provisions", might nevertheless run counter to the object and purpose of the treaty. As to the subjective test, it interprets paragraph 2(*b*) as requiring the fact that acceptance of the clauses in question was not an essential condition of the consent to the treaty as a whole to be proved either from the text of the treaty or from statements made by both parties; and maintains that this is not very rational. It says that what may be essential to one party may be precisely the opposite to the other; that if, during the negotiations, no difficulties arise in regard to certain texts, there will be nothing whatever to indicate what is essential to them and what is not; and that the parties may well change their minds, during the period of the treaty's operation, regarding the value they attach to particular clauses. It further says that, if difficulties arise after a treaty has been concluded, a solution will either be found by the parties themselves or it will not; and that no provisions of a convention on the law of treaties, if they are just and not merely designed to cut Gordian knots, could ever be so clear-cut as to exclude the possibility of each party's invoking them in support of its contentions. In its view, therefore, the question is whether the courts should be given directives in the draft articles as to the solution of difficulties.

The Netherlands Government suggests that a broadly worded article on the following lines might meet the case:

"1. Except as provided in the treaty itself, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall in principle relate to the treaty as a whole.

"2. If a ground mentioned in articles 31, 32, 33, 34, 35, 36, 37, 39, 42, 43, 44 and 45 for nullity, termination, suspension of the operation of a treaty or withdrawal from a treaty, applies only to particular clauses of a treaty, and a party to the treaty wishes to uphold the remainder of the treaty, the other party or parties shall accept the continuing validity and operation of the remainder of the treaty, unless such acceptance cannot reasonably and in good faith be required from such other party or parties.

"3. The provisions of paragraph 2 shall not apply if:

(*a*) the clauses in question are not separable from the remainder of the treaty with regard to their application; or

(*b*) it appears either from the treaty or from the statements made during the negotiations that acceptance of the clauses in question was an essential element of the consent of a party to the treaty as a whole."

It observes that paragraphs 1 and 3 of the suggested article are largely modelled on the Commission's draft, and are accordingly open to the same objections as it has raised to the corresponding parts of the Commission's text. However, it believes that these objections are practically eliminated by paragraph 2 of its text, which makes the whole matter subject to the rules of good faith between the contracting parties.

Portugal. On the basis of the balance established by the conditions set out in paragraph 2, the Portuguese

Government has no fundamental objection to the principle of indivisibility provided for in the article.

Sweden. The Swedish Government feels that the article is on the whole a most useful and necessary complement to the exposition of grounds of nullity and termination. At the same time, it draws attention to the apparent—and presumably inadvertent—reference in sub-paragraph 1 to the possibility of a treaty's containing provisions about its own nullity.

United States. The United States Government thinks that the article is useful in clarifying, to some extent, the manner in which the articles mentioned in it are to be applied. However, it finds the expressions "articles 33 to 35" and "42 to 45" somewhat misleading, even although their meaning can be ascertained by studying the articles in question. It would prefer the text to read "articles 33 through 35" and "42 through 45". In addition, it considers that article 37, if it is retained, should be made subject to the present article.

Bulgarian delegation. The Bulgarian delegation considers that the Commission was quite right, while taking the principle *pacta sunt servanda* into account, to subject the severability of clauses to the double condition set forth in paragraph 2 of the present article. [8]

Cypriot delegation. The Cypriot delegation notes that paragraph 1 makes it clear that the principle of severability does not apply in cases of coercion of the State (article 36) or *jus cogens* (article 37). [9]

Syrian delegation. After noting the effect of the Commission's proposals regarding severability the Syrian delegation observes that there is no reason why the parties to a treaty should be deprived of the benefit of provisions to which no one objects. It further calls attention to its proposal that the operation of the principle should be extended to article 20, dealing with the effect of reservations. [10]

Uruguayan delegation. In so far as the article is directed towards fostering respect for treaty obligations, it has the support of the Uruguayan delegation. [11]

Observations and proposals of the Special Rapporteur

1. *Place and scope of the article.* The Special Rapporteur, in paragraph 10 of the introduction to this report, has suggested that this article should be included in section 1 as a "general rule". It is true that the article, as at present formulated, is expressed to govern only cases falling under articles 33 to 35 and 42 to 45. However, the suggestion made by two Governments that the rule contained in the present article should be extended so as to cover article 32 appears to be sound. There may also be a case, as the Netherlands Government considers, for extending the rule to cover article 31, because certain types of failure to comply with a provision of internal law might relate to a particular clause of a treaty and not to the conclusion of the whole treaty. If article 46 is transferred to section 1, it will have the advantage of making it unnecessary to make express reference to the "separability" rule in the substantive articles setting out grounds of invalidity, termination, etc.

Both the Netherlands and the United States Governments maintain that the rule in article 46 should be made applicable to cases falling under article 37 (conflict with a norm of *jus cogens*). Some members of the Commission expressed the same view at the fifteenth session during the discussion of article 37. [12] The majority, however, considered that in the case of a conflict with a norm of *jus cogens*, the invalidity should attach to the whole treaty and that it should be left to the parties to bring the treaty into harmony with international law by making the necessary changes in its terms. That being so, the Special Rapporteur confines himself to drawing attention to the opinion of the two above-mentioned Governments. The Netherlands Government maintains that yet another article, namely article 39, which deals with denunciation or withdrawal under a right implied from the character of the treaty or from the circumstances of its conclusion, should be brought within the rule. This may perhaps be thought to introduce an extra complication into an already delicate problem of interpretation. On the other hand, there does not seem in principle to be any reason why the rule of separability should be excluded in these cases. Accordingly, in preparing his revised draft the Special Rapporteur has included within the rule cases falling under article 39.

2. The Special Rapporteur feels considerable doubt regarding the reformulation of the article proposed by the Netherlands Government. It may be true that the so-called "objective" and "subjective" criteria contained in paragraphs 2(*a*) and (*b*) of the Commission's text are not so clear-cut as to exclude the possibility of each party's invoking them in support of its contention. This may also be said of some other provisions of the draft articles and, indeed, of many rules both of international law and municipal law. But it does not diminish the value of laying down as exact criteria as possible which, when applied in good faith by the parties, may provide the basis for determining their legal rights. The Netherlands Government appears to go too far in implying that the "directives" contained in article 46 can only serve a useful purpose when the question of separability comes before a court. The Commission, in formulating the draft articles, is entitled to assume that the parties will respect the rule *pacta sunt servanda* and will interpret and apply the treaty in good faith. It is also entitled to assume that in applying the provisions of the present articles the parties will equally act in good faith. This being so, the Special Rapporteur believes that the criteria laid down as the test of separability in the Commission's text of article 46, if not so precise as to exclude any possibility of dispute, are nevertheless meaningful and useful.

3. The new provision—paragraph 2—which is the basis of the Netherlands Government's proposal appears for the same reason to be open to question. Its chief

[8] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 788th meeting, para. 11.

[9] *Ibid.*, 783rd meeting, para. 23.

[10] *Ibid.*, 786th meeting, para. 14.

[11] *Ibid.*, 792nd meeting, para. 22.

[12] *Yearbook of the International Law Commission, 1963*, vol. II, p. 199, para. 5.

purpose is to make explicit the element of good faith in the application of the rule of separability. As stated in the previous paragraph, this element is already present, and doubly present, in article 46: first, because the rule *pacta sunt servanda* governs the application of the treaty between the parties; and secondly, because it also governs the application of the present articles. If, on the other hand, the reference to "good faith" is intended to add a further requirement additional to the two criteria laid down by the Commission, then it seems to introduce an element of *ex aequo et bono* into the rule which might deprive those criteria of much of their value. Other Governments appear to have considered paragraphs 2(*a*) and (*b*) of the Commission's text to be satisfactory.

4. The Special Rapporteur suggests, however, that the formulation of article 46 needs reconsideration from a different point of view. At present the rule regarding separability of treaty provisions is stated partly in article 46, which specifies the general conditions necessary for separation to be possible, and partly in the individual articles which lay down whether separation is admissible with respect to each particular ground of invalidity, termination, etc. Clearly, if the rule of separability is to be transferred to section 1 and formulated as a general rule, the new article will have to state both the general conditions and the specific cases in which separation is or is not admissible. At the same time, the existing provision in the individual articles appears to the Special Rapporteur to be formulated in a way which is a little equivocal on the question whether separation is in each case an option or the rule. For example, in article 34 (error) and article 44 (fundamental change of circumstances) it is provided that, under the conditions specified in article 46 (the separability conditions) an error or a fundamental change which relates to the particular clauses "may be" invoked with reference to those clauses alone. It is not clear what will be the position if one party invokes the error or fundamental change as invalidating or terminating particular clauses while the other claims that it affects the whole treaty; nor what will be the position in the reverse case where one party invokes it with reference to the whole treaty and the other then claims to limit it to particular clauses. In short, the question is whether, when the conditions for it exist, separation is a matter of law or discretion.

5. The Special Rapporteur considers that, in the interests of the security and stability of treaties, the general principle should be that, whenever the conditions for separability exist, the scope of a ground of invalidity, termination, etc., should be limited to the particular clauses to which it relates. To this principle, however, there would be some exceptions. Thus, in cases of fraud by one party (article 33) or of personal coercion exercised by one party on the other's representative (article 35) the party whose confidence has been thus gravely abused by the other party should, it is thought, have the option to invalidate, terminate, etc., the whole treaty or the clauses to which the other party's misconduct particularly relates. In addition, the Commission decided at the fifteenth session that in cases of the coercion of the State itself by the threat or use of force (article 36) or of conflict with a rule of *jus cogens* (article 37) the principle of separability should not be applicable at all. Subject to these exceptions, it would seem logical that separation should be the rule, not a mere option.

6. The Special Rapporteur thinks it desirable, however, to draw attention to the possible impact of the separability rule on one other article, namely, on article 41, which deals with the termination of a treaty by implication from entering into a subsequent treaty. At both the fifteenth and sixteenth sessions the Commission gave careful consideration to the relation between the question of implied termination through entering into a subsequent incompatible treaty and that of the application of treaties having incompatible treaty provisions. It concluded that, although they may overlap to a certain extent, the two questions are distinct; and in consequence the "termination" aspect has been dealt with in article 41 and the "application" aspect in article 63. The problem is whether the provisions of article 63 make it either unnecessary or undesirable to apply the separability rule to the cases of implied termination dealt with in article 41. The Commission's conclusion as to the distinction between "implied termination" and application of incompatible provisions seems to hold good for particular clauses as well as for the whole treaty. Accordingly, it seems logical to admit the operation of the separability rule in cases of implied termination under article 41; and, in consequence, the revised draft of article 46 formulated in the next paragraph does not except article 41 from its provisions.

7. In the light of the above-mentioned considerations, the Special Rapporteur suggests that the present article should be transferred to section 1 and revised to read as follows:

Grounds for invalidating, terminating, withdrawing from or suspending the operation only of particular clauses of a treaty

1. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty which relates to particular clauses of the treaty may be invoked only with respect to those clauses when:

(*a*) the said clauses are clearly separable from the remainder of the treaty with regard to their application; and

(*b*) it does not appear from the treaty or from the circumstances of its conclusion that acceptance of those clauses was an essential basis of the consent of the other party or parties to the treaty as a whole.

2. However, in cases falling under articles 33 and 35 the State entitled to invoke the fraud or the personal coercion of its representative may do so with respect either to the whole treaty or only to the particular clauses as it may think fit.

3. Paragraph 1 does not apply in cases falling under articles 36 and 37.

SECTION 2: INVALIDITY OF TREATIES

Article 31.—Provisions of internal law regarding competence to enter into treaties

The observations and proposals of the Special Rapporteur regarding this article are contained in addendum 2 to his fourth report (A/CN.177/Add.2).

In his observations on articles 46 and 47 the Special Rapporteur has also proposed that the application of the provisions of the present article should be made subject to those articles.

Article 32.—Lack of authority to bind the State

The observations and proposals of the Special Rapporteur regarding this article are contained in addendum 2 to his fourth report (A/CN.177/Add.2).

In his observations on articles 46 and 47, the Special Rapporteur has also proposed that the application of the provisions of the present article should be made subject to those articles.

Article 33.—Fraud

Comments of Governments

Israel. The Government of Israel suggests that the article should be placed after article 34 "in order to distinguish the reprehensible from the non-reprehensible *vices de consentement* and place the former in ascending order of calumny". In paragraph 1 it suggests that in lieu of "fraudulent conduct" it would be better to say "fraudulent act or conduct". In paragraph 2 it suggests the omission of the word "only". Otherwise the paragraph might, it feels, be open to the interpretation that it excludes any option for the injured State to invoke the fraud as invalidating its consent to the whole treaty or to the particular clauses to which the fraud relates, as it may prefer. At the same time it notes that the Commission's intention, as appears from paragraph 6 of its commentary, was to allow such an option.

Jamaica. The Jamaican Government considers that a defrauded party should take steps to invalidate its consent to the treaty within a stated time after the discovery of the fraud; and that, if it fails to do so, it should be precluded from invoking the fraud as a reason for the termination of the treaty, unless the conditions for its termination are agreed upon by both parties.

Netherlands. The Netherlands Government suggests that, in paragraph 2, the reference to "the State in question" is not sufficiently clear; and that the phrase "the injured State" should be used instead. Paragraph 2 should, it believes, be deleted if its proposals for the revision of article 46 are adopted (see its comments on that article).

Portugal. The Portuguese Government examines the provisions of the article *seriatim* and appears to agree with the Commission's treatment of the question of fraud. As to paragraph 2, it appears to consider the Commission's proposals as providing a reasonable rule regarding partial nullity in cases of fraud.

Sweden. The Swedish Government observes that this article, like article 34 concerning error, deals with contingencies that must be very rare, and that for this reason there may be a question whether the article is really needed at the present stage. At the same time, it says that the actual formulation of the article appears to be unobjectionable.

United Kingdom. The United Kingdom Government doubts the need for this article. If the article is included, it believes that provision should be made for independent adjudication on its interpretation and application.

United States. The United States Government feels that the article might create more problems than it would solve. In its view, a serious question arises as to when an injured State is required to assert the existence of the fraud in order to take advantage of it. If it waits two or ten years after discovering the fraud, the United States Government thinks it extremely doubtful whether the State should be entitled to invoke the fraud. It suggests that, if the article is retained, a clause should be added to the following effect "provided that the other contracting States are notified within —— months after discovery of the fraud". It also suggests that it would be highly desirable to include a requirement that the fraud should be determined judicially.

Brazilian delegation. Stressing the difficulty of finding a satisfactory definition of fraud and the absence of recorded instances of fraud, the Brazilian delegation thinks it inadvisable to give approval to provisions which might raise more difficulties in practice than they would solve.[13]

Bulgarian delegation. The Bulgarian delegation regards the separate treatment given to fraud and error by the Commission as a remarkable innovation not always admitted in the opinions of international jurists.[14]

Colombian delegation. In view of the diversity of meanings attributed in internal law to fraud as a ground for invalidating consent, the Colombian delegation considers that the term "fraud" should be given as precise and uniform a definition as possible for purposes of international law.[15]

Ecuadorian delegation. The Ecuadorian delegation considers the article to be generally acceptable, but feels that its scope should be extended to cover a fraudulent act as well as fraudulent conduct. It does not believe that the failure of States in the past to invoke absence of consent on the ground of fraud is a sufficient reason for omitting the article.[16]

French delegation. The French delegation takes the view that, in including the principle which is the subject of the present article, the Commission is acting in accordance, and not in conflict, with article 15 of its Statute.[17]

Iraqi delegation. The Iraqi delegation considers that the fact that fraud is very rare is no reason for failing to declare that it vitiates consent. It also considers that fraud does not necessarily consist of fraudulent conduct but may arise from one fraudulent act.[18]

Pakistan delegation. The Pakistan delegation is of the opinion that a time-limit should be placed on the right to invoke fraud, as otherwise the question of determining

[13] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 793rd meeting, para. 16.

[14] *Ibid.*, 788th meeting, para. 9.

[15] *Ibid.*, 783rd meeting, para. 10.

[16] *Ibid.*, 782nd meeting, para. 3.

[17] *Ibid.*, 787th meeting, paras. 2 and 7.

[18] *Ibid.*, 788th meeting, para. 20.

when the injured State is required to assert the defect in the consent will give rise to difficulties. [19]

Peruvian delegation. The concept of fraud is not thought by the Peruvian delegation to be applicable in international law. [20]

Salvadorian delegation. The Salvadorian delegation observes that the article does not specify whether the fraudulent conduct of a third party may be invoked as invalidating consent. It also suggests that the expression "fraudulent conduct" should be replaced by "fraudulent act". [21]

Syrian delegation. The Syrian delegation approves the Commission's decision to draw up separate articles on fraud and error in order to demonstrate the differences in the effect of these two defects in the consent. [22]

Thai delegation. The Thai delegation appears to consider that, despite the Commission's explanations in paragraph 3 of its commentary, the influence of English private law is predominant in the drafting of the article. [23]

Venezuelan delegation. The Venezuelan delegation thinks that the Commission was wise not to attempt to define the word "fraud" in view of the difficulty of establishing a satisfactory definition. [24]

Observations and proposals of the Special Rapporteur

1. Although some Governments and delegations are against making fraud a distinct ground of invalidity separate from error, the majority are either in favour of such a course or do not voice any objection to it. At the fifteenth session some members of the Commission would have preferred to amalgamate fraud and error in a single article [25] and the Commission will, no doubt, now re-examine this question in the light of the comments of Governments. At that session the Commission concluded that, on balance and despite the rarity of fraud, it is advisable to keep it distinct from error in a separate article. It said :

> "Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely nullify the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties." [26]

2. If the article is retained, the Special Rapporteur considers that the Government of Israel's suggestion of reversing the order of articles 33 and 34 so as to place "fraud" after "error" should be adopted. "Fraud" is, as it were, an "aggravated" ground of invalidity more akin to coercion than to innocent forms of misrepresentation and mistake.

3. One delegation considers that in paragraph 1 the term "fraud" should be given as precise and uniform a definition as possible for purposes of international law. In general, however, Governments and delegations appear to share the view expressed by the majority of the Commission at the fifteenth session that "it would be better to formulate the general concept of fraud applicable in the law of treaties in as clear terms as possible and to leave its precise scope to be worked out in practice and in the decisions of international tribunals". [27] On the other hand, a number of the comments make the point that it is not enough to mention "fraudulent conduct", because a single act may suffice to accomplish a fraud. Although the Commission is thought by the Special Rapporteur to have been justified in thinking that the phrase "fraudulent conduct" covers a single act as well as a series of acts of fraud, it seems desirable in the light of the comments of Governments and delegations to expand the phrase to read "fraudulent act or conduct".

4. In paragraph 2 the Government of Israel suggests the deletion of the word "only", in order to remove any possibility of the paragraph's being interpreted as obliging the defrauded State to invoke the fraud as invalidating its consent only to the particular clauses, without giving it the option to claim that its consent to the whole treaty is affected. If paragraphs 1 and 2 are read together, as they must be, the Special Rapporteur does not think that paragraph 2 is really open to the suggested interpretation; nor does he think that, if it is regarded as open to that interpretation, the deletion of the word "only" would have the effect of removing the difficulty. On the other hand, the comment of the Netherlands Government that the phrase "the State in question" is not sufficiently clear appears to be justified, as two States are mentioned in paragraph 1. However, if the Special Rapporteur's proposals for the revision of article 46 and its transfer to section 1 are accepted by the Commission, it will not be necessary to retain paragraph 2, as the question of separability will have already been covered in article 46. If the Commission were to decide to retain paragraph 2, it would seem advisable to reformulate it on the lines of the corresponding paragraph in article 34, concerning "error", because from a purely drafting point of view it would be more elegant for this provision to be formulated in the same way in both articles.

5. As to the suggestion of the Jamaican and United States Governments that a specific time-limit should be laid down for invoking the invalidity of a treaty on the ground of fraud, this has been examined in the Special Rapporteur's observations and proposals regarding the revision of article 47.

6. In the light of the above observations, the Special Rapporteur suggests that the article should be revised to read as follows :

> If a State has been induced to enter into a treaty by the fraudulent act or conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty.

[19] *Ibid.*, 791st meeting, para. 28.

[20] *Ibid.*, 789th meeting, para. 17.

[21] *Ibid.*, 782nd meeting, para. 3.

[22] *Ibid.*, 786th meeting, para. 16.

[23] *Ibid.*, 791st meeting, para. 4.

[24] *Ibid.*, 790th meeting, para. 16.

[25] *Yearbook of the International Law Commission, 1963*, vol. II, p. 194, article 33, para. (2).

[26] *Ibid.*, p. 195, article 33, paras. (2) and (3),

[27] *Ibid.*, p. 195, article 33, paras. (2) and (3).

Article 34.—Error

Comments of Governments

Israel. The Government of Israel observes that paragraph 1 speaks of an error relating to "a fact or state of facts", whereas paragraph 7 of the commentary does not appear to take so limitative a view of errors which may vitiate consent. It suggests that the text of the article should be brought into line with the commentary. In paragraph 4 it suggests that the words "mistake" and "error" should be transposed, so that the paragraph would then read :

> "When there is no error as to the substance of a treaty but there is a mistake in the wording of its text, the mistake shall not affect the validity of the treaty and articles 26 and 27 then apply."

Commenting further on paragraph 4, the Government of Israel cites the judgment of the International Court in the *Case concerning sovereignty over certain Frontier Land* as authority for the view that a mistake in transcription can vitiate the treaty (as opposed to invalidating a party's consent), subject to the necessary proof being forthcoming; and also for the view that, in any event, such a mistake can be cured by subsequent ratification of the treaty, its publication, and by acquiescence.[28] It suggests that the language of paragraph 4 and, if necessary, also of articles 26 and 27, should be adjusted accordingly. If paragraph 4 is redrafted in the manner which it proposes, it notes that, by way of consequential amendment, it would be necessary to amend the title to section V of part I and articles 26 and 27 by substituting the word "mistake" for the word "error" wherever the latter appears.

Netherlands. The Netherlands Government merely observes that, if its proposed amendment to article 46 is adopted, this will affect the drafting of paragraph 2 of the present article.

Portugal. The Portuguese Government interprets paragraph 7 of the commentary as stating that an error of law is admissible on the same footing as one of fact and, on that basis, it questions the statement. It also maintains that, in making the treaty void *ab initio*, the article clashes with "the theory most in vogue which even in cases of annulment on the ground of error does not allow such effects".

Sweden. The Swedish Government observes that this article, like article 33 concerning fraud, deals with contingencies that must be very rare, and that for this reason there may be a question whether the article is really needed. At the same time, it says that the actual formulation of the article appears to be unobjectionable.

United Kingdom. The United Kingdom Government considers that independent adjudication would be necessary for the interpretation and application of this article; and it invokes the cases referred to in the Commission's commentary as underlining this need.

United States. In this article, as in the previous article dealing with fraud, the United States Government considers it essential to impose some time-limit within which the defect in the consent — the error in this case — must be asserted after its discovery. It also considers that provision should be made for judicial determination of cases of "error".

Brazilian delegation. The notion of error, which is so important in matters of contract, is thought by the Brazilian delegation to lose much of its force in contemporary international law, particularly as treaties are now frequently formulated at international conferences in which a large number of countries take part. The Brazilian delegation thinks it inadvisable to give approval to provisions which might raise more difficulties in practice than they would solve.[29]

Bulgarian delegation. The Bulgarian delegation appears to think that error and fraud should be dealt with together (see its comments on article 33).[30]

Ecuadorian delegation. The Ecuadorian delegation thinks it difficult to determine precisely the practical scope of the provisions of paragraph 1.[31]

Iranian delegation. The Iranian delegation observes that the article deals with errors of fact, but not with errors of law.[32]

Iraqi delegation. The Iraqi delegation considers that it is logically necessary to include an article dealing with error in a body of rules relating to the validity of treaties; and that the fact that error is infrequent is no reason for failing to declare that it vitiates consent.[33]

Pakistan delegation. The Pakistan delegation is of the opinion that a time-limit should be placed on the right to invoke an error, as otherwise the question of determining when the injured State is required to assert the defect in the consent will give rise to difficulties.[34]

Peruvian delegation. The concept of "error" is not thought by the Peruvian delegation to be applicable in international law.[35]

Salvadorian delegation. The Salvadorian delegation commends the drafting of the article. At the same time, it expresses the view that it may be necessary to determine not only whether there has been an error on the part of a contracting State, but also whether that error relates to a state of facts involving a third State.[36]

Syrian delegation. The Syrian delegation approves the Commission's decision to separate "error" from "fraud".[37]

Thai delegation. The Thai delegation considers the scope of the exception provided for in paragraph 2 to be too wide and to have the effect of rendering paragraph 1 ineffective. It also observes that the map in the *Temple of Preah Vihear*[38] case, mentioned in para-

[28] *I.C.J. Reports 1959*, pp. 222-227.

[29] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 793rd meeting, para. 16.

[30] *Ibid.*, 788th meeting, para. 9.

[31] *Ibid.*, 789th meeting, para. 25.

[32] *Ibid.*, 787th meeting, para. 32.

[33] *Ibid.*, 788th meeting, para. 20.

[34] *Ibid.*, 791st meeting, para. 28.

[35] *Ibid.*, 789th meeting, para. 17.

[36] *Ibid.*, 782nd meeting, para. 4.

[37] *Ibid.*, 786th meeting, para. 16.

[38] *I.C.J. Reports 1962*, p. 26.

graph (4) of the commentary, was neither a treaty nor part of a treaty because it had been drawn up by one party and not authenticated by the other party. In its view, therefore, the treaty could not be considered a treaty within the meaning of part I of the draft articles.[39]

Observations and proposals of the Special Rapporteur

1. Two Governments express doubts as to the advisability of including an article on error. But cases of error in the conclusion of treaties are by no means rare and, whatever view may be taken as to the need to devote a specific article to "fraud", the Special Rapporteur feels that the omission of any provision regarding cases of "error" would leave an unacceptable gap in the draft articles.

2. The statement of the main rule in paragraph 1 speaks of cases where the error related to a "fact or state of facts" assumed to exist at the time when the treaty was entered into. In paragraph (7) of its commentary to the article the Commission said:

> "The Commission did not intend the requirement that the error must have related to a ' fact or state of facts ' to exclude any possibility that an error of law should in some circumstances serve to nullify consent. Quite apart from the fact that errors as to rights may be mixed questions of law and fact, the line between law and fact is not always an easy one to draw and cases are conceivable in which an error of law might be held to affect consent. For example, it may be doubtful how far an error made as to a regional or local custom is to be considered as one of law or of fact for the purposes of the present article, having regard to the pronouncements of the Court as to the proof of a regional or local custom. Again, it would seem clear on principle that an error as to internal law would for the purposes of international law be considered one of fact." [40]

The Government of Israel suggests that the text of the article ought to be brought into line with the commentary, by which it presumably means that paragraph 1 should be expanded so as to deal explicitly with the points mentioned in the above passage from the commentary. The Portuguese Government, on the other hand, interprets that passage as putting errors of law on the same footing as errors of fact and questions its correctness.

3. The Commission, according to the Rapporteur's understanding, had no intention of putting errors of law on the same footing as errors of fact. Its intention in paragraph (7) of the commentary was rather to enter a caveat that, in certain circumstances, an error which may be said to involve an error as to a matter of law may constitute an "error related to a fact or state of facts", and for that reason fall within the article. As each case will tend to depend on its own special facts, the Special Rapporteur doubts whether it would be advisable to attempt to expand paragraph 1 of the article in the manner apparently suggested by the Government of Israel. It seems preferable to state the basic rule contained in paragraph 1 and leave the special cases to be determined by reference to that general rule. On the other hand, when the final text of the commentary is drawn up, it may be desirable to modify paragraph (7) so as to leave no possibility for misunderstanding.

4. One Government considers the scope of the exceptions provided for in paragraph 2 to be too wide and to have the effect of largely nullifying paragraph 1. The formulation of paragraph 2, as stated in the commentary, was taken from the Court's judgment in the *Temple* case. The language of the exception is certainly strict and the words " or could have avoided it " have, no doubt, to be reasonably interpreted as meaning no more than "or could with due diligence have avoided it".

5. If the Special Rapporteur's proposals for the revision of article 46 and for its transfer to section 1 as a general rule are accepted by the Commission, paragraph 3 will become unnecessary as the question of separability will have already been covered in article 46.

6. In paragraph 4 two suggestions of the Government of Israel require consideration. The first is that the words "error" and "mistake" should be transposed. The idea presumably is that, as in the English text of article 26 the word "error" is used in connexion with the correction of errors in texts of treaties, the same word should also be used in the present article in that connexion and the word "mistake" be employed for errors of substance. Although the words "error" and "mistake" are synonymous, the Special Rapporteur agrees that uniformity in the terminology is desirable. He thinks it preferable, however, to use the same word "error" throughout rather than to appear to make a distinction in the use of the two words which is not found in the terminology of English-language legal systems. Another consideration is that in the French and Spanish texts the same word—"*erreur*", "*error*"—is used both in article 26 and throughout the present article.

7. The second suggestion is that paragraph 4, and if necessary also article 26, should be adjusted so as to give effect to the following propositions :

> (*a*) A mistake in transcription can vitiate the treaty (as opposed to invalidating a party's consent), subject to the necessary proof being forthcoming; and
>
> (*b*) A mistake in transcription may be cured by subsequent ratification of the treaty, its publication and by acquisition.

Both these propositions are said to be involved in the Court's judgment in the *Frontier Land* case on pages 222-6.[41] Both these propositions, in the view of the Special Rapporteur, oversimplify, and in a certain measure distort, the judgment of the Court in the *Frontier Land* case. The facts of that case were very special. A "minute" —the so-called communal minute—was drawn up between the communes of Baerle-Duc (Belgium) and Baarle-Nassau (Netherlands) purporting to record their agreement as to the commune to which two plots of land

[39] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 791st meeting, para. 4.

[40] *Yearbook of the International Law Commission, 1963*, vol. II, p. 196.

[41] *I.C.J. Reports 1959.*

appertained. The Belgian-Netherlands Mixed Boundary Commission then purported in a so-called "descriptive minute" to transcribe word for word the agreement in the communal minute. Then the descriptive minute was incorporated by reference in the Belgian-Netherlands Boundary Convention of 1843. The Netherlands Government claimed that the terms of the communal minute had been wrongly transcribed in the descriptive minute and ought to have attributed the two plots to the Netherlands, not Belgium. The Court found as a fact that there had been two versions of the communal minute, one attributing the plots to the Netherlands and the other to Belgium. It further found that the version which the Mixed Boundary Commission had intended to transcribe was the one attributing the plots to Belgium, not the one relied on by the Netherlands; and that in consequence there was no mistake in the descriptive minute and no mistake in the Convention of 1843. It is true that the Court added that the Convention had been "confirmed by the Parliament of each State and ratified in accordance with their constitutional processes"; and that its terms had been "published in each State". But it did so only by way of finding confirmation for its conclusion that no case of mistake had been made out by the Netherlands Government. Accordingly, the Special Rapporteur does not feel that the case supports the propositions which are drawn from it in the comments of the Government of Israel.

Moreover, independently of the *Frontier Land* case, the inclusion of the two propositions does not appear to be advisable. To lay down that a mistake in transcription may, as such, vitiate a treaty is to obscure if not eliminate the distinction which the Commission has been so careful to draw — and rightly — between cases of error under article 26 and those under the present article. Again, while it may be possible for an erroneously transcribed agreement to be accepted and acted on by the parties as the treaty binding upon them, this will be a case not of "curing" an error but of substituting a new agreement for the original one. So far as it may involve any element of error, it will be an error as to the substance of the treaty; and so far as any curing of an error is involved, the case will fall under article 47.

8. In the light of the above observations, the Special Rapporteur proposes that the article should be revised to read as follows :

Error

1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 above shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

3. When there is no error as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply.

Article 35.—Personal coercion of representatives of States

Comments of Governments

Czechoslovakia. The Czechoslovak Government notes with satisfaction that article 35 declares null and void *ab initio* treaties concluded through personal coercion of representatives of States. Its delegation recalls the tragic events which had followed the imposition on Czechoslovakia of the Munich Agreement.

Israel. The Government of Israel observes that there is a possible inconsistency between the absolute expression "without any legal effect" in paragraph 1 and the relative, partial, invalidation of the consent under paragraph 2; and that it is not clear whether any difference is intended between the expression "shall be without legal effect" in paragraph 1 of this article and the expression "shall be void" in article 36. It suggests that paragraph 1 should be revised to read as follows:

> "If an individual representative of a State is coerced... the State whose representative has been coerced may invoke the coercion as invalidating its consent to be bound by the treaty."

In paragraph 2, it suggests the omission of the word "only". Otherwise the paragraph might, it feels, be open to the interpretation that it excludes any option for the injured State to invoke the coercion as invalidating the consent to the whole treaty or to the particular clauses to which the coercion relates, as it may prefer.

Netherlands. The Netherlands Government merely observes that, if its proposed amendment to article 46 is adopted, this will affect the drafting of the present article.

Portugal. The Portuguese Government comments on the legal principles underlying this and the following article. Although stressing the novel character of this article, it considers the Commission's approach to the question of personal coercion to be praiseworthy. It also considers paragraph 2 to provide a reasonable rule regarding partial nullity in cases of personal coercion.

Sweden. The Swedish Government observes that, like articles 33 (fraud) and 34 (error), the present article deals with a contingency that is most unusual. However, as there have been some well-known cases of the kind contemplated by the article, and as the rule proposed has a good deal of support in "doctrine", it thinks that an express provision on the matter may be desirable.

United Kingdom. The United Kingdom Government observes that it is not clear whether paragraph 1 would cover the case of signature of a treaty which is subject to ratification and, if so, whether a signature procured by coercion is capable of being ratified.

United States. The United States Government feels that paragraph 1 goes too far in providing that an expression of consent obtained by means of coercion "shall be without any legal effect"; and that it would be better to provide that it may be treated by the injured State as being without legal effect. This would prevent the coercing State from asserting the invalidity of the treaty on the basis of the coercion. Nor, in the opinion of the United States Government, ought the injured State to be required to take the view that the treaty is

without any legal effect; for it may conceivably wish to ignore the coercion if its interest in maintaining the security of the treaty is dominant. Furthermore, if paragraph 1 is revised in the way it suggests, the United States Government thinks that it will have the advantage of helping to prevent third States from attempting to meddle in a situation where the parties immediately involved are content to continue the treaty.

Colombian delegation. The Colombian delegation endorses the distinction drawn by the Commission between personal coercion of representatives and coercion of the State itself. [42]

Ecuadorian delegation. The Ecuadorian delegation suggests that the provisions of article 35 should be extended to cover members of the families of representatives. [43]

Iraqi delegation. The Iraqi delegation approves the position adopted by the Commission on the present article. [44]

Pakistan delegation. The Pakistan delegation suggests that, in paragraph 1 the word "shall" should be replaced by "may". [45]

Spanish delegation. The Spanish delegation opposes the amendment suggested by the United States Government that the treaty should not be invalid unless the injured State invokes the coercion as a ground for considering the treaty to be invalid. [46]

Thai delegation. The Thai delegation welcomes the progressive character of the article. [47]

Venezuelan delegation. The Venezuelan delegation thinks that it would be better to include in the article itself a provision that "representatives" include families of representatives instead of leaving this point to be covered in the commentary. [48]

Observations and proposals of the Special Rapporteur

1. Four Governments suggest that paragraph 1 should be revised so as to give the State the right to invoke the coercion as invalidating its consent rather than automatically to render the expression of consent obtained by coercion "without legal effect". The Spanish Government, on the other hand, opposes this suggestion. The Commission at the fifteenth session took the view that "the use of coercion against the representative of a State for the purpose of procuring the conclusion of a treaty would be a matter of such gravity that the article should provide for the absolute nullity of a consent to a treaty so obtained".

2. The Special Rapporteur is inclined to doubt whether the absolute nullity of the consent is necessarily called for in cases covered by the present article. Cases of the coercion of the State itself are dealt with in article 36, under which any treaty procured by the threat or use of force in violation of the principles of the Charter is declared to be void. Those are indeed cases of the utmost gravity. But, although they may sometimes also involve direct coercion of high officers of the State, it is in the forcible compulsion of the State that the extreme gravity of those cases consists. The cases of personal coercion exercised upon a representative in his individual capacity with which the present article deals appear, on the other hand, to be more akin to cases of " fraud " than to the cases under article 36. Accordingly, the Special Rapporteur feels that it would be quite justifiable to accept the suggestion that, as in cases of "fraud", the State whose representative had been subjected to personal coercion should have the option to accept the treaty as valid, or to reject it as invalidated by the coercion or, in appropriate cases, to regard as invalid only the particular clauses to which the coercion relates. In that event, it would seem natural to use the same formula as in previous articles, i.e. "the State may invoke the coercion as invalidating its consent to be bound".

3. If paragraph 1 is revised in the manner just indicated, the problem posed by the United Kingdom as to whether a signature procured by coercion is capable of ratification will become comparatively easy of solution. Ratification of such a signature would then be possible, as in the case of a signature procured by fraud, but it would not preclude the State from afterwards invoking the coercion as invalidating its expression of consent unless the ratification were effected or were confirmed after the State had become aware of the coercion. In other words, ratification would be definitive and bind the State only if the case came within the provisions of article 47. In order to cover this point, however, it will be necessary to speak not of an "expression of consent to be bound" but of a signature's having been procured by coercion.

4. If the Special Rapporteur's proposals for the revision of article 46 and its transfer to section 1 as a general rule are accepted by the Commission, paragraph 2 of the present article will become unnecessary, since the question of separability will already have been covered in article 46.

5. The Special Rapporteur accordingly proposes that the article should be revised to read as follows:

> If the signature of a representative of a State to a treaty has been procured by coercion, through acts or threats directed against him in his personal capacity, the State may invoke such coercion as invalidating its consent to be bound by the treaty.

Article 36.—Coercion of a State by the threat or use of force

Comments of Governments

Czechoslovakia. The Czechoslovak Government notes with satisfaction that the article declares null and void *ab initio* treaties concluded through coercion of a State by the threat or use of force. It expresses the opinion that this article, together with article 37, pronounces the invalidity of unequal treaties which, in its view, constitute a serious obstacle to the attainment of complete independence and sovereignty by a number of developing

[42] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 783rd meeting, para. 10.

[43] *Ibid.*, 789th meeting, para. 25.

[44] *Ibid.*, 788th meeting, para. 21.

[45] *Ibid.*, 791st meeting, para. 27.

[46] *Ibid.*, 792nd meeting, para. 8.

[47] *Ibid.*, 791st meeting, para. 5.

[48] *Ibid.*, 790th meeting, para. 17.

countries and a source of conflicts. It also considers that article 36 should explicitly prescribe the invalidity of treaties imposed by such forms of coercion as, for example, economic pressure.

Israel. The Government of Israel suggests that the article should be completed by adding a provision to the effect that the article also applies where the participation of a State in an existing treaty was procured by the threat or use of force.

Jamaica. The Jamaican Government considers that the scope of the article should be extended to cover circumstances where the threat or use of force does not, strictly, involve any violation of the principles of the Charter but is none the less a material factor in bringing about the conclusion of a treaty. In its view, an improper use or concealed threat of force may be so manipulated as to avoid violation of the principles of the Charter and yet violate the essential elements of consent in much the same way as fraud. In such cases it suggests that the treaty should be regarded not as void *ab initio* but as voidable at the instance of the injured State.

Netherlands. While fully endorsing the principle underlying the article, the Netherlands Government stresses two points. First, it says that the rule contained in the article is only acceptable and only capable of being applied in practice if the term "use of force" is understood in its strict sense of "armed agression", to the exclusion of all forms of coercion of an economic or psychological nature. In its view, however reprehensible such forms of coercion may be in certain circumstances, under present international conditions they cannot be included in a single general rule prohibiting coercion without creating rather than clearing away uncertainties — without making the rule ineffective even in its strict sense. Secondly, it raises the question of the retrospective operation of the article and asks whether it is to be assumed that the "principles of the Charter" did not become valid until the entry into force of the Charter in 1945.

Poland. The Polish Government considers that "coercion" for the purposes of this article should include not only the threat or use of force but also some other forms of pressure, in particular, economic pressure. In its view the latter represents a typical kind of coercion sometimes exercised in the conclusion of treaties.

Portugal. Although stressing the novel character of the article, the Portuguese Government considers the Commission's approach to the question of coercion to be praiseworthy. It appears to endorse the Commission's decision to define coercion in terms of the principles of the Charter and to leave the precise scope of the acts covered by the definition to be determined in practice by interpretation of the relevant provisions of the Charter.

Turkey. The Turkish Government considers that it would be helpful to define the threat or use of force envisaged in this article. Otherwise, it feels that the principles involved will in general be interpreted in connexion with the solution of political questions and that such a political interpretation can hardly be expected to possess the degree of clarity required in juridical matters. It also observes that this interpretation may not be acceptable to countries not members of the United Nations.

Uganda. The Government of Uganda is very much in favour of the article in that it eliminates coercion as an element in the conclusion of treaties.

United Kingdom. The United Kingdom Government considers that this article should be subject to independent adjudication. Its delegation accepts the Commission's view that the principle stated in article 36 is *lex lata.* It also shares the view of the Commission that the notion of coercion should be confined to a "threat or use of force in violation of the principles of the Charter". In its opinion, to widen that notion might lessen the effectiveness of the article and give rise to pretexts for the evasion of treaty obligations.

United States. The United States Government considers that, with certain safeguards, the article would constitute an important advance in the rule of law among nations. It agrees with the Commission that the rule should be restricted to the threat or use of physical force since, in its view, it is this which is prohibited by Article 2, paragraph 4, of the Charter. On the other hand, it considers that the Commission should deal in its commentary with the important question of the application of this provision in terms of time. The traditional doctrine prior to the League Covenant was that the validity of a treaty was not affected by the fact that it had been entered into under the threat or use of force. With the Covenant and the Pact of Paris, this traditional doctrine came under attack; with the Charter it was overturned. In the view of the United States Government, it was therefore only with the coming into effect of the Charter that the concept of the illegitimacy of threats or uses of force in violation of the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, was accepted. Accordingly, the United States Government considers it doubtful whether invalidity due to an illegitimate threat or use of force should be applied retroactively. Otherwise, the validity of a large number of treaties, notably peace treaties, might be thrown into question. Indeed, the United States Government thinks it open to question whether such a provision should have effect from 1945 or, alternatively, from the conclusion of a convention on the law of treaties incorporating this rule. In general, it considers that retroactivity of the article would create too many legal uncertainties.

Algerian delegation. The Algerian delegation considers that economic pressure may sometimes be more effective in reducing the power of self-determination of a country, above all in the case of a country with single-crop farming or whose economy depends on the export of one product only. In its view, recognition that economic pressure is a cause of nullity of treaties is not a threat to their stability but increases the confidence of the newly independent States in international law. [49]

Bolivian delegation. The Bolivian delegation, in the light of the commentary, interprets the article as applying not only to future treaties but to all treaties without

[49] *Ibid.*, 784th meeting, para. 30.

exception; for a treaty procured by the threat or use of force is to be regarded as void *ab initio*. It also stresses that the Commission has not enumerated all possible forms of coercion, since it had felt that the scope of the Charter is sufficiently broad. [50]

Brazilian delegation. The Brazilian delegation notes that, in paragraph 1 of its commentary, the Commission has concluded that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in present-day international law. [51]

Bulgarian delegation. The Bulgarian delegation unreservedly supports the notion embodied in the article and hopes that the work of the Commission will continue along the same lines. In particular, it considers that leonine treaties running counter to the principle of the sovereign equality of States and to the liberation of countries and peoples should disappear. [52]

Byelorussian delegation. The Byelorussian delegation considers the principle of the nullity of leonine treaties to be of great contemporary importance from the point of view of the eradication of colonialism in all its forms and of the protection of new States from unequal treaties. In its view, colonialist Powers are now resorting to more subtle forms of coercion, for example, under the guise of economic assistance. [53]

Chinese delegation. While welcoming the inclusion of the article, the Chinese delegation feels that difficulties may arise in its application unless the Commission solves the question of determining the presence of the threat or use of force at the time of the conclusion of a treaty, and works out safeguards to ensure that "coercion" is not used as a pretext for violating a treaty. [54]

Colombian delegation. The Colombian delegation observes that articles 35 and 36 mark a step forward in the preservation of freedom of contract, which may, it thinks, be endangered not only by acts of violence against diplomatic representatives but also, and more seriously, by indirect means of coercion incompatible with the sovereign equality of States. [55]

Ecuadorian delegation. After setting out its views regarding the absolute character of the prohibition of the threat or use of force in Article 2, paragraph 4, of the Charter except in case of self-defence, the Ecuadorian delegation expresses the opinion that the Commission should take account of the proposal of the Iraqi delegation that article 36 should be extended to cover economic and political pressure. [56]

Ghanaian delegation. While generally welcoming the Commission's proposals regarding coercion, the Ghanaian delegation notes the absence of any provision relating to the economic pressure that may be put upon a State to compel it to sign a treaty. [57]

Guatemalan delegation. The Guatemalan delegation approves the principle stated in article 36, which it considers to be *lex lata* in the international law of today. [58]

Hungarian delegation. The Hungarian delegation does not share the view that article 36 applies only to cases involving the threat or use of force. It considers that all types of duress should be taken into account and that the article should be redrafted to prevent an unduly narrow interpretation. [59]

Indonesian delegation. In general, the Indonesian delegation supports the Commission's conclusion regarding the effect of coercion, but observes that the Commission does not seem to have anticipated the case where the threat or use of force is applied by a third country rather than by one of the contracting parties. It considers that the expression "threat or use of force in violation of the principles of the Charter" covers all forms of coercion employed to induce a State to act against its own interests and, in particular, to a threat to strangle the economy of a country. In its view, the fact that the expression "armed force" is used in the seventh paragraph of the Preamble to the Charter but not in Article 2, paragraph 4, demonstrates clearly that the latter is not limited to cases of armed force; and also by the fact that in the third paragraph of the Preamble "justice" is mentioned before "respect for the obligations arising from treaties and other sources of international law". [60]

Iraqi delegation. While approving the principle adopted by the Commission, the delegation finds that there is one omission. In its view, if a restricted interpretation of the expression "threat or use of force" is adopted, many forms of real coercion will not come under article 36 and treaties which have been imposed by force, for example, treaties imposed by political or economic pressure, will remain valid. An article the purpose of which is to put treaties on a healthier basis and to guarantee the freedom of the parties must therefore declare as a ground of nullity every and any form of coercion, whether a threat or use of force or any other unlawful pressure, economic or political, likely to compel the consent of a State. The Iraqi delegation considers that pressure which may pass unperceived is more to be feared today than threats or the use of physical force, which can easily be denounced; and that by clearly defining the rules relating to the vitiation of consent and coercion, the risks of unequal treaties will be reduced. Without fraud, without error, and without coercion there would, it believes, scarcely be any unequal treaties, except between States having unequal international juridical status; and here again vitiation of consent or coercion might often be noted. [61]

Moroccan delegation. While noting that article 36 represents an important step towards the establishment of the rule of law among States, the Moroccan delegation thinks that the Commission should give further study to the question whether the article should apply as from 1945 or from the date when a convention on the law of treaties comes into force. It also thinks that the Commis-

[50] *Ibid.*, 793rd meeting, para. 20.
[51] *Ibid.*, 793rd meeting, para. 15.
[52] *Ibid.*, 788th meeting, para. 10.
[53] *Ibid.*, 791st meeting, para. 10.
[54] *Ibid.*, 792nd meeting, para. 12.
[55] *Ibid.*, 783rd meeting, para. 10.
[56] *Ibid.*, 789th meeting, para. 25.
[57] *Ibid.*, 791st meeting, para. 35.
[58] *Ibid.*, 785th meeting, para. 4.
[59] *Ibid.*, 789th meeting, para. 10.
[60] *Ibid.*, 785th meeting, para. 8.
[61] *Ibid.*, 788th meeting, para. 21.

sion should consider other forms of pressure. Economic pressure, for example, often influences the attitude of a country which is aware of the unfavourable position in which it is placed by entering into a treaty but feels compelled by circumstances to sign it; e.g. when a State's economy depends on that of another powerful State which controls either its national production or the international market for its products. [62]

Nigerian delegation. The Nigerian delegation considers that the Commission should examine the question of treaties signed by dependent States just before receiving their independence; for the signing of such treaties is often a condition of the granting of independence. In its view, therefore, such treaties are signed under a form of duress and are void. [63]

Panamanian delegation. The Panamanian delegation commends what it refers to as the Commission's successful revision of traditional doctrine concerning the use of force. [64]

Philippine delegation. While saying that article 36 represents a notable step forward, the Philippine delegation considers that the Commission should not have confined the notion of coercion to the threat or use of force. On that basis there would be no protection against measures such as economic strangulation, to which, in its view, many countries, and especially the developing countries, are particularly vulnerable. The delegation shares the anxiety of those who think that an excessively wide definition of coercion may be used as a pretext for avoiding treaty obligations. But it feels that such abuses can be avoided by inserting detailed provisions to prevent them and to permit easy ascertainment of the facts, rather in the manner in which possible abuses of the *rebus sic stantibus* principle are prevented in article 44 by the limitations in paragraphs 2, 3 and 4 of that article. [65]

Romanian delegation. The Romanian delegation concurs in the text of article 36. In its view, any treaty concluded in violation of the general principles of present day international law are *ipso facto* void and without effect for all the parties. [66]

Spanish delegation. The Spanish delegation supports the principle stated in the article. While agreeing that both the threat of starvation through economic warfare and the threat of destruction by atomic warfare are prohibited by the text of the article, it does not consider that there is any need to make the article more explicit on the point. In its view, it would be best to leave the matter to be interpreted in practice in the spirit of the Charter. [67]

Syrian delegation. The Syrian delegation endorses the Commission's decision to recognize as void treaties the conclusion of which has been procured by the threat or use of force in violation of the principles of the Charter. [68]

Thai delegation. The Thai delegation welcomes article 36. In its view, it is the more necessary to consider the principle laid down in the article as a rule of international law in that small nations have in the past suffered greatly from the threat or use of force. [69]

USSR delegation. The USSR delegation considers that, to secure respect for treaties, leonine treaties such as exist, in its view, between some new States and former colonial Powers must be prohibited. It considers that to accompany a grant of independence with reservations is contrary to the principle of equality of peoples and States proclaimed in the Charter. [70]

United Arab Republic delegation. The delegation of the United Arab Republic endorses the Commission's extension of the notion of coercion in article 36 and thinks that a sound theory regarding vitiation of consent could contribute greatly to the solution of the problem of unequal treaties. [71]

Uruguayan delegation. The Uruguayan delegation considers article 36 to be of fundamental significance as the first clear statement in international law that treaties secured by force are invalid. It says that, although Articles 17 and 18 of the Charter of the Organization of American States contain certain provisions regarding the use of force and other means of coercion, the Organization has not yet adopted so forthright principles as those in article 36. [72]

Venezuelan delegation. The Venezuelan delegation fully supports the inclusion of article 36. At the same time it feels that there should be a fuller definition of what is meant by "force" so as to avoid restrictive interpretations which may prejudice what, in its view, is the article's true intention of condemning coercion in all its forms. [73]

Yugoslav delegation. The Yugoslav delegation considers that the narrowness of the definition given for coercion in the article shows that the language of Article 2, paragraph 4, needs elaboration in order that it may cover all the varied, often indirect or concealed, forms in which pressure may now be brought to bear on a State. [74]

Observations and proposals of the Special Rapporteur

1. A number of Governments suggest that the article should be expanded so as to make it cover other forms of pressure, e.g. political and economic pressure. Certain other Governments endorse the Commission's view that coercion of the State as a ground of invalidity should be limited to cases of a threat or use of force in violation of the principles of the Charter.

2. The Commission dealt with this question in paragraph (3) of its commentary, where it said:

> "If the notion of coercion is confined, as the Commission thinks it must be, to a threat or use of force in violation of the principles of the Charter, the possibilities of a plausible abuse of this ground of invalidity

[62] *Ibid.*, 792nd meeting, para. 16.
[63] *Ibid.*, 790th meeting, paras. 2 and 3.
[64] *Ibid.*, 790th meeting, para. 31.
[65] *Ibid.*, 790th meeting, para. 9.
[66] *Ibid.*, 783rd meeting, para. 32.
[67] *Ibid.*, 792nd meeting, para. 8.
[68] *Ibid.*, 786th meeting, para. 13.
[69] *Ibid.*, 791st meeting, para. 5.
[70] *Ibid.*, 787th meeting, para. 15.
[71] *Ibid.*, 791st meeting, para. 15.
[72] *Ibid.*, 792nd meeting, para. 26.
[73] *Ibid.*, 790th meeting, para. 18.
[74] *Ibid.*, 782nd meeting, para. 15.

do not appear to be any greater than in cases of fraud or error or than in cases of a claim to terminate a treaty on the ground of an alleged breach or of a fundamental change in the circumstances. Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a 'threat or use of force in violation of the principles of the Charter', and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter." [75]

At the fifteenth session, as the Special Rapporteur understands it, the Commission was unanimous in thinking that a treaty procured by the threat or use of force in violation of the principles of the Charter should be stated to be void; but equally it thought that it should not, in codifying the law of treaties, seek to pronounce upon the precise scope and effect of Article 2, paragraph 4, and other relevant provisions of the Charter. It felt that the full content of the principle contained in the present article should be left to be determined in practice by interpretation of the provisions of the Charter. In the same way it preferred in article 37 to state in general terms the rule that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.

3. In the interval since the Commission's fifteenth session, the General Assembly has established, by resolution 1966 (XVIII), a "Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States", composed on the basis of "the principle of equitable geographical representation and the necessity that the principal legal systems of the world should be represented". Among the principles referred to the Special Committee by the General Assembly for study with a view to their progressive development and codification was "the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". In other words, among the topics referred by the General Assembly to the Special Committee was the precise content of the general principle which forms the basis, in the particular context of the law of treaties, of the rule formulated in the present article.

4. The Special Committee studied the principle at its session in Mexico City in November 1964, when it debated a number of different problems regarding its interpretation and application. Among these was the question whether the obligation to refrain from the threat or use of "force" embraces "economic, political and other forms of pressure or coercion". No conclusion was reached on this question, and the report of the Committee summed up the result of the discussion as follows:

"The Special Committee debated in considerable detail whether the term 'force' embraced pressures of the foregoing nature, and was unable to arrive at any consensus on this point, which was considered in the light of (*a*) the interpretation of Article 2, paragraph 4, both in its context in the Charter and with reference to other relevant Articles; (*b*) the legislative history of Article 2, paragraph 4, and (*c*) developments since the Charter and the current requirements of the world community." (A/5746, para. 47).

5. In the circumstances, the Special Rapporteur feels that the appropriate course for the Commission is to retain the general formulation of the rule which now appears in the draft article. Under this general formulation the article is, as it were, open-ended: any interpretation of the principle that States are under an obligation to refrain from the threat or use of force in violation of the principles of the Charter which becomes generally accepted as authoritative will automatically have its effects on the scope of the rule laid down in the present article. On the other hand, if the Commission were itself to attempt to elaborate the rule contained in the article by detailed interpretations of the principle, it would encroach on a topic which has been remitted by the General Assembly to the Special Committee and the detailed study of which would seem to belong rather to the topic of State responsibility.

6. The United States and Netherlands Governments raise the question of the time element in connexion with the application of the rule contained in the article and the former expresses the view that to give retroactivity to the rule would be creative of too many legal uncertainties, especially with regard to peace treaties. The operation of the rule in point of time would seem naturally to fall under the so-called inter-temporal law: the rule that "a juridical fact must be appreciated in the light of the law contemporary with it". [76] A comparable problem arises under article 37 in regard to invalidity resulting from conflict with a rule of *jus cogens*. There, in order to take account of the inter-temporal law the Commission dealt with the subject in two separate articles: (1) article 37, covering conflict with an existing rule of *jus cogens*, and (2) article 45, covering invalidity resulting from a new rule of *jus cogens*. The latter it treated as a case of termination of the treaty through the emergence of the rule, thereby recognizing the validity of the treaty under the law in force prior to the emergence of the rule of *jus cogens*. Articles 37 and 45 concern the legality of the objects of the treaty—the legality, that is, of its performance; and for that reason the validity of the treaty at any given time is affected by the evolution of the law and is determined by the law then in force. The present article, on the other hand, concerns the conditions under which a treaty may validly be concluded—the conditions, that is, for the creation of the legal relation between the parties to the treaty. An evolution of the law governing the conditions for the accomplishment of a legal act does not, under the inter-temporal law, operate to deprive of validity a legal act already accom-

[75] *Yearbook of the International Law Commission, 1963*, vol. II, p. 198, article 36, para. (3).

[76] *Island of Palmas* case (Netherlands) (U.S.A.) United Nations, *Reports of International Arbitral Awards*, vol. II, p. 845.

plished in conformity with the law previously in force. Consequently, a peace treaty or other treaty procured by coercion prior to the emergence of the rule codified in the present article would not, under the inter-temporal law, be deprived of its validity by the operation of that rule.

7. The Netherlands Government inquires whether it may be assumed that the "principles of the Charter" did not become valid until 1945. As to the actual date from which the rule in the present article should be considered to govern the conditions for the conclusion of a valid treaty, the United States Government, on the other hand, thinks it "open to question" whether the date should be 1945 or the date of the conclusion of a convention on the law of treaties. In paragraph 1 of its commentary to the present article the Commission pointed out in 1963 that with the Covenant of the League and the Pact of Paris there began to develop a strong body of opinion which advocated that treaties procured by force ought no longer to be recognized as valid; and that this opinion had been reinforced and consolidated by the charters of the allied military tribunals for the trial of Axis war criminals and by the clear-cut prohibition of the threat or use of force in Article 2, paragraph 4, of the Charter of the United Nations. The Commission further stated that, in its view, these developments justified the conclusion that "the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today", [77] and this view has not been questioned in the comments of Governments. Accordingly, it would seem illogical to formulate the principle as one applicable only from the date of the conclusion of a convention on the law of treaties. The precise date at which the rule contained in the present article may be said to have become accepted as a general rule of international law is a matter on which, perhaps, different opinions may be held. But it is beyond question that the entry into force of the Charter and the establishment of the United Nations mark the beginning of the new era of international relations and international law which followed the Second World War. Whatever may be their opinions about the state of the law prior to the establishment of the United Nations, the great majority of international lawyers consider that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force. The Commission itself, by formulating the present article in terms of "the threat or use of force in violation of the principles of the Charter of the United Nations" appears by implication to have recognized that the present article is applicable at any rate to all treaties concluded since the entry into force of the Charter. On the other hand, it hardly seems to be the function of the Commission, in codifying the modern law, to specify at what precise date in the past an existing rule of international law came to be generally accepted as such. The Special Rapporteur, therefore, doubts whether the Commission need or should attempt to go beyond the broad indication of the time-element contained in the reference to "the principles of the Charter of the United Nations".

8. There remains the proposal of the Government of Israel that the article should be revised so as to make it cover a participation in an existing treaty procured by the threat or use of force in violation of the principles of the Charter. Although such cases may rarely occur today, it seems logical that they should be governed by the article. Accordingly, it is suggested that the article should be reworded so as to read as follows:

> Any treaty and any act expressing the consent of a State to be bound by a treaty which is procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.

Article 37.—Treaties conflicting with a peremptory norm of general international law (jus cogens)

Comments of Governments

Israel. The Government of Israel suggests that it should be made clear in the commentary that for a rule of *jus cogens* to exist the two elements set out in the article must subsist simultaneously, as appears to be already implicit in paragraph 4 of the commentary.

Luxembourg. The Luxembourg Government considers that the article is likely to create a great deal of uncertainty. Assuming, as appears from the commentary, that peremptory norms may be norms established by treaty as well as by usage, it says that the article will have the effect of introducing the whole question of the conflict of rules resulting from successive treaties. It also argues that, if the present article were to be combined with the rule *pacta sunt servanda*, which it considers to be undoubtedly a peremptory norm, any treaty incompatible with a previous treaty could be said to be null and void, except in cases where the parties to the later treaty have the power to abrogate the first treaty. Moreover, in its view, there will be no less uncertainty in regard to the substance, since there is no authority competent to define the norms which are peremptory and those which are not. Having regard to the contractual nature of all treaties, the Luxembourg Government thinks it arguable that all rules formulated by treaty are peremptory; for each one is an undertaking of a State towards other States. It interprets the Commission's object as being to introduce as a cause of nullity criteria of morality and "public policy" such as are used in internal law to determine the compatibility of private contracts with fundamental concepts of the social order; and it questions whether such concepts are suitable for transfer to international relations which are characterized by the lack of any authority, political or judicial, capable of imposing on all States standards of international justice and morality. Consequently, in the view of the Luxembourg Government, it is not possible in the present state of international relations to define in legal terms the substance of peremptory international law. In addition, it asks who would be entitled to invoke the ground of nullity dealt with in the article, the parties or third States. If the former, the Luxembourg Government says that this would mean

[77] *Yearbook of the International Law Commission, 1963*, vol. II, p. 197, article 36, para. (1).

that a party, which had itself contributed to the conclusion and entry into force of a treaty, would contradict its own act; in short, that it would be a case of *venire contra factum proprium*. On the other hand, if a third State were to be considered entitled to invoke the nullity of the treaty, the Luxembourg Government says this would be inconsistent with the principle of relativity which, in the absence of any supranational authority, continues still to dominate the whole subject of treaties.

Netherlands. The Netherlands Government endorses the principle underlying the article. At the same time it feels that it is a pleonasm to say "a peremptory norm from which no derogation is permitted".

Portugal. The Portuguese Government considers that the position adopted by the Commission is a balanced one and that it would be difficult to go further in the definition of *jus cogens*. A mere enumeration of examples would involve the risk of rendering the interpretation of the article difficult in cases not expressly mentioned. Nor does it think that the inclusion of acts constituting crimes against international law or other offences constituting violations of human rights or of the principle of self-determination would be helpful; for it considers that these notions have become corrupt in reality and that any reference to them would not assist in removing the confusion which surrounds them.

Turkey. The Turkish Government considers that the article, which at first glance appears essential and useful, cannot easily be applied without modification. In its view, the examples cited in the commentary are not compatible with reality, since States do not conclude treaties dealing with the use of force, with crime, traffic in slaves and genocide. What is meant by *jus cogens* not being defined in the article, the Turkish Government thinks that it will be possible for each State to interpret it to fit its own needs. Indeed, it feels that this is just what has happened; and that, in the absence of machinery for compulsory jurisdiction, these different interpretations will merely give rise to new misunderstandings. It considers that it would be wrong to include the notion of *jus cogens* in the law of treaties without first establishing effective machinery for settling differences arising between States regarding *jus cogens*.

United Kingdom. The United Kingdom Government considers that, if this article is accepted, its application must be very limited; for in its present form the article calls for a great deal of elucidation and, in particular, as to its relation to Article 103 of the Charter. In its view, it would be useful if examples of peremptory norms contained in the Charter or found in the remainder of the Commission's draft articles on the law of treaties could be given. Moreover, it considers that, in any event, the article would have to be made subject to independent adjudication.

United States. The United States Government considers that the concept embodied in this article would, if properly applied, substantially further the rule of law in international relations; and that the provisions of the article should be supported if it can be made certain that they will not conduce to abuse and undesirable disruption of treaty relations. It finds the examples given in points (*a*), (*b*) and (*c*) of paragraph (3) of the commentary readily acceptable. On the other hand, it feels that even in these cases the application of the article retroactively might result in injustices to one or more of the parties concerned, and might disrupt beneficial relations on the basis of clearly acceptable treaty provisions which are included amongst others that have long been recognized by the parties as obsolete but which, under the concept stated in article 37, would render the entire treaty void. It suggests that the Commission should reconsider the provisions of the article and all aspects of the manner in which it might be applied, particularly the question as to who would decide when the facts justify application of the rule. In its comments on article 45 the United States Government reiterates that under article 37 a *jus cogens* rule developed after the conclusion of many early treaties may avoid the provisions of those treaties "if, as appears to be the case, the provisions of that article apply retroactively". It adds that article 37 could not be accepted unless agreement is reached as to who is to define a new peremptory norm and to determine how it is to be established.

Algerian delegation. The Algerian delegation endorses the approach of the Commission to the question of *jus cogens*. It observes that, while it may be difficult to find an exact criterion for defining rules having a *jus cogens* character, the United Nations has already developed a number of peremptory norms of morality and public policy in international relations—norms which will be defined and developed in State practice. It also observes that it is on the basis of these norms that the Organization of African Unity would seek the annulment of agreements existing between racist and colonialist States in southern Africa. [78]

Brazilian delegation. The Brazilian delegation considers that, whatever doctrinal divergencies there may be, the evolution of international society since the Second World War shows that it is essential to recognize the peremptory nature of certain rules. It observes that the notion of *jus cogens* raises the question of the hierarchy of the sources of international law; that in internal law this question is solved in accordance with a formal criterion, but that in international law, where the weight of a rule is not determined by whether it has been established by treaty or by custom, a positive criterion has to be found. In its view, the Commission was wise to limit itself to merely stating the principle and leaving it to State practice and to the jurisprudence of international tribunals to develop the content of the rule. [79]

Bulgarian delegation. The Bulgarian delegation expresses the opinion that the debate in the Sixth Committee on the principles governing friendly relations between States would help to give certainty to the content of the rules of *jus cogens* and provide a more satisfactory foundation for article 37. [80]

Cypriot delegation. The Cypriot delegation regards article 37 as a constructive contribution to the progressive

[78] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 789th meeting, para. 30.

[79] *Ibid.*, 793rd meeting, para. 14.

[80] *Ibid.*, 788th meeting, para. 9.

development of international law, and considers it prudent to leave the full content of the article to be worked out by State practice and in the jurisprudence of international tribunals. The article, in its view, would have the effect of invalidating a provision which, whether directly or by implication, contemplates the threat or use of force against the political independence or territorial integrity of a State or one which purports to confer upon one or more States the right to intervene in the internal affairs of another State. In the second connexion it cites the judgment[81] of the International Court of Justice in the *Corfu Channel* case.[82]

Czechoslovak delegation. The Czechoslovak delegation considers the provision in article 37 to be in harmony with the legal convictions of States and to represent a remarkable step forward in the development of the law of treaties. In its view, that provision is largely supported by State practice and international law and is endorsed by many authorities as, for example, C. C. Hyde.[83]

Ecuadorian delegation. The Ecuadorian delegation endorses the initiative of the Commission in including a violation of *jus cogens* as a ground for invalidating a treaty.[84]

French delegation. Codification, in the view of the French delegation, does not consist in anticipating everything, but merely in formulating general rules and leaving the rest to time, experience and the interpretation of the courts. In this respect it considers that article 37 is one of the genuinely key provisions of the draft articles.[85]

Ghanaian delegation. The Ghanaian delegation endorses the Commission's approach to the concept of *jus cogens*.[86]

Guatemalan delegation. The Guatemalan delegation welcomes the Commission's recognition of the existence of certain peremptory norms and rules of international law.[87]

Hungarian delegation. The Hungarian delegation welcomes the principle enunciated in article 37, and finds it impressive that ideological differences did not prevent members of the Commission from reaching a solution that meets the needs of practice.[88]

Indonesian delegation. The Indonesian delegation shares the Commission's hope that the precise criteria by which to identify norms having the character of *jus cogens* may be worked out in State practice and in the jurisprudence of international tribunals.[89]

Iraqi delegation. The Iraqi delegation observes that the notion of *jus cogens* raises the question of the hierarchy of the rules of international law; that in internal law this question is solved according to a formal rule; but that this does not apply in international law where the fact that a rule is conventional or customary does not determine its value. In its view, it is necessary to adopt a material standard which will show the substance of the rule, its necessity and its importance. It considers that, while there is great need for prudence, the notion of *jus cogens* is indisputable; and this notion derives from positive law, not from natural law; and that it is not a matter of immutable and permanent norms but of a rule that has a particular value at a particular moment.[90]

Italian delegation. The Italian delegation endorses the Commission's recognition of the existence of rules of *jus cogens*. Their existence, in its view, was challenged in the past only because a contractual idea of international law still prevailed; but as a result of the evolution of international law since the establishment of the United Nations, that idea could not continue to prevail.[91]

Moroccan delegation. The Moroccan delegation notes that the Charter has established several peremptory norms of general international law and has rendered them binding upon Member States under Article 103.[92]

Panamanian delegation. The Panamanian delegation agrees wholeheartedly with article 37, considering that it would be absurd for the principle of freedom of contract to retain its absolute sway in international law when in internal law it is being constantly restricted through the application of the principles of social justice.[93]

Philippine delegation. The Philippine delegation welcomes the Commission's decision to recognize the existence of peremptory norms of international law. It also expresses satisfaction that in paragraph (3) of the commentary the Commission recognizes human rights and self-determination as of the essence of *jus cogens*, violation of which may lead to a treaty's being declared void.[94]

Polish delegation. The Polish delegation underlines that the notion of *jus cogens* is not new. As to the question of identifying *jus cogens* rules, it recalls the proposal made in the Sixth Committee that a declaration should be drafted on the fundamental principles of international law.[95]

Romanian delegation. The Romanian delegation concurs in the article.[96]

Spanish delegation. The Spanish delegation considers the Commission to have been wise not to attempt to identify the rules which possess a *jus cogens* character. In its view, such rules are readily recognized in practice, as in the case of General Assembly resolution 1881 (XVIII) condemning certain violations of human rights.[97]

Syrian delegation. The Syrian delegation endorses the Commission's decision to recognize the existence of peremptory norms of general international law, and also its decision not to draw up a list of *jus cogens* rules. In

[81] *I.C.J. Reports 1949*, p. 35.

[82] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 783rd meeting, para. 18.

[83] *Ibid.*, 787th meeting, para. 25.

[84] *Ibid.*, 789th meeting, para. 26.

[85] *Ibid.*, 787th meeting, para. 5.

[86] *Ibid.*, 791st meeting, para. 35.

[87] *Ibid.*, 785th meeting, para. 4.

[88] *Ibid.*, 789th meeting, para. 11.

[89] *Ibid.*, 785th meeting, para. 9.

[90] *Ibid.*, 788th meeting, para. 22.

[91] *Ibid.*, 793rd meeting, para. 11.

[92] *Ibid.*, 792nd meeting, para. 17.

[93] *Ibid.*, 790th meeting, para. 31.

[94] *Ibid.*, 790th meeting, para. 10.

[95] *Ibid.*, 788th meeting, para. 36.

[96] *Ibid.*, 783rd meeting, para. 32.

[97] *Ibid.*, 792nd meeting, para. 9.

its view, the rule in article 37 is all the stronger for being stated in general terms. [98]

Thai delegation. The Thai delegation notes with great interest the insertion of the *jus cogens* principle in the law of treaties. This it considers to be a new rule recognizing in positive international law the existence of superior norms in the hierarchy of international rules. [99]

Ukrainian delegation. The Ukrainian delegation considers that article 37 should prove an adequate criterion by which to indentify treaties incompatible with the principles of the Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)). In its view, unjust treaties conflict with the affirmation in the Preamble to the Charter of faith in the equal rights of nations large and small. It observes that Article 103 of the Charter provides that, in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the former are to prevail; and that article 37 appears to it to be completely in accord with that principle. It further observes that unjust treaties designed as instruments of colonial oppression and exploitation also conflict with the Declaration on the Granting of Independence to Colonial Countries and Peoples and with General Assembly resolutions 523 (VI), 626 (VII), 1314 (XIII) and 1515 (XV). [100]

USSR delegation. The USSR delegation notes that article 37 states that a treaty is void if it conflicts with a peremptory norm of general international law; and that leonine treaties such as existed between some new States and former colonial Powers must be prohibited. In its view, treaties granting independence but accompanied by reservations are contrary to the principle of equality of peoples and States proclaimed in the Charter. [101]

United Arab Republic delegation. The delegation of the United Arab Republic endorses the decision of the Commission to recognize the existence of rules having the character of *jus cogens*. It notes that the Charter contains several incontestable norms of international public law; that Article 103 makes these obligatory at any rate for Member States; and that as a quasi-universal set of norms the Charter has helped considerably to make the idea of *jus cogens* an international reality. In its view, the recognition of the notion of *jus cogens* by the Commission marks the transition from the classical international law to the modern law of the United Nations. [102]

Uruguayan delegation. The Uruguayan delegation considers it to be of the greatest significance that the Commission, representing jurists from many different legal systems, has agreed to include so vital a principle in a multilateral convention on the law of treaties. It notes that, up to date, Article 103 constitutes the most far-reaching legal text applicable to the question, and that it establishes a hierarchy of norms in international law. In its view, article 37 represents a substantial advance over Article 103 of the Charter, in that it not only recognizes the existence of peremptory norms, but also provides a penalty for derogation from them in the form of the nullity of a treaty. At the same time it considers that the article also raises questions. Is the article, it asks, considered by the Commission to be the codification of an accepted principle or the progressive development of a new principle? If the former, it thinks that the Commission should cite previous cases in which the principle of *jus cogens* has been reflected in United Nations solutions of international problems. Another question it raises is the date upon which article 37 should become effective, and whether it should be retroactive. It suggests that there are three possible solutions to this question: (1) the article should affect only future treaties signed after a specified date; (2) it should take effect as soon as it is adopted as part of a convention on the law of treaties; or (3) it should be applicable not only to treaties signed after its adoption but also to those signed at any time in the past. In its view, either of the last two solutions would give rise to great difficulties, but the Commission should consider the whole question. [103]

Venezuelan delegation. The Venezuelan delegation considers the recognition of the principle of *jus cogens* by the Commission a milestone in international law. [104]

Yugoslav delegation. The Yugoslav delegation welcomes the Commission's recognition of the existence of peremptory norms of international law and its recognition of the fact that these norms are constantly developing and changing with the times. It regards this as an important step in the progressive development of international law. [105]

Observations and proposals of the Special Rapporteur

1. Although certain Governments express doubts as to the advisability of the inclusion of this article unless it is backed by a system of independent adjudication, the principle contained in the article appears to meet with a large measure of approval. Indeed, only one Government — the Luxembourg Government — really questions the existence today of a concept of rules of *jus cogens* in international law. Since the comments of this Government do not appear to raise any new points not taken into account by the Commission, it is thought sufficient to draw attention to them. [106]

2. The Netherlands Government suggests that it may be a pleonasm to say "a peremptory norm from which no derogation is permitted". This point, which is primarily one of drafting, received careful consideration at the fifteenth session. The term "peremptory norm" might, no doubt, suffice by itself to convey the notion of a rule of a *jus cogens* character, if there were an existing usage clearly giving that meaning to the term. But this is not

[98] *Ibid.*, 786th meeting, paras. 13 and 16.

[99] *Ibid.*, 791st meeting, para. 6.

[100] *Ibid.*, 784th meeting, paras. 8 and 13.

[101] *Ibid.*, 787th meeting, para. 15.

[102] *Ibid.*, 791st meeting, para. 16.

[103] *Ibid.*, 792nd meeting, paras. 23-25.

[104] *Ibid.*, 790th meeting, para. 19.

[105] *Ibid.*, 782nd meeting, paras. 13 and 14.

[106] The inclusion of the concept of rules of *jus cogens* in the draft articles has met with strong criticism in a recent publication; G. Schwarzenberger, *Texas Law Review*, 1965, pp. 455-478.

the case. Moreover, all general rules of international law have a certain peremptory character in the sense that they are obligatory for a State unless and until they have been set aside by another lawfully created norm derogating from them. A general rule possesses a *jus cogens* character only when individual States are not permitted to derogate from the rule at all—not even by agreement in their mutual relations. In short, a *jus cogens* rule is one which cannot be derogated from but may only be modified by the creation of another general rule which is also of a *jus cogens* character. Accordingly, in formulating the article, the Commission considered it essential to speak not merely of a "peremptory" norm but of one "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

3. The United Kingdom Government raises the question of the relation between the present article and Article 103 of the Charter, which provides: "In the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Article 103 of the Charter, as its terms specify, is a provision which essentially lays down a rule not for States generally but for "Members of the United Nations". In formulating article 63 of the draft articles regarding the application of incompatible treaty provisions, the Commission viewed Article 103, like similar provisions found in certain other treaties, as directed to establishing the priority of the obligations of Members under the Charter rather than the invalidity of treaty clauses incompatible with those obligations. The Commission decided, in stating the rules regarding the application of incompatible treaties, to recognize the overriding character of Article 103 of the Charter—in other words, it recognized the primacy of the rule in Article 103 in the context of the relative priority of incompatible treaty obligations.[107] It appreciated that there may be a certain overlap in the application of the *jus cogens* provisions of articles 37 and 45 of the draft articles and Article 103 of the Charter because certain provisions of the Charter, notably those of Article 2, paragraph 4, are of a *jus cogens* character. But it considered the invalidity of a treaty under articles 37 and 45 of the draft articles by reason of a conflict with a rule of *jus cogens* to be a distinct and independent question. In a case where a treaty conflicts with a *jus cogens* provision of the Charter, the offending treaty will be or become wholly invalid under article 37 or article 45 of the draft articles; the case will not be one where the obligations of the parties under the treaty are merely subordinated to their obligations under the Charter.

4. The United States Government, as in the case of the previous article, questions the advisability of allowing any retroactive operation to the rule enunciated in the article. It fears that otherwise injustices may result to one or more of the parties concerned and that there may be a disruption of treaty provisions which are clearly beneficial and acceptable, but are included amongst other provisions which, although long recognized to be obsolete, would render the whole treaty void under the present article. As the Special Rapporteur has already pointed out in paragraph 6 of his observations on article 36, the Commission has taken account of the temporal element by dealing with the subject of *jus cogens* in two separate articles: (1) the present article, covering conflict with a rule of *jus cogens* existing at the time of the conclusion of the treaty, and (2) article 45, covering invalidity resulting from the emergence of a new rule of *jus cogens*. If these two articles are read together, they make it clear that the provisions which they contain regarding conflict with a rule of *jus cogens* are not intended to give rules of *jus cogens* any retroactive operation. A treaty is void *ab initio* and wholly void under the present article, only if it conflicts with a rule of *jus cogens* existing at the time of its conclusion. Under paragraph 1 of article 45, if a new rule of *jus cogens* is established subsequently to the conclusion of a treaty, the treaty only becomes void and terminates at that later time. Moreover, under article 53, paragraph 2, a situation resulting from the previous application of the treaty will retain its validity to the extent that it is not in conflict with the new rule of *jus cogens*. Nor will the whole treaty become void and terminate under article 45 when it is only certain of its clauses that are in conflict with the rule of *jus cogens*. Under paragraph 2 of the article the rest of the treaty, if properly severable from the void clauses, will remain valid.

5. Article 37, as drafted, does not state expressly that it concerns cases where a treaty conflicts with a rule of *jus cogens* existing at the time of its conclusion. The Commission assumed that this would be clear from reading its provisions together with those of article 45; and it also assumed that the inter-temporal law would preclude article 37 from being interpreted as invalidating retroactively past treaties concluded prior to the emergence of a conflicting rule of *jus cogens*. However, having regard to the distinctions made by the Commission in the operation of the present article and that of article 45, the Special Rapporteur feels that it may be desirable, in order to leave no possibility of misunderstanding, to make explicit in the text of the present article that it relates to treaties which conflict with a rule of *jus cogens* existing at the time of their conclusion.

6. Admittedly, if the rule embodied in article 37 were to be regarded as a total innovation in international law, the time-element would present itself in a different light. On that hypothesis, the application of the article would logically be confined to treaties concluded after the entry into force of a general convention on the law of treaties incorporating the rule. The Special Rapporteur does not, however, understand the Commission to have intended in article 37 to propose a completely new rule of treaty law. In paragraph 1 of its commentary, the Commission "concluded that in codifying the law of treaties it must take the position that today there are certain rules from which States are not competent to derogate by a treaty arrangement".[108] In other words,

[107] *Yearbook of the International Law Commission, 1964*, vol. II. pp. 185-186, paras. (2)-(5).

[108] *Ibid., 1963*, vol. II, p. 198.

it recognized that some rules of *jus cogens* already exist in international law and in article 37 merely drew the logical consequences from that fact. The concern as to the possibility of retroactive effects is thought really to arise from doubts, first, as to precisely which norms have become norms of *jus cogens* and at what dates and, secondly, by whom these points are to be authoritatively determined. At its fifteenth session the Commission considered its correct course to be to leave the full content of the rule—the identification of the norms which have become norms of *jus cogens*—to be worked out in State practice and in the jurisprudence of international tribunals. It felt, *inter alia*, that if it were to attempt to draw up, even selectively, a list of norms of *jus cogens*, this might involve a prolonged study of matters which belong to other branches of international law. The second point—the authority by whom norms are to be determined to be norms of *jus cogens*—is connected with the problem of the procedure for resolving disputes which the Commission sought to cover in article 51. This point, which is a general one, will necessarily come up for consideration when that article is re-examined; and the particular significance of the point in connexion with the present article will, no doubt, be borne in mind by the Commission.

7. Having regard to the observations in paragraph 5 above, it is suggested that the opening phrase of the article should be revised so as to read:

> A treaty is void *ab initio* if at the time of its conclusion it conflicts...etc.

SECTION 3: TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 38.—Termination of treaties through the operation of their own provisions

Comments of Governments

Burma. The Burmese Government suggests that consideration should be given to including the doctrine of *rebus sic stantibus* as an additional clause in this article.

Finland. The Finnish Government considers that the main provisions of this article are self-evident and could be omitted. On the other hand, it favours the retention of paragraph 3(*b*) which, in its view, embodies an important principle.

Israel. The Government of Israel suggests that, in order to avoid the impression that the article merely states the obvious, the title and the opening phrase should be revised so as to make the article relate more specifically to the time of termination.

Portugal. The Portuguese Government observes that, in paragraph 2, and paragraph 3(*a*), the references to the " date of denunciation " do not furnish a very precise formula because the date of termination may be a difficult question of interpretation. At the same time it doubts whether a more precise principle could be laid down. The rule stated in paragraph 3(*b*) it finds commendable, since that rule will ensure greater certainty in the application of the clauses with which paragraph 3(*b*) deals.

Sweden. The Swedish Government thinks the need for paragraphs 1, 2 and 3(*a*) of the article to be somewhat doubtful. Paragraph 3(*b*), on the other hand, it considers to be a useful residuary rule.

United States. In the view of the United States Government, the rules spelled out in article 38 are self-evident and axiomatic, so that the article could well be omitted, if the draft convention on the law of treaties were to be simplified. The formulation of the rules in the draft article it considers to be satisfactory.

Observations and proposals of the Special Rapporteur

1. The article, as at present formulated, still reflects the "code" concept of the Commission's work on the law of treaties; and four out of the six Governments which have commented upon it appear to feel that some of its provisions are too self-evident to require statement. The Government of Israel suggests that the self-evident character of those provisions might be avoided by making the title and the opening phrase relate more specifically to the time of termination. The Special Rapporteur doubts whether this solution would be satisfactory, because the articles in section 3 deal essentially with the grounds or causes of termination, just as those in section 2 deal with the grounds or causes of invalidity. He feels that the best course may be to reduce paragraphs 1, 2, 3(*a*) and the first sentence of 3(*b*), which are simply a matter of the application of the terms of the treaty, into a single paragraph. On the other hand, the second sentence of paragraph 3(*b*), as three Governments note, contains a rule of some importance on a point which might otherwise give rise to uncertainty, and this sentence might then become paragraph 2.

2. The article, as at present formulated, is limited to the termination of a treaty under its own provisions, whereas the suspension of its operation or the conditions for the withdrawal of individual parties may equally find mention in the treaty. It therefore seems desirable that the article should also cover both these possibilities.

3. The Special Rapporteur accordingly suggests that the article might be revised to read as follows:

> *Termination or suspension of the operation of a treaty under its own provisions*
>
> 1. A treaty terminates or its operation is suspended or the withdrawal of a party from the treaty takes effect on such date or on the fulfilment of such condition or on the occurrence of such event as may be provided for in the treaty.
>
> 2. A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Article 39.—Treaties containing no provisions regarding their termination

Comments of Governments

Israel. The Government of Israel suggests that provision should be made for the possibility of suspending the operation of the treaty in the circumstances mentioned in the article as an alternative to terminating it. It observes that this might be done by an addition on the lines of paragraph 3 of article 40.

Luxembourg. In the first sentence of the article, the Luxembourg Government proposes that the reference to "statements of the parties" should read "concordant statements of the parties". The purpose of the proposal is to prevent a party from invoking its own unilateral statements in order to secure a right to denounce or withdraw from a treaty.

Netherlands. The Netherlands Government considers that, with the exception of some old treaties, cases are seldom found where contracting parties are so careless as simply to "forget" to include any provision regarding the termination or denunciation of the treaty. In its view, failure of the parties to mention the subject is normally to be ascribed to their having deliberately avoided it. Reference to the *travaux préparatoires* would, it thinks, show almost invariably that the question was indeed discussed but that for political reasons they did not think it opportune to mention the conditions under which the treaty should cease to operate, or that they had disagreed about those conditions, or that they took the effect of such conditions as a matter of course, or that there were other reasons why they refrained from inserting any stipulations on the subject in the treaty. Accordingly, it considers that the parties may be assumed in all cases to have had the possible termination of the treaty in mind but often only in exceptional circumstances. It does not feel that all the provisions intended but not actually made by the parties can be replaced by the single provision that any treaty may be terminated by giving one year's notice. It suggests that, in order to make the article suitable for existing and future treaties, the end of the first sentence and the beginning of the second should be revised to read:

> "...intended to admit under certain conditions denunciation or withdrawal. Under those conditions, a party may denounce or withdraw...etc.".

Poland. In the first sentence of the article the Polish Government proposes that the phrase "from the character of the treaty and from the circumstances of its conclusion" should be revised so as to read "or" instead of "and". In its view, the relevant intention of the parties may result from the character of the treaty alone or from the circumstances of its conclusion alone or from the statements made by them.

Portugal. The Portuguese Government thinks it reasonable to establish, as is done in this article, a negative principle (i.e. against a right to denounce or withdraw from a treaty) while admitting the possibility of denunciation or withdrawal on the basis of three factors: (1) the character of the treaty; (2) the circumstances of its conclusion; and (3) the statements of the parties made either before or after the treaty's conclusion. In its view, the summary of the basic elements of interpretation contained in article 39 leaves a sufficient latitude for the application of the relevant principles; and the requirement of not less than twelve months' notice is a justifiable means of safeguarding the interests of the other parties to the treaty.

Sweden. In the view of the Swedish Government, the article offers a reasonable and partly new solution to the problem of treaties containing no provisions regarding their termination.

Turkey. The Turkish Government does not think that the exceptions in article 39, under which denunciation is allowed in certain conditions, exactly reflect the needs of our times. It believes that it will be for the benefit of the international community if in the exceptional cases envisaged in the article each party were to be given the right to request the reviewing of the treaty instead of the right of termination or withdrawal.

United States. In the opinion of the United States Government, the article has the merit of overcoming the alleged presumption that a treaty may be denounced unilaterally where there is no provision regarding denunciation. At the same time, it considers that, in the first sentence of the article, the word "clearly" should be inserted before "appears" in order to emphasize that the intention to permit denunciation or withdrawal should be a clear intention.

Algerian delegation. The Algerian delegation suggests the advisability of including the possibility of a revision of the treaty as a third possible solution which would, in its view, be more practical in the case of some treaties no longer effective under the conditions prevailing.[109]

Colombian delegation. The Colombian delegation's view is that a right of denunciation or withdrawal should be admitted only if explicitly provided for and that, failing any provision, the treaty should be presumed to be of indefinite duration. It considers that to seek the intention of the parties in documents other than the treaty itself would place treaty-making on an insecure basis. It favours the maintenance of the principle contained in the Declaration of London of 1871 that denunciation or withdrawal is admissible only if provided for in the treaty or consented to by all the other parties.[110]

Cypriot delegation. The Cypriot delegation is inclined to share the view of some members of the Commission that in certain types of treaty, such as treaties of alliance, the presumption as to the intentions of the parties was that a right of denunciation or withdrawal after reasonable notice should be implied unless there were indications of a contrary intention.[111]

Indian delegation. The Indian delegation considers that the article may give rise to difficulties of interpretation and application, particularly in view of the observation in paragraph 5 of the commentary that the reference to "statements of the parties" embraces statements subsequent to the conclusion of the treaty.[112]

Panamanian delegation. The Panamanian delegation shares the Commission's opinion that under certain conditions a treaty may be denounced unilaterally although it does not contain an express denunciation clause. It does not, however, consider that the intention of the parties is the sole factor determining the question since, in its view, all the circumstances should be taken

[109] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 789th meeting, para. 31.

[110] *Ibid.*, 783rd meeting, para. 11.

[111] *Ibid.*, 783rd meeting, para. 19.

[112] *Ibid.*, 783rd meeting, para. 4.

into account, especially in the case of treaties of military alliance. [113]

Observations and proposals of the Special Rapporteur

1. The great majority of Governments appear to approve of the principle of this article, opposition to it being voiced by only one delegation. The Netherlands Government, however, proposes that the words "under certain conditions" should be inserted after "intended to admit". It considers that the parties ought always to be assumed to have given their minds to the question of the termination of the treaty and to have contemplated denunciation or withdrawal only in exceptional circumstances. The Special Rapporteur doubts whether this assumption is altogether justified, and also whether the proposed amendment is really necessary in order to take account of the point that the parties may have contemplated the possibility of termination only in certain conditions. The principle of the article is that denunciation or withdrawal is admitted only if such appears to have been the intention of the parties. Clearly, if what appears from the treaty or from the circumstances of its conclusion is an intention to admit the possibility of denunciation or withdrawal only in particular circumstances, that intention will prevail. He feels that a slightly different revision of the article on the lines proposed in paragraph 7 below should suffice to cover this point. As to the suggestion of the United States Government that the word "clearly" should be inserted before "appears", no objection is seen by the Special Rapporteur to this extra emphasis on the need to establish the intention of the parties. On the other hand, the insertion of that word hardly seems essential, and in revising articles 4, 11, 12 and 19 the Commission has consistently used the word "appears" without any qualifying adverb.

2. The Luxembourg Government proposes that, in order to prevent a party from relying on a unilateral statement, the phrase "statements of the parties" should be amended to read "concordant statements of the parties"; and the Indian delegation suggests that the article may give rise to difficulties of interpretation, having regard particularly to the fact that "statements of the parties" are to include subsequent statements. Neither of these points seems to the Special Rapporteur to have very much force. The language of the first sentence of the article makes it quite clear that it is the intention of the "parties", not that of a single party, which is relevant; and a unilateral statement to which no objection was taken may in certain circumstances be evidence of a common understanding. Again, while any question of ascertaining intention may sometimes give rise to difficult cases, subsequent statements and conduct of the parties may be helpful in showing the common understanding of the parties regarding the terms of the treaty, as the Commission has recognized in paragraph 3 of article 69.

3. Although for these reasons the Special Rapporteur does not feel that the reference to the "statements of the parties" is open to objection, he considers that some revision of the first sentence of the article is desirable. When the text of the present article was considered by the Commission, articles 69 and 70 had not yet been formulated. Article 69, which lays down the general rules of interpretation of treaties, provides, *inter alia*, that together with the context there are to be taken into account (*a*) any agreement between the parties regarding the interpretation of the treaty and (*b*) any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation. Article 70 then provides that recourse may be had to the "preparatory work" of the treaty and to the circumstances of its conclusion in order to verify or confirm the meaning resulting from an interpretation under article 69 or to determine the meaning when that interpretation leaves it ambiguous or obscure. An interpretation of the treaty in accordance with those articles therefore covers all that is included in the phrase "unless it appears from the character of the treaty or from the circumstances of its conclusion or the statements of the parties". In other words, it is arguable that it would be sufficient in the present article to say "unless it appears... etc.", leaving all the rest to the operation of articles 69 and 70; or, alternatively, to say "unless the interpretation of the treaty in accordance with articles 69 and 70 shows...etc.". Probably, where the treaty is silent on the matter and the rule is expressed in terms of a particular intention of the parties, the first alternative may be thought too laconic. The second alternative, on the other hand, may have certain attractions as a general formula for use in cases where the rule has to be expressed in terms of a particular intention. As the Special Rapporteur pointed out in his fourth report, it will in due course be desirable for the Commission to review all the provisions where phrases such as "unless it appears from the treaty or from the circumstances of its conclusion" occur in order to ensure that their language is fully correlated with the provisions of articles 69 and 70. [114]

4. At the first part of the present session, when revising article 12 regarding the conditions under which consent to be bound is expressed by ratification, the Commission spoke in paragraph 1(*b*) of the intention appearing "from the circumstances of the conclusion of the treaty" and in paragraph 1(*d*) of its "being expressed during the negotiations". [115] In short, it selected the phrases which it thought most suitable for the case under consideration and did not simply rely on the operation of articles 69 and 70. Accordingly, while reserving the general question of terminology in this type of provision, the Special Rapporteur has retained the mention of the circumstances of the conclusion of the treaty in the present article. Having regard, however, to the separate mention in article 70 of "preparatory work" and "the circumstances of conclusion", it seems necessary here to make specific mention of "preparatory work"; otherwise it might be possible to contend that reference to "preparatory work", including statements made by the parties during the negotiations, to ascertain the intention of the parties is not admissible under the present article.

[113] *Ibid.*, 790th meeting, para. 33.

[114] *Yearbook of the International Law Commission, 1965*, vol. II, p. 9.

[115] *Ibid.*, vol. I. p. 281.

This seems all the more necessary in that recourse to "preparatory work" and "the circumstances of conclusion" under article 70 is expressed to be permissive. Under article 69, paragraph 3, on the other hand, the subsequent practice of the parties, including their subsequent statements, is automatically to be taken into account in the interpretation of a treaty, so that specific mention of subsequent "statements" of the parties in the present article does not appear to be necessary.

5. One Government proposes that the article should provide for a right to request the reviewing of the treaty rather than a right of termination or withdrawal. The difficulty is that a right to request the review of a treaty is an imperfect "right" since, if the other party is unwilling to accept a modification of the treaty, the "right" is somewhat illusory. At the same time, there is nothing to prevent a party from proposing a revision of the treaty at any moment and, if the other party is willing to entertain the possibility of a revision, it can be negotiated by mutual agreement. As pointed out in paragraph (6) of the Commission's commentary to article 44 (fundamental change of circumstances), a right of termination may, in fact, often serve the purpose of a lever to induce a spirit of compromise in the other party and in that way facilitate a revision.[116] But revision of a treaty always depends on mutual acceptance of the modification (see articles 66-68). Consequently, the Special Rapporteur believes that the Commission was right to state the present article, as also article 44, in terms of a right of termination, not of requesting revision.

6. There remains the Government of Israel's suggestion that a paragraph should be added, along the lines of article 40, paragraph 3, providing for the possibility of suspending the operation of the treaty in the circumstances mentioned in the article as an alternative to terminating it. The simplicity of this suggestion is, perhaps, a little deceptive. Article 40 does not deal with the intention of the parties regarding the termination or suspension of the operation of a treaty. It deals with the procedural requirements of an agreement to terminate or suspend a treaty's operation and merely provides that the requirements for termination apply also to suspension. In short, not only is the context different in article 40, but there is no question in that article of "suspension" being made an alternative to termination. In the present article it seems doubtful whether parties who intended to admit a right of denunciation or withdrawal can be assumed automatically to have intended to admit a unilateral right to suspend the operation of the treaty as an alternative to termination; for suspension sets up a more complex relation than termination. The Special Rapporteur, in short, thinks that suspension of the operation of the treaty could not be regarded as admissible—unless it appeared that this particular right had been specifically envisaged by the parties. Consequently, if it is considered that suspension of the operation of the treaty should be included in the article, the Special Rapporteur feels that it should be introduced into paragraph 1 alongside termination, denunciation and withdrawal, and made dependent on the specific intention of the parties.

7. It seems preferable, simply as a matter of drafting, to state the rule in the first sentence in the form "may... only if" instead of in its present form "is not... unless"; and also to make the second sentence a separate paragraph. On this basis, and in the light of his observations in previous paragraphs, the Special Rapporteur suggests that the text of the article might be revised so as to read as follows:

Treaties containing no provisions regarding their termination or the suspension of their operation

1. When a treaty contains no provision regarding its termination and does not provide for denunciation or withdrawal or for the suspension of its operation, a party may denounce, withdraw from or suspend the operation of the treaty only if it appears from the treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended to admit the possibility of such denunciation, withdrawal or suspension of the treaty's operation.

2. A party shall in every case give not less than twelve months' notice of its intention to denounce, withdraw from or suspend the operation of the treaty under the provisions of paragraph 1.

Article 40.—Termination or suspension of the operation of treaties by agreement

Comments of Governments

Australia. The Australian Government suggests that the period of years to be specified in paragraph 2 of the article should be twenty-five. In this connexion it observes that a number of cases have occurred of multilateral treaties which for years have languished, with few parties, but have then proved popular.

Canada. The Canadian Government suggests that, in paragraph 2, a reasonable period would be ten years; and that this period, as in article 9, should be expressed to run from the date of the adoption of the text, i.e. from the time when the treaty was opened for signature. It also feels that the period of years should be the same in both articles.

Finland. The Finnish Government shares the view of the Commission that the termination or the suspension of the operation of a multilateral treaty should require the consent of not less than two-thirds of the States which drew it up, as well as the agreement of all its actual parties. As to the period of years to be specified in paragraph 2, it suggests that a period of from three to five years after the entry into force of the treaty would not be unreasonable.

Israel. The Government of Israel suggests that, in view of the definition of "treaty" in article 1, paragraph 1(*a*), the reference to a new "treaty" in paragraph 1 of the commentary to the present article may not be consistent with the reference to an "agreement" in paragraph 1 of the article. It considers that the text of the article is acceptable if it includes the possibility of termination by the tacit agreement of all the parties. It further suggests that in paragraph 1, after the words "A treaty", there should be inserted the phrase "in whole or in part". In paragraph 2, it considers that the

[116] *Ibid., 1963*, vol. II, p. 209.

period to be specified should correspond to the period adopted for article 9. It also raises the question whether, in the present article and in article 9, the rule should not refer to "two-thirds of the States which drew up the treaty, including two-thirds of the parties". Finally, it considers that the function conferred on the depositary under paragraph 1(*b*)[117] would require an appropriate modification in article 29—dealing with the functions of depositaries.

Luxembourg. The Luxembourg Government does not think that the situation envisaged in paragraph 2 is a sufficient reason for laying down what, in its view, is too complicated a rule. It considers the contingency that a small number of States which have been the first to adhere to a multilateral treaty would wish to terminate it by mutual agreement to be highly improbable. If that contingency is to be guarded against, it would suggest a provision to the effect that States which have drawn up but not become parties to a treaty may still bring the treaty into force amongst themselves, even after its termination by the original parties. However, it would prefer to delete paragraph 2 altogether.

Netherlands. In paragraph 2, the Netherlands Government does not think that a single period can be laid down which would be reasonable for all the different kinds of treaties, and shares the view of the United States that the parties to a treaty should be at liberty to lay down shorter or longer periods to suit the circumstances of the case. It feels that the best general period would be ten years, because a shorter period might mean, especially in technical treaties, that some States were still preparing the necessary internal legislation to enable them to become parties when the parties were discussing its termination. It proposes that the final phrase of the paragraph should be revised to read: "however, after the expiry of ten years, or such other period as the treaty may stipulate, the agreement..." etc.

Poland. The Polish Government considers that, in paragraph 2, the period to be specified should be as short as possible and, in any event, should not be longer than four years. This would avoid excessive dependence on the will of countries that have not undertaken any obligations under the treaty and yet be sufficient for carrying out in the countries concerned the procedure necessary for ratification or adoption of the treaty.

Portugal. The Portuguese Government considers that in paragraph 2 the period to be specified should not exceed five years. In its view, the operation of the treaty over this period should normally be sufficient to enable States to decide whether or not to become parties; and thereafter no principle concerning the protection of their interests could justify the need for their consent to the termination of the treaty.

Sweden. While doubting whether paragraph 1 is really necessary, the Swedish Government thinks that paragraphs 2 and 3 contain useful innovations regarding the termination or suspension of the operation of multilateral treaties.

[117] The reference to paragraph 1(*a*), in the comments of the Government of Israel as circulated in document A/CN.4/175, is assumed by the Special Rapporteur to be a clerical error.

Turkey. In the view of the Turkish Government, the period to be specified in paragraph 2 should be ten years.

United States. The United States Government observes that paragraph 2 embodies a new concept, and that it would permit parties to a multilateral treaty to terminate it by agreement, without regard to any of the provisions of the treaty concerning termination, if after the expiry of the given period of years they found it desirable to do so. It feels that there may be great difficulty in deciding upon the period of years which would be practicable with respect to all treaties. It accordingly suggests that the final phrase might be revised to read as follows: " however, after the expiry of...years, or such other period as the treaty may provide, the agreement only of the States parties to the treaty shall be necessary".

Cypriot delegation. The Cypriot delegation notes that, according to paragraph 2 of the commentary, parties might express their consent to termination through the diplomatic channel.[118]

Indian delegation. The Indian delegation thinks that paragraph 2 confers an unnecessary privilege on States which have not become parties, and that the article should accordingly be amended so as to make the consent of the parties the only prerequisite for the termination of a multilateral treaty.[119]

Salvadorian delegation. The Salvadorian delegation considers that in the Spanish text the opening words "*Tratado que termina*" should be replaced by "*Tratado que se extingue*".[120]

Somali delegation. In the view of the Somali delegation, paragraph 2 should be deleted. It considers that, even if a particular multilateral treaty had been terminated, it would be possible for any interested States to re-establish the treaty either in its original or in a modified form.[121]

United Kingdom delegation. The United Kingdom delegation considers that paragraph 2 is likely to complicate the process of terminating a treaty, particularly in cases where there have been changes affecting the international personality of the original contracting parties and intricate problems of State succession may be involved.[122]

Observations and proposals of the Special Rapporteur

1. One Government expresses doubt as to whether paragraph 1 is really necessary. The Special Rapporteur, while inclined to agree with respect to the two sub-paragraphs, considers that the rule in the opening sentence—requiring the agreement of all the parties for the termination of a treaty—contains a point of substance which should be retained.

2. The Government of Israel, pointing to the reference to a new "treaty" in paragraph 1 of the commentary,

[118] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 783rd meeting, para. 20.

[119] *Ibid.*, 783rd meeting, para. 5.

[120] *Ibid.*, 782nd meeting, para. 5.

[121] *Ibid.*, 786th meeting, para. 1.

[122] *Ibid.*, 786th meeting, para. 7.

in effect queries whether the language of paragraph 1 is satisfactory on the question of the form of the agreement. It suggests that the existing text is acceptable only if it admits the possibility of termination by the *tacit* agreement of all the parties. The difficulty arises partly from the terms of sub-paragraphs (*a*) and (*b*) and partly from paragraphs (1) and (2) of the commentary. Sub-paragraphs (*a*) and (*b*) provide that the agreement to terminate may be embodied either (*a*) in an instrument or (*b*) in communications made by the parties to the depositary or to each other. Their primary purpose is to discountenance the thesis favoured by some jurists that an agreement terminating a prior treaty must take the same form as the treaty, or at least be in a treaty form of "equal weight". The Commission considered that it is for the parties in each case to select the appropriate instrument or procedure for bringing a treaty to an end and to take account of their own constitutional requirements. However, the terms of sub-paragraphs (*a*) and (*b*) and the references in the commentary to a new "treaty" and to a formal instrument or "treaty in simplified form" may, perhaps, give the impression that the Commission intended to exclude the possibility both of terminating a treaty by oral agreement and of doing so on the basis merely of tacit consent. The Special Rapporteur does not understand the Commission to have had this intention. If an agreement to terminate a treaty would normally be reduced to writing, it seems quite conceivable that certain kinds of bilateral treaty might be brought to an end by an oral agreement between Ministers or between a Foreign Minister and an ambassador acting on instructions. Similarly, where a large measure of agreement had been expressed for the termination of a multilateral treaty, it would seem perfectly legitimate for the depositary to notify States which had not evinced any interest in the matter that, in the absence of any reply by a given date, their agreement to the termination of the treaty would be assumed. The Special Rapporteur suggests that the best solution is to delete the two sub-paragraphs and to limit paragraph 1 to the first sentence, at the same time amending the commentary to take account of the above-mentioned considerations.

3. The proposal of the same Government that the words "in whole or in part" should be inserted in paragraph 1 is considered to be well-founded. The case being one of termination by agreement, application of the rule in article 46 regarding the separability of treaty provisions would hardly be appropriate. Accordingly, the possibility of partial termination should, it is thought, be covered in the present article by the insertion of the words "in whole or in part".

4. Certain Governments are opposed to the inclusion of paragraph 2, either on the ground that it constitutes an unnecessary complication or on the ground that it is too favourable to States which have not yet become parties. The majority, however, appear to endorse the general principle embodied in the paragraph. The consideration which led the Commission to lay down this principle was that many multilateral conventions, especially those of a technical character, require only two or a very small number of ratifications or acceptances to bring them into force; and that it hardly seemed right that the first two or three States to deposit instruments should have it in their power to terminate the treaty without regard to the wishes of the other States which drew up the treaty.[123] This consideration appears in itself to be valid, and it is not felt that there is great force in the United Kingdom's objection that the paragraph may lead to complication "where there have been changes affecting the international personality of the original contracting parties and intricate problems of State succession may be involved". This complication may equally arise in the case of "parties" whose consent is certainly necessary under paragraph 1, as well as in every article the operation of which is dependent on the consent or the acts of "parties", for example articles 65 and 66 dealing with the amendment of treaties.[124] On the other hand, the consideration which led the Commission to include paragraph 2 in the present article is one which is no less valid in the sphere of the amendment of treaties, and the Commission did not, in article 65, provide that the consent of two-thirds of the States which adopted the text should be necessary for the amendment of a multilateral treaty. It is therefore desirable that in re-examining the present article the Commission should at the same time have in mind the similar problem in article 65 with respect to this point. As to the Israel Government's suggestion that the paragraph should be revised so as to read "two-thirds of the States which drew up the treaty, including two-thirds of the parties", this appears to be open to the objection that multilateral treaties are often open at an early date to accession by States which did not take part in drawing them up. In other words, it is not possible to speak of all the "parties" to a multilateral treaty as necessarily included amongst the States which adopted the text.

5. The opinions of Governments regarding the length of the period during which States that drew up the treaty should continue to have a voice on the question of its termination show wide variations: Australia, twenty-five years; Canada, the Netherlands and Turkey, ten years; Finland, Poland and Portugal, periods of the order of three, four or five years. Finland specifies a period of from three to five years after the entry into force of the treaty; all the other Governments appear to contemplate the periods as running from the date of the adoption of the text. The United States and Netherlands Governments propose that a single period of years may not be suitable for all treaties and suggest that, in order to make the provision more flexible, it should be amended to

[123] *Yearbook of the International Law Commission, 1963*, vol. II, p. 203, article 40, para. (4).

[124] This complication does not appear to have constituted any insuperable obstacle to the success of the efforts of the United Nations to amend general multilateral treaties concluded under the auspices of the League of Nations and to open them to the new States. For an illuminating account of the practice of the Secretary-General in this regard, see the Secretariat's memorandum on " Succession of States in relation to General Multilateral Treaties of which the Secretary-General is the Depositary" (*Yearbook of the International Law Commission, 1962*, vol. II, p. 106.). Cf. also chapter III of the report of the Commission for its fifteenth session, paragraphs 36-38 (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 220-221).

read "after the expiry of...years or such other period as the treaty may stipulate". This proposal is considered acceptable, since a provision in the treaty actually specifying a period for this purpose ought obviously to prevail. The period to be specified in the present article as the general rule should, it is thought, be such as, without being too long, will give States which participated in drawing up the treaty a full opportunity to have become parties before its expiration. The constitutional processes for obtaining the necessary parliamentary and other consents to ratification may in some countries be somewhat drawn out. Having regard to this consideration and to the different periods proposed in the comments of Governments, the Special Rapporteur suggests that six years may be a suitable period to specify for the general rule.

6. Paragraph 3, as at present drafted, applies the provisions of paragraphs 1 and 2 regarding termination of a treaty also to the suspension of the operation of a treaty. The Special Rapporteur, however, doubts whether this is appropriate in the case of paragraph 2; for it does not seem necessary to obtain the consent of anyone other than the parties to the suspension of the operation of a treaty. He therefore suggests that (1) paragraph 3 should be deleted; and (2) paragraph 1 should be widened so as to apply also to suspension of the operation of a treaty. Paragraph 2 would then apply only to cases of termination.

7. In the light of the foregoing observations and on the assumption that paragraph 2 is to be retained, the Special Rapporteur suggests that the article might be revised so as to read as follows:

> 1. A treaty may at any time be terminated or its operation suspended in whole or in part, by agreement of all the parties, subject to paragraph 2.
>
> 2. Until the expiry of six years from the adoption of its text, or such other period as may be specified in the treaty, the termination of a multilateral treaty shall also require the consent of not less than two-thirds of all the States which adopted the text.

Article 41.—Termination implied from entering into a subsequent treaty

Comments of Governments

Israel. In the light of paragraph 15 of the Commission's report and paragraph 2 of the commentary to the present article, the Government of Israel believes that the article contains an inherent contradiction. It observes that, if the later treaty was intended to terminate the earlier treaty, then the termination of the later treaty would not bring about the revival of the earlier treaty; but that, if the later treaty was intended to suspend the operation of the earlier treaty, the termination of the later treaty will, following article 54, bring about the revival of the earlier treaty. In either event, the whole matter depends upon the interpretation of the intention of the parties to the later treaty. The Government of Israel suggests that, if the article is retained, the element of "suspension" should precede that of "termination"; and that the word "only" should then be omitted. In its view, the reconstruction of the article on the above lines might facilitate the placing of this provision in the draft articles.

Portugal. The Portuguese Government observes that, on a strict construction, the principle laid down in paragraph 2 is already contained in paragraph 1. Even so, it considers paragraph 2 to be useful as it underlines the importance of ascertaining the will of the States concerned.

Sweden. The Swedish Government considers that the article lays down a rule of construction that may be useful.

United States. In the view of the United States Government the article is sound in principle and, although its concept is self-evident, will be helpful in resolving questions in this area of treaties. [In the Sixth Committee the United States delegation had suggested that the article could be omitted from a simplified convention.][125]

Indian delegation. The Indian delegation feels that sub-paragraphs (*a*) and (*b*) may to some extent be redundant and suggests that their wording should be reconsidered.[126]

Salvadorian delegation. The Salvadorian delegation suggests that paragraph 2 might more appropriately be dealt with in a separate article.[127]

Observations and proposals of the Special Rapporteur

1. The "inherent contradiction" seen by the Israel Government in this article does not seem to the Special Rapporteur to be evident in its text; nor does it seem to him to be made evident in the Government's comments. Again, while the rules stated in the article are certainly dependent upon the interpretation of the intention of the parties to the later treaty, rules dependent on intention are to be found in quite a number of the draft articles and are, indeed, inevitable in the law of treaties. The real problem in the present article is its relation to, and possible overlap with, article 63 governing the application of treaties having incompatible provisions.

2. When it drafted the article at its fifteenth session, the Commission recognized that there is necessarily a close link between implied termination under this article and the application of treaties concluded between the same parties which have incompatible provisions. The Commission for this reason decided to adopt the present article dealing with the "implied termination" aspect of incompatible treaties provisionally, to defer the general question of the application of treaties having incompatible provisions until its sixteenth session, and to reconsider the desirability and the placing of the present article at that session. At its sixteenth session the Commission adopted in article 63 general rules regarding the application of treaties having incompatible provisions, paragraph 3 of which contains a cross-reference to the present article. This paragraph draws a distinction between cases where the parties to the later treaty intend to terminate the prior treaty, which it leaves to be governed by article 41, and cases where they do not so intend, which raise a question of the priority of the obligations of the two treaties and are dealt with in article 63. In

[125] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 784th meeting, para. 33.

[126] *Ibid.*, 783rd meeting, para. 6.

[127] *Ibid.*, 782nd meeting, para. 5.

paragraph (12) of its commentary to article 63,[128] the Commission explained the outcome of its re-examination of the question of implied termination as follows:

> "Paragraph 3 deals with cases where all the parties to a treaty, whether with or without additional States, enter into a later treaty which is incompatible with the earlier one, and from a different angle it covers the same ground as article 41 adopted at the previous session. The provisional decision of the Commission in 1963 to characterize these cases as instances of implied termination of an earlier treaty was confirmed by the majority of members who took part in the discussion at the present session. 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 gives these cases a certain connexion with the present article. It therefore seems desirable to mention these cases in paragraph 3, with a cross-reference to article 41. In examining the question at the present session the Commission felt that a minor modification to article 41 may be desirable so as to transfer cases of a partial conflict between two treaties from article 41 to the present article. As adopted in 1963, the opening phrase of paragraph 1 of article 41 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. Without deciding at this stage on the final form of article 41, opinion in the Commission inclined to accept the view that the appropriate course would be to eliminate the words 'in whole or in part' from article 41 and to assign to article 63 cases of partial conflict in which there does not appear to be any intention to terminate the earlier treaty. 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 earlier treaty, and that in other cases the earlier treaty should apply to the extent that its provisions are not incompatible with those of the later treaty."

Accordingly, while the relation between the matters dealt with in articles 41 and 63 will, no doubt, be reviewed by the Commission, the retention of article 41 in more or less its present form will be assumed by the Special Rapporteur for the purposes of the present report.

3. The Commission, as appears from the above-quoted passage of its commentary to article 63, was inclined at its 1964 session to take the view that the words "in whole or in part" should be deleted from the opening phrase of the present article. In referring to the point, the Commission had in mind the need to co-ordinate as closely as possible the provisions of articles 41 and 63 but preferred to postpone this question until it came to revise article 41.

4. When in this type of case the parties to the later treaty do not intend the earlier treaty to be wholly superseded, whether temporarily or definitively, by the later treaty, there will be two treaties in force and in operation which have incompatible provisions. Paragraphs 3 and 4(*a*) of article 63 then state that the earlier treaty shall apply only to the extent that its provisions are not incompatible with those of the later treaty. The practical effect of that paragraph, no doubt, is to negative and in that way to suspend the operation of the incompatible provisions of the earlier treaty so long as the later treaty is in force. But article 63 deals only with the priority of inconsistent obligations under treaties both of which are in principle to be considered as in force and in operation. That article does not apply to cases where it is clear that the parties intended the earlier treaty to be abrogated or its operation to be wholly suspended by the conclusion of the later treaty; for then there are not two sets of incompatible treaty provisions in force and in operation but only one, namely, those of the later treaty. In other words, article 63 comes into play only after it has been determined under the present article that the parties did not intend to abrogate, or wholly to suspend the operation of, the earlier treaty. The present article, for its part, is not concerned with the priority of treaty provisions which are incompatible. It deals with cases where it clearly appears that the intention ofthe parties in concluding the later treaty was either definitively or temporarily to supersede the régime of the earlier treaty by that of the later one. In these cases the present article terminates or suspends the operation of the earlier treaty altogether, so that it is either no longer in force or its operation is considered as wholly suspended.

5. The dividing line between cases of termination falling under paragraph 1 of the present article and cases falling under article 63 is clear enough. Under the present article, the earlier treaty is abrogated; it is not simply a question of priority and, even if the later treaty were to be terminated or suspended, the earlier one, having been abrogated, would still be inapplicable. Under article 63, it is simply a question of priority and, if the later treaty were to be terminated or suspended, the earlier treaty would recover its force and operation. The dividing line, on the other hand, between cases of "suspension" falling under paragraph 2 of the present article and cases of priority of incompatible provisions falling under paragraphs 3 and 4(*a*) of article 63 is not perhaps so clear; for article 63, by making the provisions of the later treaty prevail, in effect suspends the operation of the incompatible provisions of the earlier treaty. Even in these cases, however, the rule in the present article is broader in scope than that in article 63. Under the present article, even although only some provisions of the earlier treaty are incompatible with those of the later one, the operation of the whole treaty will be suspended if it appears from the later treaty, its preparatory work or the circumstances of its conclusion that such was in fact the intention of the parties. Accordingly, although the two articles may appear to some extent to overlap in these cases, they do not coincide.

6. Quite apart from the question whether the words "in whole or in part" should be retained, some revision

[128] *Yearbook of the International Law Commission, 1964*, vol. II, p. 188.

of the present article appears to the Special Rapporteur to be desirable in order to improve the text and to co-ordinate the article more fully with article 63.

In the opening phrase of paragraph 1, he suggests the deletion of: (1) the word "impliedly", since the idea of "implication" is already contained in the words "shall be considered as"; and (2) the words "either with or without the addition of other States", since their omission would not seem to effect any change in the rule stated in the paragraph.

In paragraph 1(*a*), it seems desirable to amplify the expression "the parties in question have indicated their intention" by specifying how this intention is to be ascertained, and at the same time to bring the language into line with that used in other articles where the law is stated in terms of the intention of the parties as ascertained from the treaty, its preparatory work or the circumstances of its conclusion. It also seems desirable to insert the word "exclusively" after "governed" in this sub-paragraph, in order to convey more explicitly the idea of the supersession of the earlier treaty by the later one. Paragraph 2, as at present drafted, merely negatives the termination of the earlier treaty when the intention of the parties was only to suspend its operation, and leaves it to be implied that in this event the earlier treaty will be only suspended in its operation. The Special Rapporteur suggests that it may be preferable to reformulate the rule in positive terms.

7. As to the words "in whole or in part" in paragraph 1, it is certainly possible to conceive of cases where a later treaty is concluded with the object of revising and superseding only one part of an earlier treaty, e.g., where the earlier treaty is one which deals with a number of different matters in separate "sections" or "chapters". The question is whether such cases should be left to be covered by paragraphs 3 and 4(*a*) of article 63, or whether partial termination and partial suspension of the operation of a treaty should receive specific mention in the present article. An argument against providing for these cases here is that it may tend to increase the overlap between "suspension of operation" under the present article and the non-application of incompatible provisions of an earlier treaty under article 63. This argument is not, perhaps, very weighty, since there is a certain difference between a definite intention to suspend the operation of the earlier treaty and an intention to give priority to the provisions of the later treaty; and in any event the two articles give the same practical results. Moreover, if the Commission decides to endorse the Government of Israel's proposal that article 40 should cover termination or suspension of operation by express agreement "in whole or in part", it would seem logical to do the same in cases of implied agreement. On the other hand, as pointed out by the Commission in the passage from its commentary to article 63 cited in paragraph 2 above, the present text of article 41 refers to partial termination only in the opening phrase of paragraph 1, and does not carry the distinction between total and partial termination or suspension through the drafting of the rest of the article. It would not, therefore, suffice to leave the words "in whole or in part" in the opening phrase of the paragraph; but to attempt to insert references to partial termination or suspension in sub-paragraphs 1(*a*) and 1(*b*) and in paragraph 2 would result in a decidedly complicated and clumsy text. Accordingly, if cases of partial termination and suspension are to be covered in the present article, the Special Rapporteur suggests that this should be done separately in a new paragraph.

8. In the light of the foregoing observations the Special Rapporteur considers that article 41 should be reformulated along the following lines:

Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty

1. A treaty shall be considered as terminated if all the parties to it enter into a further treaty relating to the same subject-matter and:

(*a*) It appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended that the matter should thenceforth be governed exclusively 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 be considered as only suspended in operation if it appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that such was the intention of the parties when concluding the later treaty.

3. Under the conditions set out in paragraphs 1 and 2, if the provisions of the later treaty relate only to a part of the earlier treaty and the two treaties are otherwise capable of being applied at the same time, that part alone shall be considered as terminated or suspended in operation.

9. At the same time, the Special Rapporteur suggests that, in order to achieve a full co-ordination between article 63 and the present article, it may be desirable in due course to revise paragraph 3 of article 63 so as to read as follows:

When all the parties to a treaty enter into a later treaty relating to the same subject-matter but the earlier treaty is not terminated or suspended in operation under article 41 of these articles..., etc.

Article 42.—Termination or suspension of the operation of a treaty as a consequence of its breach

Comments of Governments

Australia. Paragraph 2(*b*) (*ii*) appears to the Australian Government to give a very large power which might, in its view, be out of proportion to the breach. It suggests that it might be better to use a longer form of words which would circumscribe the right more precisely. On the other hand, it would feel that the paragraph has sufficient safeguards if "common consent" is to be understood as meaning "unanimous consent"; and, if that is the intention, it would prefer the clearer word "unanimous" to be used.

Canada. The Canadian Government observes that the article does not provide, where there is a material breach, that another party shall have the right unilaterally (and not merely by common and perhaps unanimous agreement) to withdraw from the treaty. It interprets the commentary as indicating that the Commission considered

a right of suspension to afford adequate protection to a State directly affected by such a breach. It does not, however, feel that the recourse allowed to the individual State under paragraph 2 is sufficient in the case of a treaty where the parties agree to refrain from some action; for the individual State could not suspend its obligations vis-à-vis the violator (by doing what it had agreed not to do) without violating its own obligations to the other parties. It suggests that the article should be amended so as to allow an individual party to suspend the operation of the treaty *erga omnes* without first obtaining the common agreement of the other parties. In support of this suggestion it recalls that the texts proposed by Sir Gerald Fitzmaurice,[129] the present Special Rapporteur,[130] and by Mr. Castrén[131] envisaged a unilateral right of withdrawal in these cases.

Israel. The Government of Israel observes that paragraph (8) of the commentary seems to suggest that the definition of breach in paragraph 3 is not exclusive.[132]

Netherlands. In paragraph 2(*a*) the Netherlands Government does not think that the Commission's intention, as expressed in paragraph (7) of the commentary, is entirely realized in the text of the article. Paragraph 2(*a*) attributes the right to invoke the breach to "any other party", whereas the Netherlands Government interprets the Commission's intention in paragraph (7) of the commentary as having been to restrict that right to an injured party. It proposes that paragraph 2(*a*) should be revised in the manner suggested by the United States delegation at the 784th meeting of the Sixth Committee: "Any other party, whose rights or obligations are adversely affected by the breach..." etc. Paragraph 2(*b*) the Netherlands Government considers should be left as it is in the Commission's text. It dissents from the suggestion of the United States delegation at the same meeting of the Sixth Committee that paragraph 2(*b*) should be similarly revised to read "The other parties, whose rights or obligations are adversely affected by the breach, either..." etc. If this revision were made in the text of the paragraph, then paragraph 2(*b*) (*i*) would, in its view, have the same effect as paragraph 2(*a*), while paragraph 2(*b*) (*ii*) would allow a treaty to be terminated by fewer than all the other parties, which it considers undesirable. With regard to paragraph 4, the Netherlands Government notes that its observations on article 46 apply to this paragraph.

Portugal. With regard to paragraph 2, dealing with multilateral treaties, the Portuguese Government observes that a certain current of opinion among jurists makes a distinction, as far as concerns the parties affected by the breach, between contractual and law-making treaties. These jurists, while unhesitatingly admitting the right of an injured party to free itself from the treaty in the case of contractual treaties, hold that normative obligations continue in force despite the breach and despite the fact that the injured parties have also for their part temporarily given up complying with them. The Portuguese Government notes that paragraph 2 does not go beyond permitting the injured parties the alternatives of suspension or termination without distinguishing between the categories to which the treaty in question may belong; and it appears to advocate that this distinction should be introduced into the paragraph. It further maintains that the injured parties should not be left with a free choice between suspension and termination, but should be allowed to terminate the treaty only when the violation is of a certain character. This restriction it believes to be desirable in order to ensure greater stability of treaties and better discipline in international relations. It recalls that in its commentary the Commission mentioned the case where the breach has frustrated or undermined the operation of the treaty as between all parties; and it expresses the view that this concept should be embodied in an article or at least receive mention in paragraph 2(*b*) (*ii*).

Sweden. The Swedish Government endorses the limitation of the article to cases of "material breach" and considers the definition of that concept as acceptable. It questions, however, whether the procedure prescribed in article 51 for alleging a ground of termination, withdrawal or suspension offers an adequate and sufficiently rapid response to the urgent problem of breach of a treaty. With regard to paragraph 2, it notes that the draft limits an injured party to a multilateral treaty to a right to suspend or to terminate[133] the treaty in relation to the party which has violated it, or to seek the agreement of the other parties in order to free itself wholly from the treaty. In its view, however, there may be circumstances in which the injured party ought to be allowed to suspend or terminate the treaty even unilaterally, e.g. if the participation of the State committing the breach was an essential condition for the adherence of the other State to the treaty.

United Kingdom. The United Kingdom Government expresses concern lest the article may be open to abuse in that a State may invoke an alleged breach in order simply to provide a ground for terminating a treaty. Whilst recognizing that article 51 affords certain safeguards, it considers that a State accused of a breach should be able to call upon the other State to establish objectively that a breach has, in fact, occurred before that other State may invoke the breach in the manner proposed in the article. In its view, provision for independent adjudication is required.

United States. The United States Government endorses the principle stated in paragraph 1 and thinks that it should be crystallized as a rule of conventional law. With regard to paragraph 2, it feels that the Commission's text to a certain extent ignores the differing varieties of multilateral treaties. The paragraph may be appropriate enough

[129] *Yearbook of the International Law Commission, 1957*, vol. II, p. 31, draft article 19, para. 1 (*iii*).

[130] *Yearbook of the International Law Commission, 1963*, vol. II, p. 77, commentary to draft article 20, para. 17.

[131] *Ibid.*, vol. I, p. 120.

[132] This observation, which presumably refers to the phrase "*main* definition" in the final sentence of paragraph (8) of the commentary, does not appear to be well-founded. Paragraph 3 of the article contains two sub-paragraphs. The commentary, having dealt with sub-paragraph (*a*), refers to the "*main* definition" in sub-paragraph (*b*). This cannot properly be read as implying that the two sub-paragraphs together do not comprehend the whole definition.

[133] Paragraph 2, as drafted, does not authorize unilateral termination of the treaty by one injured party.

in the case of law-making treaties on such matters as disarmament, where observance by all parties is essential to the treaty's effectiveness. But, in its view, it is questionable whether a multilateral treaty such as the Vienna Convention on Consular Relations—which is essentially bilateral in its application—should be subjected to the rules in paragraph 2 as now drafted. In such a case (and it mentions a convention for the exchange of publications as another example) it considers that, if Party A refuses to accord to Party B the rights set forth in the Convention, this should not entitle Parties X, Y and Z, in addition to the wronged Party B, to treat the Convention as suspended or no longer in force between themselves and Party A. The United States Government maintains that termination or suspension in the case of a multilateral treaty should follow the rule applicable to bilateral treaties; and that an injured party should not be required to continue to accord rights illegally denied to it by the offending party. Its specific proposals for the revision of paragraph 2 would have the effect of making it read:

"A material breach of a multilateral treaty by one of the parties entitles:

(*a*) Any other party, whose rights or obligations are adversely affected by the breach, to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*b*) The other parties, whose rights or obligations are adversely affected by the breach, either:

(*i*) To apply to the defaulting State the suspension provided for in sub-paragraph (*a*) above; or

(*ii*) To terminate the treaty or to suspend its operation in whole or in part."

Ghanaian delegation. The Ghanaian delegation considers that in paragraph 2 there is need for a provision which would enable an injured party to terminate the treaty unilaterally, for example after a period of notice during which the treaty would merely be suspended. Otherwise an injured party, if unable to persuade all the other parties to terminate the treaty, would be unable to do more than suspend it and would have theoretically to remain a party.[134]

Guatemalan delegation. The Guatemalan delegation approves, in principle, the content of the article.[135]

Panamanian delegation. The Panamanian delegation considers that the article places the defaulting State in a more favoured position than that which it enjoyed in traditional doctrine. In its view, the majority of jurists recognize that the breach of a treaty by one party gave the other party the right to abrogate it or suspend its operation, and no limitation ought to be placed on that right.[136]

Uruguayan delegation. In its general comments, the Uruguayan delegation expresses approval of article 42 as strengthening the principle that treaties should be respected and rejecting the idea that a breach was sufficient to render a treaty null and void except under certain clearly defined conditions.[137]

Observations and proposals of the Special Rapporteur

1. Apart from a point raised by the Netherlands Government in relation to paragraph 4, all the points made by Governments are directed at the provisions of paragraph 2 regarding the rights of the parties to a multilateral treaty in case of a material breach. One Government—that of Portugal—considers that this paragraph should make a distinction between contractual and law-making treaties. This distinction, as the Special Rapporteur pointed out at the fifteenth session,[138] is one which, however attractive in theory, it is difficult to draw in practice. Treaties not infrequently contain both normative and contractual provisions; nor is it always possible to draw a clear line between normative and contractual treaties. Moreover, the fact that normative treaties are not infrequently made subject to a unilateral right of denunciation irrespective of any antecedent breach by another party renders it difficult to differentiate between normative and contractual treaties with respect to the rights of the parties in case of breach.

2. The Netherlands and United States Governments both query the phrase "Any other party" in paragraph 2(*a*) and propose that it should read "Any other party, whose rights or obligations are adversely affected by the breach", etc. The Netherlands Government observes that, in paragraph (7) of its commentary, the Commission itself appears to have envisaged paragraph 2(*a*) as concerned with the right of an injured party rather than with the right of all the parties. The United States Government goes further than the Netherlands Government and proposes that paragraph 2(*b*), as well as paragraph 2(*a*), should be revised so as to relate only to "parties, whose rights or obligations are adversely affected by the breach". It takes the position that some multilateral treaties, e.g., the Vienna Convention on Consular Relations or a convention for the exchange of publications, are essentially bilateral in their application; and that in the case of these treaties it would be inadmissible that a breach of Party B's rights by Party A should ever entitle Parties X, Y and Z also to regard the treaty as suspended or no longer in force between themselves and Party A. In general, it thinks that the rule governing termination or suspension in the case of multilateral treaties should follow the rule applicable to bilateral treaties; and in the new draft which it proposes, it omits any reference to the need for the "common agreement" of the parties in paragraph 2(*b*). The Netherlands Government, on the other hand, expressly dissents from the United States Government's proposal respecting paragraph 2(*b*) and advocates the maintenance of the existing text of this paragraph.

3. The Netherlands Government is certainly correct in thinking that paragraph 2(*a*) is intended to refer primarily to the rights of parties whose own interests are affected by the breach, while paragraph 2(*b*) refers generally to

[134] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 791st meeting, para. 36.

[135] *Ibid.*, 785th meeting, para. 4.

[136] *Ibid.*, 790th meeting, para. 31.

[137] *Ibid.*, 792nd meeting, para. 22.

[138] *Yearbook of the International Law Commission, 1963*, vol. I, pp. 130-1.

the other parties, whether or not their own interests are affected by the breach. The Commission, it is believed, assumed that, since paragraph 2(*a*) authorizes suspension of the operation of the treaty only bilaterally as against the offending State, only a party whose own interests are affected by the breach would be likely to wish to exercise the right provided for in this paragraph. However, if it is really thought—as the Netherlands and United States Governments appear to think—that the right provided for in paragraph 2(*a*) may be abused by a party not itself affected but anxious to find a pretext for suspending the operation of the treaty vis-à-vis the particular offending State, little objection is seen to limiting paragraph 2(*a*) specifically to parties whose interests are affected by the breach. At the same time, it seems necessary to bear in mind that the interests of one party may be seriously affected by the violation of the rights of another party; and also that every party to a multilateral treaty—even a treaty which is essentially bilateral in its application—has a certain interest in the observance of the provisions of the treaty by every other party. The basic hypothesis of the present article is, after all, that the offending State has committed a material breach of the provisions of the treaty, and it would seem undesirable to go too far in discouraging the other parties from showing solidarity with the party directly injured by the breach. In the light of these considerations, the Special Rapporteur suggests that, instead of the phrase "any other party, whose rights or obligations are adversely affected by the breach", proposed by the United States and Netherlands Governments, it may be preferable in paragraph 2(*a*) to say "any other party whose interests are affected by the breach".

4. The Special Rapporteur shares the doubts expressed by the Netherlands Government regarding the United States proposals for the revision of paragraph 2(*b*), which would limit the application of this paragraph also to States whose rights or obligations are adversely affected and would at the same time remove the need for the agreement of the other States for the termination or suspension of the treaty. Presumably this proposal envisages a right of unilateral withdrawal from, rather than termination of, the treaty because parties whose rights and obligations are affected by the breach could hardly terminate the treaty for all the other parties without the consent of the latter. Even so, the proposal seems to be open to objection from two points of view. First, it appears to disregard the right which every party to a multilateral treaty has to the observance of the treaty by every other party. Secondly, it appears to authorize any party which is the object of a material breach to terminate or suspend its obligations vis-à-vis all the other parties without their agreement and irrespective of whether the performance of its rights and obligations vis-à-vis the other parties is in any way affected by the defaulting party's breach of the treaty. At the fifteenth session members of the Commission attached particular importance to ensuring that the breach of a multilateral treaty by one party should not jeopardize the security of the rights and obligations of the other parties as between themselves, which would be the case if any individual party affected by the breach could unilaterally terminate or withdraw from the treaty. It was for this reason that the Commission proposed that an individual party's right to react to a breach of a multilateral treaty unilaterally should be limited to the suspension of the operation of the treaty as between itself and the defaulting party; and that termination or suspension of the operation of the treaty vis-à-vis all the parties should require the agreement of the other parties.

5. The great variety of the purposes which multilateral treaties are designed to effect admittedly renders more difficult the formulation of general provisions which will at the same time safeguard the security of the treaty as between the parties generally and afford adequate protection to an individual party when a material breach of the treaty has occurred. The Canadian Government brings up the case of a treaty which requires the parties to refrain from some action. It says that in such a case an individual party cannot effectively suspend the operation of the treaty vis-à-vis the violator because, if it does what it has agreed under the treaty not to do, it will violate its own obligations to the other parties. It suggests that the individual party should in these cases be entitled to suspend the operation of the treaty *erga omnes* without the need first to obtain the common agreement of the other parties. The validity of the suggested exception to the rules proposed by the Commission seems open to question. When a multilateral treaty—and especially a general multilateral treaty—forbids certain action, it is frequently because that action is considered to be contrary to the general interests of the international community. In most cases the fact that one State has violated its obligations under the treaty—perhaps only with reference to one particular party—does not make it any the less desirable that the treaty should remain in full force as between all the other parties. It is only in special types of treaty, e.g., disarmament treaties, where a breach by one party tends to undermine the whole régime of the treaty, that the interests of an individual party may not be adequately protected by the rules proposed by the Commission. In short, the exception suggested by the Canadian Government appears to be too widely stated. The Swedish Government may have such special types of treaty in mind when it suggests that the injured party ought to be allowed to suspend or terminate the treaty even unilaterally, e.g., if the participation of the State committing the breach was an essential condition for the adherence of the other State to the treaty.

6. The Special Rapporteur in his second report [139] sought to allow for these special types of treaty by a proviso which would have permitted any party to withdraw from the treaty if the breach was of such a kind as to frustrate the object and purpose of the treaty as between the parties generally. The Commission may wish to re-examine this point in the light of the comments of Governments, and the Special Rapporteur suggests, as a basis for discussion, the possible inclusion of a new paragraph—here numbered paragraph 2(*bis*)—on the following lines:

> 2(*bis*). Notwithstanding paragraph 2, if the provision to which the breach relates is of such a character that its violation by one

[139] *Ibid.*, vol. II, p. 73, article 20, para. 4(*b*) and p. 77, para. 17

party frustrates the object and purpose of the treaty generally as between all the parties, any party may suspend the operation of the treaty with respect to itself or withdraw from the treaty.

7. There is perhaps a slight anomaly in the text of paragraph 2(*b*), as at present drafted, in that it authorizes the other parties by agreement to terminate the operation of the treaty altogether in the relations between all the parties but not to take the more limited step of terminating the participation in the treaty only of the defaulting State, i.e., of insisting upon its withdrawal from the treaty. The present text contemplates the possibility of a joint suspension of the operation of the treaty vis-à-vis the defaulter but not its termination. Although suspension may serve the purpose in most cases, it seems illogical to exclude even the possibility of taking the more drastic step of expelling the defaulter from the treaty. It is therefore suggested that the text of paragraph 2(*b*) should be modified in order to cover this possibility.

8. If the Special Rapporteur's proposals for the revision of article 46 and for the transfer of the article to section 1 as a general rule are accepted by the Commission, paragraph 4 will become unnecessary, since the question of separability will have already been covered in article 46.

9. In the light of the foregoing observations the Special Rapporteur suggests that the article might be revised so as to read as follows:

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) Any other party whose interests are affected by the breach to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*b*) The other parties by unanimous agreement to suspend or terminate the operation of the treaty either

(*i*) only in the relations between themselves and the defaulting State or

(*ii*) as between all the parties.

2(*bis*). Notwithstanding paragraph 2, if the provision to which the breach relates is of such a character that its violation by one party frustrates the object and purpose of the treaty generally as between all the parties, any party may suspend the operation of the treaty with respect to itself or withdraw from the treaty.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(*a*) The unfounded repudiation of the treaty; or

(*b*) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

Article 43.—Supervening impossibility of performance

Comments of Governments

Israel. The Government of Israel proposes that paragraph 2 of the article should be redrafted to read:

"If it is not clear that the disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty will be total and permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty."

The Government of Israel further suggests that it should be made clear that the article does not apply in the case where the impossibility is the consequence of the breach of the treaty by the party invoking the impossibility.

Netherlands. The Netherlands Government, while having no comment on paragraphs 1 and 2, points out that its observations on article 46 apply to paragraph 3 of the present article.

Portugal. The Portuguese Government notes the provisions of the article with approval. It observes that the impossibility may be either physical or juridical. As an example of the latter, it mentions a case where performance of the treaty towards one party will, *per se*, be a breach of the treaty to the other party; for instance, when three States have entered into a treaty of alliance and two of them are now at war.

Sweden. The Swedish Government thinks that the article may be useful even although the contingency for which it provides may be rare.

United States. The United States Government raises the question of what is to be the position of the parties if certain of the provisions of the treaty have been executed while others remain executory. The instance given by it is where a cession of land is made by State A to State B on condition that State B will for ever maintain, and permit the use of, a navigable channel in a river, and then a natural event renders the river useless for navigation. It suggests that a new paragraph 4 might be added to the article on the following lines:

"The State invoking the impossibility of performance as a ground for terminating the treaty or suspending the operation of the treaty may be required to compensate the other State or States concerned for benefits received under executed provisions."

Pakistan delegation. The Pakistan delegation supports the suggestion of the United States Government regarding cases in which some provisions have been executed while others remain executory (this suggestion had been presented by the United States delegation at the 784th meeting of the Sixth Committee). It also considers that provision should be made for cases where one party has deliberately created circumstances which made, or seemed to make, it impossible for that party to execute the treaty. It feels that the party in question should be compelled to restore the *status quo* and to execute the treaty, and points out that in private law a party may not take advantage of his own wrong to evade his contractual obligations. The delegation accordingly proposes the addition to the article of a new paragraph 5, which would read as follows:

"A party to a treaty may not plead impossibility of performance if the impleaded impossibility is based upon a change of circumstances deliberately brought about by that party. Such a party should be under an obligation to restore the *status quo* and to carry out its obligations under the treaty." [140]

[140] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 791st meeting, para. 29.

United Kingdom delegation. The United Kingdom delegation observes that there is a close connexion between articles 43 and 44, and that they might well be considered together. [141]

Venezuelan delegation. The Venezuelan delegation suggests that allowance should be made in the text for possible cases in which one party obtains, through the execution of the treaty, permanent benefits not enjoyed by the other party or parties. [142]

Observations and proposals of the Special Rapporteur

1. At the fifteenth session the Commission examined the question whether "supervening impossibility of performance" and "fundamental change of circumstances" should be dealt with in the same article. It decided that, although related, these are juridically distinct grounds for regarding a treaty as having been terminated, and that they should be kept separate. Another consideration which, it is thought, may reinforce this decision, is that the elements required to establish supervening impossibility of performance tend to be more objective and clear-cut than those on the basis of which a "fundamental change of circumstances" may be alleged. In consequence, cases falling under the present article are less open to the difficulty of subjective appreciations than those falling under article 44.

2. In paragraph 2, dealing with cases of temporary impossibility, the Government of Israel suggests that the text should repeat the phrase "the total and permanent disappearance or destruction of the subject-matter of the obligations contained in the treaty", instead of referring merely to "the impossibility of performance". The Special Rapporteur appreciates that the aim of this suggestion is to give as much precision as possible to the formulation of the rule. Nevertheless, he doubts whether the suggested formulation is really an improvement, because there is a certain ambiguity in the expressions "disappearance or destruction of the subject-matter of the obligations". The disappearance or destruction of the original subject-matter may be permanent; but it may nevertheless be possible to replace the subject-matter. Moreover, juridically it is the resulting impossibility of performance rather than the destruction or disappearance of the subject-matter which is the ground for the termination or suspension of the operation of a treaty. Accordingly, quite apart from the "heaviness" which would result from the repetition of the phrase "the total and permanent disappearance...etc.", it seems more correct to distinguish between the permanent and the temporary character of the impossibility of performance. The Special Rapporteur in any event considers that it may be better to reverse the order of paragraphs 1 and 2 so as to deal with temporary impossibility of performance first. As the article is at present drafted, the rule in paragraph 2 appears as a qualification to the rule in paragraph 1, whereas it seems more logical simply to state two rules, one for cases of temporary and one for cases of permanent impossibility of performance. Accordingly, in the new text of the article which the Special Rapporteur proposes in paragraph 6 below, the order of the paragraphs is reversed, with some consequential changes in their drafting.

3. If the Special Rapporteur's suggestions for the revision of article 46 and for its transfer as a general rule to section 1 are accepted, paragraph 3 of the present article will become unnecessary.

4. The Governments of Israel and Pakistan advocate the insertion of a provision to the effect that supervening impossibility of performance may not be invoked by a party as a ground of termination where the impossibility is the result of a breach of the treaty by that party (Israel) or where that party has deliberately created circumstances which make, or seem to make, it impossible for it to execute the treaty (Pakistan). The general principle on which these proposals are based is indisputable; for it is a general principle of law, as the Permanent Court of International Justice itself recognized, [143] that a party cannot take advantage of its own wrong. The question is whether it is necessary to state the principle in the present article. A similar question arises in connexion with "fundamental change of circumstances" in article 44, and in his second report the Special Rapporteur included a provision negativing the right to invoke a fundamental change of circumstances when it has been "caused or substantially contributed to by the acts or omissions of the party" in question. The Commission, although recognizing the validity of the principle, did not include it as part of the article. Having regard, however, to the anxiety expressed by a number of Governments concerning the possible dangers to the security of treaties which they consider the doctrine of "fundamental change of circumstances" to involve, it may be found desirable to give expression in that article to the limiting rule that a party may not invoke a change produced by its own acts in conflict with its treaty obligations. In that event, it would seem desirable to give expression to the rule also in the present article. The Government of Israel's formulation, which precludes impossibility of performance from being invoked when it results from the party's own breach of the treaty, appears more correct than one based on the criterion of an impossibility deliberately brought about. Accordingly, the statement of the rule in the new text of the article proposed in paragraph 6 below reflects the concept of the Government of Israel, rather than that of the Government of Pakistan.

5. The United States, Pakistan and Venezuelan Governments further suggest that special provision should be made for cases where part of the treaty has been executed and benefits have been obtained by a party before the impossibility of performance of the rest of the treaty supervenes. The question of an equitable adjustment of the interests of the respective parties in the event of the frustration of a partially executed contract is a familiar concept in municipal law; and it is presumably this concept which has inspired the proposal of the above-named Governments. As it is conceivable that such a question should also arise in the event of the frustration

[141] *Ibid.*, 786th meeting, para. 8.

[142] *Ibid.*, 790th meeting, para. 20.

[143] *Chorzów Factory* case, *P.C.I.J.*, Series A, No. 9, (1927), p. 31.

of a treaty, the Special Rapporteur has included in his revised draft for the consideration of the Commission a paragraph on the lines suggested by the three Governments.

6. In the light of the foregoing observations, the Special Rapporteur proposes that the article should be revised so as to read as follows:

1. If the total disappearance or destruction of the subject-matter of the rights and obligations contained in a treaty renders its performance temporarily impossible, such impossibility of performance may be invoked as a ground for suspending the operation of the treaty.

2. If it is clear that such impossibility of performance will be permanent, it may be invoked as a ground for terminating or withdrawing from the treaty.

3. Paragraphs 1 and 2 shall not apply when the impossibility of performance is the result of a breach of the treaty by the party invoking such impossibility.

4. If part of the treaty has already been executed, a party which has received benefits under the executed provisions may be required to give equitable compensation to the other party or parties in respect of such benefits.

Article 44.—Fundamental change of circumstances

Comments of Governments

Australia. In paragraph 2(*b*), the Australian Government suggests the insertion of the word "continuing" before obligations, on the ground that if a treaty has been carried out completely on both sides so that no obligations under it remain, it would be contrary to common sense and to the need for stability and certainty to admit the possibility of such a treaty's being brought within article 44. In paragraph 3(*a*) the Australian Government considers that the exception should at least be extended to cover all other determinations of territorial sovereignty; for all determinations of territorial sovereignty must, in its view, be final.

Canada. The Canadian Government observes that paragraph 3(*a*) does not take into consideration the possible case of a treaty which establishes the boundary by reference to the thalweg of a river; and that in such a case it is conceivable that a fundamental change in circumstances might radically affect the boundary question. It suggests that the paragraph should be modified along the following lines:

"To a treaty fixing a boundary, except if such a boundary is based directly on a thalweg or other natural phenomenon the physical location of which subsequently significantly altered as the result of a natural occurrence; or...".

Denmark. While agreeing with the rule stated in the article, the Danish Government considers that this is a field in which contracting parties are likely to evaluate factual circumstances differently and draw different legal conclusions from the facts. In its view, if the principle of the binding force of treaties is not to be unduly weakened, it is essential to include an additional provision to the effect that a State should not be entitled to withdraw from a treaty under the present article unless it is ready to submit any controversy arising under the article to the decision of an arbitral or judicial tribunal. It proposes that, even if no general clause of judicial settlement is ultimately added to the draft articles, such a clause should be attached to this specific article.

Israel. The Government of Israel suggests that in paragraph 2 the expression "fact or situation" should be made to coincide with whatever expression is ultimately used in article 34, which at present reads "fact or state of facts". It further suggests that the article might also envisage the suspension of the operation of the treaty in whole or in part.

Jamaica. The Jamaican Government suggests that the exceptions under paragraph 3 might be extended to include "a fundamental change of circumstances which the parties could reasonably have foreseen and the occurrence of which they impliedly undertook not to regard as affecting the validity of the treaty". It also recalls that, in 1963 in the Sixth Committee, its delegation mentioned the desirability of making allowance in the present article for the fundamental change of circumstances which may sometimes arise out of State succession. In this connexion it observes that a fundamental change of circumstances does not inevitably follow from State succession, but that instances may occur when a newly independent State finds the terms of a treaty so manifestly unjust or inequitable that that State may be justified in not recognizing such a treaty as one which it should inherit. While recognizing that this situation may be dealt with by the Commission when it examines the topic of succession of States, the Jamaican Government considers that the present article should also make provision for such a situation.

Netherlands. In paragraph 3(*a*), the Netherlands Government agrees with the exclusion of boundary settlements from the *rebus sic stantibus* principle. At the same time, it observes that boundary treaties often cover other points as well, e.g. the Netherlands-German Treaty of 8 April 1960 settling the boundaries and matters connected with them, which also contains provisions on matters not concerned with determining territorial boundaries, such as the maintenance of the waterways forming part of the frontier. Moreover, that treaty forms an integral part of a complex of greatly divergent regulations, all of which are embodied in a single general treaty. Accordingly, it proposes that paragraph 3(*a*) should be modified so as to read as follows:

"To stipulations of a treaty which effect a transfer of territory or the settlement of a boundary."

The Netherlands Government also raises the question whether other "dispositive" treaties should be excluded from the *rebus sic stantibus* principle, i.e. treaties by which certain *de facto* conditions are created or modified, after which the treaties have served their purposes and only the conditions created by them remain. In its opinion, however, once these "executed" treaties have served their purpose, the true position is that the *rebus sic stantibus* principle can no longer be applied to them. It could only be applied to the condition created by the treaty, but that is outside the law of treaties. On the other hand, it does not feel that it would be realistic or in accord with the view of writers and the jurisprudence of international tribunals to regard the case of boundary

treaties as included in the category of dispositive treaties. It believes that treaties concerning the settlement of boundaries or transfer of territory should be regarded as constituting a separate category: treaties that regulate the territorial delimitation of sovereignty. All other treaties, including those that establish a so-called "easement" or "servitude" regulate in some way or another the exercise of that sovereignty.

Portugal. The Portuguese Government observes that in this article the difficulty lies not in the acceptance of the principle of a treaty's being affected by fundamental change of circumstances, but in the terms in which the principle has to be formulated. In a detailed review of the provisions of the article, it underlines the importance of investing the principle with the character of an exceptional principle. It observes that the definition of "fundamental change" in paragraph 2, although not indisputable, is adequate in the present state of the evolution of this branch of the law. In its view paragraph 2(*b*) is, strictly speaking, covered by paragraph 2(*a*), but is nevertheless useful by reason of its positive reference to the change in the nature of the obligations. At the same time, it notes that paragraph 2 permits some doubts to subsist as to the effect of substantial political changes within each contracting State, but feels that it is better to retain a somewhat broad formula such as "fundamental change of circumstances" which will permit the consideration of the application of the principle to each particular case. In general, it endorses the provisions of the article.

Sweden. The Swedish Government refers in general terms to article 44, together with articles 36, 37 and 45, as articles which, though they represent a bold tackling of difficult problems and are welcome from the point of view of theory and progressive development, must necessarily be considered in the context of present-day organization of international society. Having expressed concern at the possible effects on the stability of international relations of the invalidation of many existing treaties under these articles, it also emphasizes its concern regarding the method by which the determination of the invalidity of a treaty is envisaged in the draft articles. It does not make any specific point with regard to the provisions of the present article.

Turkey. After observing that the principle dealt with in this article is one of the most controversial in international law, the Turkish Government states that it does not concur with the view that, under certain limitations, a change of circumstances may be invoked as a ground for terminating or withdrawing from a treaty. In its view, substantial changes in conditions can entitle the parties only to request negotiations for the adaptation of the treaty to changed circumstances. Then, if the parties cannot agree, they can always seek arbitration or apply to international juridical organs. The Turkish Government therefore suggests that the article should be amended so as to provide that the parties should first enter into discussions among themselves and subsequently refer the matter to the International Court, should they fail to reach an agreement.

United Kingdom. While agreeing that in certain conditions a fundamental change in circumstances may be invoked as a ground for terminating or withdrawing from a treaty, the United Kingdom Government considers that the article should not apply to all treaties. In its view, the article should be confined to treaties which contain no provision for denunciation (or which contain a provision which would not permit denunciation within, for example, twenty years of the fundamental change). It also expresses doubt as to whether a subjective change of policy or a change of government can ever be regarded as a fundamental change of circumstances. The United Kingdom Government further considers that the security of treaties would be impaired if procedural steps additional to those proposed in article 51 were not required. It takes the view that in the present connexion a party alleging a fundamental change of circumstances is under an obligation, before it may invoke the change in any way, to propose negotiations to the other party and, if these are not successful, at least to offer arbitration of the issue.

United States. The concept of *rebus sic stantibus* embodied in the present article appears to the United States Government to have long been recognized to be of so controversial a character and so liable to the abuse of subjective interpretation that it has reservations about the incorporation of the concept in the draft articles, at any rate in its present form. In its view, the absence of accepted law makes it questionable whether the concept is capable of codification, and it also doubts whether its incorporation in the draft articles would be a progressive development of international law. At the same time, it states that the doctrine of *rebus sic stantibus* would have unquestionable utility if it were adequately qualified and circumscribed so as to guard against the abuses of subjective interpretation. On the other hand, if applied with the agreement of the parties so as to give rise to a novation of the treaty, it would certainly be acceptable. Failing any agreement, if an international court or arbitral body were entrusted with making a binding, third party, determination of the applicability of the doctrine to the particular treaty, that too would be acceptable. But at the present juncture the United States Government desires to place on record its opposition to article 44 as now drafted.

Algerian delegation. While endorsing the Commission's efforts to define as objectively as possible the notion of fundamental change of circumstances, the Algerian delegation suggests the advisability of including in article 39 the possibility of a revision of a treaty as a third solution which would frequently be more practical in the case of certain treaties no longer valid under prevailing conditions.[144]

Bolivian delegation. The Bolivian delegation considers that the doctrine of *rebus sic stantibus* applies also to imposed treaties which, for the very reason that they had been imposed, caused a change of circumstances in the sense that they created situations jeopardizing friendly relations among States. In its view, the doctrine of *pacta sunt servanda* obviously cannot apply to treaties which did not meet the conditions of article 36. The doctrine

[144] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee,* 789th meeting, para. 31.

of *rebus sic stantibus*, it considers, gives practical expression to the idea of justice and has its place in the law of treaties where it became a principle of positive law. [145]

Bulgarian delegation. The Bulgarian delegation notes that, while admitting in article 44 the doctrine of *rebus sic stantibus*, the Commission had taken care to limit its application. [146]

Cameroonian delegation. The Cameroonian delegation questions the provision in paragraph 2 excluding from the article treaties fixing a boundary. While many African States appear to agree with the *status quo* of their present boundaries, the delegation feels that it would be going too far to exclude this class of treaty altogether from the operation of the rule of *rebus sic stantibus*. In its view, this would be contrary to the principle of self-determination laid down in the Charter, especially in cases where the States had had their territorial boundaries forced on them without the slightest heed for geographical or ethnic considerations. [147]

Chinese delegation. The Chinese delegation considers that a rigid rule of *pacta sunt servanda* could impede progress and lead to situations inconsistent with equity. Nevertheless, the application of a *rebus sic stantibus* clause presents, in its view, some dangers in the absence of an impartial authority to rule on all the issues involved. It should not be left to the subjective judgment of a State to decide whether a change of circumstances justified its release from treaty obligations. The delegation accordingly advocates further study of the problem with a view to developing safeguards against abuse of the principle. [148]

Colombian delegation. In the view of the Colombian delegation the doctrine of *rebus sic stantibus* has not been accepted in positive international law and is not unanimously approved even in academic circles. Paragraph 1 would, it believes, merely add another element of instability, the doctrine of *rebus sic stantibus* having more often than not been invoked for political motives than on firm legal grounds. [149]

Cypriot delegation. The Cypriot delegation considers that the application of the principle of fundamental change of circumstances, if properly delimited and regulated, would provide the law of treaties with an essential safety-valve. If the only legal way to terminate or modify a treaty is for the parties to conclude a further agreement, an undue burden would be imposed upon the dissatisfied party, which may feel obliged to seek relief outside the law. [150]

Czechoslovak delegation. While endorsing the principle stated in the article, the Czechoslovak delegation emphasizes that its application should be regarded as an exceptional measure playing the part of a safety-valve in situations where the preservation of a treaty relation would be contrary to the realities of international life. [151]

Ecuadorian delegation. The Ecuadorian delegation notes that in article 44 the doctrine of *rebus sic stantibus* would at last become part of the positive law of treaties. [152]

French delegation. The French delegation observes that, although the *rebus sic stantibus* clause has hitherto been chiefly a subject of academic controversy, the situations which have given rise to it are wholly real. It considers that the Commission has set a problem which sooner or later must be solved. [153]

Ghanaian delegation. The Ghanaian delegation considers that in article 44 the Commission has avoided abuse of the doctrine of *rebus sic stantibus* and defined the circumstances in which it may properly be invoked. [154]

Hungarian delegation. The Hungarian delegation endorses the Commission's decision to include the principle of fundamental change of circumstances, carefully delimited and regulated, and also its decision to exclude from the application of the rule treaties fixing boundaries. [155]

Iranian delegation. The Iranian delegation asks that it should be made clear that the breaking off of diplomatic relations between two States [156] does not affect treaties already concluded between them. [157]

Iraqi delegation. The Iraqi delegation observes that the doctrine of *rebus sic stantibus* to which the article refers exists in positive international law, despite the almost total absence of case law on the subject; and that if, like many customary principles, the doctrine lacks precision, the Commission has attempted to remove that disadvantage. In its view, the principle is one which tends to adapt law to facts. [158]

Italian delegation. The Italian delegation characterizes the doctrine of *rebus sic stantibus* as highly controversial, and questions whether the procedural safeguard provided in Article 51, paragraph 3, which simply refers to Article 33 of the Charter, is adequate. It observes that disputes regarding a fundamental change of circumstances would be legal disputes, but that neither Article 33 nor even Article 36, paragraph 3, provides for compulsory jurisdiction. In its view, international law should make the application of such an intrinsically vague notion as that of a fundamental change of circumstances subject to the appropriate procedures, just as under national law the duty of adjudicating upon the termination of a contract by reason of fundamental change of circumstances is entrusted to a competent judge. The Italian delegation considers that it would be unwise to adopt the basic rules stated in article 44 unless there is a clause providing for compulsory jurisdiction. It suggests, however, that the application of the fundamental principle of good faith might offer a compromise solution. Thus, it might be provided that in case of any objection's being raised to

[145] *Ibid.*, 793rd meeting, para. 21.
[146] *Ibid.*, 788th meeting, para. 12
[147] *Ibid.*, 791st meeting, para. 41.
[148] *Ibid.*, 792nd meeting, para. 13.
[149] *Ibid.*, 783rd meeting, para. 12.
[150] *Ibid.*, 783rd meeting, para. 21.
[151] *Ibid.*, 787th meeting, para. 28.
[152] *Ibid.*, 789th meeting, para. 26.
[153] *Ibid.*, 787th meeting, para. 6.
[154] *Ibid.*, 791st meeting, para. 37.
[155] *Ibid.*, 789th meeting, para. 12.
[156] *Ibid.*, 789th meeting, para. 32.
[157] The Commission has covered this point in part III (article 64).
[158] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 788th meeting, para. 23.

the termination of a treaty on the ground of a fundamental change, the other party is to be considered as having abandoned its attempt to establish its contentions regarding the fundamental change, if it opposes the submission of the matter to the verdict of an impartial authority.[159]

Moroccan delegation. The Moroccan delegation endorses the Commission's decision to specify that the doctrine of *rebus sic stantibus* is applicable only in certain carefully defined circumstances. Nevertheless, it suggests that further study should be given to this question, and that the conditions proposed by the United States Government should be taken into account.[160]

Panamanian delegation. The Panamanian delegation endorses the Commission's decision to include the doctrine of *rebus sic stantibus* in the draft articles. With reference to paragraph 6 of the Commission's commentary, the delegation expresses the view that it would be the party which insists on the application of obsolete, unequal and inequitable treaties which acts outside the law rather than the State which invokes the doctrine of *rebus sic stantibus*.[161]

Philippine delegation. The Philippine delegation favours the inclusion of the article, and considers that it contains adequate safeguards against abuse.[162]

Romanian delegation. The Romanian delegation fears that the article, if adopted, may become a serious source of misunderstanding. In its view, the article is unnecessary and experience has shown that, whenever a party has successfully invoked the principle of *rebus sic stantibus*, it has been freed of its obligations by the application of general principles of international law.[163]

Spanish delegation. The Spanish delegation observes that there has been no precedent which has dealt with the validity of the doctrine itself. It considers that, as the principle of *pacta sunt servanda* is based on good faith, it cannot be invoked to uphold the validity of leonine conventions.[164]

Syrian delegation. The Syrian delegation notes with approval the effort of the Commission to lay down for the doctrine of *rebus sic stantibus* limits indispensable to safeguarding the security of treaties.[165]

Thai delegation. The Thai delegation endorses the inclusion of the principle of *rebus sic stantibus* in the law of treaties.[166]

United Arab Republic delegation. The delegation of the United Aral Republic endorses the Commission's recognition of the principle of *rebus sic stantibus* and its formulation of that principle as an objective rule of international law.[167]

Uruguayan delegation. The Uruguayan delegation supports the article and considers that the Commission has succeeded in reducing the principle of *rebus sic stantibus* to manageable proportions.[168]

Venezuelan delegation. The Venezuelan delegation considers the Commission's recognition of the principle of *rebus sic stantibus* to be a milestone in international law, and the only doubts which it has regarding the article relate to the restriction on the principle contained in paragraph 3(*a*).[169]

Yugoslav delegation. The Yugoslav delegation considers that articles 39, 43, 44 and other articles, by recognizing the important principle of *rebus sic stantibus*, set the law of treaties in tune with the realities of international life.[170]

Observations and proposals of the Special Rapporteur

1. Four Governments speak of the controversial character of the *rebus sic stantibus* principle in international law and express doubts regarding its recognition as *lex lata* in the Commission's draft articles. The great majority of Governments, however, appear to endorse the principle and in general to approve the terms in which it is formulated in paragraph 2 of the article, although a number of them emphasize its dangers unless the application of the article is made subject to some form of independent adjudication.

2. One Government (Bolivia) considers that the principle covers "imposed" treaties. But the invalidity of treaties imposed by "coercion" is dealt with as an independent rule under article 36, and it might only blur the principles underlying the two articles if "imposed" treaties were also to be subsumed under the present article.

3. Another Government (Jamaica) suggests that the present article should make provision for certain cases of State succession. It takes the position that a fundamental change of circumstances does not follow inevitably from State succession, but considers that cases where the terms of a treaty are manifestly unjust or inequitable for a newly independent State may give rise to a right to invoke the termination of the treaty under the present article. In 1963 the Commission adverted to the question of State succession in connexion with the extinction of the personality of a State as a cause of "supervening impossibility of performance". As stated in paragraph 14 of its report on the work of the fifteenth session and in paragraph 3 of its commentary to article 43, the question of succession of States to treaty rights and obligations is a complex one which is under separate study by the Commission.[171] The Commission, which had already appointed Mr. Manfred Lachs as its Special Rapporteur for the topic of State succession, thought it undesirable to prejudge in any way the outcome of that study by attempting to formulate the conditions under which the extinction

[159] *Ibid.*, 793rd meeting, para. 12.
[160] *Ibid.*, 792nd meeting, para. 18.
[161] *Ibid.*, 790th meeting, para. 32.
[162] *Ibid.*, 790th meeting, para. 11.
[163] *Ibid.*, 783rd meeting, para. 33.
[164] *Ibid.*, 792nd meeting, para. 10.
[165] *Ibid.*, 786th meeting, para. 16.
[166] *Ibid.*, 791st meeting, para. 7.
[167] *Ibid.*, 791st meeting, para. 17.
[168] *Ibid.*, 792nd meeting, para. 28.
[169] *Ibid.*, 790th meeting, para. 19.
[170] *Ibid.*, 782nd meeting, para. 16.
[171] *Yearbook of the International Law Commission, 1963*, vol. II, pp. 189 and 206-7.

of the personality of a party would bring about the termination of a treaty. At the same time, it hoped to be able to undertake at any rate a preliminary examination of State succession in the field of treaties before completing its work on the general law of treaties, and it envisaged the possibility of taking the results of that preliminary examination into consideration when revising part II. In the event, owing to the Commission's heavy programme of work, that possibility has not materialized. This being so, the Special Rapporteur suggests that, both in article 43 and in the present article, the Commission should adhere to its decision not to prejudge the outcome of its work on State succession by entering into particular aspects of that topic in connexion with these two articles. Certainly, the reason which led the Commission to leave aside questions of State succession in dealing with "supervening impossibility of performance" appear to apply with equal force to "fundamental change of circumstances". Thus, the Jamaican Government's apparent assumption that a new State in principle succeeds to the treaty obligations of the preceding sovereign of the territory is one of the basic questions on which the Commission will have to pronounce in its study of State succession.

4. The Special Rapporteur doubts whether paragraph 1 need be retained in the final text of the article. It does no more than emphasize that a fundamental change of circumstances may be invoked as a ground for terminating a treaty only if the conditions laid down in the remaining paragraphs are fulfilled. As explained in paragraph 9 of the commentary, the paragraph was inserted primarily because many members of the Commission regarded the principle contained in the article, even when strictly defined, as representing a danger to the security of treaties, and its purpose was simply to underline the exceptional character of the rule. Although the Special Rapporteur in general shares the opinion of these members, he feels that their purpose can equally be achieved by a slight modification of the opening phrase of paragraph 2 so as to make it state that a fundamental change of circumstances may be invoked etc. only if the conditions set out in paragraph 2 are satisfied. At present paragraph 1 almost duplicates the opening phrase of paragraph 2 and the Special Rapporteur's proposal is, in effect, that paragraph 1 should be merged in the opening phrase of paragraph 2.

5. In paragraph 2 itself, two drafting suggestions have been made by Governments. First, the Government of Israel suggests that the expression "fact or situation" should be correlated with the similar expression "fact or state of facts" found in article 34. The Special Rapporteur agrees with this suggestion. The concepts underlying the rules contained in the two articles have something in common and it seems better to use the same expression in both articles. Of the two expressions, the one used in article 34—"fact or state of facts"—seems preferable. Secondly, the Australian Government suggests that in sub-paragraph (*b*) the word "continuing" should be inserted before "obligations", in order to make it clear that the article does not apply to treaties whose provisions have already been fully executed on both sides. This suggestion also appears to be acceptable in principle. But the Special Rapporteur feels that it may be preferable to cover the point by changing the phrase "the obligations undertaken in the treaty" by "the obligations to be performed under the treaty".

6. Paragraph 3, as at present drafted, contains two clauses which negative altogether the right to invoke a fundamental change of circumstances in the cases of (*a*) a treaty fixing a boundary and (*b*) a change which the parties have foreseen and for the consequences of which they have made provision in the treaty. The second clause in sub-paragraph (*b*) states a point which seems to belong to the formulation in paragraph 2 of the conditions under which a fundamental change of circumstances may be invoked as a ground of termination. The Special Rapporteur feels that, on balance, it would be preferable to transfer the point in sub-paragraph (*b*) to paragraph 2. If a treaty makes provision for the consequences of a change of circumstances, the will of the parties must prevail; and this would appear to form part of the general conditions for the operation of the article rather than to be an "exception".

7. As to paragraph 3(*a*), the Australian Government proposes that the exception should be extended to cover all other "determinations of territorial sovereignty", since all such determinations must, in its view, be final. The Netherlands Government also proposes that the exception should be widened so as to cover "stipulations of a treaty which effect a transfer of territory or the settlement of a boundary". It is thought that the slight widening of the exception which these Governments propose should be accepted. The Special Rapporteur in his second report formulated the exception in even broader terms so as to make it cover "stipulations of a treaty which effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights"; and in a further sub-paragraph he added "stipulations which accompany a transfer of territory or boundary settlement and are expressed to be an essential condition of such transfer or settlement."[172] The stipulations which the Special Rapporteur had in mind in the additional sub-paragraph were those creating frontier servitudes which not infrequently form an integral part of the settlement of certain types of boundary. The Commission preferred to limit the exception to "a treaty fixing a boundary". It seems logical, however, to deal with a treaty transferring territory on the same basis as one settling a boundary. A few Governments, it is true, express themselves as opposed to the exception in sub-paragraph (*a*), but the majority appear to endorse it. That being so, the Special Rapporteur proposes that it should be revised so as to cover transfers of territories. Both Governments, it is to be noted, refer not to treaties fixing a boundary etc. but to "stipulations of a treaty" fixing a boundary etc. and this formula is thought by the Special Rapporteur to be preferable.

8. The Canadian Government mentions the possibility that the boundary fixed by a treaty might be the thalweg of a river or some other geographical feature, and that the location of the thalweg or other geographical feature

[172] *Yearbook of the International Law Commission, 1963*, vol. II, p. 80, article 22, para. 5.

might be significantly altered as a result of a natural occurrence. It suggests that, in order to take account of this possibility, the provision in paragraph 3 excepting treaties fixing a boundary from the application of the article should itself be qualified by a clause excluding such cases from the exception. The Special Rapporteur appreciates that an extraordinary flood, an earthquake or a landslide might conceivably alter the location of a thalweg, watershed or other feature used in a treaty delimitation of a boundary. But he doubts whether such a case could be said to raise a question of the termination of the treaty on the ground of a fundamental change of circumstances. It would seem rather to raise a problem as to the correct interpretation and application of the treaty in the light of the changed geographical facts.

9. If the Special Rapporteur's proposals for the revision of article 46 and for its transfer to section 1 of the present part as a general rule are accepted by the Commission, paragraph 4 will become unnecessary as the question of separability will have been covered in article 46.

10. A number of Governments express serious anxiety regarding the danger to the stability of treaties which, in their view, the rule formulated in the present article involves; and they lay emphasis on the need for recourse to independent arbitration in the event of differences regarding the application of the article. The question of independent arbitration and the danger to the stability of treaties which certain articles in part II may involve is a more general one. Article 51 is the article which attempts to deal with this question and the Special Rapporteur does not think it appropriate to make special provision for it in the present article. Clearly, the Commission will require to re-examine the whole problem of the procedures for applying the articles relating to invalidity and termination of treaties in connexion with article 51.

11. In the light of the foregoing observations, the Special Rapporteur suggests that the article might be revised to read as follows:

> 1. A fundamental change which has occurred with regard to a fact or state of facts existing at the time when a treaty was entered into may be invoked by a party as a ground for terminating or withdrawing from the treaty only if:
>
> (*a*) The existence of that fact or state of facts constituted an essential basis of the consent of the parties to be bound by the treaty;
>
> (*b*) The effect of the change is to transform in an essential respect the character of continuing obligations undertaken in the treaty; and
>
> (*c*) The change has not been foreseen by the parties and its consequences provided for in the treaty.
>
> 2. A fundamental change may not be invoked as a ground for terminating or withdrawing from a treaty provision fixing a boundary or effecting a transfer of territory.

Article 45.—Emergence of a new peremptory norm of general international law

Comments of Governments

Czechoslovakia. The Czechoslovak Government endorses in general terms the principle of this article.

Israel. The Government of Israel reserves its views, noting that the article has links with problems of intertemporal law still to be considered by the Commission.

Luxembourg. In line with its comments on article 37, the Luxembourg Government considers the inclusion of this article to be undesirable in the present state of international law, and proposes its deletion.

Netherlands. The Netherlands Government draws attention to its comments on article 46 regarding the principle of separability, and points out that if article 46 is modified in accordance with those comments, it will be possible to delete paragraph 2 of the present article.

Portugal. The Portuguese Government refers to the relation between the present article and article 37. It appears to endorse the rule contained in paragraph 1 of the present article as well as the application of the principle of separability provided for in paragraph 2.

Sweden. The Swedish Government concedes that a rule prescribing the invalidity of treaties violating emerging peremptory norms may be said to be required from the point of view of logic and consistency. But, as in the case of article 37, it voices its concern at the effect of such a rule on the stability of treaties; and it stresses what it considers to be the inadequacies of the method by which the invalidity of a treaty is to be determined under the provisions of article 51.

Turkey. In the absence of any system of compulsory jurisdiction, the Turkish Government finds the same objections to this article as it does to article 37.

United Kingdom. As in the case of article 37, the United Kingdom Government considers it essential that the application of the present article should be made subject to independent adjudication.

United States. In the opinion of the United States Government, considerable further study is needed to decide whether the "logical corollary" to article 37 which the present article contains is workable, just as it is also needed to decide whether article 37 itself is workable. It feels that the determination of precisely when a new rule of international law has become sufficiently established to be a peremptory rule is likely to be extremely difficult. It interprets article 37 as applying retroactively, so as to avoid earlier treaties concluded prior to the emergence of later peremptory norms. In general, it considers that the present article is unacceptable unless agreement is reached as to who is to define a new peremptory norm and to determine how it is to be established.

Cypriot delegation. The Cypriot delegation notes that the present article is a logical corollary to article 37.[173]

Hungarian,[174] *Italian,*[175] *Moroccan,*[176] *Philippine,*[177] *Syrian*[178] *and Thai*[179] *delegations.*

[173] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 783rd meeting, para. 22.

[174] *Ibid.*, 789th meeting, para. 11.

[175] *Ibid.*, 793rd meeting, para. 11.

[176] *Ibid.*, 792nd meeting, para. 17.

[177] *Ibid.*, 790th meeting, para. 10.

[178] *Ibid.*, 786th meeting, paras. 13 and 16.

[179] *Ibid.*, 791st meeting, para. 6.

These delegations make their comments on the present article in conjunction with their comments on article 37. They all express their general approval of the inclusion of the two articles as part of the modern law of treaties.

Salvadorian delegation. The Salvadorian delegation expresses approval of the fact that the concepts of relative and absolute nullity of a treaty have both been taken into account in the Commission's commentary to the article. It suggests that the Spanish text of the article should begin with the words "*Un tratado se extingue cuando*...etc.". [180]

Observations and proposals of the Special Rapporteur

1. The comments of Governments in regard to the rule in paragraph 1 of the present article are closely connected with their comments on article 37 and have already been taken into account by the Special Rapporteur in re-examining that article. Both articles will, no doubt, receive careful reconsideration by the Commission in the light of those comments, and in the meanwhile the Special Rapporteur confines himself to one purely verbal suggestion. This is to substitute the word "if" for "when". Having regard to the nature of the rule contained in paragraph 1, the conditional "if" seems more appropriate.

2. If article 46, dealing with the separability of treaty provisions, is revised in the manner proposed by the Special Rapporteur and is transferred as a general rule to section 1, it is arguable that paragraph 2 of the present article may be unnecessary. Paragraph 3 of article 46 specifically excepts articles 36 and 37, but not the present article, from the application of the principle of separability, and thus by implication places the present article under the operation of that principle. It may be desirable, however, to retain an express reference to the principle of separability in the present article in order to underline that, whereas the whole treaty is to be void in case of conflict with a *jus cogens* rule in force at the time of the treaty's conclusion, only the offending provisions will be void in case of conflict with a *jus cogens* rule which emerges at a later date. In view of this consideration, the Special Rapporteur suggests that paragraph 2 might be retained in the following slightly amended form:

> If certain clauses only of the treaty are in conflict with the new norm and the conditions specified in article 46, paragraph 1, apply, those clauses alone shall be void.

Article 50.—Procedure under a right provided for in the treaty

Comments of Governments

Israel. In paragraph 1, the Government of Israel considers that the notice should correspond in principle, and subject only to the rules of separability, to the requirements for instruments of ratification, accession, etc., which are contained in article 15, paragraph 1(*b*) (unless otherwise contemplated by the treaty the instrument must apply to the treaty as a whole). It further considers that this paragraph should be framed as a residual rule, operative in the event of the silence of the treaty. In addition, it suggests that at the end of the paragraph the phrase should read "to" instead of "through" the depositary.

Netherlands. The Netherlands Government observes that in paragraph 1 no mention is made of the fact that the notice must in the first place be given in the manner prescribed in the treaty. It suggests that the paragraph should be revised to read:

> "A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must, unless the treaty otherwise provides, be communicated through the diplomatic channel...etc."

Portugal. After noting the provisions of the article the Portuguese Government states that it considers the principle which they contain to be acceptable.

Sweden. The Swedish Government suggests that, in paragraph 2, the rule regarding revocation of a notice may have been framed in too general terms. It considers that, while the rule proposed may be reasonable in cases such as breach, it may not be acceptable for a normal notice in accordance with an express provision for notice of termination. The purpose of such a provision, it thinks, is to enable other parties to take suitable measures in good time to meet the new situation; and these measures could not be taken with confidence if notices of termination were susceptible of being revoked. It also feels that the rule proposed may have the effect of neutralizing provisions regarding advance notice, as the rule would make it possible in practice for a State to defer its decision to terminate until the day before the notice given by it under the treaty was due to take effect.

United States. The United States Government considers that paragraph 1 correctly states the procedures and principles normally applied. Paragraph 2, however, it considers to require reformulation. It observes that the reason for specifying a given period of time before a notice of termination becomes effective is to allow the other party or parties to adjust to the new situation created by the termination; and that in the case of a bilateral treaty, a State receiving such a notice is entitled to assume that the notice will stand and to prepare to adjust its affairs accordingly. It suggests that otherwise one party might avoid the giving of notice by the other, whom it knows to contemplate terminating the treaty, by the device of giving notice itself and then withdrawing it with a view to prolonging the treaty beyond the period contemplated by the other party; and it says that such a situation ought not to be contemplated. It considers that the most reasonable rule would be that where a notice of termination would bring the treaty to an end with respect to all other parties, withdrawal of it must be concurred in by at least a majority of the other parties. It accordingly proposes that paragraph 2 should be reformulated to read as follows:

> "Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect, except in a case in which the notice would have caused the treaty to terminate with respect to

[180] *Ibid.*, 782nd meeting, para. 6.

all parties. Where the notice would cause the treaty to terminate with respect to all parties, the notice of withdrawal will not be effective if objected to by the other party in the case of a bilateral treaty, or if objected to by more than one-third of the other parties in the case of a multilateral treaty."

Polish delegation. The Polish delegation observes that withdrawal from a treaty involves the taking of a serious decision and that, especially in the case of a bilateral treaty, it may be a means of exercising political or economic pressure. In its view, paragraph 2 of the article does not take into account the need for other parties to adapt themselves to the situation created by the withdrawal of one State, the termination of the treaty, or conversely its continuation. It considers that in the interests of international co-operation the right to revoke a notice should be limited by linking it to the clear consent of the other party.[181]

Observations and proposals of the Special Rapporteur

1. The suggestion of the Israel and Netherlands Governments that paragraph 1 should be stated in the form of a residuary rule—a rule applicable if the treaty does not otherwise provide—is thought to be well-founded. The further suggestion of the Israel Government that a notice of termination given under a provision in the treaty must relate to the whole treaty, unless the treaty expressly contemplates partial termination is also thought to be well-founded.

2. The procedure for communicating a notice of termination to the other parties would appear automatically to be governed by the provisions of the new article 29(*bis*) (Communications and notifications to contracting States), approved by the Commission at the first part of the present session,[182] unless the treaty provides otherwise. A small modification therefore seems necessary in paragraph 1 of the present article in order to take account of article 29(*bis*). In addition, attention is drawn to the fact that article 15 (Exchange or deposit of instruments of ratification, accession, acceptance or approval), approved at the first part of the present session, speaks of instruments of ratification, accession, etc. "becoming operative" by exchange, deposit or notification.[183] It would seem logical to state the rule in the present article also in terms of the notice "becoming operative" by communication.

3. Three out of the six Governments which have commented upon this article have criticized paragraph 2 as giving too wide a right to revoke a notice of termination at any time before it takes effect. These Governments emphasize that, as one of the chief reasons for inserting a provision regarding notice to terminate is to enable the other parties to take appropriate steps to adjust themselves to the situation created by the withdrawal of one party, an unrestricted right to revoke a notice to terminate might prejudice the interests of the other parties. The alternative rule preferred by the United States Government is felt by the Special Rapporteur to be rather complex and the simpler rule—proposed by the Polish Government—making revocation dependent on consent —is thought to be preferable.

4. In the light of the above observations, it is suggested that the article might be reworded as follows:

Unless the treaty otherwise provides:

(*a*) A notice to terminate, withdraw from or suspend the operation of a treaty given in pursuance of a right provided for in the treaty becomes operative by its communication to the other parties;

(*b*) After such communication, the notice may be revoked only with the consent of the other parties.

Article 51.—Procedure in other cases

Comments of Governments

Finland. The Finnish Government observes that, although acceptance of the procedure contained in this article would undoubtedly be of great importance, the article still fails to provide for cases where efforts to settle the dispute are unsuccessful. In its view, a particular difficulty arises from the fact that some States do not accept compulsory settlement of disputes, so that those which do accept it can only have recourse to an optional protocol, as in the case of the 1958 Geneva Conventions and the two Vienna Conventions on Diplomatic and Consular relations. However, it feels that, as a compromise, the *status quo* can be accepted subject to an additional stipulation to the effect that, if the party desiring to withdraw from the treaty offers to submit the dispute to arbitration and the offer is rejected, it has a right of denunciation. It also considers paragraph 1(*b*) to be defective in that no time-limit is fixed within which the answer must be given in urgent cases; and it suggests that a time-limit of two weeks or one month would be suitable.

Israel. The Government of Israel states that it has no observations to make on the article.

Luxembourg. The Luxembourg Government underlines that in international law there is no authority competent to determine whether a ground of nullity or termination is or is not invoked with good reason; and that this involves real dangers to the stability of treaties, more especially in the case of an alleged conflict with a *jus cogens* rule and in cases of an alleged violation of the treaty, impossibility of performance or fundamental change of circumstance. In its view, it is not possible in practice to admit the incorporation in a formal convention of provisions regarding grounds of nullity and termination, unless the parties at the same time undertake to submit the application of these provisions to compulsory adjudication. The solution which it proposes is that a new provision should be inserted at the end of the articles, authorizing parties to make a reservation under which articles 33 to 37 and 42 to 45 could not be invoked against them by States which have not accepted compulsory adjudication with respect to those articles. The effect of the provision, it explains, would be: (*a*) as between States accepting compulsory adjudication, the

[181] *Ibid.*, 788th meeting, para. 38.

[182] *Yearbook of the International Law Commission, 1965*, vol. II, p. 163.

[183] *Ibid.*, p. 161.

articles regarding nullity and termination would have full force; and (*b*) in other cases, only the general rules of international law would be applicable, so that the provisions contained in the articles would serve only for guidance and have no binding force. The text which it suggests for this new provision reads as follows:

> "Upon acceding to these articles, States parties may, without prejudice to the general rules of international law, exclude from the application of the provisions relating to the defect in validity and the termination of treaties any State that has not accepted in their regard an undertaking concerning compulsory jurisdiction or compulsory arbitration, with respect to a treaty of which a defect in validity or the termination is alleged."

The Luxembourg Government further says that, should its proposal be adopted, the procedure laid down in article 51 would no longer serve any purpose in the case of a State which made the reservation contemplated in the new provision; and article 51 would presumably require to be modified to that extent.

Portugal. The Portuguese Government finds that the procedure provided for in this article is set out in a somewhat cautious and vague manner. At the same time it feels that to go much further in the formulation of the rule than what is contained in Article 33 of the Charter would be to ensure in advance that the present article would be a dead letter. That being so, it considers paragraphs 1, 2 and 3 of the article to be acceptable. In paragraph 4, on the other hand, it thinks that the reservation of "the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes" is too broad. In its view, these rights or obligations should be reserved only when they are [not][184] incompatible with the Charter. Paragraph 5 it considers to be in accord with realities.

Sweden. The Swedish Government expresses concern that, while the draft articles considerably develop and specify the grounds on which treaties may be claimed to be invalid, they do not similarly develop the methods by which such claims may be examined and authoritatively decided. It considers that the present article, although useful as far as it goes, does not offer any safeguards against abusive claims of invalidity. It finds particularly disconcerting the fact that the article does not appear to answer the question whether a treaty is to be subject to termination unilaterally or to remain valid if the means of settlement indicated in Article 33 of the Charter have been exhausted without result. It also draws attention to paragraph 5 of the article, saying that this would reduce the already limited value of the article if it means that a State, on discovering that an error or change of circumstances has occurred, may immediately cease to perform the treaty and merely invoke the error or change of circumstances.

Turkey. The Turkish Government observes that, if in the view of some members the adoption of compulsory adjudication is not realistic, this is also true of other articles. In its opinion, provisions which do not enjoy the concurrence of all nations cannot be incorporated in international law without first providing appropriate guarantees. Accordingly, the Turkish Government proposes that paragraph 3 should be complemented by the addition of a paragraph to the effect that the parties shall have the right to apply to the International Court of Justice.

United Kingdom. The United Kingdom Government considers paragraph 1 of the article to be of great importance and value, but does not think that paragraphs 3 and 4 provide sufficient safeguards. In its view, the draft articles on the invalidity and termination of treaties, while they would in themselves mark an advance in the law of treaties, may impair the security of numerous existing and future treaties unless there are provisions for independent international adjudication or arbitration. It considers that possibilities of abuse exist in relation to practically all the articles and, in particular, in relation to articles 36, 41, 42, 43 and 44. In its view, articles such as these would be acceptable only if coupled with the protection of an ultimate appeal to an independent judicial tribunal. This view, it maintains, accords with Article 36, paragraph 3, of the Charter, by which legal disputes should as a general rule be referred by the parties to the International Court, and with the intent of resolution 171 (II) of the General Assembly. In general, the United Kingdom Government suggests that the draft articles should be subject to interpretation and application by the International Court or, if such a provision is not generally acceptable, they should be capable of being invoked against a State which has accepted the compulsory jurisdiction of the Court only if the State relying on the article is willing to submit the issue to the Court.

United States. The United States Government regrets that the Commission did not find it possible to incorporate a rule subjecting the application of the articles regarding invalidity and termination to compulsory judicial settlement by the International Court. In its view, the rule of law—particularly in an area like the law of treaties—argues most strongly for compulsory reference to the Court. As article 51 stands, it considers that it is uncertain whether the article will supply the safeguards that may be required in connexion with some of the articles to which it applies. It holds that a requirement of compulsory arbitration or judicial settlement in the absence of settlement by other means is necessary, and hopes that the Commission will give further consideration to this point.

Bulgarian delegation. The Bulgarian delegation comments that the article prescribes a procedure for preventing a State from invoking a cause of nullity or termination of a treaty in order to evade its obligations unilaterally, and that the article does not specify the authorities which would decide the matter. It also feels that it was perfectly reasonable for the Commission to confine itself to a reference to Article 33 of the Charter.[185]

Colombian delegation. The Colombian delegation considers that, although the article would eliminate some risks to the security of treaties, the effect of para-

[184] The Special Rapporteur thinks that the negative must have been inadvertently omitted from this sentence.

[185] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 788th meeting, para. 14.

graph 3 will be to reopen closed issues and to encourage revisionist ideas on the part of many Governments.[186]

Iraqi delegation. The Iraqi delegation considers that article 51 is of capital importance in that it reconciles the principle that no person can be judge in his own case with the fact that no general compulsory jurisdiction is provided. In its view, international rules lack precision, and many are disputed and, in consequence, States are in general reluctant to commit themselves in advance to have recourse to a Court when they do not know exactly what rules will be applied to them. It considers that to make the development and codification of international law depend on the acceptance of compulsory jurisdiction would be both harmful at the time of codification and indirectly harmful to the expansion of compulsory jurisdiction. Accordingly, it feels that article 51, by referring simply to the means indicated in Article 33 of the Charter, takes into account the realities of international life.[187]

Italian delegation. Speaking of the doctrine of *rebus sic stantibus*, and of paragraph 3 of the present article, the Italian delegation expresses the opinion that a reference to Article 33 of the Charter is not enough. It notes that, while disputes regarding a fundamental change of circumstances are of a legal nature, neither Article 33 nor Article 36, paragraph 3, of the Charter provides for compulsory jurisdiction, and it considers that the parties will in consequence find themselves in a deadlock. The delegation interprets the present article as allowing a State wishing to evade the provisions concerning a fundamental change of circumstances to raise an objection under paragraph 2, while at the same time refusing to agree to a decision by an international judge on the merits. It considers that it would be unwise to adopt the basic rules stated in article 44 regarding a change of circumstances, unless there is a clause providing for compulsory jurisdiction. It suggests a compromise solution based on the principle of good faith under which, if an objection is raised to the termination of a treaty under article 44 and the objection is not accepted, the party opposing the submission of the dispute to the verdict of an impartial authority would be considered to have abandoned any attempt to prove the matters which it alleged.[188]

Pakistan delegation. The Pakistan delegation considers that, in order to guard against the danger to the security of treaties involved in the articles contained in sections II and III of part II, it would be best to subject the application of those articles to the compulsory jurisdiction of the International Court.[189]

United Arab Republic delegation. The delegation of the United Arab Republic considers that the Commission was wise to refrain from adopting any rigid formulae and to take as its basis the carefully worked out approach to the pacific settlement of disputes contained in the Charter.[190]

Uruguayan delegation. Commenting on article 30 and on other articles in part II, the Uruguayan delegation notes that, like article 46, the present article provides guarantees against arbitrary action by one party seeking to terminate a treaty. It adds that it supports the article in so far as it is directed towards fostering respect for treaty obligations.[191]

Venezuelan delegation. The Venezuelan delegation considers that, in not prescribing the compulsory jurisdiction of the International Court, the Commission wisely recognizes the practice at present followed in regard to international disputes.[192]

Observations and proposals of the Special Rapporteur

1. Governments in their comments appear to be unanimous in approving the general object of the present article, namely, the surrounding of the various rights to invoke grounds of invalidity or termination with specific procedural safeguards against arbitrary recourse to these grounds for the purpose simply of getting rid of inconvenient treaty obligations. The comments of Governments differ, as did the opinions of members of the Commission in 1963, with respect to the question whether these safeguards should or should not include provision for some form of compulsory international adjudication of the dispute in the event of a deadlock. Of the sixteen Governments which have commented on the article, nine appear to consider that paragraphs 1-3 do not go far enough in their development of the procedural safeguards and to wish to see specific rules laid down for cases where the parties are unable to reach agreement. Seven Governments, on the other hand, appear to feel that paragraphs 1-3 represent the furthest that it is possible to go in the way of procedural safeguards in the present state of international relations and of international opinion regarding acceptance of compulsory jurisdiction.

2. At its session of September 1964, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, established pursuant to General Assembly resolution 1966 (XVIII), considered, *inter alia*, "The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered". In considering this principle the Special Committee examined the various means of peaceful settlement of international disputes and, in particular, negotiation, inquiry, mediation, conciliation, arbitration and judicial settlement. Differences of opinion appeared also in the Special Committee regarding the appropriateness of the establishment of compulsory jurisdiction at the present juncture in international relations and in the present degree of the integration of the international community. The Special Rapporteur does not feel that it would serve any useful purpose to recapitulate the considerations advanced in the Special Committee for or against the establishment of compulsory jurisdiction, whether in general or in

[186] *Ibid.*, 783rd meeting, para. 13.
[187] *Ibid.*, 788th meeting, para. 24.
[188] *Ibid.*, 793rd meeting, para. 12.
[189] *Ibid.*, 791st meeting, para. 30.
[190] *Ibid.*, 791st meeting, para. 18.
[191] *Ibid.*, 792nd meeting, para. 22.
[192] *Ibid.*, 790th meeting, para. 22.

connexion with the interpretation and application of treaties. He considers it sufficient to mention that these differences of opinion were not resolved in the Special Committee and that the Committee recorded on page 104 of its report (A/5746) that it "was unable to reach any consensus on the scope or content of the principle" that "States shall settle their international disputes by peaceful means in such manner that international peace and security and justice are not endangered".

3. Consequently, although one or two recent multilateral conventions have contained clauses for the compulsory settlement of disputes,[193] it hardly seems possible to say that there has been any significant change in the general state of international opinion on this question since the present article was adopted by the Commission in 1963. The Organization of African Unity, it is true, in article 19 of its Charter of 25 May 1963 made provision in its constitution for a Commission of Mediation, Conciliation and Arbitration.[194] However, if the Charter of the Organization furnishs evidence of the importance attached by the African States to this means of peaceful settlement, it has not provided that the jurisdiction of the Commission of Mediation, Conciliation and Arbitration should be compulsory.

4. Article 51, as provisionally adopted by the Commission in 1963, represented the highest measure of common ground that could be found in the Commission at its fifteenth session on the procedural safeguards to be attached to the articles relating to grounds of invalidity and termination. If the Special Rapporteur himself shares the opinion of those who favour making the application of these articles subject to some form of independent determination, he does not feel that the comments of Governments on the present article, divided as they are, or any other developments since the 1963 session would justify him in proposing a new text for the article, recognizing an ultimate right of recourse to compulsory means of settlement. While drawing the attention of the Commission to the concern expressed by certain Governments regarding the omission from the article of any reference to independent adjudication, the Special Rapporteur feels bound to examine the proposals of Governments on the basis of the maintenance of the present general structure and content of the article.

5. The Luxembourg Government proposes an intermediate solution. Any State becoming a party to the draft articles should be specifically authorized to make a reservation under which no other party could invoke articles 33 to 37 or 42 to 45 against it unless that party had accepted compulsory adjudication with respect to those articles. Then, if another party had not accepted compulsory adjudication, only the general rules of international law would be applicable as between it and the reserving State, the provisions in the articles having no binding force and serving only for guidance. The efficacy of this intermediate solution may be doubted. As the Luxembourg Government recognizes, the general rules of international law regarding non-compliance with international law, lack of authority, fraud, error etc., would remain applicable. In consequence, the possibility of arbitrary recourse to grounds of invalidity or termination would still exist, and perhaps in aggravated form; for the strict definitions of the conditions for alleging grounds of invalidity or termination contained in the Commission's draft articles and the procedural safeguards at present contained in article 51 might be claimed not to apply. Indeed, a serious objection to the proposal is the very fact that it involves drawing a distinction between "the general rules of international law" on the subject and the rules laid down in the draft articles. Although some elements of "progressive development" may normally be expected to be present in any codifying convention, the Special Rapporteur feels that it would, in some measure, defeat the object of codification if the resulting convention drew a distinction between the provisions of the code and the "general rules of international law".

6. The Italian and Finnish Governments—one from the point of view of the party alleging a ground of invalidity or termination, the other from the point of view of the party contesting the allegation—make similar suggestions for resolving cases of deadlock. The Italian Government suggests that, if a party alleging a ground of invalidity or termination opposes the submission of the question to arbitration, it should be considered to have abandoned all attempt to prove the matters which it alleges. The Finnish Government suggests that, if a party alleging a ground of invalidity or termination offers to submit the question to arbitration and the offer is refused, the party should automatically have the right to denounce the treaty. In other words, the refusal of a party to submit to arbitration would in either event be considered to raise a conclusive presumption that it was unable to make good its allegation or its objection as the case might be. The original proposals of the Special Rapporteur in his second report[195] incorporated the concept that refusal of an offer to arbitrate should give rise to a presumption. Although the concept commended itself to some members of the Commission, others considered it as going too far in the direction of introducing into the article an element of compulsory submission to arbitration. The text which the Commission adopted as representing the greatest measure of common ground amongst members did not include this concept. Accordingly, the Special Rapporteur does not feel that he would be justified in proposing its reintroduction.

7. The Finnish Government also suggests that in paragraph 1(*b*) a time-limit should be fixed within which the other party's reply would have to be given in cases of "special urgency"; and it suggests a limit of two weeks or one month. This question, if the Special Rapporteur's memory is correct, was considered in the Drafting Committee which, however, thought it difficult to fix in advance a rigid time-limit to apply to all cases of "special urgency". In practice, cases of special urgency are likely to be cases arising from a sudden and serious violation of the treaty

[193] e.g. Convention on Transit Trade of Land-locked States, 8 July 1965, article 16.

[194] United Nations, *Treaty Series*, vol. 479, p. 80.

[195] *Yearbook of the International Law Commission, 1963*, vol. II, pp. 86-87, article 25.

by the other party; and it seems possible to conceive of cases where even a time-limit of two weeks might be too long in the particular circumstances of the violation.

8. Paragraph 5 is questioned by the Swedish Government which fears that it may be interpreted as allowing a State, on discovering an error or change of circumstances, immediately to cease to perform the treaty and merely invoke the error or change of circumstances. This paragraph concerns cases where a demand is made for the performance of a treaty, or a complaint is made alleging a violation, and the other party desires to invoke a ground of invalidity or termination by way of answer to the demand or complaint. The Special Rapporteur does not understand it to have been the intention of the Commission in these cases to allow the other party merely to invoke the error and at once to act as if the treaty were invalid or terminated. What the Commission had in mind, as appears from paragraph 7 of the commentary to article 51, was only to make it clear that the mere fact that the other party had not previously given notice under the present article of a ground of invalidity or termination could not be represented as precluding it from invoking that ground when requested to perform the treaty or to answer for an alleged violation of it. If the article is read as a whole, it is doubted whether paragraph 5 is open to the interpretation feared by the Swedish Government. However, in order to discourage such an interpretation, the Special Rapporteur suggests that it may be preferable to reword paragraph 5 as follows:

> Subject to article 47, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.