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

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

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Introduction

1. In the two parts of its seventeenth session [1] the Commission re-examined in the light of the comments of Governments:

(*a*) the articles on the conclusion, entry into force and registration of treaties prepared at its fourteenth session [2] and included in part I of its draft articles on the law of treaties;

(*b*) the articles on invalidity and termination of treaties prepared at its fifteenth session [3] and included in part II of its draft articles on the law of treaties.

The Commission provisionally adopted revised texts of forty-four articles. It deleted five articles, namely articles 5, 10, 14, 27 and 38 (in some cases incorporating their substance in another article). It transferred article 48 to part I, renumbering it article 3(*bis*). It formed three new articles by separating provisions from existing articles, namely, article 0 (from article 2), article 4(*bis*) (from article 32, paragraph 1), and article 30(*bis*) (from article 53, paragraph 4); and, in deleting article 38, it retained one of its provisions as article 39(*bis*). It added one new article, article 29(*bis*).

2. In re-examining the articles contained in part I, the Commission postponed its decision:

(*a*) on certain points in article 1 concerning the use of terms in the draft articles and on the inclusion in that article of a provision regarding the characterization or classification of international agreements under internal law;

(*b*) on articles 8 and 9 (participation in a treaty) and 13 (accession).

3. In re-examining the articles contained in part II, the Commission postponed its decision:

(*a*) on article 40 (termination or suspension of the operation of a treaty by agreement); and

(*b*) on articles 49 (authority to denounce, terminate, etc.) and 50 (procedure under a right provided for in the treaty), instructing the Drafting Committee to present revised texts at the next session.

At the same time it instructed the Drafting Committee to consider what, if any, elements of article 38, paragraphs 2 and 3(*a*) [4] should be retained and transferred to article 50.

4. The above questions still remaining undecided in parts I and II will necessarily have to be taken up again by the Commission at its forthcoming session when the

[1] *Official Records of the General Assembly, Twentieth Session, Supplement No. 9* (A/6009) and *Ibid., Twenty-first Session, Supplement No. 9* (A/6309/Rev.1).

[2] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 161-186.

[3] *Ibid., 1963*, vol. II, pp. 189-217.

[4] This article has been deleted, paragraph 3(*c*) being transferred to a new article, article 39(*bis*).

draft articles on the law of treaties are to be completed and submitted to the General Assembly. Accordingly, the Special Rapporteur will in due course present to the Commission or to the Drafting Committee, as may be appropriate, fresh proposals or revised texts in regard to each of these questions.

5. The time available to the Commission at the second part of its seventeenth session did not permit it to take up the re-examination of all the articles of part II of the draft articles, the articles not yet reconsidered by it being articles 51 to 54 inclusive. The Special Rapporteur, therefore, assumes that at the eighteenth session the Commission will begin with these articles. His observations and proposals regarding article 51 were presented to the Commission as part of his fifth report, and are to be found at the end of addendum 4 to that report [5] (A/CN.4/183). Articles 52, 53 and 54, concerning the legal consequences of the invalidity, termination or suspension of the operation of a treaty, could not be covered in the fifth report, owing to lack of time, and the Special Rapporteur's observations and proposals regarding these articles are therefore presented to the Commission as the first instalment of this report. The articles on the application, effects, modification and interpretation of treaties contained in part III will then be dealt with in successive addenda to this first instalment.

The basis of the present report

6. The basis of the present report is the same as that of the Special Rapporteur's fourth and fifth reports, namely, the written replies of Governments, the comments of delegations in the Sixth Committee of the General Assembly [6] and the observations and proposals of the Special Rapporteur resulting therefrom. The comments of Governments and delegations on draft articles 52, 53 and 54 are contained in the Secretariat document A/CN.4/175 and in addenda 1-4 of that document, while their comments on part III of the draft articles are contained in document A/CN.4/182.

7. 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 paragraphs 5 to 7 of his fifth report, and at the second part of the seventeenth session, [7] the Special Rapporteur indicated to the Commission the reasons why a considerable rearrangement of the order of the articles appears to him to be necessary. The question of the order of the articles has now been referred to the Drafting Committee, [8] which will make its recommendations to the Commission regarding it in the course of the forthcoming session.

[5] See p. 49 above.

[6] *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 87, *Report of the Sixth Committee* (A/6090).

[7] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 822nd meeting, para. 19.

[8] *Ibid.*, 823rd meeting, para. 79.

Completion of the revision of part II of the draft articles in the light of the comments of Governments (section VI — articles 52-54) [9]

The title to section VI

Proposal of the Special Rapporteur

The title to the section at present reads: "The legal consequences of nullity, etc.". The substantive articles concerning grounds of nullity, however, invariably speak of "invalidity", and it therefore seems essential in the interests of consistency of terminology to substitute the word "invalidity" for "nullity" in the title to section VI.

Article 52.—Legal consequences of the nullity of a treaty

Comments of Governments

Israel. The Government of Israel observes that the article attempts to deal with two distinct matters, namely: treaties which are a nullity *ab initio* and treaties the consent to which may be invalidated subsequently at the initiative of one of the parties. It feels that this distinction should be brought more sharply into focus. It feels that the resulting difficulties, and certain difficulties of a terminological character, would be reduced if the text were to be oriented not to the general concept of nullity but to the legal consequences of the application of the different articles of part II to which it relates. Subject to these observations the Government of Israel suggests that paragraph 1(*a*) should refer to the "legal consequences of acts performed in good faith by a party in reliance on the void treaty". In its view, even making due allowance for the maxim *omnia rite acta praesumuntur*, the invalidation of the consent to be bound by a treaty ought not in itself to impair claims based upon the alleged illegality of acts performed in reliance on the treaty. In this connexion, it points to a passage of the Judgment of the International Court in the *Northern Cameroons* case [10] as alluding to this principle in the context of the termination of a treaty. Paragraph 1(*b*) it thinks should be introduced by the word "Nevertheless". In paragraph 3 it considers that the phrase "nullity of a State's consent to a multilateral treaty" should be replaced by "invalidation of a State's participation in a multilateral treaty" in order to make the language correspond more closely with that of articles 8 and 9.

Netherlands. The Netherlands Government merely states that it has no comment on the article.

Portugal. The Portuguese Government analyses and appears to endorse the several provisions contained in the article.

Sweden. The Swedish Government observes that the article deals in very general and abstract terms with problems of great complexity. It suggests that a fuller discussion than that given in the commentary is desirable to illustrate and analyse the various cases that may arise. It adds that in paragraph 1(*b*) the expression "may be required" seems inadequate.

[9] *Ibid.*, *1963*, vol. II, pp. 216 and 217.

[10] *I.C.J. Reports 1963*, p. 34.

United Kingdom. The United Kingdom Government considers that the operation of paragraph 1(*b*) may be difficult in practice, especially if a treaty has been executed to a large extent or if formal legislative, or other internal, steps have been taken to give effect to it. Nor is it clear to the United Kingdom Government in what manner and by whom the parties may be required to restore the *status quo ante*.

United States. In the view of the United States Government, the provisions of the article are a useful clarification of the consequences resulting from the nullity of a treaty.

Salvadorian delegation. The Salvadorian delegation, while endorsing the article in general, states that it does not provide for the case where the fact that one party, having invoked its own error, is no longer bound to execute the terms of the treaty may prevent the other party from executing it as well. In its view, provision should be made to enable the other party to continue to execute the treaty. It also feels that, if the treaty produces benefits for the parties, the question arises whether a party is not entitled to call upon the "erring" party to continue to implement those terms of the treaty which produce the benefits, notwithstanding that the nullity of the treaty has been invoked. It considers that the present article should be placed in part III since, in its view, the article deals with the effects of a treaty.[11]

Observations and proposals of the Special Rapporteur

1. The Government of Israel suggests that the article should distinguish more sharply between cases of nullity *ab initio* and cases in which consent to a treaty may be invalidated subsequently at the initiative of one of the parties. The original text of the article in the Special Rapporteur's second report[12] did distinguish between cases of nullity *ab initio* and cases of subsequent invalidation of the consent of a party at its initiative for the purposes of their legal effects. The Commission, however, decided to treat all causes of invalidity as operating to nullify the treaty *ab initio*, except the emergence of a new rule of *jus cogens* which it dealt with as a special case akin to termination of a valid treaty. The Commission felt that any differentiation in the effects of the invalidity that would result from the application of articles 31-37 should be based rather on the different nature of the various grounds of invalidity.

2. The Government of Israel also suggests that the article should be formulated with reference to the particular articles creating invalidity rather than to the general concept of invalidity. If this is done, it feels that difficulties of a terminological character will be reduced. The Special Rapporteur in principle agrees with this suggestion, but from a drafting point of view it seems convenient to retain paragraph 1 in its present general form, and then in paragraph 2 to differentiate certain articles as special cases. This is already done partially in the present text, but the statement of the articles to which paragraph 1 does not apply should, it is thought, be made both more complete and more specific.

3. The distinction at present made in the article is between cases where the invalidity does not result from misconduct committed by one party in order to obtain the other's consent (paragraph 1) and cases where it does result from one party's having defrauded or coerced the other (paragraph 2). In the first category of cases, acts done in good faith are not rendered illegal by reason only of the invalidation of the treaty and each party is entitled to require the other to establish as far as possible the position that would have existed if the acts had not been performed. In the second category of cases, the wrongdoing party is not entitled to invoke either of these provisions. This category comprises cases falling under articles 33, 35 and 36, and it is thought that specific reference should be made to these articles.

4. The article as at present drafted does not in terms distinguish as a special case invalidity resulting from conflict *ab initio* with a rule of *jus cogens*, that is, cases in which both parties in concluding the treaty have transgressed a peremptory rule of international law. The Commission, it is thought, assumed that in these cases it would not be open to any party to speak of "acts performed in good faith in reliance on the void instrument", so that these cases would automatically be excluded from the benefit of the relieving provisions contained in paragraph 1. However, in order to avoid any possible misunderstanding, it seems advisable specifically to except cases of *jus cogens* from the operation of paragraph 1 by adding a particular reference to article 37 in paragraph 2.

5. The further problem stems from the use of the phrase "becomes void" in article 45 to express the effect of the emergence of a new rule of *jus cogens* with which a treaty conflicts. Although the case is dealt with—and rightly dealt with—in that article as one of termination, the fact that the use of the word "void" introduces the terminology of invalidity gives rise to a certain awkwardness in the drafting of the present article. It is true that paragraph 2 of article 53 by implication indicates that cases of invalidity under article 45 are not intended to be embraced by the provisions of the present article. But there remains a logical inconsistency in the drafting. The easiest way of removing this inconsistency would be to express the rule in article 45 in terms of the treaty's law rather than in terms of "nullity". However, in 1963 the Commission showed a preference for emphasizing in article 45 that the treaty becomes "void" as a result of the emergence of the new rule of *jus cogens*. That being so, it may be desirable, purely for reasons of drafting, expressly to reserve cases of invalidity arising under article 45 from the application of the present article and to underline that it falls under article 53. This can easily be achieved by adding an appropriate clause in paragraph 2.

6. Another suggestion of the Government of Israel is that paragraph 1(*a*) should read: "The invalidity of a treaty shall not as such affect the legal consequences of acts performed in good faith etc.". It maintains that the invalidation of the consent to be bound by a treaty ought not in itself to impair claims based upon the alleged illegality of acts performed in reliance on the treaty. The

[11] *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 782nd meeting, para. 8.

[12] *Yearbook of the International Law Commission, 1963*, vol. II, article 27, p. 93.

view taken by the Commission was that acts done in good faith in reliance on the treaty at a time when both parties conceived the treaty to be valid, and were conducting themselves on the basis of that assumption, ought not, as a general rule, to be converted into wrongful acts by reason only of the subsequent invalidation of the treaty. By inserting the words "as such", it underlined that the article deals only with the consequences of the invalidity, and does not exclude the possibility that illegality may attach to the acts for other reasons. In connexion with this point, the Special Rapporteur feels that the words "by itself" may perhaps be preferable to "as such", as well as corresponding more exactly with the words in the French text.

The Special Rapporteur is not clear whether the Government of Israel thinks the Commission's view to be unsound, or whether it is simply the expression "the legality of acts performed in good faith" to which it takes exception. At any rate, the observations of the International Court in the *Northern Cameroons* case[13] do not appear to touch in any way the questions which arise under the present article, since those observations relate to the quite different situation of acts done at a time when the treaty was not only conceived by the parties to be valid, but was in fact valid and effective to create definitive legal rights and obligations. They concern the case of termination of a treaty, and may require consideration in connexion with article 53, but do not seem to the Special Rapporteur to introduce any new element into the examination of the present article. As to the expression "the legality of acts performed in good faith etc.", the other expression "the legal consequences etc.", preferred by the Government of Israel was in fact considered and rejected by the Drafting Committee in 1963. This is because it seems impossible to say that the invalidation of a treaty will not affect the legal consequences of an act performed in reliance on the treaty. Paragraph 1(*b*) is based on the very supposition that the legal consequences of the act are affected by the nullity of the treaty. If the Commission in 1963 did not find it altogether easy to find the right phrase, it came to the conclusion that the phrase "does not affect the legality of the acts"—"*n'affecte pas le caractère légitime*" in the French text—was the most appropriate to express the rule in paragraph 1(*a*).

7. In paragraph 1(*b*), two Governments query the adequacy of the expression "The parties to that instrument may be required". To meet their criticism, and having regard to the classes of cases of invalidity with which paragraph 1 deals, it may be preferable to revise paragraph 1(*b*) so as to make it read: "The parties to the void instrument may require each other, etc.".

8. In paragraph 2, as invalidity may result from two different kinds of coercion under two separate articles (articles 35 and 36), it seems desirable to specify the actual articles to which the paragraph has reference, and in that event to specify also the article dealing with fraud. It is also felt that the paragraph may read more smoothly if the second half of the sentence is placed first.

[13] *I.C.J. Reports 1963*, pp. 34 and 35.

9. Since the texts of the substantive articles adopted by the Commission all speak of invalidity rather than nullity, the Special Rapporteur thinks it desirable that the same term should be used in the present article.

10. In the light of the above observations the Special Rapporteur proposes that the article should be revised on the following lines:

1. (*a*) The invalidity of a treaty shall not by itself affect the legality of acts performed in good faith by a party in reliance on the void instrument before the invalidity of the instrument was invoked.
(*b*) However, a party to the void instrument may require any other party to establish as far as possible the position that would have existed between them if the acts had not been performed.

2. A party may not invoke the provisions of paragraph 1 if the invalidity results:

(*a*) under articles 33, 35 or 36, from fraud or coercion imputable to that party;

(*b*) under article 37, from the conflict of the treaty with a peremptory norm of general international law;

(*c*) under article 45, from the emergence of a new peremptory norm of general international law, in which case article 53 applies.

3. The same principles apply with regard to the legal consequences of the invalidity of an individual State's consent to be bound by a multilateral treaty.

Article 53.—Legal consequences of the termination of a treaty

Comments of Governments

Israel. The Government of Israel suggests that paragraph 1(*b*) should be revised to read: "Shall not affect the legal consequences of any act done in conformity with the provisions of the treaty while that treaty was in force or...". Secondly, it suggests that, for reasons similar to those given in its comments on article 52, paragraph 1 might be clearer if it were to specify the articles of part II to which the present article relates. Thirdly, it reserves its position concerning paragraph 2 pending the Commission's decision regarding the problems of the inter-temporal law which arise in connexion with article 45. In addition, it suggests that the commentary should make it clear that, once a treaty is terminated, it can only be revived by some formal treaty (in the sense used in the draft articles). It explains that in Israel, when an enactment repealing a former law is itself repealed, the repeal of the latter enactment does not revive the law previously repealed unless the later enactment expressly so provides; and that it assumes the position regarding treaties in international law to be the same.

Netherlands. The Netherlands Government suggests that paragraph 3(*c*) should be modified so as to read:

"The legality of any act done in conformity with the provisions of the treaty prior to the date upon which the denunciation or withdrawal has taken effect and the validity etc.".

In support of its suggestion, it points out that some treaties remain in force for a certain period after notice of termination has been given.

Portugal. The Portuguese Government expresses doubts regarding paragraph 2 which provides that, where a rule of *jus cogens* is the cause of the nullity of the treaty, a situation resulting from the operation of the treaty is to retain its validity only to the extent that it is not in conflict with the rule of *jus cogens*. In its view, it would be more equitable in these cases to apply the rule in paragraph 1 and to respect *in toto* situations legitimately created prior to the date when the nullity of the treaty supervened because of the development of a new rule of *jus cogens*. At the same time, it concedes that the solution proposed in paragraph 2 may accord better with the imperative nature of the supervening norm.

Sweden. The Swedish Government considers that the division between paragraph 2 of the present article and article 52 is not obvious and requires clarification. As article 52 deals with the nullity of treaties, it presumes that that article covers all treaties termed "void"—a term which is found in article 52, paragraph 1(*a*); yet article 53, paragraph 2, also refers to treaties which are void. It further suggests that, in paragraph 1(*a*) of the present article, it may be preferable to speak of releasing parties "from any further obligation to apply a treaty" rather than "from any further application of the treaty"; and it draws attention to the fact that the former phrase is the one used in article 54. In addition, it feels that, in paragraph 2 the expression "a situation... shall retain its validity" may be in need of improvement.

United Kingdom. The United Kingdom Government comments that the article does not make provision with regard to the accrued obligations of a State under a treaty at the time of its denunciation by that State. In the Sixth Committee, the United Kingdom delegation also commented that paragraph 2 throws no light on the kinds of situation envisaged by it and that the application of the paragraph is likely to give rise to difficulties. In particular, it felt that where the treaty's provisions have already been executed, it may be extremely difficult to restore the *status quo*.

United States. In the view of the United States Government the provisions of this article constitute a useful clarification of the consequences of the termination of a treaty.

Observations and proposals of the Special Rapporteur

1. In paragraph 1(*a*), the observation of the Swedish Government that it may be preferable to speak of releasing parties from "any further obligation to apply the treaty" is thought to be justified, as this phrase is perhaps more precise.

2. In paragraph 1(*b*), in line with its suggestion regarding the previous article, the Government of Israel suggests that the text should specify the articles of part II to which this sub-paragraph relates. In the present article, however, this does not seem necessary, since an exception is made only of one article—article 45 (emergence of a new rule of *jus cogens*)—and article 45 is already mentioned specifically in paragraph 2.

As in the previous article, the Government of Israel also suggests that the operative words should read: "shall not affect the legal consequences of any act etc.". The Special Rapporteur does not think that this change would be an improvement. The article is concerned with the legal consequences of the termination of a treaty, and not—at any rate directly—with the legal consequences of acts done under the treaty. On the other hand, the question does arise whether it is completely sufficient to provide that the termination of a treaty "shall not affect the legality of any act done in conformity with the provisions of the treaty or that of any situation resulting from the application of the treaty". It is here that the *Northern Cameroons* case,[14] already referred to by the Government of Israel in connexion with article 52, appears to call for consideration, as also the observation of the United Kingdom Government that paragraph 1 does not make provision with regard to "the accrued obligations of a State under a treaty at the time of its denunciation by that State". The Commission certainly assumed that obligations already accrued and rights already vested under the treaty before its termination could not be affected by the latter event, unless the treaty otherwise provided or the parties otherwise agreed; and this was intended to be implied from the provision, in paragraph 1(*a*), that the parties are released from any further application of the treaty. However, the implication from that provision may not be so unambiguous as to exclude any possibility of misunderstanding. Moreover, the very fact that there is an express provision in sub-paragraph (*b*) safeguarding the legality of acts done in conformity with the treaty may increase the need to include a provision regarding accrued rights and obligations so as to avoid any risk of doubt on the point. It is therefore proposed that a new sub-paragraph should be added to paragraph 1 preserving accrued rights and obligations.

3. In paragraph 2, the Swedish Government requests that the relation between the cases of invalidity under this paragraph and those under article 52 should be clarified. This request will, however, be met if the Commission endorses the Special Rapporteur's proposal in paragraph 5 of his observations on the previous article; that is, if a clause is added to article 52, paragraph 2, underlining that cases of invalidity due to the emergence of a new rule of *jus cogens* fall under the present article.

The United Kingdom Government's comment that the paragraph does not throw light on the kinds of situation envisaged by it appears to be a criticism of the uncertain content of *jus cogens* articles in line with its criticisms of articles 37 and 45, which the Commission has already had under consideration when revising those articles. Its further point that, where the treaty's provisions have already been executed, it may be extremely difficult to restore the *status quo*, may be true as a statement of fact but it does not seem to touch the principle laid down in paragraph 2. Unlike paragraph 1(*b*) of article 52, paragraph 2 of the present article does not call for the restoration of the *status quo* as such. Its object is a quite different one. When a treaty terminates owing to its conflict with a rule of *jus cogens* subsequently established, it will be because any further performance of the treaty will have become contrary to a peremptory norm of general inter-

[14] *Ibid.*

national law from which no derogation whatever is permitted. Nevertheless, it would be inadmissible to regard the emergence of the new rule of *jus cogens* as retroactively rendering void acts done at a previous time when they were not contrary to international law; and paragraph 1(*b*) of the present article accordingly preserves the legality of such acts. The purpose of paragraph 2 is only to underline that, by so doing, paragraph 1(*b*) is not to be understood as authorizing the further enforcement of a situation resulting from the application of the treaty, if such further enforcement would otherwise be illegal by reason of the new rule of *jus cogens*. In other words, paragraph 1(*b*) is not to be understood as recognizing vested rights to commit breaches of peremptory rules of general international law. This being so, the Portuguese Government's doubts about the rule laid down in paragraph 2 and its preference for the application of paragraph 1(*b*) *in toto* do not appear to be well-founded. On the other hand, the principle stated in paragraph 2 is not altogether easy to formulate, and the doubts expressed by Governments may partly concern the phrase "a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict etc.". The Swedish Government, at any rate, expresses the view that the phrase "a situation...shall retain its validity" needs improving. The Special Rapporteur feels that this criticism may be justified since this phrase perhaps leaves it doubtful whether it refers merely to the situation's validity on the temporal plane of the law in force prior to the emergence of the new rule of *jus cogens*, or to its validity as a still living situation legally recognized under the régime of the new rule of *jus cogens*. Accordingly, it seems desirable to look for another phrase, and the Special Rapporteur suggests for consideration the following:

> a situation resulting from the application of the treaty may be maintained in force only to the extent that its maintenance in force does not conflict etc.

4. Paragraph 3 applies the general principles laid down in paragraph 1 to the special case of a single State's denunciation of or withdrawal from a multilateral treaty. The Netherlands Government suggests, with reference to sub-paragraph (*c*), that account should be taken of the possible time-lag between the giving of a notice of denunciation or withdrawal and its taking effect; in other words, it suggests that the operative date for the application of sub-paragraph (*c*) is the date of "taking effect" and not necessarily that of "denunciation" or "withdrawal". This suggestion is clearly well-founded, but the Special Rapporteur thinks it equally clear that the point affects the whole paragraph and not merely sub-paragraph (*c*). At the same time, the Special Rapporteur feels that, as paragraph 3 simply restates in three sub-paragraphs the two general rules contained in paragraph 1, it should be possible to shorten the text by referring to paragraph 1 and adapting its rules to the context of a single State's denunciation or withdrawal. Accordingly, he suggests that the paragraph should be reconstructed so as to shorten it and to incorporate the point made by the Netherlands Government.

5. The Special Rapporteur also feels that it may be preferable to reverse the order of paragraphs 2 and 3. Paragraphs 1 and 3 of the existing text state general rules for every-day situations. Paragraph 2, on the other hand, states an exceptional rule for a highly exceptional case. No doubt, the present order is justifiable on the logical ground that, like paragraph 1, paragraph 2 concerns the termination of the treaty between all the parties, whereas paragraph 3 concerns only a single party's denunciation or withdrawal. But on general grounds it may be better to state the normal rules first.

6. The Special Rapporteur has given consideration to the question whether it is necessary to make special provision for cases of termination in response to a breach of the treaty, that is, for cases under article 42. The chief point in these cases would seem to be to ensure that, by terminating the treaty, the injured party shall not prejudice the right to reparation accruing to it in consequence of the breach. The Special Rapporteur suggests that, if his proposal in paragraph 2 above for the addition of a third clause in paragraph 1 safeguarding accrued rights and obligations is accepted, the case of termination in response to a breach can conveniently be covered by specifying in that clause that accrued rights and obligations include those arising from a breach of the treaty.

7. Paragraph 4, as explained in the introduction to this section, is no longer necessary because its substance has been transferred to section I of this part as a general rule (article 30(*bis*)).

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

> 1. Subject to paragraph 3, and unless the treaty otherwise provides, the lawful termination of a treaty shall:
>
> (*a*) release the parties from any obligation further to apply the treaty;
>
> (*b*) not affect the legality of any act done in conformity with the treaty or that of a situation resulting from the application of the treaty;
>
> (*c*) not affect any rights accrued or any obligations incurred prior to such termination, including any rights or obligations arising from a breach of the treaty.
>
> 2. In the case of a particular State's denunciation of or withdrawal from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.
>
> 3. If a treaty terminates on account of its having become void under article 45, a situation resulting from the application of the treaty may be maintained in force only to the extent that its maintenance in force does not conflict with the norm of general international law the establishment of which has rendered the treaty void.

Article 54.—Legal consequences of the suspension of the operation of a treaty

Comments of Governments

Israel. The Government of Israel begins by stating its assumption that this article does not refer to the consequences on the operation of a treaty of the suspension of diplomatic relations between the parties or, in

the case of a multilateral treaty, between some of the parties. It then makes the suggestion that the article should specify the substantive articles to which it refers. In this connexion, it points out that the suspension of the operation of a treaty is mentioned in articles 30, 40, 41, 42, 43, 46, 49 and 50; and that articles 42 and 43 also raise the possibility of the suspension of the operation of a part of a treaty. In addition, it makes the further suggestion that, having regard to the peremptory effect of the termination of a treaty, an option to suspend the operation of a treaty should be extended to cases falling under articles 39 and 44. This would, it thinks, have the advantage of rendering possible a later resumption of the operation of the treaty.

Netherlands. The Netherlands Government merely states that it has no comments on this article.

Portugal. The Portuguese Government analyses the provisions of the article and appears in general to endorse them.

Sweden. The Swedish Government observes, that although the provisions of this article are less complex than those of the previous articles, further illustration of the effect of the abstract rules might provide useful clarification.

United States. The United States Government observes that, if one party to a multilateral treaty suspends the operation of the treaty with respect to one other party, only the latter party should be relieved of the obligation to apply the treaty, unless the nature of the treaty is such that the suspension affects the immediate interests of all parties. It accordingly recommends that paragraph 1(*a*) should read:

> "Shall relieve the parties affected from the obligation to apply the treaty".

Observations and proposals of the Special Rapporteur

1. The Government of Israel's assumption that this article was not designed to cover the consequences of the suspension of diplomatic relations on the operation of a treaty was, of course, correct. The Commission, when it drafted the article, had not yet considered the effect of the suspension of diplomatic relations on the treaty relations of the States concerned. This question was taken up at the sixteenth session, and the Commission adopted article 64 which, after laying down that the severance of diplomatic relations does not in general affect the legal relations established by the treaty, provided:

> "However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of a treaty if it results in the disappearance of the means necessary for the application of the treaty." [15]

In short, article 64 now provides for a further case of suspension of the operation of a treaty very similar to that in the second sentence of article 43 (temporary impossibility of performance). Furthermore, article 64 also makes express provision for the application of the principle of "separability" to this case. Accordingly, it seems both logical and necessary that the provisions of the present article regarding the legal consequences of the suspension of a treaty's operation should be made applicable to article 64. Exactly in what way this should be done is a matter of drafting which is to some extent dependent on the place ultimately allotted to article 64 in the order of the draft articles. There are no compelling reasons why the article should be retained in its present position at the end of the section dealing with "the application and effects of treaties". Indeed, the Special Rapporteur would prefer to see it moved either to a position close after "*pacta sunt servanda*" or else to the section dealing with the termination and suspension of the operation of treaties. Whatever place is given to article 64 in the final scheme of the draft articles, a form of words can easily be found to bring it within the scope of the present article.

As to the Government of Israel's suggestion that the present article should specify all the substantive articles to which it has reference, this again is a matter of drafting which can perhaps best be decided when the final arrangement of the draft articles is more nearly settled. The present general form of the article would appear to be more elegant and even safer than one containing a long list of the articles which may give rise to cases of suspension. But the preferable course is thought to be to return to the point when the draft articles as a whole are nearer to completion.

2. The Swedish Government's suggestion that "further illustration of the effect of the abstract rules might provide useful clarification" seems to concern the commentary rather than the article itself. Since the draft articles are being prepared as a draft convention rather than as a code, illustrations could hardly find a place in the present article.

3. The United States justly draws attention to the fact that the text, as at present drafted, does not take account of cases of a suspension of the operation of a treaty as between only two parties to a multilateral treaty. The point is, indeed, a little broader than that since suspension may take place between a group of States, while article 42 (cases of breach) contemplates that all the other parties may, in certain circumstances, decide to suspend the operation of a treaty vis-à-vis a defaulting State, though not as between themselves. It therefore seems necessary to cover the point, as in articles 52 and 53, by the addition of a paragraph dealing specially with multilateral treaties. The Special Rapporteur accordingly proposes that a new paragraph should be inserted between paragraphs 1 and 2 in the following form:

> In the case of the suspension of the operation of a multilateral treaty:
>
> (*a*) with respect to one party, paragraph 1 applies only in the relations between that party and each of the other parties;
>
> (*b*) between certain of the parties, paragraph 1 applies only in the mutual relations of those parties.

[15] *Yearbook of the International Law Commission, 1964*, vol. II, p. 192.

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

Title and arrangement of the articles

The Special Rapporteur, as mentioned in paragraph 7 of the introduction to this report, has elsewhere given his reasons for thinking that a considerable rearrangement of the order of the draft articles is necessary.[16] This rearrangement relates particularly to the articles in part III and the Special Rapporteur does not, therefore, think it useful to discuss in detail here the title of the part, the arrangement of the articles or their place in the final scheme of the draft articles. These matters must now await the general consideration of the final structure of the draft articles by the Drafting Committee and by the Commission when it has concluded its first revision of all the articles. Consequently, the Special Rapporteur will not at this stage comment on the titles to part III and its various sections or on the general arrangement of the articles.

Article 55.—Pacta sunt servanda

Comments of Governments

Cyprus. The Government of Cyprus endorses the inclusion of the words "in force" in the Commission's formulation of the *pacta sunt servanda* rule: "A treaty in force is binding, etc.", saying that the rule would be erroneous and misleading if stated without that qualification. It comments that article 55 must consequently be read subject to the considerable number of articles which may militate against a given treaty being in force, and especially those dealing with invalidity and termination. It also refers to the provision in Article 2, paragraph 2, of the Charter that Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter", concluding that the difference in formulation between that provision and article 55 is not material. Then it discusses the particular cases of treaties which may be invalid on the grounds specified in articles 36 (coercion of the State) and 37 (conflict with *jus cogens*), or terminated under article 42 (response to a material breach), without, however, noting the role of article 51 in the application of these articles.

Czechoslovakia. The Czechoslovak Government comments that the *pacta sunt servanda* rule is of considerable significance for the strengthening of peaceful coexistence and co-operation in economic, technical, social and cultural fields. It suggests that either in the text or in the commentary it should be indicated that "treaty in force" means a treaty concluded freely and on the basis of equality in accordance with international law. In this connexion it recalls its Draft Declaration of the Principles of Peaceful Coexistence (A/C.6/L.505)[17] and suggests that the final text of the article should incorporate the results of the discussion in the General Assembly concerning the codification of the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

Finland. The Finnish Government suggests that there might be advantage if the article were also to state that a party must abstain from acts calculated to frustrate the objects and purposes of the treaty. In its view, this would complete the article by putting it in accord with provisions in other articles stating this point.

Israel. The Government of Israel believes the title to the article to be narrower than the scope of the article itself. It assumes that the article will ultimately be combined with article 30 (presumption as to the validity, continuance in force and operation of a treaty). It also considers that, having regard to its fundamental character, the *pacta sunt servanda* principle should be placed at the beginning of the draft articles; and it notes that in the Charter the principle appears in the preamble. At the same time, it considers that the principle of good faith has a broader scope than the "application and effects" of treaties and is particularly appropriate with regard to the application of the draft articles themselves. In its view, therefore, it is necessary to avoid formulating the present article in a way to give the impression that the principle of good faith is limited to the application of treaties.

The Government of Israel further suggests that some mention should be made—at least in the commentary—of the interrelation between the present article and article 24 concerning "provisional entry into force". In these cases it assumes that the *pacta sunt servanda* principle would apply to the underlying agreement upon which the provisional entry into force is postulated.

The Government of Israel notes with approval the statement in paragraph 4 of the commentary that the Commission considers the duty of a party to abstain from acts calculated to frustrate the objects and purposes of the treaty to be implicit in the obligation to perform the treaty in good faith. It adds the somewhat cryptic observation that "it is not clear whether the discordance between the three versions is a reflection of transient difficulties". This is presumably a reference to the difference in the formulation of the English text "A treaty in force etc." as against the French and Spanish texts "*Tout traité en vigueur*" and "*Todo tratado en vigor*".

Turkey. The Turkish Government considers the Commission's restatement of the *pacta sunt servanda* rule to be useful and necessary "in view of the opinions which have been advanced during the last few years"; and that its effectiveness is enhanced if it is reinforced by the principle of good faith. It feels that the text is not fully satisfactory on the latter point and suggests the addition of a provision stipulating that the parties to a treaty must refrain from acts calculated to prevent the application of the treaty, on the lines of paragraph 2 of the Special Rapporteur's original draft.[18] It also suggests the desirability of including a provision, such as appeared in paragraph 4 of the Special Rapporteur's original draft, regarding the responsibility under international law which attaches to a State in the event of its not respecting its treaty obligations.

[16] *Ibid., 1966*, vol. I, part I, 822nd meeting, para. 19.

[17] *Official Records of the General Assembly, Seventeenth Session, Annexes*, agenda item 75.

[18] *Yearbook of the International Law Commission, 1964*, vol. II, p. 7.

In this connexion, it points out that article 63, paragraph 5, contains a specific provision regarding State responsibility and suggests that this makes it the more necessary to include the point in the present article.

United States. The United States Government considers that the *pacta sunt servanda* rule is clearly and forcefully defined in the article, at the same time observing that it is "the keystone that supports the towering arch of confidence among States".

Argentine,[19] *Byelorussian,*[20] *Kenyan*[21] *and United Arab Republic*[22] *delegations.* These delegations express in general terms their approval of the article.

Ecuadorian delegation. The Ecuadorian delegation, recalling Article 2, paragraph 2, of the Charter, stresses the element of good faith in the observance of obligations and points out that Article 2, paragraph 2, speaks of "obligations assumed... in accordance with the present Charter." It then lists a number of principles contained in the Charter which in its opinion have become rules of *jus cogens*, cites Article 103 of the Charter and states that the rule *pacta sunt servanda* cannot redeem an international agreement which violates provisions of the Charter. It then makes certain observations concerning the application of the provisions of the Charter to treaties concluded by Members of the United Nations before and after its entry into force. Emphasizing that it has no intention of disavowing the principle of *pacta sunt servanda*, it maintains that recognition of the various causes of nullity will strengthen rather than weaken it.[23]

Nigerian delegation. Commenting on the fact that the article limits the application of the *pacta sunt servanda* rule to treaties in force, the Nigerian delegation expresses the view that the rule should be stated in more categorical terms. It considers that the restrictive words should be dropped, more especially in view of the Commission's adoption of article 30 (Validity and continuance in force of treaties).[24]

Pakistan delegation. Underlining the importance which it attaches to the principle of *pacta sunt servanda*, the Pakistan delegation insists that care should be taken to ensure that it is not impaired or undermined in the rules formulated in the draft articles. In this connexion, it refers to the doctrine of the *clausula rebus sic stantibus* which, it says, should be understood as "a rule of construction which secures that a reasonable effect shall be given to a treaty, rather than the unreasonable one which would result from a literal adherence to its expressed terms only". And it observes that, even as a rule of construction, it should be applied only by agreement of the parties or by an impartial agency, judicial or arbitral.[25]

[19] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 846th meeting, para. 9.

[20] *Ibid.*, 842nd meeting, para. 34.

[21] *Ibid.*, 850th meeting, para. 37.

[22] *Ibid.*, 847th meeting, para. 28.

[23] *Ibid.*, 849th meeting, para. 37.

[24] *Ibid.*, 847th meeting, para. 16.

[25] *Ibid.*, 851st meeting, paras. 4 and 6.

Observations and proposals of the Special Rapporteur

1. The Government of Israel considers that the *pacta sunt servanda* principle should be placed at the beginning of the draft articles. It urges that the principle appears in the preamble to the Charter, and also that care must be taken in the formulation of the present article to avoid giving the impression that the principle of good faith is limited to the application of treaties. It observes that the principle of good faith has a broader scope than the application and effects of treaties and is particularly appropriate with regard to the application of the draft articles themselves. The Special Rapporteur has more than once indicated to the Commission his own view that the present article should be placed in an earlier position in the final scheme of the draft articles, and he believes that this view is widely held in the Commission. The supreme importance of the *pacta sunt servanda* principle in the law of treaties is common ground. On the other hand, it may be doubted whether the article formulating the principle would really gain much in legal content by being introduced prematurely out of its logical place in an orderly exposition of the law of treaties. Part I, as at present arranged, begins with general provisions, the effect of which is to explain and narrow the scope of the draft articles; and to precede these provisions with a staccato statement of the *pacta sunt servanda* rule might not seem very satisfactory from a scientific point of view. The Special Rapporteur feels that the appropriate place for the present article is immediately following part I, and that the preoccupation of the Government of Israel should be met rather by a strong paragraph in a preamble to the draft articles. It has not been the practice of the Commission to prepare texts of preambles for its draft articles. But there would not seem to be any objection to the Commission's suggesting that, either in the language of the preamble to the Charter or in some similar form, the *pacta sunt servanda* principle should be given strong emphasis in a preamble to the draft articles.

As to the point about good faith, the Special Rapporteur doubts whether the draft articles as a whole could be said to give the impression of limiting the principle of good faith to the application and effects of treaties. Article 69 contains a strong affirmation of the principle of good faith in stating the general rule for the interpretation of treaties. In short, the draft articles provide expressly for "good faith" in both the interpretation and the application of treaties. In addition, article 17 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force), although it does not now in its revised form actually mention good faith, specifically requires the maintenance of a certain standard of good faith between negotiating States, even before the conclusion and entry into force of the treaty. Good faith is, indeed, an element which is inherent in the legal relations of States; and it is not thought that by specifying it in general terms in the present article and in article 69 (general rule of interpretation), the draft articles can legitimately be interpreted as throwing doubt on the generality of the principle in the law of treaties. Indeed, there is not very much that cannot be brought within the concepts of "interpretation" and "application of treaties".

But again, it would be possible to give supplementary emphasis to the principle of good faith by appropriate language in the preamble.

2. One Government (Cyprus) specifically endorses the inclusion of the qualifying words "in force" in the expression "A treaty in force is binding, etc.". On the other hand, one delegation (Nigerian) feels that the words are restrictive and should be dropped, more especially in view of the adoption of article 30. In point of fact, article 30 has undergone some modification in the course of its revision at the second part of the seventeenth session and no longer takes the form of a presumption as to the validity, continuance in force and operation of a treaty. Apart from that, however, the question of including the words "in force" was discussed in 1964 when the arguments against doing so were before the Commission. On balance, as explained in paragraph (3) of its commentary, the Commission considered that, having regard to other provisions in the draft articles, it is necessary on logical grounds to include those words. Those provisions deal with entry into force, provisional entry into force, obligations resting on negotiating States prior to entry into force, and grounds of invalidity and termination.[26] The Commission accordingly felt that, from a drafting point of view, it is really necessary to specify that it is to treaties in force that the *pacta sunt servanda* rule applies. A further consideration is that the term treaty is defined in article 1 as "an international agreement concluded between States in written form, etc.", without any mention of the element of being "in force"; and the draft articles then go on to distinguish clearly between the two phases of treaty-making, "conclusion" and "entry into force".

Certain Governments and delegations link the words "in force" specially with grounds of nullity or termination, with the question of "equal" treaties, or with the provision in Article 2, paragraph 2, of the Charter that Members shall "fulfil in good faith the obligations assumed by them in accordance with the present Charter". The latter provision seems primarily to concern the obligations of Members under the Charter itself and only indirectly, through articles 36 and 37 of the draft articles, to affect the validity of treaties. In any event, the questions touched on by these Governments and delegations have been considered by the Commission in connexion with the various articles on the grounds of invalidity, and the present article naturally assumes the concurrent application of other provisions of the draft articles. In 1964, the Commission attached considerable importance to formulating the *pacta sunt servanda* rule in the simplest possible terms.

3. The Government of Israel suggests that mention should be made—at least in the commentary—of the interrelation between the present article and article 24, concerning "provisional entry into force". And it indicates that, in its view, the *pacta sunt servanda* rule would apply to the "underlying agreement upon which the provisional entry into force is postulated". Article 24 has in fact undergone some revision at the first part of the seventeenth session; but the Commission did not, either in 1962 or in 1965, seek to specify what precisely is the source of the parties' obligations in cases of provisional entry into force. Article 24, as it now reads, states the law unambiguously in terms of the treaty's entering into force provisionally; in other words, under article 24 the treaty is stated as being brought "into force". Consequently, there does not appear to be any need in the present article to make special reference to "treaties provisionally in force". Under the present article, the *pacta sunt servanda* rule is expressed to apply to every "treaty in force", and that would seem to be sufficient. At most, a brief reminder in the commentary that treaties may be in force under article 24 as well as under article 23 (Entry into force of treaties) would seem to be indicated.

4. Two Governments (Finland and Turkey) suggest that a provision should be added to the article specifically requiring the parties to refrain from acts calculated to frustrate the objects and purposes of the treaty. The original proposals of the Special Rapporteur in his third report did contain such a provision in the form: "good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects".[27] The Commission, however, considered that this obligation is implicit in the obligation to perform the treaty in good faith. Preferring to state the *pacta sunt servanda* rule in as positive and simple a form as possible, it decided not to spell out in the article this secondary aspect of the rule. The main argument for including a specific provision on the point is that indicated by the Finnish Government, namely, the fact that such an obligation is expressly laid upon States by article 17 in certain circumstances prior to the entry into force of a treaty. The argument is that *a fortiori* that obligation must be laid upon the parties to a treaty in force. But the very reason for dealing with the point in article 17 is the fact that in the circumstances there stated the treaty is not as such binding on the parties; and the case is quite different when the treaty itself is binding on the parties. In short, the Special Rapporteur shares the view of the Commission that this obligation is implicit in the *pacta sunt servanda* rule as formulated in the present article.

5. The Turkish Government also suggests that the article should include a provision, on the lines of paragraph 4 of the Special Rapporteur's original proposals, regarding the international responsibility which attaches to a State in the event of its failure to comply with its treaty obligations. Although the point is not referred to in the commentary, it was fully considered by the Commission, which decided that it should be left to be covered in the draft articles on State responsibility. As the formulation of the point in paragraph 4 of the Special Rapporteur's third report indicates, it is not possible to state such a rule without taking account of the detailed rules applicable to State responsibility. The Commission preferred not to trespass upon the law of State responsibility in any way in the present articles, which essentially concern the creation, interpretation, application, termination and modification of treaty obligations rather than the reparation to be made in the event of their breach. The

[26] *Yearbook of the International Law Commission, 1964*, vol. II, p. 177.

[27] *Ibid.*, p. 7.

point made by the Turkish Government that article 63, paragraph 5, already contains a provision regarding State responsibility does not seem to the Special Rapporteur to be persuasive. This provision is concerned only with preserving any obligation to make reparation which may attach to a party under the law of State responsibility by reason of a breach of a treaty. It does not purport to provide for that obligation which it treats as belonging to the law of State responsibility.

6. Finally, there is the Government of Israel's point that the English version "A treaty" does not exactly correspond with the other versions "*Tout traité*"—"*Todo tratado*". Although the majority of articles refer to "a" treaty, the use of the word "every" seems appropriate in the present instance, in order to give maximum emphasis to the *pacta sunt servanda* rule. Accordingly, it is proposed that the English version should be brought into line with the others by changing the opening words to "Every treaty in force".

Article 56.—Application of a treaty in point of time

Comments of Governments

Israel. The Government of Israel feels that the concordance of the three language versions requires further close examination. It also raises the question of the interrelation of this article with article 24 (provisional entry into force).

Netherlands. The Netherlands Government, having read paragraphs 5 and 7 of the commentary, is nevertheless not convinced of the desirability of employing a different formula at the end of paragraph 2 from that used at the end of paragraph 1. In its view, the possibility that "the very nature of the treaty" may indicate that it is intended to have certain legal consequences even after its termination ought not to be expressly excluded. Accordingly, it proposes that the same formula—unless the contrary appears—should be used in both paragraphs. The Netherlands Government further compares the expression "any situation which exists", found in paragraph 2, with the expression "any situation which ceased to exist", found in paragraph 1. It interprets the expression in paragraph 2 as meaning "any situation which comes into existence", and proposes that this should be substituted for "any situation which exists". In sum, therefore, it suggests that paragraph 2 of the article should be revised to read:

> "Subject to article 53, the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which comes into existence after the treaty has ceased to be in force with respect to that party, unless the contrary appears from the treaty."

Turkey. The Turkish Government, while recognizing the general principle stated in the article, considers that the exception should be restricted to more specific and definite cases. It suggests that, at the end of paragraph 1, the words "unless the contrary appears from the treaty" should be replaced by "unless the treaty stipulates otherwise".

United States. The United States Government observes that paragraph 1 will not only be helpful to Governments in the correct consideration of treaty rights and obligations in point of time but will remind draftsmen that a retroactive effect can be accomplished by a provision specifically designed or clearly intended for that purpose. With regard to paragraph 2, it draws attention to the remarks in paragraph (7) of the Commission's commentary concerning acquired rights resulting from the illegality of acts done while the treaty was in force.[28] It then suggests that account should also be taken of acquired rights resulting from the operation of the treaty. To this end, it proposes that at the end of paragraph 2 the words "unless the treaty otherwise provides" should be replaced by "unless the contrary appears from the treaty".

Chilean delegation. In commenting upon article 36 (coercion of the State) the Chilean delegation expresses the view that it should be stated whether the article is to take effect from 1945, the date of the adoption of the Charter, or from the date of the entry into force of the convention on the law of treaties. It observes that the first alternative, which might call in question most of the peace-treaties closing the Second World War, seems to be excluded by article 56. It prefers, however, that the draft articles should state explicitly that neither article 36 nor any of the other articles establishing grounds for invalidating a treaty would have retroactive effect.[29]

Greek delegation. The Greek delegation thinks that the usefulness of the article lies chiefly in its emphasis on the exception to the principle of non-retroactivity; i.e., on the possibility that the parties may give a treaty retroactive effects if they so desire. As to paragraph 2, it finds it hard to see any exception to the rule that acts, facts or situations post-dating the expiry of a treaty do not fall within the scope of the treaty. In its view, if a treaty is applicable to such acts, facts or situations, it is in force. It interprets provisions like article XIX of the Convention on the Liability of Operators of Nuclear Ships[30] as in reality extending the force of the treaty beyond the date set for its duration. On this basis, it considers that the words "unless the treaty otherwise provides" should be deleted. In addition, it observes that the article does not settle the question whether the provisions of a treaty apply to facts, acts or situations falling partly within the period when it is in force, although paragraph (4) of the commentary answers the question in the affirmative. It considers that this is insufficient and that an explicit provision should be included to cover the point.[31]

Observations and proposals of the Special Rapporteur

1. The Government of Israel raises two general points with respect to the article. The first is the concordance of the versions of the article in the different languages. The Special Rapporteur concurs that special care is necessary on this point in the present article, because the rules which it sets out incorporate principles which,

[28] *Ibid.*, p. 179.

[29] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 749th meeting, para. 9.

[30] *Le Droit maritime français*, tome XIV, 1962, p. 596.

[31] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 845th meeting, paras. 34 and 35.

as the Commission found in 1964, are particularly difficult to express in any language. But he feels that it will suffice to draw the point to the attention of the Drafting Committee.

2. The second point raised by the Government of Israel is the interrelation of the present article with article 24, which concerns the entry into force of treaties provisionally. Admittedly, provisional entry into force is a special case and there may be doctrinal differences as to what precisely is the source of the obligations of the parties in such a case. But the provisions of the treaty by one process or another come into force for the parties; and subsequently either they cease to be in force without the treaty's ever having come into force definitively, or the treaty enters into force definitively and its provisions continue in force until the treaty itself terminates. The present article speaks in general terms of "the date of entry into force of the treaty" and of the period "after the treaty has ceased to be in force"; and these expressions appear to be apt to cover both entry into force generally under article 23 and entry into force provisionally under article 24. The only question would seem to be the date which should be considered as the date of entry into force in those cases where a treaty first enters into force provisionally and later comes into force definitively. Having regard to the nature of the rule stated in paragraph 1 of the present article, it seems evident that the relevant date should be the date of provisional entry into force. In many cases, treaties which enter into force provisionally are never brought into force definitively at all, but the possibility of double dates of entry into force certainly exists. Accordingly, the Commission may think it desirable, for the sake of completeness, to cover the point in the article, and that might conveniently be done by adding a provision in a new paragraph 3 on the following lines:

> 3. In the case of a treaty which has first entered into force provisionally under article 24 and afterwards definitively under article 23, the date of the entry into force of the treaty for the purpose of paragraph 1 shall be the date when the treaty entered into force provisionally.

3. The Greek delegation proposes that an explicit provision should be included in the article to cover the question whether the provisions of a treaty apply to facts, acts or situations which fall partly within the period when it is in force. It interprets paragraph (4) of the commentary as indicating that the Commission considers that they do apply to such facts, acts or situations and it asks that this should be made clear in the article itself. To speak of a treaty's applying to facts, acts or situations which fall partly within the period when it is in force seems to the Special Rapporteur to over-simplify the matter and to read rather more into paragraph (4) of the commentary than the Commission intended. The main point made by the Commission in paragraph (4) was that "the non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date". In these cases the treaty does not, strictly speaking, apply to a fact, act or situation falling partly within and partly outside the period during which it is in force; it applies only to the fact, act or situation which occurs or exists after the treaty is in force. This may have the result that prior facts, acts or situations are brought under consideration for the purpose of the application of the treaty; but this is only because of their causal connexion with the subsequent facts, acts or situations to which alone in law the treaty applies. Accordingly, the article is believed by the Special Rapporteur to be complete as a statement of the law without the addition of the special provision proposed by the Greek delegation. Moreover, it might not be easy to draft such a provision without giving rise to difficulties such as the International Court has experienced in interpreting clauses limiting its jurisdiction *ratione temporis*.[32]

4. In paragraph 1, the Turkish Government suggests that the final words "unless the contrary appears from the treaty" should be replaced by "unless the treaty stipulates otherwise". Its argument is that exceptions to the non-retroactivity rule should be limited to specific and definite cases. The Commission weighed this point carefully in 1964 but felt that the formula proposed by the Turkish Government would be too narrow; for quite often the very nature of a treaty indicates that it is intended to have certain retroactive effects without specifically so providing (see paragraph (5) of the commentary). This is certainly the case, and the Special Rapporteur feels that for this reason the existing text is preferable.

5. In paragraph 2, the Netherlands Government questions the accuracy of the words "any situation which exists after the treaty has ceased to be in force", proposing that "which comes into existence" should be substituted for "which exists". This proposal does not seem to the Special Rapporteur to be acceptable, for the reason that the paragraph must cover not only cases where a situation comes into existence after the treaty terminates but also cases where a situation which arose during the currency of the treaty continues to exist after the treaty ceases to be in force. The words "which exists" were intended by the Commission to bring both those types of case within the rule stated in the paragraph.

6. The final phrase of paragraph 2 "unless the treaty otherwise provides" has attracted suggestions from three Governments. The most radical is that of the Greek delegation, which advocates the deletion of the phrase altogether. It does not think that there can be any exception whatever to the rule that acts, facts or situations post-dating the expiry of a treaty do not fall within the scope of the treaty; for, in its view, if a treaty is applicable to any such act, fact or situation, it must be considered to be "in force". The possibility of taking this view of the effect of stipulations which expressly provide for particular obligations to continue after the "termination" of the treaty was not overlooked by the Commission. However, that view was rejected because it scarcely seems admissible to disregard the expressed will of the parties in a case like article XIX of the Convention on

[32] e.g. *Phosphates in Morocco* case, *P.C.I.J. (1938)* Series A/B No. 74, p. 24; *Electricity Company of Sofia and Bulgaria* case, *P.C.I.J. (1939)* Series A/B No. 77, pp. 81-82; and *Right of Passage* case, *I.C.J. Reports* 1960, pp. 33-36.

the Liability of the Operators of Nuclear Ships [33] that the treaty, as such, shall terminate although a particular provision is to continue to be applicable. These cases may be rare, but the Commission felt that it should make allowance for them in paragraph 2 by inserting at the end "unless the treaty otherwise provides".

7. The Netherlands and United States Governments both propose, though for somewhat different reasons, that the final phrase should be changed from "unless the treaty otherwise provides" to "unless the contrary appears from the treaty", in which event the final phrase of paragraph 2 would correspond to that of paragraph 1. The Netherlands Government considers that, just as "the very nature of a treaty" may indicate that the treaty is intended to have certain retroactive effects, so it may also indicate that the treaty is intended to have certain legal consequences even after its termination. The Special Rapporteur doubts whether the reason advanced for making the change is a sufficient one. Paragraph 2 is not concerned with legal consequences which may continue after a treaty terminates but with the further application of provisions even after the treaty itself ceases to be in force. The question of the legal consequences of the termination of a treaty is dealt with in article 53, and it seems advisable to keep that question quite separate from the question which is the subject of paragraph 2 of the present article. As to the present question, it does not seem easy to conceive of a case where the very nature of a treaty would indicate an intention that certain of its provisions should continue to apply after it had ceased to be in force.

The United States Government also appears to have in mind more the legal consequences of a treaty after its termination than the continued application of certain of its provisions after the treaty itself has ceased to be in force; for it suggests that account should be taken of "acquired rights" resulting from the operation of a treaty when it was in force. The preoccupation of the United States Government on this point may, perhaps, be due to the fact that article 53, which deals with the legal consequences of the termination of a treaty, does not in the form in which it was adopted in 1964 specifically mention acquired rights. In re-examining article 53 in the present report, however, the Special Rapporteur has proposed that a new clause should be added to paragraph 1 which would state that the termination of a treaty "shall not affect any rights accrued or any obligations incurred prior to such termination". This provision, it is thought, should be adequate to cover the question of acquired rights. And paragraph 2 of the present article does not appear, on close examination, to touch the question of the survival of acquired rights, but to relate only to the further application of the treaty's provisions after its termination. Vested rights of a kind which will survive the termination of the treaty, although they may have their origin in provisions of the treaty, acquire an independent legal existence of their own. When the treaty terminates, it is the rights which are afterwards enforceable rather than the provisions of the treaty which gave them birth.

[33] See footnote 31.

8. Accordingly, neither the reason given by the Netherlands Government nor the point raised by the United States Government appear to call for the words "unless the treaty otherwise provides" at the end of paragraph 2 to be changed to the form "unless the contrary appears from the treaty", which is used in paragraph 1. On the other hand, as the Special Rapporteur has more than once emphasized, both these phrases and other similar phrases will ultimately have to be re-examined carefully by the Commission in the light of its final conclusions regarding the general rules for the interpretation of treaties set out in articles 69 and 70.

9. In the light of the foregoing observations, the only change in the article which seems to require consideration is the possible addition of a new provision on the lines indicated in paragraph 2 above.

Article 57.—The territorial scope of a treaty

Comments of Governments

Czechoslovakia. The Czechoslovak Government endorses the formulation of the rule set out in this article, considering it more correct and precise than the wording often used in the past "all the territory or territories for which the parties are internationally responsible". It holds that the latter formulation was contrary to the requirements for the speedy liquidation of colonialism. In its view, there is no place in modern international treaties for the so-called colonial clause or for any other form of discrimination aiming at a limitation of the validity of a treaty only to certain parts of the territory of a State. It considers that the phrase "unless the contrary appears from the treaty" found in the article can be applied only to bilateral or multilateral treaties governing specific interests of the contracting parties in limited areas, and never to a régime of a general contractual nature.

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

Netherlands. The Netherlands Government finds the rule stated in the article acceptable as a general principle, saying that it assumes that a subject of international law constitutes a unity. On the other hand, it underlines that treaties intended to apply mainly to the territories of the parties need not for that purpose be limited in their operation; e.g. with respect to ships and aircraft. It also mentions treaties which lend themselves to application by diplomatic or consular representatives in the territory of a State which is not a party, or to application on the continental shelf, which is not under the Geneva Convention "territory" of the coastal State. It suggests that in the latter case disputes may, for example, arise as to whether customs treaties relating to minerals won on the continental shelf, or to operational material placed on the shelf, are applicable. In its view, therefore, the article should take account of the operation of treaties outside the territory of the parties and it proposes the following revised text:

> "The scope of a treaty extends to the entire territory of each party, and beyond it as far as the jurisdiction of the State extends under international law, unless

the contrary appears from the treaty or, in accordance with paragraph 2 of this article, from the act by which the State expresses its consent to be bound by the treaty."

The paragraph 2 referred to in this proposal would be a new paragraph designed to take account of special factors such as the federal structure of a State or the position of dependent territories. The Netherlands Government observes that protectorates, trust territories and colonies might be said not to form part of the "entire territory" of a State but that this cannot so readily be said of autonomous parts of a State, such as the Isle of Man, and also Zanzibar in certain respects, or of the component parts of a Federal State such as Cameroon, Nigeria and Switzerland. It adds that the autonomous or component parts of States with different constitutional structures are frequently seen to be competent to decide for themselves whether or not they shall be bound by treaties, and cites the Ukraine, Byelorussia and the three parts of the Kingdom of the Netherlands. It considers that, where a treaty does not itself determine its territorial validity, a State may in the first instance wish to become a party for one of its territories, leaving it to the Government of each other part to decide whether or not the treaty should be accepted for that part too. In its view, if the treaty prescribes no other procedure, expression can be given to this territorial differentiation when the treaty is signed and/or ratified; and it would not be appropriate in the law of treaties to lay down a rule preventing States from availing themselves of the opportunity of differentiating between their territories which existing international practice offers them. To do so would, it contends, curtail the autonomy of single parts of the State within the whole and obstruct the conclusion of treaties. It observes that, in practice, it is only federal structures and constitutions granting autonomy to the component parts with respect to treaty commitments that need this opportunity; and that federal governments should be required to make it clear whether they are becoming parties for the complete unit or for some only of the component States. Although the point might conceivably be covered under the articles on reservations, it feels that a territorial reservation is not normally a reservation in a material sense, i.e., a reservation to a provision in the treaty; and it does not think that the point should be covered in that way. For the above reasons, it proposes that a new paragraph should be added to the article on the following lines:

"A State consisting of parts which under constitutional provisions decide autonomously and individually whether they shall accept a treaty shall, provided that the contrary does not appear from the treaty, declare in the act by which it expresses its consent to be bound by the treaty to which of its constituent parts the treaty shall apply. This declaration shall not be regarded as a reservation within the meaning of article 18. In the absence of such a declaration the State shall be deemed to be bound by the treaty with respect to all the constituent parts of the State".

United States. The United States Government considers the definition of the scope of application of a treaty in the present article to be self-evident. On the other hand, it thinks that an important question is the effect of the provision on treaties recognizing rights and imposing obligations with respect to such areas as the high seas. Although it may be clear from the commentary that the application of a treaty is not necessarily confined to the territory of a party, the United States Government feels that the present article standing alone may imply that such is the intention. It proposes that the article should be reworded to read as follows:

"1. A treaty applies throughout the entire territory of each party unless the contrary appears from the treaty.

"2. A treaty also applies beyond the territory of each party whenever such wider application is clearly intended."

Algerian delegation. The Algerian delegation would prefer the article expressly to limit the application of a treaty to the metropolitan territory of the parties, unless the still subject peoples through a valid expression of opinion decide to accept the treaty and its effects. Otherwise the legitimate representatives of those peoples may have no alternative but to denounce treaties in which they have taken no part and which are, in its view, often detrimental to their interests. [34]

Finnish delegation. The Finnish delegation observes that the article does not take into account that the provisions of a treaty may be intended to be applicable outside the territories of the parties. It proposes that the article should be revised so as to cover treaties with extended territorial application or, alternatively, that it should be deleted. [35]

Greek delegation. The Greek delegation states that the article creates a refutable legal presumption and queries whether the inclusion of such a provision is useful in a formal text. Since every treaty has an object and purpose related to various elements (territory, population, situation, etc.) it does not see why reference should be made only to the territorial element. [36]

Kenyan delegation. The Kenyan delegation notes with approval what it refers to as the comprehensive and lucid wording of article 57 and its commentary. [37]

United Arab Republic delegation. The delegation of the United Arab Republic also approves of the article. [38]

Observations and proposals of the Special Rapporteur

1. The Greek delegation queries the need for the article, saying that it merely creates a refutable legal presumption. It also observes that every treaty has an object and purpose related to various elements (territory, population, situation, etc.) and asks why reference should be made only to the territorial element. This point of view was considered by the Commission which, however, concluded that a State's territory plays such an essential role in the scope of the application of treaties that it is desirable to

[34] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 846th meeting, para. 15.

[35] *Ibid.*, 850th meeting, para. 2.

[36] *Ibid.*, 845th meeting, para. 36.

[37] *Ibid.*, 850th meeting, para. 38.

[38] *Ibid.*, 847th meeting, para. 28.

formulate a general rule on the matter. The rule may be liable to be set aside by the will of the parties; but it is none the less desirable to state what the legal position will be in the absence of specific provisions in the treaty.

2. The most substantial alteration proposed for this article is the suggestion of the Netherlands Government that a second paragraph should be inserted spelling out a right for a State composed of distinct autonomous parts to declare to which of the constituent parts of the State the treaty is to apply. This paragraph would at the same time provide that a declaration limiting a State's consent to be bound to certain parts only of the State is not to be regarded as a "reservation" within the meaning of article 18. In formulating this proposal, it should be said, the Netherlands Government makes it clear that it considers every subject of international law—and therefore every State—to constitute a unity.

The matter raised by the Netherlands Government has, in one aspect or another, been much discussed by the Commission in the context of "capacity" to conclude treaties (article 3), and in the context of the territorial application of treaties (the present article). It suffices to refer to the proceedings of the Commission at its fourteenth,[39] sixteenth[40] and seventeenth[41] (first part) sessions. While in sympathy with much that is said in the comments of the Netherlands Government, the Special Rapporteur does not feel that those comments introduce any new elements into the discussion such as might call for a reconsideration of the whole question by the Commission, Moreover, the rule adopted by the Commission in 1964 is a flexible one which would not appear to give rise to difficulties in practice of the kind envisaged by the Netherlands Government. Accordingly, the Special Rapporteur does not think that the case is made out for adding the proposed new paragraph.

3. Three Governments (Netherlands, United States and Finland) suggest that the article should also indicate that some treaties may be intended to apply beyond the territories of the parties. The Netherlands instances, *inter alia*, treaties applicable with respect to ships and aircraft or to the continental shelf, while the United States mentions treaties applicable with respect to the high seas. Outer space and Antarctica are other cases which might be mentioned. The Commission was, of course, aware of the existence of treaties of this kind applicable with respect to areas outside the territories of the parties. But it regarded the present article as concerned essentially with the application of treaties to the territories of the parties. The rule it contains is therefore limited to that aspect of the territorial scope of a treaty and, as formulated in 1964, it hardly seems open to the construction that by implication it excludes the application of a treaty beyond the territories of the parties. On the other hand, the title may give the impression that the article covers the whole topic of the territorial scope of a treaty; and, having regard to the suggestion of the three Governments, the Commission may wish to consider whether to add a clause providing for treaties designed to be applicable with respect to areas beyond the territories of the parties.

4. The Netherlands Government suggests that the point should be covered by a revision which would make the article read, excluding that part of the suggested revision which relates to the Netherlands proposal regarding autonomous territories of a State:

> "The scope of a treaty extends to the entire territory of each party, and beyond it as far as the jurisdiction of the State extends under international law, unless the contrary appears from the treaty."

The United States Government, on the other hand, suggests that the point should be covered in a new paragraph reading:

> "2. A treaty also applies beyond the territory of each party whenever such wider application is clearly intended."

The Special Rapporteur feels that, in order to maintain the simplicity and clarity of the principal rule regarding the territories of a State, it would be preferable to use a separate paragraph, if this point is to be added to the article. At the same time, it may be desirable to retain from the Netherlands draft the limiting element of competence, if misunderstanding is to be avoided. And the competence which is relevant would seem to be competence with respect to the matters dealt with in the treaty rather than with respect to the "areas" beyond the territory of the parties. Even on the high seas, a State may not generally contract except with respect to ships, aircraft or persons over which it has jurisdiction. In the case of Antarctica, the position is complicated by the fact that some of the parties have territorial claims while others do not, but the Antarctic treaty[42] seems to assume a competence similar to that possessed by States on the high seas.

5. If the suggestion of the three Governments that cases of extraterritorial application should be covered commends itself to the Commission, the Special Rapporteur proposes that a new paragraph should be added on the following lines:

> A treaty may apply also in areas outside the territories of any of the parties in relation to matters which are within their competence with respect to those areas if it appears from the treaty that such application is intended.

Article 58.—General rule limiting the effects of treaties to the parties

Comments of Governments

Cyprus. The Government of Cyprus, commenting on articles 58 and 59 in conjunction, expresses its agreement with the Commission's formulation of the two articles on the basis of the explanations given by the Commission in paragraph (1) of its commentary to article 59. It adds that the notion of duress and undue influence, and the

[39] *Yearbook of the International Law Commission, 1962*, vol. I, 639th, 640th, 658th and 666th meetings, pp. 57-71, 193-195 and 240-243.

[40] *Ibid., 1964*, vol. I, 731st-733rd, 749th and 759th meetings, pp. 46-63, 167-169 and 232-235.

[41] *Ibid., 1965*, vol. I, 779th, 780th, 811th and 816th meetings.

[42] United Nations *Treaty Series*, vol. 402, p. 74.

doctrine of unequal, inequitable and unjust treaties also applies to the case where a State finds itself having no free choice and is forced to undertake an obligation as a result of an agreement to which it is not a party. In its view, this is even more true when the third party has not yet reached the stage of statehood but is still under colonial domination.

Czechoslovakia. The Czechoslovak Government endorses the Commission's formulation of the article as respecting the sovereign equality of States which it considers the key principle of contemporary international law. In its view, any transfer of obligations or of rights to a third State necessarily requires its consent; and it is impossible either to oblige or to authorize a non-party. without its consent, by a treaty *inter alios acta.*

Netherlands. The Netherlands Government observes that this rule does not apply to all treaties and instances treaties defining a frontier or transferring a piece of territory. In these cases the effect of the treaty is to alter the area over which the consuls of third States may exercise jurisdiction; and to make agreements formerly applicable in one area cease to apply there and to render other agreements applicable in that area. Another example which it gives is a demarcation of the continental shelf under article 6 of the Geneva Convention on the Continental Shelf,[43] which may have similar effects with respect to customs agreements affecting mineral resources. In general, treaties governing the territorial demarcation of sovereignty, in the view of the Netherlands Government, undoubtedly involve rights and obligations for third States and constitute a separate category. It suggests the addition of a clause to the present article making an exception in the case of this special category.

United States. The United States Government notes that the general principle stated in this article is the fundamental rule governing the effect of a treaty upon States not parties. It also comments that the difference of opinion in the Commission regarding the question whether a treaty may of its own force confer rights upon third parties shows the need for a precise provision on the matter.

Algerian delegation. The Algerian delegation would like the article to contain a provision declaring absolutely null and void any obligation imposed by a treaty upon a third State without the latter's assent.[44]

Greek delegation. The Greek delegation considers that the article states a very simple rule too forcefully.[45]

Mexican delegation. The Mexican delegation appears in general to endorse the provisions in articles 58 *et seq.* regarding the effects of treaties on third States.[46]

United Arab Republic delegation. The delegation of the United Arab Republic approves of the manner in which the problem of the effect of treaties in relation to the parties and third States has been solved in articles 58-62.[47]

Observations and proposals of the Special Rapporteur

1. This and the next four articles form a group covering the topic of the effect of treaties in creating obligations or rights for third States. Accordingly, in considering each of these articles, it is necessary to keep in mind the contents of the five articles as a whole.

2. The Special Rapporteur suggests that, having regard to the comments of the Netherlands Government on the article, the title is perhaps a little misleading and may require modification. That Government comments that the general rule formulated in the article does not hold good for all treaties, since treaties defining a frontier or transferring a piece of territory or delimiting a continental shelf may have effects for non-parties by changing the areas in which their treaty obligations and rights operate. This comment, if true enough as a statement of fact, is believed to be misconceived in relation to the rule laid down in the article. The rule does not concern the general question of the effects of treaties on third States; it concerns only the effect of a treaty in creating obligations and rights for third States under the treaty. The cases referred to by the Netherlands Government are not cases in which an obligation or right is created for a third State by the treaty, or by a provision in the treaty afterwards assented to by the third State; the third State's obligations and rights exist and were created wholly *dehors* the treaty and it is only their application which consequentially and as a matter of fact is affected by the treaty. The title to the article, on the other hand, in its present form does speak in general terms of a rule limiting the effects of treaties to the parties; and this may tend to invite misconceptions such as appears to have occurred in the comment of the Netherlands Government. Accordingly, the Special Rapporteur suggests that the title should be modified to read as follows: "General rule limiting to the parties the obligations and rights arising under a treaty."

3. Two Governments (Cyprus and Algeria) emphasize the relevance in the context of the present article and of article 59 of the principle in article 36 which invalidates any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter. Their contention that a third State's agreement to be bound by a provision of a treaty to which it is not a party would be void if procured by the threat or use of force is clearly correct in principle. It again raises the question regarding the adequacy of the formulation of article 36 which was discussed when this article was re-examined at the second part of the seventeenth session. The Government of Israel, the Commission will recall, suggested that article 36 should be reworded so as to make it cover explicitly the procurement by the threat or use of force of a State's consent to be bound by an already existing treaty—in other words, of a subsequent act of consent to a treaty already in force. The Special Rapporteur proposed that the article should be slightly

[43] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, p. 142

[44] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 846th meeting, para. 15.

[45] *Ibid.*, 845th meeting, para. 37.

[46] *Ibid.*, 841st meeting, para. 7.

[47] *Ibid.*, 847th meeting, para. 28.

expanded so as to make it read "any treaty and any act expressing the consent of a State to be bound by a treaty which is procured, etc.".[48] The Commission, however, preferred to formulate article 36 in the tersest and simplest terms; and it felt that the words "any treaty the conclusion of which has been procured" were sufficiently broad to cover subsequent acts of consent—such as accession—to an already existing treaty. In the present context the question as to the adequacy of the drafting of article 36 is perhaps even more pointed, because what is involved is not the acceptance of a "treaty" but an agreement to be bound by a provision without becoming a party to the treaty. On the other hand, under article 59 an obligation will arise from a provision of a treaty for a non-party, only if the non-party State has expressly "agreed to be bound" by the obligation proposed in the provision. Consequently, it may be said that the words "any treaty the conclusion of which has been procured, etc." cover the non-party State's agreement to be bound by the particular provision. The Special Rapporteur cannot avoid the feeling that, from a purely technical point of view, article 36 would be more complete if it included a second paragraph stating that the rule contained in the article applies equally to any act expressing the consent of a State to be bound by an existing treaty or by a provision of a treaty to which it is not a party. But he recognizes that the Commission has expressed itself definitely, on psychological grounds, in favour of the single short formulation of the rule which it adopted for article 36 in 1963 and which it reaffirmed during its recent session at Monaco in January.[49]

Article 59.—Treaties providing for obligations for third States

Comments of Governments

Cyprus. In commenting on articles 58 and 59 together, the Government of Cyprus emphasizes its opinion that the notion of duress and undue influence, and the doctrine of unequal, inequitable and unjust treaties applies also to the case where a State finds itself forced to undertake an obligation as a result of an agreement to which it is not a party (see under article 58).

Hungary. The Hungarian Government notes with approval the statement in paragraph (3) of the Commission's commentary on the present article that a treaty provision imposed on an aggressor State does not fall under the rule of invalidity set forth in article 36; and it draws from that statement the conclusion that the consent of an aggressor is not needed to establish an obligation for it under a treaty to which it is not a party. It considers this exception to be highly important and suggests that it should be incorporated in the text of the article.

Israel. The Government of Israel considers that the French text—especially in the conditional clause—expresses the substance of the rule somewhat better than the English. In general, it suggests that further attention should be given to the language used for expressing the rule; and in the English text it would prefer the last five words to be replaced by "agreed to be bound by that obligation". It further suggests, without giving reasons, that the order in which this and the following article are placed should be reversed.

USSR. The Soviet Government emphasizes that there are cases where obligations under a treaty may be extended to a third State without its consent. It instances cases where a treaty, in conformity with the principle of State responsibility, imposes obligations on an aggressor State guilty of launching and conducting a war of aggression.

United States. The United States Government questions whether the concept embodied in paragraph (3) of the commentary—that treaty provisions imposed on an aggressor State fall outside the principle contained in the present article—is covered by the text of the article. It feels that, without the commentary, the text may be misleading on this point. It also feels that the article leaves entirely open the question as to the time at which assent by the third party must be indicated.

Cameroonian delegation. The Cameroonian delegation regrets that no precise definition of "contracting parties" has yet been arrived at by the Commission, and considers it necessary to re-examine completely the application and effects of treaties in regard to third States.[50]

Greek delegation. The Greek delegation considers that articles 59 and 60 should have been combined in a single article or, at the very least, worded in a more similar fashion.[51]

Nigerian delegation. In the view of the Nigerian delegation, articles 59 and 60, in their present wording, might mistakenly be invoked in order to impose upon a third State an obligation arising out of treaties not general in character and by which it did not wish to be bound.[52]

Ukrainian delegation. The Ukrainian delegation observes that international law recognizes exceptions to the principle of free consent where treaties impose obligations on aggressor States guilty of unleashing aggressive wars. It suggests the Commission should further clarify the rule in article 59 on this point.[53]

Observations and proposals of the Special Rapporteur

1. The comment of the Cyprus Government regarding the relevance of the notion of duress and undue influence has already been taken into account in paragraph 3 of the Special Rapporteur's observations on the previous article.

2. The article is at present formulated in permissive terms: "an obligation may arise". This form is perhaps reminiscent of a code rather than of a convention, and the Special Rapporteur suggests that the more categorical form "arises" would be preferable and more exact. When a State "agrees to be bound" by an obligation provided

[48] See pp. 20 above.

[49] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 827th meeting, para. 58.

[50] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 845th meeting, para. 4.

[51] *Ibid.*, 845th meeting, para. 38.

[52] *Ibid.*, 847th meeting, para. 16.

[53] *Ibid.*, 843rd meeting, para. 44.

for in a treaty to which it is not a party, the obligation unquestionably "arises", and it seems better to say so without equivocation.

3. The Government of Israel's suggestion that the French text may express the substance of the rule better than the English is considered by the Special Rapporteur to be justified in so far as concerns the phrase "if the parties intend the provision to be the means of establishing, etc.". The French use of the subjunctive "*soit un moyen d'aboutir à la création*" may better express the notion that the parties cannot themselves establish the obligation but only propose it. The final words of the French text "*consent expressément à être lié par cette obligation*" are also more exact than the English "has expressly agreed to be so bound". On the other hand the French phrase "*Si les parties entendent qu'une telle disposition soit le moyen*, etc." is not as exact as the English text "intend the provision, etc.". These are matters for consideration in the first instance by the Drafting Committee, and similar questions of terminology arise also in the Spanish text. However, in the light of a comparison of the three texts, the Special Rapporteur thinks it right to suggest that the English text should be modified so as to read as follows:

> An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend that the provision may be a means of establishing the obligation and the State in question expressly agrees to be bound by that obligation.

4. A point of substance is raised by four Governments (Hungary, USSR, United States and Ukraine), which consider that the reservation in paragraph (3) of the Commission's commentary regarding the imposition of an obligation upon an aggressor is not enough and would like to see the point incorporated in the text. In article 36, the point is covered by implication in the text of the article, since it is only "coercion by the threat or use of force in violation of the principles of the Charter", which is expressed to render a treaty void. Here, however, there are no such saving words and, when articles 58 and 59 are read together, they may be open to the interpretation that the express agreement of the third State is always necessary before it can be bound by a provision in a treaty to which it is not a party. On the other hand, the exception in the case of an aggressor stems not from the law of treaties but from the law of State responsibility; and the policy of the Commission is to avoid as far as possible prejudging matters of State responsibility, which will fall to be decided when it takes up that topic in 1967. Accordingly, if an express reservation regarding the case of an aggressor is thought to be desirable, the Special Rapporteur suggests that the appropriate way of dealing with the point may be to add the following proviso to the present article as paragraph 2:

> Nothing in the present article or in article 58 precludes a provision in a treaty from being binding on an aggressor State, not a party to the treaty, without its consent if such provision is imposed on it in accordance with the law of State responsibility and with the principles of the Charter of the United Nations.

Article 60.—Treaties providing for rights for third States

Comments of Governments

Netherlands. The Netherlands Government considers that the faculty of "implied assent" by the third State admitted in paragraph 1(*b*), combined with the ban imposed by article 61 on revoking or amending the provision conferring the right without the third State's consent, may place an unduly heavy burden on the parties to the treaty. This combination, it suggests, may be particularly unfortunate in the case of a treaty that accords rights to a large group of States or to the community of States in general, like treaties regarding freedom of shipping in an international waterway. To give a voice in matters concerning the regulations operative for those waterways to a State which has not reacted in any formal fashion to the conclusion of the treaty and whose nationals have only occasionally availed themselves of the rights accorded would, in its view, be going further than is compatible with reasonable practice. Another objection, it feels, is that the parties to the treaty might be unable to find out which States have given their "implied assent" to the provision conferring the right. In consequence, the Netherlands Government suggests that the words "or impliedly" should be deleted from paragraph 1(*b*).

Turkey. The Turkish Government, while recognizing the general principle contained in the article regarding treaties providing rights for third States, considers that the conditions prescribed for the latter's enjoyment of such rights are unsatisfactory. It interprets paragraph 2 as restricting the power of the parties to the treaty to conclude a new treaty to the extent that the third State has acquired vested rights. In its view, this not only constitutes a restriction of the powers of sovereign and independent States but also "causes an imbalance and injustice between their responsibilities". The Turkish Government further expresses the view that the parties may amend the rights recognized to third States subject to certain conditions by concluding a new treaty similar to the original one but not based on its provisions. Paragraph 2, as at present drafted, it considers to run contrary to the changing requirements of international life and it would like to see the words "or established in conformity with the treaty" replaced by "or established by a new treaty".

In addition, in its comments on article 61 the Turkish Government intimates that that article would be acceptable to it only if the words "or impliedly" are deleted from paragraph 1 of the present article (see article 61).

United States. The United States Government feels that paragraph 1, as at present worded, might be understood as preventing two or more States from dedicating by a treaty a right to all States in general without that dedication's being subject to the condition that each State wishing to exercise the right should have first assented thereto. It proposes that the paragraph should be revised on the following lines:

> "A right may arise for a State from a provision of a treaty to which it is not a party if the parties intend to accord that right either (*a*) to the State in question or to a group of States to which it belongs and the

State expressly or impliedly assents thereto or (*b*) to States generally."

Paragraph 2 the United States Government considers to express a self-evident rule the inclusion of which is nevertheless highly desirable as a guide in the formulation of treaties and their application. At the same time, it feels that further consideration of the over-all effect of the article is required.

Argentine delegation. The Argentine delegation considers that two or more States can effectively and directly create a right in favour of another State by treaty if they so intended. Accordingly, it does not apqrove of the formulation of this article or of article 61.[54]

Greek delegation. The Greek delegation considers that articles 59 and 60 should be included in article 58 as a single but separate paragraph. It also considers that paragraph 2 of the present article adds nothing to the principles stated in paragraph 1. Furthermore, in its view, the inclusion of the provisions set out in the present article are only necessary if it is assumed that treaties create rights for third parties even without their consent, whereas the article has been drafted on the assumption that their consent is required. It appears to hold that in essence the third State becomes a party to the treaty. It observes that lawyers might consider that there is a collateral agreement between the parties and the third State; but that, collateral or not, that agreement is a treaty.[55]

Observations and proposals of the Special Rapporteur

1. Two Governments (Netherlands and Turkish) ask that the words "or impliedly" should be deleted from paragraph 1(*b*). They feel that a third State which merely gives an implied assent to the provision, e.g. by exercising the right, ought not to be recognized as having a vested right to enforce the provision against the parties to the treaty. Both Governments consider that this would put too large a burden on the parties to the treaty. The Netherlands Government sees particular objection to recognizing such a vested right in cases where a treaty accords rights to a large group of States or to the community of States in general, e.g., a treaty providing for freedom of shipping through an international waterway. Interpreting the article as giving "a voice in matters concerning the regulations operative for those waterways to a State which has not reacted in any formal fashion to the conclusion of the treaty and whose nationals have only occasionally availed themselves of the rights", it expresses the opinion that this goes beyond what is compatible with reasonable practice. It also observes that the parties may have difficulty in tracing which States have given their "implied assent".

2. The formulation of the rule stated in paragraph 1 of the present article, as explained in paragraphs (5) and (6) of the Commission's commentary, gave rise to considerable discussion in 1964.[56] The Commission was evenly divided on the question whether "assent" is necessary in any form whatever in order for the provision to vest the right definitively in the third State. Approximately half the members were of the opinion that, when the parties to a treaty intend that a provision shall create an actual right in favour of a third State, there is nothing in international law to prevent that intention having effect; and that the right arises at once in virtue of the provision and exists in law unless and until disclaimed by the intended beneficiary State. According to these members, therefore, neither express nor implied assent is needed to establish the right; and this view is reflected also in the comments of the Argentine delegation in the Sixth Committee. The other members of the Commission, on the other hand, were of the opinion that some form of acceptance is in principle necessary, even if it may take the tacit form of a simple exercise of the right provided for in the treaty. The Commission, thinking that the two views would be likely to produce different results only in very exceptional circumstances, decided to frame the rule in a neutral form which would not prejudge its doctrinal basis and which would respect as far as possible the scruples felt by each group. The drafting of such a "neutral" rule was found to be a matter of considerable difficulty and paragraph 1(*b*), as adopted in 1964, is open to the interpretation put upon it by some Governments that some form of "assent" is necessary in order to vest the right definitively in the third State. The Commission intended to leave open the question whether the right is created by the treaty or by the beneficiary State's act of acceptance, though the formulation which it adopted may not entirely succeed in doing so. Be that as it may, the inclusion of the words "or impliedly" in paragraph 1(*b*) was regarded by a large group of members as indispensable for their endorsement of the article. In short, those words were considered indispensable in 1964 if there was to be sufficient common ground to unite any substantial majority in the Commission in support of the article.

3. The Commission will, no doubt, give close attention to the comments of the Netherlands and Turkish Governments in re-examining the formulation of paragraph 1 at the forthcoming session. Meanwhile, having regard to the course of the discussion in the Commission in 1964, the Special Rapporteur feels that only in the event of a clear expression of opinion on the part of a number of Governments would it be advisable to propose the deletion of the words "or impliedly", the omission of which would destroy the basis on which many members accepted the article in 1964. But the majority of Governments do not appear to have found any difficulty in these words. Indeed, the United States Government suggests an amendment which would dispense even with implied assent in the case of a dedication of a right to all States in general—the very class of case specially referred to by the Netherlands Government. Moreover, the principal preoccupation of the Netherlands and Turkish Governments appears to relate to the effect of the present article on the freedom of action of the parties subsequently to modify or terminate the treaty; and this is dealt with in article 61, where a number of Governments have called for a diminution of the position of the third State in this regard.

[54] *Ibid.*, 846th meeting, para. 9.

[55] *Ibid.*, 845th meeting, para. 38.

[56] *Yearbook of the International Law Commission, 1964*, vol. I, 734th-738th meetings.

4. The United States in effect proposes that the rule, as at present formulated in paragraph 1, should apply in all cases where the intention is to accord a right to a particular State or to any State in a particular group; but that no assent by a State in any shape or form should be necessary to vest the right in it when the intention of the parties was to dedicate a right to "States generally". The Special Rapporteur belongs to the group of members who consider that, when the intention of the parties to create an actual right as distinct from a mere benefit is clearly expressed, the right already exists before any act of assent takes place. Accordingly, he would in any event find no difficulty in adopting the United States proposal. As Special Rapporteur, however, he approaches the proposal from the basis of the conclusion reached by the Commission in 1964. Even on that basis he feels that the United States proposal has much to recommend it, since the mere fact that the parties have expressed an intention to confer a right on "States generally" would seem to justify the conclusion that they fully intended to dispense with any expression of assent by individual States. Moreover, the special rule proposed by the United States for these cases appears better designed to serve the practical needs of the international community than leaving them to be governed by the general rule proposed by the Commission in paragraph 1. Having regard to the course of the discussion in 1964, the Special Rapporteur makes no formal proposal of his own on this point, but invites the attention of the Commission to the United States proposal to revise paragraph 1 so as to make it read as follows:

> "A right may arise for a State from a provision of a treaty to which it is not a party if the parties intend to accord that right either (*a*) to the State in question or to a group of States to which it belongs and the State expressly or impliedly assents thereto or (*b*) to States generally."

5. The Turkish Government objects to paragraph 2, as an undue restriction on the power of the parties to amend the rights recognized to third States. Its objection appears, however, to be based on an interpretation of the paragraph which is certainly not the one intended by the Commission, while the United States Government expresses the view that the paragraph states a "self-evident rule the inclusion of which is nevertheless highly desirable". The question raised by the Turkish Government of restrictions on the power of the parties to modify the rights of the third State is the central issue of the following article, and it is that article to which its observations on this question appear primarily to have relevance. The present article, as its text and paragraph 7 make clear, concerns the obligation of the third State to comply with the conditions prescribed in the treaty or established in conformity with the treaty. The words "or established in conformity with the treaty" were intended to cover conditions for the exercise of the right laid down in the treaty or in a related instrument concluded between the parties or established unilaterally by a party in whose territory the exercise of the right is to take place. The only question, it is thought, is whether the words "established in conformity with the treaty" might be held by implication to mean that the third State would be under no obligation to comply with conditions laid down in a subsequent treaty validly concluded between the parties to the treaty which created the right. Such an interpretation of paragraph 2 is believed to be inadmissible since, if under article 61 the subsequent treaty constitutes a valid modification of the right arising from the first treaty, the "treaty" for the purposes of paragraph 2 of the present article will automatically become the original treaty, as modified by the subsequent treaty.

Article 61.—Revocation or amendment of provisions regarding obligations or rights of third States

Comments of Governments

Hungary. The Hungarian Government notes that under article 59 express consent is needed to establish an obligation for a third State, while under article 60 express or implied consent suffices to establish a right; and it objects that the present article does not reflect this distinction. It points out that, according to the rules laid down in articles 59 and 60, express consent would logically be needed for the revocation or unfavourable amendment of a provision establishing a right, but that implied consent would be sufficient for the revocation or favourable amendment of a provision establishing a right. It suggests that article 61 should be brought into line with articles 59 and 60.

Israel. The Government of Israel considers that the provisions of this article should be more closely co-ordinated with the provisions of part II relating to the termination of treaties and those of part III relating to the modification of treaties. In its opinion, article 61 in its present form may be open to the interpretation that it gives to the third State more extensive rights—possibly even amounting to a veto—than the parties themselves would have as between themselves under the applicable provisions of the draft articles. It suggests that the position of the parties should be safeguarded by some reference to articles 38-47 and 49-51 as regards revocation and that the principles of articles 65-67 as regards modification should be made applicable as between the third State and the parties.

Netherlands. After mentioning the link between its comments on article 60 and the present article, the Netherlands Government states that it has considered whether its objective—the denial of rights to third States which have scarcely, if at all, reacted to the offer of a right—could be achieved by amending not article 60 but the present article. The amendment it has in mind is to add a proviso to the article on the following lines:

> "and provided the State has actually exercised the right [and complied with the obligation]".

However, although this solution might theoretically be more equitable, it feels that the amendment which it proposes for article 60 is preferable as being clearer; for, in its view, it would in practice be very difficult to produce evidence of "traditional rights".

The Netherlands Government offers three further comments on the text of the article. First, it does not appreciate why the complete or partial withdrawal of an obligation imposed on a third State should require

its assent. While recognizing that assent might be required if a modification of the original obligation gives rise to a new or more onerous obligation, it thinks that article 59 suffices to cover such a case. Secondly, in its view, the modification of a right granted to a third State need not be mentioned separately in the article; for, if the modification amounts to a partial withdrawal of the right, it is governed by the rule regarding withdrawal and, if it involves the grant of a new or more comprehensive right, article 60 is applicable. Finally, it considers that the rule laid down in the article should protect the third State against withdrawal (or modification) of the right accorded, rather than of the treaty provision from which that right is derived. In the light of the foregoing observations, it would prefer to see the article read:

"When under article 60 a right has arisen for a State from a provision of a treaty to which it is not a party, the right may be revoked only with the consent of that State, unless it appears from the treaty that the right was intended to be revocable."

Pakistan. The Government of Pakistan considers that the article should be revised so as to require not the consent of the third State but a mere notification to it.

Turkey. The Turkish Government, as the Special Rapporteur understands its position, would find the present article unacceptable so long as implied consent is recognized under article 60 as sufficient to establish a right in favour of the third State. In its view, it would be indefensible that a State which has not expressly accepted the right should be in a position to obstruct an agreement between the parties to revoke or amend the treaty. Accordingly it is not prepared to accept article 61 unless the words "or impliedly" are deleted from article 60.

United Kingdom. The United Kingdom Government considers that the rule proposed might over-safeguard the position of the third State to the detriment of the parties. It suggests that the parties should be permitted to amend a provision affecting a third State unless it appears from the treaty or the surrounding circumstances that the provision was intended not to be revocable or unless the third State is entitled to invoke the rule of "estoppel" or preclusion against the amendment.

United States. The United States Government considers that the rule as at present formulated may give rise to more problems than it would resolve. In its view the rule may seriously hamper efforts of the original parties to revise or even terminate a treaty in its entirety; and changes in circumstances may result in the principal benefits flowing almost completely to the third State. It thinks that parties should not be impeded in their desire to reach a new agreement between themselves, especially if the third State has undertaken few, if any, reciprocal obligations under the treaty. Again, it asks what would be the situation in the event of a party's having given notice of termination in accordance with a provision in the treaty, and whether the existence of that provision would be evidence of the revocability of the provision regarding an obligation or right for a State not a party. In general, it suggests that considerably more study of the rule in this article is necessary.

Argentine delegation. The Argentine delegation considers that two or more States can effectively and directly create a right in favour of another State by treaty, if they so intended. It does not approve of article 61 since, in its view, the right of the third State would be only too likely to be revoked afterwards. [57]

Greek delegation. The Greek delegation, which considers that the right accruing to the third State under article 60 arises from a collateral treaty between the parties and that State, is of the opinion that the present article is superfluous. [58]

Observations and proposals of the Special Rapporteur

1. The Argentine delegation, starting from the position that a treaty may of its own force create an actual right in the third State, does not think that the article goes far enough in protecting that right. The Greek delegation, starting from the opposite position that the right arises from what is legally a collateral agreement between the third State and the parties to the treaty, maintains that the article is superfluous; and by this it presumably means that the third State's consent would always be necessary for the revocation or modification of that agreement. The Netherlands Government also suggests that the article is largely superfluous because (*a*) it considers that no consent is needed for the complete or partial withdrawal of an obligation; and (*b*) cases of modification either of an obligation or of a right are already covered by articles 59 and 60. In addition, the majority of the Governments which have commented on the article, including the Netherlands Government, think that it goes too far in the protection which it gives to the right of the third State.

2. The Netherlands Government is, of course, correct in pointing out that in principle the situations covered in the present article are situations to which articles 59 and 60 themselves could be said to be at least partly applicable. Indeed, it would be possible to go further and say that, in principle, they should be completely applicable to those situations. When a third State has an "obligation" or a "right" arising from a treaty to which it is not a party, any modification increasing an obligation or diminishing a right could be said necessarily to fall under article 59, while any modification decreasing an obligation or increasing a right could be said necessarily to fall under article 60. But the obligations and rights vesting in third States under articles 59 and 60 arise in special circumstances and have a particular basis. The question posed in the present article is whether, by reason of their particular basis, their termination and modification should be governed by particular rules. If a single rule is to be formulated to cover both obligations and rights, then it is believed that it must be one along the lines of the text adopted in 1964 or one framed in the same way but, as suggested by the United Kingdom, reversing the presumption so as to make consent unnecessary unless it appears that the provision was intended to be irrevocable.

[57] *Official Records of the General Assembly, Twentieth Session, Sixth Committee,* 846th meeting, para. 9.

[58] *Ibid.,* 845th meeting, para. 38.

3. The alternative is to deal separately with the termination and modification, on the one hand, of obligations and, on the other, of rights; and this might make it easier to take account of the objection that the article at present over-protects the position of the third State. The Special Rapporteur himself feels that there is force in the view that, however necessary it may be to insist on the need for consent to any increase in an obligation or any change in the conditions for its performance, it is somewhat illogical to require it for the termination or reduction of an obligation. In those cases the position really is that the parties are renouncing in whole or in part their right to call upon the third State for the performance of its obligation; and it hardly seems consistent with principle to make their action subject to the consent of the State in whose favour the renunciation is made. Simple notice to the third State would appear to be fully sufficient. In the case of a right, the main question is whether the rule should be that the consent of the third State is presumed to be necessary unless it appears that the intention was to confer an irrevocable right, or vice versa, as a number of Governments would appear to prefer.

4. The Special Rapporteur has doubts as to the Government of Israel's suggestions for safeguarding the position of the parties by a reference to the articles on termination, and for applying the principles of articles 65-67 on modification as between the parties and the third State. The relationship between the parties, on the one hand, and the third State, on the other, is a special one and there are two questions of termination or modification involved: (*a*) termination or modification of the treaty provision as between the parties themselves and (*b*) the termination or modification of the obligation or right as between the parties and the third State. Clearly, the ordinary rules regarding termination and modification of treaties apply as between the parties with respect to the termination or modification of the treaty provision giving rise to the third State's obligation or right. But it is not so clear that the termination or modification of the obligation or right as between them and the third State is a simple question of the termination or modification of treaties. The Netherlands Government has, indeed, very pertinently raised the question whether it is correct in the present article to speak of the termination and amendment of the "provision" giving rise to the obligation or right, rather than of the actual "obligation" or "right" itself. As between the parties, it is the termination or amendment of the "provision" which is the focal point; as between the parties and the third State, the focal point, although the "provision" is again involved, is the obligation or right arising from it rather than the provision itself. The Special Rapporteur feels that the question of termination or amendment of the "provision" as such should be left to be governed by the general law laid down in the articles concerning termination and modification of treaties; and that the present article should confine itself to the relationship between the parties and the third State. In other words, he feels that it should deal with the obligation or right rather than the provision.

5. The other suggestion of the Netherlands Government for the addition of a proviso excluding, in the case of a right, the need for the third State's consent unless it has actually exercised the right is already covered by what has been said in paragraph 2 of the Special Rapporteur's observations on article 60. The Netherlands Government evidently itself feels that the point properly belongs to article 60; but for the reasons given in the Special Rapporteur's observations on that article, the point does not seem to the Special Rapporteur to be consistent with the position taken up by the Commission in regard to treaties giving rise to a right in favour of a third State.

6. In general, the Special Rapporteur shares the view of the United States Government that "more study of the rule in this article is necessary". Accordingly, in order to provide the Commission with a basis for discussion, he has drafted in the next paragraph a text which (*a*) separates cases of "obligation" from those of "right" and (*b*) reverses the presumption as to revocability in cases of "right". The reversal of the presumption in cases of right under article 60 does not, it is believed, in any way affect the positions of principle taken up by different members in regard to the source of the right; for it only concerns the intention of the parties with respect to the revocable or irrevocable nature of the right which they are "conferring on", or alternatively "offering to", the third State, whichever be the theory held.

7. The text prepared by the Special Rapporteur for discussion reads:

> 1. When an obligation has arisen for a State not a party to a treaty under article 59, the parties afterwards may:
>
> (*a*) terminate the obligation in whole or in part on giving notice to such State;
>
> (*b*) modify the obligation in any other respect only with the consent of such State.
>
> 2. When a right has arisen for a State not a party to a treaty under article 60, the parties afterwards may:
>
> (*a*) terminate the right in whole or in part, after giving X months' notice to such State, unless it appears that the right was intended to be irrevocable except with its consent;
>
> (*b*) modify the right in any other respect only under the rules laid down in articles 59 and 60.

Article 62.—Rules in a treaty becoming generally binding through international custom

Comments of Governments

Finland. In the opinion of the Finnish Government this article concerns the importance of custom as a source of international law and does not really belong to the law of treaties. In addition, as international custom and the law of treaties are equivalent sources of law, it considers the principle expressed in article 62 to be self-evident.

Israel. The Government of Israel suggests that the opening words should read: "Nothing in these articles precludes... etc.".

United States. The United States Government thinks the inclusion of the provision in the present article to be desirable and considers that the recognition of the extension of the rules contained in a treaty to non-parties through international custom does not in any way conflict with the concepts embodied in articles 58 to 60.

Greek delegation. The Greek delegation considers that the article, since it deals with the free creation of new rules of international law, may even be dangerous as well as unnecessary. It asks what would be the position if a number of States were to conclude a treaty which, being freely accepted by other States, became customary law for the latter and the parties terminated the treaty. Would the parties no longer be bound whereas the other States continued to be? The article, it complains, provides no solution to this problem. [59]

Netherlands delegation. The Netherlands delegation notes that, whereas the title refers to rules "generally binding through international custom", the text speaks simply of "customary rules", which seem to include regional custom. It then suggests that there may be an inconsistency between the present article and article 59: rules in a regional treaty would, it suggests, become tacitly binding on all States of the region under the present article, whereas under article 59 obligations arising under a treaty intended to apply throughout a region could only become binding on non-parties by express agreement. Then, the decision to apply one rule or the other would depend on the conception held of customary law. In consequence, it asks whether the present article, which it considers to evoke certain doctrinaire problems, would not fit better in a code than in the convention on the law of treaties now envisaged. [60]

Syrian delegation. The Syrian delegation, referring to the Commission's statement in paragraph (2) of its commentary regarding the recognition by non-parties of the rules set out in a treaty as binding customary law, suggests that the element of recognition should be expressly mentioned in the article in order to avoid any ambiguity. [61]

Observations and proposals of the Special Rapporteur

1. The Finnish Government considers that, as custom and treaties are "equivalent sources" of law, the principle expressed in the present article is self-evident; and that the article does not really belong to the law of treaties. The reason urged by this Government for omitting the article does not seem to the Special Rapporteur to carry conviction. The mere fact that custom and treaties may be independent and "equivalent" sources of law does not prevent their spheres of operation from intersecting and impinging on each other. Not infrequently the very object of a treaty is to establish a regime derogating in some respects from the general law. The purpose of the present article is to make it clear that the apparently general and all-embracing provisions of articles 58-60 do not preclude treaty provisions from having other effects vis-à-vis third States by becoming a generator of international custom.

2. The objection to the article raised by the Greek delegation does not appear to the Special Rapporteur to be any more convincing. The article does not establish any new rule. It merely states, for the purpose of avoiding any misconceptions as to the effects of articles 58-60, what is certainly the law: namely that, independently of the rules of the law of treaties regarding the effects of treaties on third States, principles contained in treaties may become binding on non-parties through being recognized as customary rules. Whatever may be the problems which may arise if the parties to a treaty, which has been the nucleus for the generation of customary law, should seek to terminate it, they will be inherent in the complex origins of the customary rule and their solution will depend on the particular circumstances in which the treaty is terminated, including the intentions of the parties in terminating it and the attitude of all the States concerned regarding the continuance of the custom. The present article does nothing to create these problems and nothing to prejudge their solution.

3. Similar considerations apply to the suggestion of the Netherlands delegation that there may be an inconsistency between the present article and article 59. If the present article is read according to its terms, there is not and cannot be any such inconsistency; for the article merely states that nothing in article 59 precludes rules set forth in a treaty from being binding upon States not parties to that treaty if they have become customary rules of international law. Nor does the article in any way prejudge the requirements for the establishment of a rule of customary law, whether general or regional. As already pointed out, it merely makes clear that, where the spheres of article 59 and of custom intersect, article 59 does not negative the normal operation of custom as a factor in the generation of rules of international law. Furthermore it is to be noted that in its written comments the Netherlands Government expressly states that it has no comment to make on the present article.

4. The Government of Israel suggests that the opening words of the article should read "Nothing in these articles precludes, etc.", instead of "Nothing in articles 58 to 60 precludes, etc.". Provided that the article retains its present place in the group of articles dealing with "third States", the Special Rapporteur sees no objection to the suggested modification, since it covers the point even more completely than the existing text.

5. The Syrian delegation suggests that the element of "recognition" should be expressly mentioned in the article to avoid ambiguity. Presumably, it has in mind modifying the phrase so as to make it read: "if they have become recognized as customary rules of international law." Although this modification would not meet with any difficulty from the Special Rapporteur, he does not think that the reason advanced for it is very cogent. He also believes that the Commission's choice of the quite neutral expression "if they have become customary rules of international law" was deliberate; and he therefore makes no new proposal in this connexion.

Article 63.—Application of treaties having incompatible provisions

Comments of Governments

Cyprus. The Government of Cyprus attaches great importance to retaining in the draft the present wording expressing the over-riding character of Article 103 of the Charter. In its opinion, whenever circumstances warrant

[59] *Ibid.*, 845th meeting, para. 38.

[60] *Ibid.*, 847th meeting, para. 11.

[61] *Ibid.*, 845th meeting, para. 8.

it, the competent organs of the United Nations should be guided by and apply Article 103 unreservedly.

Israel. The Government of Israel expresses its concurrence with the view that cases of partial termination should be removed from article 41 and placed in the present article. It also thinks that the inter-relation between article 41 and the present article would be clearer if the element of "suspension" were removed from article 41 and dealt with either here or in a separate section collecting together all the various provisions relating to suspension of the operation of a treaty. It observes that, if article 41 is left to deal exclusively with "implied termination", its place in the section dealing with termination will be logically correct and its provisions will be put in better focus.

The Government of Israel further suggests that, in paragraph 1, reference should be made to the rights as well as the obligations of States. In paragraph 2, it raises the question whether the treaty provision must always be taken at face value, as in its view the text implies, or whether it should not "be made open to the possibility of a material examination in order to establish whether in fact there is an inconsistency".

In addition, it observes that obsolescence is an important cause of termination and yet is not covered in the draft articles. It expresses the view that the understanding of the present article would be facilitated and the scope of its application possibly reduced, if a place were found in the draft articles, or at least in the commentaries, for the problem of obsolescence.

Netherlands. Noting that article 67, paragraph 1(*b*) (*ii*), rightly takes account of the object and purpose of the treaty as a whole, the Netherlands Government says that paragraph 4 of the present article, on the other hand, suggests that "every multilateral treaty can simply be divided up into a number of bilateral legal relationships leaving no remainder". Again, while recognizing that paragraphs (14), (15) and (16) of the commentary show that the Commission has not lost sight of the question of the coherence of the various provisions of a treaty and of their relation to its object and purpose, it is of the opinion that paragraph 4 is "one-sided" and unsatisfactory. In its view, there may be some justification for concluding that customary law has not yet crystallized on the point and that the problem is not yet ripe for codification.

Yugoslavia. Commenting on articles 63, 66 and 67 together, the Yugoslav Government observes that they all have a bearing on the modification of multilateral treaties, with reference either to all the parties or to some of them only. It suggests that in the final draft of these articles a single, comprehensive and clearer draft should be aimed at. In particular, it feels that the consequence arising from the modification of a treaty under article 63, paragraph 5, and article 67, paragraph 1(*a*) and (*b*) should be put on the same footing.

United Kingdom. The United Kingdom Government suggests that paragraph 2 should be so drafted as to avoid any appearance of referring to a specific earlier or later treaty; e.g. by making it read "any earlier or later treaty". In its introductory observations, it mentions the test of "compatibility" in paragraph 3 as one of several provisions demonstrating the need of an independent adjudication of disputes regarding the operation of the draft articles.

United States. The United States Government observes that the article as a whole enunciates rules long and widely accepted and is a valuable classification. Paragraph 5 it mentions as especially important in calling attention to the fact that by entering into a later treaty a State cannot divest itself of treaty obligations under an earlier treaty with a State that does not become a party to the later treaty.

Argentine delegation. The Argentine delegation refers to the article as "wisely worded".[62]

Kenyan delegation. The Kenyan delegation, while commenting that the article seems quite adequate, expresses the view that the test of "incompatibility" is subjective and should be modified to make it "more judicial and objective".[63]

Observations and proposals of the Special Rapporteur

1. In paragraph 1, the Government of Israel's suggestion that mention should be made of rights as well as of obligations appear to be well founded, even although the emphasis on the article may be primarily on obligations.

2. In paragraphs 2, the United Kingdom suggests that the references to "an earlier or a later treaty" should be changed to "any earlier or later treaty" in order not to appear to refer to a specific earlier or later treaty. This modification, although it does not seem to change the sense of the paragraph, is perhaps an improvement from a drafting point of view. The Government of Israel's suggestion that the paragraph should admit the possibility of a "material examination" of the treaty provision in order to establish whether in fact there is an "inconsistency" does not seem apposite; for the paragraph concerns cases where the treaty by an express provision regulates its relation to other treaties.

3. In paragraph 3, the Government of Israel expresses the view that the interrelation of article 41 and of the present article would be clearer if (*a*) cases of "partial termination" were removed from article 41 and placed in the present article, and (*b*) if the element of "suspension" were removed from article 41 and dealt with either here or in a separate section covering all the various provisions relating to suspension of the operation of a treaty. The question of the co-ordination of the provisions of article 41 and 63 received the close attention of the Commission at its sixteenth session in 1964[64] when it drafted the present article and again at its recent session in Monaco when it revised article 41.[65] The new text of article 41 makes no express mention of "partial termination" of a treaty through the conclusion of a later—overlapping—treaty. On the other hand, the Commission

[62] *Ibid.*, 846th meeting, para. 9.

[63] *Ibid.*, 850th meeting, para. 38.

[64] *Yearbook of the International Law Commission, 1964*, vol. I, 742nd and 743rd meetings.

[65] *Ibid., 1966*, vol. I, part I, 830th meeting.

has retained in article 41 the provision in paragraph 2 dealing with cases of "implied suspension of the operation of a treaty" resulting from the conclusion of a later treaty whose provisions are incompatible with the earlier one. The distinction between cases of implied termination and implied suspension under article 41 is simply one of intention, and the Commission considered it logical and convenient to deal with both in the same article. Moreover, there are other cases, e.g. article 42 dealing with termination as a reaction to a breach, where it is almost essential to deal with both "termination" and "suspension" in the same article. Accordingly, it did not seem to the Commission that it would be a convenient course to place all the cases of suspension in a separate section. Only in dealing with the legal consequences of invalidity, termination and suspension, did the Commission find it possible to treat cases of suspension in a separate article.

4. The Special Rapporteur himself feels that, in order to complete the co-ordination of article 41 and the present article, it is desirable in the present article to revise paragraph 3 so as to make it read: "when all the parties to a treaty conclude a later treaty relating to the same subject matter, but the earlier treaty is not terminated or its operation suspended under article 41, etc." Otherwise there will be a slight discrepancy between the two articles. Moreover, when the earlier treaty is wholly suspended, the case really falls outside the present article.

5. Paragraph 4 the Netherlands Government considers to be "one-sided and unsatisfactory" on the ground that it does not take sufficient account of the relation between the various provisions of a treaty and its "object and purpose". On the other hand, it offers no alternative solution, simply observing that there may be some justification for concluding that customary law has not yet crystallized on the point and that the problem is not yet ripe for codification. The rules set out in paragraph 4 are founded upon fundamental principles of treaty law: the principle *pacta tertiis non nocent* and the principle that States in entering into a new agreement are presumed to intend that its provisions shall apply between them, rather than those of any earlier agreement between them regarding the same matter. The problem which appears to preoccupy the Netherlands Government is one to which the Commission itself gave the most anxious attention in 1964, namely, whether certain types of treaty, by reason of their object and purpose, should be considered to be of such a character that they limit the actual competence of their parties to enter into a valid subsequent treaty inconsistent with their provisions. This problem was examined at length in paragraphs (13) to (17) of the Commission's commentary upon the 1964 text of the present article [66] and no purpose would be served in setting out the various considerations again here. The Commission considered that the parties to the new treaty may engage their international responsibility to the other parties to the earlier treaty if the new treaty violates provisions of the earlier one; and it expressly reserved the question of State responsibility for breach of the earlier treaty in paragraph 5. At the same time, however, it felt bound to conclude that, as the law stands today, by entering into the earlier treaty the parties do not render themselves legally incompetent to enter into another inconsistent treaty and that the later treaty is valid and effective as between the States parties to it. It recognized that, if the provisions of the earlier treaty state rules of *jus cogens*, a later treaty incompatible with it may be actually void; but it considered that this would result from the *jus cogens* nature of the provisions of the earlier treaty, not from the mere incompatibility of the later treaty with the earlier one. Accordingly, *jus cogens* apart, paragraph 4 of the article adopted in 1964 is based on the relative priority, rather than the nullity, of the conflicting treaties—always without prejudice to the question of State responsibility for breach of the earlier treaty. As this appears to be in conformity with long-standing practice, and as the existence of treaties whose provisions are in some degree incompatible is quite a common phenomenon, it hardly seems possible for the Commission to adopt the suggestion of the Netherlands Government that the problem is not yet ready for codification.

6. The Yugoslav Government makes two points with respect to the article. First, it would prefer to see the provisions of the articles 63, 66 and 67, touching the modification of multilateral treaties, combined in a single, comprehensive and clear text. But the present article is not confined to the problem of incompatible treaty provisions arising out of treaties concluded for the purpose of "modifying" a prior treaty; it seeks to deal with all cases of incompatibility and to cover some cases in the present article and others in an article on modification might perhaps lead to a greater, if different, complexity. Another difficulty is the inherent complexity of the matters covered by the three articles—which led the Commission in 1964 to prefer to deal with "amendment of multilateral treaties" and "*inter se*" agreements in separate articles. This Government's second point is understood by the Special Rapporteur as being essentially a request that the Commission should try to ensure full co-ordination between the present article and article 67; and, as such, it seems to him to call for consideration primarily in connexion with article 67.

7. There remains the Government of Israel's observation regarding "obsolescence" as an important cause of termination and suggestion that a place should be found for it in the draft articles. Clearly, the point is a general one and does not arise directly in connexion with the drafting of the present article. In fact, the point has been raised previously by the Special Rapporteur as to whether "obsolescence" or "desuetude" should be dealt with specifically as a ground of termination, and in order to dispose of the matter, the Commission may think it useful to ask the Drafting Committee to consider the point and report its conclusion. The problem is to determine whether "obsolescence" and "desuetude" should be regarded merely as cases of implied agreement to terminate founded on an interpretation of the intention of the parties in the light of the facts, or as examples of the application of article 44 (fundamental change of circumstances), or whether they should be regarded as distinct

[66] *Ibid., 1964*, vol. II, pp. 189-191.

legal causes of termination. At present, the Commission has before it (*a*) draft article 40—dealing generally with termination of treaties by agreement, the decision on which it postponed until the eighteenth session, and (*b*) article 41 dealing with termination implied from entering into a subsequent treaty. Agreement to terminate *implied* from other facts is not specifically dealt with, though it might be said to fall under article 40.

Article 64.—The effect of severance of diplomatic relations on the application of treaties

Comments of Governments

Cambodia. The Cambodian Government considers that paragraphs 2 and 3 are too vague in that they leave it to each party to appreciate to what extent the severance of diplomatic relations permits the continued application of the treaty. It fears that a State may resort to severance of diplomatic relations in order to evade its obligations under a treaty. In its view, the text opens the door to bad faith and involves a dangerous derogation from the rule *pacta sunt servanda*. It therefore considers the deletion of paragraphs 2 and 3 to be essential.

Hungary. Noting that this article deals with the effects of severance of diplomatic relations, the Hungarian Government raises the question of the severance of *consular* relations. It suggests that the effect of severance of consular relations on the application of treaties should be dealt with either in the present article or in a separate article. It points out that the Vienna Convention on Consular Relations expressly contemplates the possibility of a severance of consular relations. In its view, the new provision should specify that paragraphs 1-3 of the present article apply equally to severance of consular relations.

Israel. The Government of Israel suggests that the present place is not the right one for the article. It also suggests that the last words of paragraph 2 should read: "disappearance of the means necessary for its operation." In addition, it observes that the severance of diplomatic relations ought not to be allowed to be an excuse even for the temporary suspension of the operation of a treaty when that is the very contingency for which the treaty was intended to provide; e.g. the Geneva Conventions of 1949 for the protection of victims of war. Paragraph (3) of the Commission's commentary, it feels, may be too categorical on this point.

Netherlands. The Netherlands Government has no comment except that paragraph 3 can be dispensed with if the Netherlands proposal for the modification of article 46 (separability of treaty provisions) is adopted.

United Kingdom. The United Kingdom Government considers that, unless the exception in paragraph 2 is carefully and narrowly defined, the rule in paragraph 1 may be impaired. It observes that, in paragraphs (3) and (4) of the commentary, the Commission recognizes that cases of supervening impossibility of performance may occur in consequence of the severance of diplomatic relations, and that article 43 deals with supervening impossibility of performance only as regards the disappearance or destruction of the "subject matter of the rights and obligations contained in the treaty." In its view, the severance of diplomatic relations affects not the subject matter of the rights and obligations, but rather "the means necessary for the application of the treaty." Having regard to this difference, it suggests that the requirement of impossibility of performance, referred to in the commentary on the present article and set out in article 43, should be expressly included in the formulation of paragraph 2 of the present article. Lastly, it emphasizes that treaty obligations concerning the peaceful settlement of disputes ought not to be capable of being suspended by reason only of the severance of diplomatic relations.

United States. In general, the United States Government endorses the need for the article but observes that the rule in paragraph 2 requires careful study. In its view, although the normal means for the application of the treaty may be lacking in a case where diplomatic relations are severed, there may be other avenues for satisfying, in part at least, the requirements of the treaty. Paragraph (3) of the Commission's commentary uses the expression "supervening impossibility of performance", but that concept does not seem to the United States Government to be clearly reflected in either paragraph 2 or 3 of the article itself. It suggests that the Commission's intentions would be more fully reflected, and possible abuse of paragraphs 2 and 3 avoided, if a further paragraph were added as follows:

> "4. The suspension may be invoked only for the period of time that application is impossible."

Even so, however, it doubts whether this would suffice to avoid altogether the abuses that might occur under paragraphs 2 and 3. It therefore concludes that the better solution may be to retain paragraph 1 only and to leave the subject matter of the remaining paragraphs to be governed by other provisions of the draft articles such as article 43, paragraphs 2 and 3. In any event, it feels that further consideration of the over-all effect of the rules in paragraphs 2 and 3 of the present article is required.

Greek delegation. The Greek delegation observes that it would be preferable for the Commission to consider the principle "*impossibilium nulla est obligatio*" in a more general way instead of including it in a provision concerning the severance of diplomatic relations (the delegation appears to have overlooked article 43 of part II). [67]

Thai delegation. While agreeing with paragraph 1, the Thai delegation feels that paragraphs 2 and 3 provide an unnecessary and undesirable opportunity for a party to resort to severance of diplomatic relations as a political expedient to shirk treaty obligations. In its view, the word "disappearance of the means necessary for the application of the treaty" (paragraph 2) and "the disappearance of such means" (paragraph 3) are open to subjective interpretation. It considers that supervening impossibility of performance is already adequately covered in articles 43 and 54 and that paragraphs 2 and 3 of the present article could be deleted altogether. Otherwise, it is of the opinion

[67] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 845th meeting, para. 39.

that these paragraphs should be reformulated in a more precise and restrictive manner. [68]

Observations and proposals of the Special Rapporteur

1. The principal rule stated in paragraph 1, that the severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty, appears to meet with the unanimous approval of Governments. The Government of Israel questions the placing of the article in its present position, without making any specific proposal of its own. The Special Rapporteur, in a tentative paper for the Drafting Committee, has suggested that this article should follow close after the *pacta sunt servanda* article. But as the whole matter of the final order of the articles is now before the Drafting Committee, the Commission will presumably prefer to await its report before considering the particular place of the present article.

2. On the other hand, almost all the Governments which have commented on the article take the view that paragraph 2 should be made more strict. A number of them, in effect, advocate either that paragraph 2 should be expressed in terms of temporary impossibility of performance or that the cases arising under this paragraph should be left to be covered by the provisions of article 43 regarding "supervening impossibility of performance". Article 43 underwent some revision at the recent session of the Commission in Monaco [69] so that the comments of these Governments on the present article have to be appreciated in the light of the new text of article 43 which now reads:

> "A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent [70] disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty".

The new text formulates the criteria of impossibility of performance in terms of the permanent disappearance or destruction of "an object indispensable for the execution of the treaty" rather than of "the subject matter of the rights and obligations contained in the treaty". In the present context, on the other hand, as the United Kingdom Government emphasizes and as the article adopted in 1964 recognizes, it is "means" necessary for the application of the treaty which may be affected by the severance of diplomatic relations rather than an "object" indispensable for its execution.

3. The view expressed by Governments that paragraph 2 as at present drafted may appear to leave too much scope for invoking the severance of diplomatic relations as a pretext for suspending performance of a treaty is thought by the Special Rapporteur to be justified. The Commission itself, in paragraphs (3) and (4) of its commentary on the present article in 1964, envisaged paragraph 2 as covering cases of a temporary impossibility of performance resulting from the disappearance of the diplomatic channel. But the text of the paragraph falls short of stating the stringent criterion of "impossibility of performance", even although the words "if it results in the disappearance of the means necessary for the application of the treaty" may in some measure imply that criterion. The difficulty arises, it is thought, from the fact that the text speaks of a right to invoke, as a ground for suspension, the severance of diplomatic relations rather than of a right to invoke the disappearance of a means indispensable to the application of the treaty.

4. The solution which the Special Rapporteur is inclined to favour is that indicated by the United States and Thai Governments, namely, to retain the general rule stated in paragraph 1 and to leave the cases envisaged in paragraph 2 to be covered by article 43. The latter article would, of course, then have to be modified so as to include the disappearance of "a means" as well as the disappearance of "an object" indispensable for the execution of the treaty. In this case, it may still be desirable to touch on the question of "impossibility of performance" in paragraph 2 in the form of a provision making a cross-reference to article 43. In other words, paragraph 2 might be revised on the following lines:

> If the severance of diplomatic relations should result in a temporary impossibility of performing the treaty in consequence of the disappearance of a means indispensable for its execution, articles 43 applies.

This solution would have the advantage of bringing the cases envisaged in paragraph 2 into the group of articles dealing with the termination and suspension of the operation of treaties to which they really seem to belong.

5. Paragraph 3 of the 1964 text, which deals with the questions of partial impossibility of performance and of the principle of the separability of treaty provisions, is no longer necessary since those points are now sufficiently covered in article 46 as revised at the recent session in Monaco. [71] The suggestion of the Netherlands Government that this paragraph may be dispensed with is therefore clearly acceptable.

6. There remain for consideration a number of particular points made in the comments of Governments. First, the Government of Israel, citing the Geneva Conventions of 1949, stresses that the severance of diplomatic relations "ought not to be allowed to be an excuse for the temporary suspension of the operation of a treaty when that is the very contingency for which the treaty was intended to provide". The Special Rapporteur suggests that, if paragraph 2 is modified in the way proposed above so as to limit that paragraph explicitly to cases of "impossibility of performance", the preoccupation of that Government will automatically be met. Certainly, it would seem out of the question to invoke an impossibility of performance

[68] *Ibid.*, 850th meeting, para. 11.

[69] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 832nd and 833rd meetings.

[70] On re-examining article 43, the Special Rapporteur is inclined to think that the word " permanent " ought to be either deleted or placed in front of the word " impossibility " where it first occurs, i.e. " A party may invoke a permanent impossibility, etc. ".

[71] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 843rd meeting, para. 13.

resulting from a severance of diplomatic relations when the treaty itself specifically provides for that contingency.

7. Secondly, there is the point made by the United Kingdom that treaty obligations concerning the peaceful settlement of disputes ought not to be capable of being suspended by reason only of the severance of diplomatic relations. This point, in the opinion of the Special Rapporteur, is in itself clearly valid. It is, indeed, unthinkable that the obligations in regard to the peaceful settlement of disputes, which are set out in Article 2, paragraph 3, and in Article 33 of the Charter of the United Nations, should be capable of being suspended by the severance of diplomatic relations. The question is whether it is necessary to provide for the point specially, either in the present article or in article 43; in other words, whether the severance of diplomatic relations creates any such impossibility of performing obligations of peaceful settlement as would entitle a State to invoke article 43. Clearly, the ability of the States concerned to negotiate directly may be impaired. But, having regard to the other methods of negotiation open to them through the United Nations, through regional organizations or through the medium of friendly States, it may be doubted whether there could be said to be any "impossibility of performance". Practice, for example the Corfu Channel incident, [72] seems to confirm that the absence of diplomatic relations does not create any legal impossibility of carrying out obligations of peaceful settlement or relieve the parties to a dispute in any way of their duty to perform those obligations. On the other hand, the performance in good faith of obligations undertaken with respect to the peaceful settlement of disputes is of such outstanding importance that the Commission may wish to consider the possible addition to the present article of a provision on the following lines:

> In no circumstances may the severance of diplomatic relations between parties to a treaty be considered as resulting in an impossibility of performing any obligation undertaken by them in the treaty with respect to the peaceful settlement of disputes.

8. Thirdly, there is the suggestion of the United States Government that a new paragraph should be added to the existing text of the present article to the effect that any suspension of the operation of the treaty resulting from severance of diplomatic relations can be invoked "only for the period of time that the application of the treaty is impossible". This suggestion is made by the United States only in case the Commission does not adopt its more radical proposal to delete all but the first paragraph and leave the rest to be covered by article 43. Since the Special Rapporteur favours that more radical proposal, he does not see any need for the new paragraph to be added to the present article. On the other hand, the United States suggestion does perhaps provoke a question as to whether the second sentence of article 43, as adopted at the Monaco session, is drafted with quite sufficient precision in regard to the duration of the suspension. Is it desirable to underline that the "suspension" must be co-extensive with the "impossibility"? In other words, ought the second sentence of article 43 to be revised so as to make it read:

> If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty while the impossibility exists?

9. Finally, there is the suggestion of the Hungarian Government that the effect of the severance of consular relations should either be covered in the present article or be dealt with in a separate article, and that the same rules should be applied as in the case of severance of diplomatic relations. Logical though this suggestion may appear at first glance, the Special Rapporteur feels some hesitation in accepting the idea that the severance of diplomatic relations and the severance of consular relations should be placed on the same footing for the purpose of the present article. It is true that the Vienna Convention on Consular Relations, in articles 2 and 27, envisages the possibility of the severance of consular relations as a measure independent of the severance of diplomatic relations. But the severance of consular relations does not seem to have the same general relevance in regard to the treaty relations of States as the severance of diplomatic relations. The maintenance of diplomatic relations is essential for the existence of normal international relations between States in a way that the maintenance of consular relations is not. Indeed, the only real need for the present article is firmly to negative the possible implication that, by severing diplomatic relations and thereby suspending normal international relations, a State equally suspends its treaty relations with the other State concerned. But the severance of consular relations does not by itself carry any such implication. On the other hand, what is said in paragraph 1 of the severance of diplomatic relations is, of course, largely true of the severance of consular relations: it does not normally affect the legal relations between the two States established by treaties. Again, it is possible to conceive of questions of "impossibility of performance" being raised—whether validly or not—as a result of a severance of consular relations; e.g. in regard to the machinery for the execution of established treaties. The Special Rapporteur feels, however, that delicate questions might arise as to the admissibility of the severance of consular relations under such treaties. Nor is it to be forgotten that there are large numbers of consular conventions in existence which must be taken into account in any formulation of a general rule regarding severance of consular relations. In short, for the reasons indicated, the Special Rapporteur feels some doubt on the question of making the rules of the present article apply also to severance of consular relations. If the Commission should favour introducing a provision on this question, the Special Rapporteur considers that it should be in the form of a separate paragraph which would at the same time take account of the problem of consular conventions.

Article 65.—Procedure for amending treaties

Comments of Governments

Israel. Observing that paragraph (7) of the commentary correctly recognizes the possibility of an oral agreement or tacit agreement to amend a treaty, the Government

[72] *Corfu Channel* case, *I.C.J. Reports 1949*, p. 4.

of Israel suggests that the opening words of the article should be revised to read: "A treaty may be amended by agreement in writing between the parties and the rules in part I shall apply etc.". It also draws attention to the phrase "the established rules of an international organization", pointing to its remarks regarding this phrase in its comments on articles 66 and 67.

Netherlands. The Netherlands Government observes that the words "If it is in writing" imply recognition of the possibility of a written and ratified treaty being amended by a verbal agreement and that, although this occasionally occurs in practice, it is not to be recommended. Accordingly, it would prefer no mention to be made of it in the article. It adds that the deletion of those words would not rule out the possible significance of a verbal agreement in the context of the present article. Pointing out that a verbal agreement with "subsequent practice" is recognized in article 68(*b*), it expresses the opinion that a verbal agreement without "subsequent practice" would be of little or no importance. It proposes that the second sentence should read simply: "The rules laid down, etc.".

United States. The United States Government draws attention to the relation between the two exceptions mentioned at the end of the article, namely, cases where a treaty lays down particular rules for its own amendment and cases where "the established rules of an international organization" prescribe a particular procedure. It suggests that questions may arise as to which of those exceptions is to prevail when a treaty concluded under the auspices of an international organization contains express provisions regarding the manner of its amendment and the rules of the international organization subsequently provide for some other manner of amendment. At the same time, it seems to consider that those questions would be solved by the principle that the agreement of the parties should govern the procedure of amendment.

However, it foresees difficulty (*a*) in the case of treaties that have been concluded outside an international organization and are to be amended by agreements concluded under the auspices of an international organization, and (*b*) in the case of treaties which contain no provision for amendment and are concluded under the auspices of an international organization which subsequently develops rules that would permit amendment without agreement of all the parties. In those cases, it suggests, a question arises as to whether the provisions of article 65, with respect to international organizations, would prevail over the provisions of article 67, regarding agreements to modify multilateral treaties between certain of the parties only. In its view, it might be contended that, under article 65, an amendment of a treaty under the auspices of an international organization could deprive some of the parties to that treaty of rights under it and relieve States which become parties to the amendment from obligation to parties to the treaty which do not accept the amendment. The inclusion in the present article of the reference to international organizations seems to the United States Government to imply that a separate body of treaty law has been and can continue to be formulated by international organizations with respect to the amendment not only of treaties concluded under the auspices of such organizations but of other treaties as well. Accordingly, it reserves its position in regard to the second sentence in the present article.

Greek delegation. The Greek delegation observes that, since an agreement amending an agreement is itself a treaty, the present article may be superfluous. On the other hand, it feels that the draft should include a provision for taking account of any proposal to amend a treaty. In its view, there is, for example, a certain analogy to be drawn between a clause in an arbitration treaty providing for the possibility of negotiations before recourse to arbitration and proposals for amending a treaty.[73]

Romanian delegation. The Romanian delegation considers that the second sentence of the present article, together with article 66, paragraphs 1 and 2 and article 72, paragraph 2(*b*), open the way to contradictions between the desires of States parties to treaties and the rules established by international organizations. It maintains that such provisions regarding the established rules of an international organization are incompatible with the fundamental principle that no treaty may be amended except with the participation and/or consent of the parties to it. In its view, the exceptions proposed in connexion with the established rules of international organizations are likely to create confusion in the interpretation of treaties and should be deleted.[74]

Observations and proposals of the Special Rapporteur

1. Two Governments (Israel and the Netherlands) though recognizing that a treaty may sometimes be amended by an oral or tacit agreement, prefer that the possibility of such less formal modes of amendment should not be underlined in the present article. Both make proposals for revising the article so as to omit the opening words of the second sentence, "If it is in writing, the rules laid down in part I, etc.". Bearing in mind article 2(*b*), the Special Rapporteur feels that it would be appropriate to omit those words from the present article. Article 2(*b*), it will be recalled, provides that the fact that the draft articles do not relate to international agreements not in written form is not to affect their legal force or the application to them of any of the rules contained in the draft articles to which they would be subject independently of those articles. This provision would seem sufficient to safeguard oral or tacit agreements to amend a treaty; and tacit amendment by subsequent practice is dealt with specifically in article 68. The form of amendment proposed by the Netherlands Government appears to the Special Rapporteur to be preferable. He accordingly proposes that the words "If it is in writing" should simply be deleted from the second sentence which would then begin: "The rules laid down in part I...".

2. Three Governments (Israel, United States and Romania) take exception to the provision regarding "the established rules of an international organization". They

[73] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 845th meeting, para. 40.

[74] *Ibid.*, 848th meeting, paras. 10 and 11.

take the view that the second sentence of the article, as at present drafted, goes too far in appearing to give an overriding effect to the "established rules of an international organization" in the amendment of any treaty—even a treaty drawn up merely "under its auspices", i.e. merely using its facilities, and indeed, even a treaty drawn up altogether outside the organization. This was not contemplated by the Commission, which intended the words: "except in so far as the established rules of an international organization may otherwise provide" simply as a general reservation to safeguard special cases such as the international labour conventions, the amendment of which is controlled by the rules of the organization. However, as the reaction of the three Governments shows, such a reservation of "the established rules of an international organization" may give rise to equivocal interpretations which it is clearly necessary to avoid.

3. The Commission itself has narrowed its own approach to the relation of the rules of international organizations to treaty making procedures since it adopted the first draft of part I in 1962. In that draft it tended to deal with treaties concluded "under the auspices of an international organization" on the same footing as treaties concluded within an organization, and to allow the procedures for both categories to be affected by the "established rules of an international organization". Further consideration of the problem, however, led the Commission, in revising part I in 1965, to restrict the operation of "established rules of an international organization" to treaties which are constituent instruments of an organization or which have been drawn up within an organization, as in the case of international labour conventions. At the same time, the Commission decided to deal with this problem in a general provision which now appears as article 3(*bis*) and reads as follows:

> "The application of the present articles to treaties which are constituent instruments of an international organization or have been drawn up within an international organization shall be subject to the rules of the organization in question."

Accordingly, quite apart from the comments of the three Governments, it would have been logical to delete from the present article the reservation regarding the rules of international organizations and to leave the question to be governed by article 3(*bis*), and this is, indeed, the proposal of the Special Rapporteur.

4. On the basis of the changes proposed in paragraphs 1 and 3 above, the revised text of the article would read:

> A treaty may be amended by agreement between the parties. The rules laid down in part I apply to such agreement except in so far as the treaty may otherwise provide.

5. It is appreciated that the deletion of the reservation regarding the established rules of an international organization from the present article may not meet all the preoccupations expressed in the comments of Governments to the fullest extent. For example, it may not meet the United States' query regarding the case of a treaty concluded within an organization which subsequently introduces rules controlling amendments to treaties concluded within the organization. The Special Rapporteur doubts whether the Commission should attempt in the present articles to provide a general answer for such special cases, for they would seem to raise questions not only of inter-temporal law but also of the law of international organizations. A more general query raised by the Government of Israel may, however, require the attention of the Commission in connexion with its final consideration of the text of article 3(*bis*). This is the question whether the phrase "treaty which has been drawn up within an international organization" is restrictive enough. This Government suggests that the treaty ought not merely to have been drawn up within the organization, but to have a material link with the constitution of the organization, as in the case of labour conventions (see its comments on articles 66 and 67); and it states that many United Nations conventions have no such material link with the constitution of the Organization but merely make use of its conference machinery. When the wide "Purposes" of the United Nations and the specific provisions of Chapters IX and X of the Charter are recalled, this statement may be disputable. Moreover, unless the "material link" is defined in terms of the objects and purposes of the organization, its definition may be difficult. However, since there is evidently some feeling among Governments that the reservation regarding "established rules of an international organization" should be of narrow scope, the Commission may wish to re-examine the problem before finally approving the text of article 3(*bis*).

Article 66.—Amendment of multilateral treaties

Comments of Governments

Hungary. The Hungarian Government considers that paragraph 1 should be completed by adding a special rule regarding general multilateral treaties. In its view every State, even those which are not parties to the original treaty, should be invited to take part in a conference dealing with the amendment of general multilateral treaties. At the same time it emphasizes that this addition to the present article presupposes the alteration of the text of article 8 so as to bring its provisions into accord with the definition of general multilateral treaties contained in article 1.

The Hungarian Government further questions the provision in paragraph 3 as being somewhat hypothetical. It doubts whether there is any need to create a new rule for a hypothetical case whose regulation hardly seems justified by practice. It also feels that the provision is open to question on the ground that it attaches a certain effect to the signature of a treaty and is moreover, in its view, out of place in the section dealing with modification of treaties.

Israel. The Government of Israel suggests that paragraph 1 should carefully distinguish between the "impersonal proposal to amend a multilateral treaty" and the right of a party to propose an amendment to a treaty which may be restricted by the terms of the treaty itself. In general, it considers that the obligations of the other parties should be determined in the first place by the

treaty (if it contains relevant provisions) and only in the second place by general rules. While accepting the distinction made in articles 66 and 67 between proposals for amendment in relation to all the parties and proposals initially for *inter se* amendments, it suggests that there may be an intermediate case: a group of parties might initiate discussion of amendments without its being clear initially as to the kind of amendments that will finally emerge from the discussion. In its view, this kind of situation may be more prejudicial to the positions of the other parties than the situations in articles 66 and 67. As a remedy, it proposes that the question of notice of amendments should be dealt with in an independent article—article 65(*bis*) it would be—applicable to all proposed amendments. It feels that, under the present texts of articles 66 and 67, notification of the conclusion of an *inter se* agreement, as provided in paragraph 2 of article 67, may come too late, particularly having regard to paragraph 1(*b*) (*ii*) of that article. It considers that the other parties ought to be given an early opportunity to determine whether the enjoyment of their rights or the performance of their obligations is likely to be adversely affected by a proposed modification of the treaty.

In addition, it queries whether the recipients of notifications of proposed amendments, whether general or *inter se*, should be limited—at all events in an initial period—to the parties to the treaty. The Commission, in its view, does not take into account the possibility of cases where a multilateral treaty will not enter into force, for want of a sufficient number of ratifications, unless amendments, the necessity for which has been established only after the adoption of the text, are first made.

The Government of Israel also considers that the expression "established rules of an international organization" in paragraph 2 of the present article and in article 65 is highly ambiguous in the present context. It asks whether the expression refers to the rules of an international organization applying to the members of that organization as such, or to those rules which apply to treaties concluded or to treaties which have been drawn up within an international organization, the parties to which may not necessarily all be members. Recalling its proposal to generalize article 48, it raises the question of the adequacy of the criterion of a treaty's having been drawn up within an international organization. It suggests that the real criterion has to be sought in the material connexion of the treaty with the organization within which it has been drawn up—its material link with the constitution of the organization; e.g. international labour conventions. Many treaties drawn up within the United Nations or at conferences convened by it have no such material connexion, or only a very tenuous one, with the Organization.

In paragraph 2(*b*) the Government of Israel suggests that it is not sufficient to refer to article 63, and that closer co-ordination is required between articles 59-61 and articles 65-67.

Netherlands. The Netherlands Government considers that paragraph 3 in its present form could be taken to mean that, conversely, a State party which has *not* signed the agreement (nor otherwise clearly intimated that it does not wish to oppose the amendment) is liable if there is a breach of the treaty. It observes that under paragraph 1 such a State would have taken part in the preliminary consultation on the desirability of an amendment and probably even in the drawing up of the amending agreement. It then expresses the view that liability for breach of the treaty will as a rule be out of place in this amendment procedure, and that this will be so even in the case of a party that has dissociated itself from the proposed amendment in the course of the procedure. In its view, paragraph 3 should be deleted.

United States. The United States Government thinks that the article as a whole may serve as a useful guide. In paragraphs 1 and 2, however, it reserves its position in regard to the phrase "established rules of an international organization", for the reasons given by it in its comments on article 65. It also suggests that the provision in paragraph 3, by which a State which signs an amendment is precluded from protesting against the application of the amendment, may be too severe. This provision, it says, goes further than the observation in paragraph (13) of the Commission's commentary that the State signing but not ratifying an amendment is "precluded only from contesting the right of other parties to bring the amendment into force as between themselves". The words "application of an amending agreement" in paragraph 3 would, in its view, cover the "giving of effect to provisions in the amending agreement that derogate from or are otherwise incompatible with the rights of parties under the earlier agreement". In consequence, it believes that paragraph 3 may have the effect of discouraging States from signing an amendment if they are not certain that they can ratify it; and that States may sometimes consider it necessary to go through their whole treaty-making procedures, including legislative or parliamentary approval, before signing. Signature of an amendment would. under paragraph 3, constitute a waiver of treaty rights,

Yugoslavia. Commenting in general terms on articles 63, 66 and 67, the Yugoslav Government observes that, in the final text of these articles bearing on the modification of multilateral treaties, whether in relation to all or only to some of the parties, it will be desirable to aim at a single, comprehensive and clearer solution.

Argentine delegation. The Argentine delegation refers to the present article as one which has been "wisely worded".[75]

Romanian delegation. The Romanian delegation's reservations regarding the use of the phrase "established rules of an international organization" in this article and in articles 65 and 72(*b*) have already been set out under article 65, to which members of the Commission are asked to refer. In brief, it maintains that the provisions regarding the established rules of an international organization in paragraphs 1 and 2 of the present article are incompatible with the principle that no treaty may be amended except with the participation and/or consent of the parties to it.[76]

[75] *Ibid.*, 846th meeting, para. 9.

[76] *Ibid.*, 848th meeting, paras. 10 and 11.

Observations and proposals of the Special Rapporteur

1. Three Governments (Israel, Romania, United States) have questioned the references to the "established rules of an international organization" found in paragraphs 1 and 2 of the article on the grounds that they may be open to large interpretations and go too far in subordinating the will of the parties to the rules of international organizations in the matter of the amendment of multilateral treaties. This point has already been discussed in paragraphs 2-5 of the Special Rapporteur's observations on article 65, where it is recalled that in 1965 the Commission decided to deal with the relation of the rules of international organizations to the general law of treaties in a comprehensive provision which now appears as article 3(*bis*). In the present article, as in article 65, the logical consequence of that decision will be to delete the reservations in regard to the "established rules of an international organization"; and the Special Rapporteur so proposes in both paragraphs 1 and 2. The effect of adopting this proposal, as pointed out by the Special Rapporteur in his observations on article 65, will automatically be to narrow the scope of the reservation in the present article regarding the rules of international organizations. At the same time, when it has completed its re-examination of the draft articles, the Commission will doubtless review the wording of article 3(*bis*) in order to satisfy itself that the reservation is not too large in scope.

2. In paragraph 1 the Government of Israel asks that the text should distinguish between the "impersonal" proposal to amend a multilateral treaty and the right to propose an amendment which may be restricted by the terms of the treaty. The Special Rapporteur understands this request as suggesting that the paragraph should be formulated so as to express more comprehensively that it states only residuary rules applicable in the absence of specific provisions in the treaty. Sub-paragraphs (*a*) and (*b*) are already stated as residuary rules, so that the point may primarily relate to the provision in the opening phrase: "every party has the right to have the proposal communicated to it". This phrase was made subject to the qualifying words "subject to the provisions of the treaty" in the text submitted by the Special Rapporteur to the Commission at its 753rd meeting [77] and it seems primarily to have been drafting considerations which led to its being made independent of those words. The Commission certainly attached great importance to the right of every party to be notified of any proposal to amend a multilateral treaty. But when the substantive rights to take part in the decision as to the resulting action (sub-paragraph (*a*)), and to take part in the conclusion of any amending agreement (sub-paragraph (*b*)), are made subject to the overriding effect of the provisions of the treaty, it seems logical that the right to notification should also be so subject.

3. The Government of Israel's suggestion may perhaps have been intended to cover also the right of a party to put forward a proposal for amending a multilateral treaty; and it is, of course, true that a number of multilateral treaties contain clauses designed to restrict the making of proposals for amendment in some manner; for example, until after the elapse of a specified period of time. The Commission considered this aspect of the question in 1964. [78] While recognizing that such clauses are not uncommon and that the influence which they may have on the reaction of the other parties to an amending proposal is not in conformity with a specific provision in the treaty, the Commission felt that such clauses do not and cannot deprive a party of the faculty of raising as a political matter the question of the amendment of a provision which it considers to be unsatisfactory. Accordingly, it deliberately avoided formulating the present article in such a way as to appear to recognize that a treaty provision may place an absolute legal bar on a party's faculty to make a political proposal for the amendment of a treaty. It preferred to speak in general terms of "Whenever it is proposed that a multilateral treaty should be amended, etc." and to leave it to the other parties to invoke or not invoke any clause in the treaty restricting proposals for its amendment.

4. In the English text of paragraph 1, a small correction is necessary to take account of a decision of the Commission at its 764th meeting when it was expressly agreed to substitute the words "as between" for "in relation to". [79] This change seems to have escaped attention in the final revision of the 1964 report, and it may be that the Spanish text also requires to be modified so as to bring it into more exact correspondence with the French text.

5. The Government of Israel makes two points in regard to the notification of proposals of amendment, which apply both to the present article and to article 67. First, it suggests that there may be an intermediate class of case where a group of parties initiate discussions regarding amendments without its being clear as to the kind of amendments which will emerge—whether they will be *inter se* amendments or proposals for general amendments. It proposes that this type of case should be guarded against by dealing with the question of notice of amendments in an independent article which would follow article 65, but does not indicate what should be the rules stated in this independent article. In order to meet in this way the preoccupation of the Government of Israel in regard to this "intermediate" class, it would seem necessary to impose an obligation on every party to a multilateral treaty to notify all other parties of any political discussions on which it embarks with any other party regarding the possible amendment of the treaty. But such an obligation would hardly seem likely to be acceptable to States, and might even prove a hindrance to the germination of desirable proposals for the amendment of the treaty. The Special Rapporteur accordingly doubts the advisability of the Commission's trying to legislate directly for this so-called "intermediate" class of case. On the other hand, two other Governments in their comments on article 67 have indicated that they share the Government of Israel's doubts whether the

[77] *Yearbook of the International Law Commission, 1964*, vol. I, p. 196.

[78] *Ibid., 1964*, vol. II, 744th to 747th meetings, pp. 132-157.

[79] *Ibid., 1964*, vol. I, p. 269, para. 33.

provision in paragraph 2 of that article for the notification of *inter se* agreements provides a sufficient safeguard for the rights of the other parties. Accordingly, the Special Rapporteur feels that this point should be met rather by strengthening paragraph 2 of article 67, and this may make it easier to maintain the distinction between "amendment" and "*inter se*" modification of multilateral agreements on which the Commission so much insisted in 1964.

6. The second point is a query whether, at any rate during an initial period in the life of a multilateral treaty, States parties to the treaty should alone be entitled to be notified of proposals of amendment. This point relates to the rights or interests of States that took part in drawing up the treaty but have not yet become parties; and in certain other contexts—for example, opening a treaty to additional participation (article 9) and termination by agreement (article 40)—it is a point which has received close attention from the Special Rapporteur and the Commission. In both articles 9[80] and 40[81] the Commission, in 1962 and 1963 respectively, adopted texts which provided that, for a period of years, States which participated in the drawing up of the text of the treaty should have a voice in decisions regarding it. The Commission has not yet completed its revision of either of these articles; in the case of article 9 because of a special problem regarding general multilateral treaties, and in the case of article 40 because of the possible link between suspension of the operation of a treaty only between certain parties with article 67 (*inter se* agreements). The Commission has also left open the question of what it means by "contracting States", a term used in a number of articles in part I to refer to States having rights as signatories, or endorsers of the text and, in particular, in article 29 setting out the functions of depositaries. On the other hand, in re-examining article 40 at the Monaco session the Commission showed no enthusiasm for retaining the provision protecting the right of States which have participated in drawing up a treaty to a voice in its termination; and the text proposed by the Drafting Committee omitted it.[82] The Drafting Committee felt that the provision would unduly complicate the article and that it covered a somewhat unlikely contingency. Since on this point the situation in cases of amendment is analogous to that obtaining in cases of termination, the Special Rapporteur does not feel that he should introduce into the present article a provision of the kind suggested by the Government of Israel unless the Commission expresses itself in favour of such a provision. In practice, the point would be likely to be important only in the case of a treaty which comes into force after very few ratifications, acceptances, etc. Moreover, in such a case the "parties" would be unlikely to amend the text without consulting the other signatory States because to do so would be to risk the continued refusal of the latter to become parties and the restriction of the treaty to a narrow circle of States.

7. There is, however, another question which arises out of the Government of Israel's point, namely, whether there is not a lacuna in the article in that it makes no provision for the amendment of the text before the treaty has come into force. Clearly, there is such a lacuna and, although proposals to amend the text of a multilateral treaty may not be frequent, they may be important in cases where, as the Government of Israel notes, the defects in the treaty are the very reason why the necessary ratifications, acceptances, etc., to bring it into force, have not been forthcoming. If the Commission decides that these cases should be covered in the article, two problems arise. The first is the definition of the States entitled to be notified and to take part in the decision. Presumably, these should in principle be any States which have "adopted" the text or otherwise endorsed it, e.g. by a subsequent signature, acceptance, etc.; but the matter is complicated by the practice of adopting the texts of multilateral treaties by resolution of an international organization when it is not necessarily possible to identify the States which have voted in favour of the text. The Commission has more than once discussed this question without resolving it; indeed, it is involved in the problem of the definition of "contracting States" mentioned above. The second problem is the effect of an amending agreement concluded before a treaty has come into force: does the original text continue in existence for those States which do not become parties to the amendment, or does the amendment substitute a new revised text for the original one? The Special Rapporteur believes that, in principle, the former is the case and that paragraph 2 of the article, as drafted in 1964, applies equally to an amending agreement concluded before a treaty has come into force. That an unratified text has a legal status of its own and that its signatories (to use a convenient if inexact expression) have certain rights in the text as such seems clear, whatever may be the true legal source of those rights. Accordingly, it would not seem possible for an amending agreement to deprive signatories of the original text, not parties to the amendment, of their rights under the original text, more especially under its final clauses.

8. The Hungarian Government suggests the addition of a special rule regarding general multilateral treaties under which every State, whether or not a party to the original treaty, should be invited to take part in a conference dealing with the amendment of general multilateral treaties; and it links this suggestion with its proposal for changing the text of article 8 (participation in a treaty). The text adopted for paragraph 1 of article 8 in 1962 reads: "In the case of a general multilateral treaty, every State may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself, etc.". The Commission was divided in regard to the substance of the paragraph in 1962[83] and, when it re-examined the article in 1965, it failed to arrive at an agreement and postponed its decision upon the article.[84] But in any event that article concerns the right to become a party to a general multilateral treaty, not the right to participate in the conference which draws it up; and in article 6, which does deal with the adoption of the texts of multi-

[80] *Ibid., 1962*, vol. II, p. 168.

[81] *Ibid., 1963*, vol. II, p. 202.

[82] *Ibid., 1966*, vol. I, part I, 841st meeting, para. 58.

[83] *Ibid., 1962*, vol. I, 670th meeting, paras. 93-101.

[84] *Ibid., 1965*, vol. I, 795th meeting, paras. 41-83.

lateral treaties, the Commission did not prescribe any special rule regarding general multilateral treaties. In short, the Commission has treated the convening of States to a diplomatic conference for drawing up the text of any treaty as a political question, and this would seem to be equally the case with an amending agreement. In the present article, the Commission has not thought it appropriate to go beyond recognizing a right for parties to participate in the drawing up of amendments to multilateral treaties which are in force.

9. The Government of Israel's point that in paragraph 2(*b*) it is not sufficient to refer to article 63 and that closer co-ordination is required between articles 59-61 and articles 65-67 may be doubted. Article 63 already gives effect to the essential rule of article 59 that a later treaty cannot deprive "third States" of their rights under an earlier treaty or modify those rights without their consent. It would, it is thought, complicate the articles unduly and unnecessarily to try to spell out in articles 65-67 all the possible implications of articles 59-61. It seems sufficient to refer to article 63 and to leave the rest to the normal operation of articles 59-61 in any set of circumstances where any of those articles may be specially applicable.

10. Three Governments (Hungary, Netherlands, United States) express doubts concerning paragraph 3. The Netherlands Government proposes the deletion of the paragraph but does so on the basis of an interpretation which it does not seem to the Special Rapporteur to be possible to extract from the paragraph. At the same time it expresses the view that any question of liability for breach of the treaty arising out of the amendment procedure will normally be ruled out and that this will be so even in the case of a party which has dissociated itself from the proposal to amend the treaty. It may be that in practice amendments will not often be adopted the application of which might violate the existing rights of parties not accepting the amendments. But the possibility of such cases can hardly be excluded and it is noted that the United States Government criticizes the formulation of paragraph 3 from the opposite point of view—on the ground that the paragraph goes too far in precluding a State, which has signed but not become a party to the amending agreement, from complaining of a violation of its own rights.

11. The Hungarian Government, though on different grounds, also proposes the deletion of paragraph 3. In the first place, it regards the cases covered by the paragraph as somewhat hypothetical and doubts the need for the creation of a new rule. The Commission did not envisage the rule in paragraph 3 as a new rule but rather as an application of the principle of *nemo potest venire contra factum proprium* and as a recognition of what appears to be the common understanding of a situation which is met with quite often in practice. It is, indeed, even usual that an amending agreement signed by the great majority of the parties to the treaty does not come into force for all of them, owing to the failure of some to ratify the new agreement. It appears to be the generally accepted practice —reflected in paragraph 2 of the present article—that the States which do ratify the amendments may lawfully bring the amendments into force as between themselves (see paragraph (13) of the Commission's commentary). The Hungarian Government also queries paragraph 3 on the ground that it attaches a certain effect to the signature of a treaty, which it considers to be out of place in the section dealing with modification. However, just as article 17(*b*) deals with a special effect of signature in the case of treaties generally, so it would seem to be perfectly appropriate—if the point arises—to deal in the present article with a special effect of signature in the case of an amending agreement. The question, it is thought, is rather whether the signature of an amending agreement has special effects and, if so, how these should be formulated.

12. There is, as the Special Rapporteur has observed on a previous occasion, a certain link between paragraph 3 of the present article and article 17(*b*); for an amending agreement is a treaty and its signature automatically gives rise to the obligation stated in article 17(*b*). In other words, under article 17 a signatory, unless and until it shall have made its intention clear not to become a party to the amending agreement, is bound to "refrain from acts calculated to frustrate its object". This would certainly seem normally to preclude a signatory from objecting to an amending agreement's being put into force *inter se* the States which become parties to it. Underlying article 17 is of course the principle *nemo potest venire contra factum proprium*, a principle of good faith, and this same principle underlies paragraph 3 of the present article. But in considering paragraph 3, it is necessary to keep in mind the specific provision already adopted regarding signature in article 17(*b*).

13. Paragraph 3, as at present drafted, may go somewhat beyond the principle in article 17, and the Special Rapporteur feels that the criticism of the paragraph by the United States Government that it is too strict may have substance. Paragraph (13) of the commentary, to which the United States Government refers, describes the object of the provision as being to protect the position of parties which in good faith ratify the amending agreement. It then adds:

> "The provision does not in any other respect affect the rights of a State which does not accept the amendment. The treaty remains in force for it unamended in its relations with all the original parties, including those who have accepted the amendment. It may still invoke its rights under the earlier treaty. It is precluded only from contesting the right of the other parties to bring the amendment into force as between themselves".

The United States Government suggests, however, that the present text of paragraph 3 may be open to the interpretation that it precludes a State which has signed the amending agreement from objecting, even when its application derogates from the State's rights under the earlier treaty. Whether an application of the amending agreement which affected the enjoyment of their rights by the other parties to the treaty or the performance of their obligations could properly be said to be merely an application as between the parties to the amending agreement may be a question. But, in the view of the Special Rapporteur, it is desirable to formulate paragraph 3 in terms which plainly confine the scope of the

restriction to applications of the amending agreement *inter se* which do not affect the rights or obligations of other States. A State which signs or otherwise adopts the text of an amending agreement must be presumed to commit itself to allowing the agreement to come into force in conformity with its final clauses, by ratification or other prescribed procedures, as between the States which thus become parties to the agreement. But it does not commit itself to having the amending agreement applied to itself, even if it refrains from becoming a party to such agreement.

14. In the light of the foregoing observations, the Special Rapporteur suggests that the article should be revised on the following lines:

1. Unless the treaty otherwise provides, any proposal to amend a multilateral treaty as between all the parties must be notified to every other party which shall have the right to take part in:

(*a*) The decision as to the action, if any, to be taken in regard to such proposal;

(*b*) The conclusion of any agreement for the amendment of the treaty.

2. Unless the treaty otherwise provides:

(*a*) An agreement amending a treaty does not bind any party to the treaty which does not become a party to such agreement;

(*b*) The effect of the amending agreement is governed by article 63.

3. If the proposal relates to a multilateral treaty which has not yet entered into force, it must be notified to every State which by its signature or otherwise shall have adopted or endorsed the text. *Mutatis mutandis*, paragraphs 1 and 2 shall then apply with respect to each such State.

4. A party to the treaty, which by its signature or otherwise has adopted or endorsed the text of the amending agreement but without becoming a party thereto, may not object to the application of that agreement as between any States which have become parties to it.

Article 67.—Agreements to modify multilateral treaties between certain of the parties only

Comments of Governments

Finland. The Finnish Government does not think the article to be in all respects satisfactory. In paragraph 1(*b*), it suggests that the third condition (i.e. not prohibited by the treaty) could be omitted, pointing out that the Commission concedes in paragraph (2) of its commentary that the second and third conditions may to some extent overlap. In paragraph 2, it considers that the States wishing to amend the treaty *inter se* should notify all the other parties, regardless of whether the treaty allows the possibility of *inter se* arrangements. It also feels that the notification should be made as soon as negotiations are under way. In any event, it considers paragraph 2 defective in that it does not specify that the notification should be made "at earliest convenience" or "as soon as possible" upon the conclusion of the *inter se* agreement.

Israel. In commenting upon article 66 and the present article the Government of Israel questions the adequacy of their provisions regarding notice of proposed amendments, and it suggests that the question of notice should form the subject of an independent article—article 65(*bis*) (see its comments under article 66). So far as the present article is concerned, it observes that notification of the conclusion of an *inter se* agreement as provided in paragraph 2 may come too late, especially having regard to paragraph 1(*b*) (*i*), which permits *inter se* agreements only if they do not affect the other parties' enjoyment of their rights or the performance of their obligations. In its view, the other parties must be given an early opportunity to consider whether the enjoyment of their rights or the performance of their obligations is likely to be affected. In addition, it suggests that paragraph 1(*a*) should read "The possibility of such an agreement is provided etc."

Netherlands. The Netherlands Government observes that, under paragraph 2, the notification may be *post factum* and that a considerable time may elapse between the conclusion of an *inter se* agreement and its being made known to the other parties. It considers that notification should be given in good time. It recognizes that in many instances it may be virtually impossible to notify the other States when the proposals for the *inter se* agreement are first tabled. But when the States concerned have reached an accord in substance on the proposals, and it is only a matter of making that accord definitive by concluding the agreement, it sees nothing to prevent the other parties from being informed at once. Accordingly, it suggests that paragraph 2 should be revised to read:

"Except in a case falling under paragraph 1(*a*), the intention to conclude any such agreement shall be notified to the other parties to the treaty."

Pakistan. The Government of Pakistan, without giving reasons, expresses the view that the article should be deleted altogether.

United Kingdom. The United Kingdom Government cites paragraphs 1(*b*) (*i*) and (*ii*) of the present article as examples of provisions demonstrating the need to provide for independent adjudication of disputes in the operation of the draft articles.

United States. The United States Government comments that the article serves the useful purpose of further developing the principle that two or more parties to a multilateral treaty cannot, by a separate treaty, derogate from their existing obligations to other parties to the multilateral treaty. It also comments that the article will provide guidance both to parties contemplating such a special treaty and to other parties interested in protecting their rights under a multilateral treaty.

Yugoslavia. The Yugoslav Government considers it desirable that, so far as possible, the consequences which may arise in connexion with the modification of treaties under article 63, paragraph 5, should be put on the same footing as those which may arise under article 67, paragraphs 1(*a*) and (*b*).

Argentine delegation. The Argentine delegation refers to this article as one which has been "wisely worded" [85]

[85] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 846th meeting, para. 9.

Kenyan delegation. The Kenyan delegation considers the article to be very useful since it enables States interested in maintaining their rights under an existing treaty to protect them adequately, and also affords a useful mechanism for parties contemplating a special treaty.[86]

Observations and proposals of the Special Rapporteur

1. This article seems to have met with general approval except in regard to the requirement of notification dealt with in paragraph 2. The only substantive proposal made for amending paragraph 1 is that of the Finnish Government which proposes the deletion of the third condition from sub-paragraph (*b*), on the ground that it overlaps with the second condition and may be dispensed with. The Commission, as the Finnish Government notes, was aware of this overlap. But for reasons given in paragraph (2) of its commentary, the Commission considered it desirable to state both conditions. The Commission there said:

> "The second and third conditions, it is true, overlap to some extent since an *inter se* agreement incompatible with the objects and purposes of the treaty may be said to be impliedly prohibited by the treaty. Nevertheless, the Commission thought it desirable for the condition contained in the second condition to be stated separately; and it is always possible that the parties themselves might explicitly forbid any *inter se* modifications, thus excluding even minor modifications not caught by the second condition".

However desirable brevity may be, these reasons seem to the Special Rapporteur to justify the very small addition to the text involved in the statement of both conditions. The Commission thought it essential that the limits within which *inter se* agreements are permissible should be formulated with all the necessary strictness and clarity. Furthermore, the third condition is really a separate case, since it leaves no room for the subjective questions of interpretation which may arise under the other two conditions.

2. In addition, a drafting suggestion is made by the Government of Israel under which the words "The possibility of such agreements, etc." in paragraph 1(*a*) would be changed to "The possibility of such an agreement, etc.". This change seems to the Special Rapporteur to be an improvement.

3. Three Governments (Finland, Israel and the Netherlands) question the adequacy of the provisions regarding notification of *inter se* agreements in paragraph 2. These Governments all consider that notification of the conclusion of an *inter se* agreement may come too late to enable the other parties to protect their interests, should the agreement not fulfil the conditions laid down in the article for an admissible *inter se* arrangement. In 1964, as paragraph (3) of the commentary records, some members of the Commission shared this view and would have preferred paragraph 2 to be so worded as to require notification of any proposal to conclude an *inter se* agreement. The Commission, however, then felt that timely notification of the conclusion of the agreement would be sufficient. In the light of the comments of the three Governments it will, no doubt, wish to re-examine the point. While it is desirable to avoid anything which might inhibit legitimate *inter se* arrangements, it is also desirable that the other parties should have a reasonable opportunity of reacting against an arrangement which may encroach upon their rights before it has crystallized into a treaty in force. The problem, as the Netherlands Government indicates and as the Special Rapporteur has noted in his observations on the previous article, is to draw the line between mere discussions and mature proposals. The suggestion of the Netherlands Government is that paragraph 2 should require the other parties to be notified of any intention to conclude an *inter se* agreement, except in cases where the treaty itself provides for the possibility of such agreements. This seems to the Special Rapporteur to meet the case, provided that the notification indicates the nature of the *inter se* agreement intended; and it may be desirable to specify that requirement. As to the Finnish Government's suggestion that the notification should be required even in the case of agreements contemplated by the treaty itself, this point merits consideration and was indeed considered in 1964. It is certainly true that even in such cases the proposed *inter se* agreement might be of a wider scope than that authorized by the treaty, and not fulfil the conditions laid down in paragraph 1(*b*). But the Commission felt in 1964 that, if the parties had themselves provided for the possibility of *inter se* agreement and had not at the same time laid down any conditions regarding notification, it might be going too far to add that condition by a provision in the present articles.

4. The Special Rapporteur accordingly suggests that paragraph 2 should be revised so as to read as follows:

> Except in a case falling under paragraph 1(*a*), the parties concerned shall notify the other parties of their intention to conclude any such agreement and of the nature of its provisions.

Article 68.—Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

Comments of Governments

Israel. The Government of Israel finds the word "also" in the opening phrase not to be clear and asks whether it is intended to refer only to articles 65 and 66 or in addition to include article 67. Paragraphs (*a*) and (*b*) it considers to be redundant. Paragraph (*a*) is, in its view, probably covered by articles 41 and 63, especially the latter; and paragraph (*b*) it feels to be indistinguishable in its practical effect from article 69, paragraph 3(*b*) (interpretation by reference to subsequent practice).

The substance of sub-paragraph (*c*), on the other hand, it thinks should find an appropriate place in the draft articles. Recalling Judge Huber's award in the *Island of Palmas* case,[87] it observes that sub-paragraph (*c*) represents the "second leg" of the inter-temporal law as enunciated by Judge Huber. Noting that the "first leg"

[86] *Ibid.*, 850th meeting, para. 38.

[87] *Reports of International Arbitral Awards*, vol. II, p. 845.

appears in article 69, paragraph 1(*b*), it comments that the Commission has not explained why it has reversed the order of postulating the two branches of the inter-temporal law; and it questions this reversal of the order, more especially when the normal order was maintained in the original proposals of the Special Rapporteur. Saying that it appreciates that "the distinction between the interpretation of a treaty as a step logically prior to its application, and the modification of a treaty as a consequence of its re-interpretation through its application, does exist from a theoretical point of view", it expresses the view that the practical consequences of the distinction are so fine that the Commission's treatment of it is open to question. It suggests that paragraph (*c*) of the present article should be brought into closer association with the "first leg" of the inter-temporal law in article 69, paragraph 1(*b*) and at the same time be given a place subsequent to it.

Netherlands. The Netherlands Government states that it has no comment to make upon the present article.

Pakistan. The Government of Pakistan, without stating reasons, comments that paragraph (*c*) of the article should be deleted.

Turkey. The Turkish Government notes that in the commentary on paragraph (*c*) the Commission appears to envisage a new general rule of international law but that this is not fully reflected in the text. Pointing out that the expression "general international law" is used in article 69, paragraph 1(*b*), it suggests that the difference in terminology may lead to a different meaning's being given to paragraph (*c*) of the present article. In consequence, it proposes that the word "general" should be inserted in paragraph (*c*)—presumably in between the words "new" and "rule" (the text of the Turkish comment says "immediately after the word 'international'", but this word does not appear in the present article).

United Kingdom. The United Kingdom Government does not consider that the operation of paragraph (*c*) would be satisfactory. The exact point of time at which a new rule of customary law can be said to have emerged is an exceedingly difficult question; and, in its view, treaties ought not to be modified without the consent of the parties. Accordingly, it proposes the deletion of paragraph (*c*).

United States. Paragraphs (*a*) and (*b*) the United States Government considers to reflect long-standing and widely accepted practice. Paragraph (*c*) also it concedes to be "literally accurate" and "in keeping with the long-recognized principle that treaties are to be applied in the context of international law and in accordance with its evolution". But at the same time it feels that paragraph (*c*) may lead to serious differences of opinion because of differing views as to what constitutes customary law, and accordingly thinks that it should be omitted, leaving the principle to be applied "under the norms of international law in general" rather than as a specific provision in a convention on treaty law.

Yugoslavia. The Yugoslav Government observes that it is necessary to harmonize the English and French texts of paragraph (*c*) with respect to the expressions used for customary international law.

Observations and proposals of the Special Rapporteur

1. This article, although not many Governments have commented upon it, is one which requires close examination by the Commission as to its substance and as to its relation to other articles, particularly to articles 63 (application of treaties having incompatible provisions), 65-67 (modification of a treaty by another treaty) and 69 (general rule of interpretation). Its genesis is traceable to a draft article in the Special Rapporteur's third report which set out the three matters mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of the present article as developments subsequent to the conclusion of a treaty which might influence its interpretation.[88] That article (article 73 of the Special Rapporteur's draft) had itself been preceded by a proposal in the same report (article 56 of that report) for the inclusion of an article setting out the implications of the two branches of the inter-temporal law for the interpretation and application of treaties. The article on the inter-temporal law would have provided that: (1) a treaty is to be interpreted in the light of the law in force at the time when the treaty was concluded; and (2) subject to the rule in (1), the application of a treaty is to be governed by the rules of international law in force at the time when the treaty is applied. However, when the article was discussed at the 728th and 729th meetings, the Commission decided to reconsider the problems involved in the inter-temporal law when it examined the rules on interpretation of treaties. Taking account of the discussion at the 728th and 729th meetings, the Special Rapporteur submitted a new article—the above-mentioned article 73—as one of a series of four general articles on interpretation of treaties. As a result of the discussion at the 765th, 766th and 767th meetings, these articles underwent considerable rearrangement and amendment. At the same time, it was noted that the three matters in question—a subsequent treaty, a subsequent practice of the parties in the application of the treaty and the subsequent emergence of a new rule of customary law—may have effects either as elements of interpretation or as elements modifying the operation of a treaty.

2. The outcome was that subsequent agreement and subsequent practice as elements of interpretation were covered in article 69, paragraphs 3(*a*) and (*b*), while subsequent agreement, subsequent practice and the subsequent emergence of a new rule of customary law as elements modifying the operation of a treaty were dealt with in the present article. The problem of the subsequent emergence of a new rule of customary law as an element of interpretation, to which the Special Rapporteur had drawn attention, was not covered in either article. These are cases where the parties have used legal terms, for example "bay" or "territorial waters", and the question is whether they intended it to have a meaning fixed by the law in force when the treaty was concluded or a meaning which would follow the evolution of the law.

[88] *Yearbook of the International Law Commission, 1964*, vol. II, p. 53.

Article 69, paragraph 1(*b*), provides merely that the terms of a treaty are to be interpreted in the light of the general rules of international law in force at the time of its conclusion.

3. In addition to the genesis of the present article, the Special Rapporteur thinks that the Commission should have in mind the order in which it is likely ultimately to arrange the articles on "modification" and "interpretation" of treaties. He has previously suggested to the Commission that the provisions on "interpretation" should be introduced much earlier in the draft articles and understands that view to be widely shared. This is not the place at which to debate that question, which is already before the Drafting Committee. But the Special Rapporteur believes it to be highly probable that, in the final arrangement of the articles, the provisions on interpretation will precede those on both the "application" and "modification" of treaties; and thinks that it may be helpful to make this assumption in revising the present article.

4. The Government of Israel queries the word "also" in the opening phrase, asking whether it is intended to refer only to articles 65 and 66 or to include article 67. In the opinion of the Special Rapporteur, the objection to the word "also" which is implicit in this query is justified, though in fact the word is thought to have been intended to relate to article 67 more than to the two previous articles. Articles 65 and 66 deal with the amendment of the treaty as such, while article 67 deals with the modification of its operation as between certain parties; and it is the "modification" motif which is echoed in the word "also". But the real explanation of the word is thought to be simply a hesitation as to precisely how to fit in article 68 into the scheme of the articles and a desire to indicate a link with articles 65-67. In any event, the word is thought to be infelicitous. If the matters covered by the article really belong to "modification" of treaties, they need no connecting link; it should suffice to state the rules.

5. The Government of Israel, in effect, also suggests that the present article should disappear, sub-paragraphs (*a*) and (*b*) being regarded as covered by other articles and sub-paragraph (*c*) being transferred to article 69. While the Special Rapporteur feels that the Commission should re-examine the question whether article 69 justifies itself as an article to be included in the section on "Modification of treaties", he will reserve his observations on this question until after he has considered the comments of Governments on the three rules stated in the article.

6. Sub-paragraph (*a*) is endorsed by the United States Government as reflecting long-standing and widely accepted practice, and no Government criticizes its content. The Government of Israel, however, considers it redundant, taking the view that it is "probably covered by articles 41 and 63, especially the latter". The sub-paragraph appears to the Special Rapporteur to reflect the Commission's uncertainty in 1964 as to the exact function of the present article; for it does little more than reserve the possibility that the operation of a treaty may be modified by a subsequent treaty, and does not state the conditions under which this will occur. These conditions, as the Government of Israel indicates, are formulated in article 63. The present sub-paragraph is incomplete since it takes no account of Article 103 of the Charter, or of other cases where the relation between two treaties is determined by a special provision in one of them, or of cases of implied termination. Being incomplete, it is unsatisfactory even if viewed as a general reservation of the possibility that the operation of a treaty may be modified by a subsequent treaty concluded between the same parties and relating to the same subject matter. No doubt this defect could be removed by rewording the text—perhaps with a cross reference to article 63. But the Special Rapporteur shares the doubts of the Government of Israel as to whether there is any need to retain sub-paragraph (*c*), if the rules regarding the effect of a subsequent treaty are satisfactorily formulated in article 63.

7. Sub-paragraph (*b*) also is endorsed by the United States Government as reflecting long-standing and widely accepted practice, and again no Government has questioned its correctness. The Government of Israel, however, thinks it to be indistinguishable in its practical effect from the provision in article 69, paragraph 3(*b*), and for that reason redundant. This provision requires that, in interpreting a treaty, there must be taken into account "any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation". The Commission, in paragraph (2) of its commentary on the present article, recognized that "the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice". But it concluded that legally the processes are quite distinct and should be dealt with separately.

8. In the case of bilateral treaties, it may be that the effect of subsequent practice as evidence of a new agreement modifying a treaty may be indistinguishable for practical purposes from subsequent practice as evidence of an agreement giving an authentic interpretation of the treaty. Thus, in the *Case concerning the Temple of Preah Vihear*,[89] the International Court, although there was a manifest divergence of the boundary line accepted by the parties in their subsequent practice from the criterion for determining the boundary laid down in the treaty, regarded the subsequent practice primarily as evidence of an authentic interpretation of the treaty settlement by the parties which must prevail over the relevant treaty clause. If this reasoning may seem somewhat artificial when the treaty clause continued to be applicable according to its ordinary meaning in other sections of the boundary, the case does perhaps show that for practical purposes it may not be of much moment whether in bilateral treaties subsequent practice is regarded as having its effect in the context of an interpretation or of a modification of the treaty. Even so, it may be going a little far to classify all subsequent practice, however much at variance with the plain meaning of the text, as constituting an authentic interpretation rather than a modification of a bilateral treaty. In the other precedent mentioned in paragraph (2) of the commentary—the

[89] *I.C.J. Reports 1962*, pp. 33 and 34.

case concerning an Air Transport Services Agreement—the tribunal found that a bilateral treaty had been modified in a certain respect by the subsequent practice of the parties. [90]

9. In any event, there remains the problem of multilateral treaties and of *inter se* applications of such treaties by two parties or by a group. Under article 69, paragraph 3(*b*), it is only subsequent practice which clearly establishes the understanding of all the parties regarding the meaning of the treaty which is recognized as equivalent to an interpretative agreement and the reason is, of course, that two parties or even a group of parties cannot, by their interpretation of the treaty, bind the other parties as to its correct interpretation. Sub-paragraph (*b*) of the present article, on the other hand, does not speak of the agreement of "all the parties" but simply of "the parties". Many multilateral treaties operate in practice bilaterally in the relations between each party and each other party; and it may happen that different parties apply the treaty in somewhat different ways; or that some parties apply the treaty in a way which the others do not accept as a correct interpretation of it. Clearly, on the plane of interpretation, the treaty has only one correct interpretation. But in practice it may have applications between particular parties which diverge from the interpretation and application of it by the general body of the parties. It hardly seems possible to classify such cases under the head of "interpretation by subsequent practice" without seeming to throw overboard the essential concept of the integrity of the text of a multilateral treaty. If this concept may suffer some qualification through the practice of reservations, it remains of the highest importance. Accordingly, it is thought that the Commission was right in 1964 to distinguish between the "interpretation" and the "modification" of a treaty by subsequent practice.

10. In the case of multilateral treaties, the question would seem to arise whether it is necessary to distinguish between a subsequent practice having the effect of "amending" the treaty generally between the parties, and one "modifying" the operation of the treaty only between certain of its parties; in other words, whether the distinction made in articles 66 and 67 between "amending" and "*inter se*" agreements has also to be made in the present article. If it may be inadvisable to try to carry the parallelism between express agreement and agreement evidenced by subsequent conduct too far, it seems desirable for the Commission to consider how far the conditions set out in article 67 may be applicable also to "*inter se*" modification by subsequent practice. In some multilateral treaties, for example, the Vienna Convention on Diplomatic Relations, an application of the treaty which differentiates between one party and another may *ipso facto* constitute a violation of the treaty.

11. Sub-paragraph (*c*) has attracted a number of criticisms and its simple deletion is proposed by three Governments. The Government of Pakistan does not indicate the grounds on which it finds difficulty in the proposition that the operation of a treaty may be modified by "the emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all parties". The United Kingdom mentions two grounds on which it objects to the inclusion of the sub-paragraph: first, the exact point of time at which a new rule of customary law can be said to have emerged is an exceedingly difficult question; and secondly, it does not think that treaties should be modified without the consent of the parties. The first of these appears also to be the reason behind the proposal of the United States Government for omitting the sub-paragraph; for it also says that paragraph (*c*) may lead to serious differences of opinion because of differing views as to what constitutes customary law. But uncertainty as to the rules of customary law does not seem a very cogent objection to the formulation of the rule in sub-paragraph (*c*) because, whatever its uncertainties, customary law is a phenomenon which looms large in international law, and the problem of how it may affect the application of treaties at any given time unquestionably exists.

12. The United States Government seems to regard sub-paragraph (*c*) essentially as an aspect of the inter-temporal law; for it observes that the sub-paragraph is in keeping with "the long-recognized principle that treaties are to be applied in the context of international law and in accordance with its evolution". The solution which it proposes is to omit the sub-paragraph and to leave the principle underlying it to be applied "under the norms of international law in general" rather than as a provision of the draft articles. The Government of Israel also treats the sub-paragraph as concerned with one aspect of the inter-temporal law. Unlike the United States Government, it advocates the retention of the substance of the sub-paragraph in the draft articles but in the context of interpretation; and it suggests that the sub-paragraph should be transferred to article 69 and follow closely after paragraph 1(*b*) of that article. The second objection mentioned by the United Kingdom Government, on the other hand, suggests that its understanding of sub-paragraph (*c*) is different from that of the United States and Israel Governments; for it seems to regard the sub-paragraph as dealing rather with the relative priority of treaty and customary norms of international law. It objects to the idea that a new customary norm should necessarily over-ride a treaty provision regardless of the will of the parties.

13. Sub-paragraph (*c*), in the view of the Special Rapporteur, is ambivalent, reflecting a certain hesitation in the Commission in 1964 as to the precise motif of the sub-paragraph, namely, as to whether it should deal with the inter-temporal law or with the relative priority of treaty and customary norms. If it deals with the inter-temporal law, the Special Rapporteur agrees with the Government of Israel that the question of the effect of the evolution of the law on the meaning of a term of a treaty falls under article 69. If, on the other hand, it deals with the relation between treaty and customary norms, the objection of the United Kingdom Government that it disregards the will of the parties is considered by the Special Rapporteur to be well-founded. The very object of a bilateral treaty or of a treaty between a small group

[90] *Yearbook of the International Law Commission, 1964*, vol. II, p. 198.

of States is not infrequently to set up a special legal régime between the States concerned and sometimes a régime which derogates from the existing customary law. Accordingly, to say that the emergence of a new rule of customary law, binding on the parties as a general rule, is necessarily to modify the particular relations which they have set up between them may defeat their intention. Here the Commission is confronted with a problem of the priority of legal norms, similar to that dealt with in article 63 in regard to successive treaties covering the same subject matter, but in the different context of the relation between a treaty and a customary norm. If the problem is to be dealt with at all in the draft articles, the Special Rapporteur feels that the rules may have to be more closely worked out than they are in sub-paragraph (*c*) and transferred to the section on the application of treaties. At the very least, it would be necessary to make the end of the sub-paragraph read: "and binding upon all the parties in their mutual relations".

14. In any event, the Special Rapporteur feels that article 68, as at present constructed, is out of place in the section on "modification" of treaties. Articles 65-67 concern the alteration of the operation of treaties by acts of the parties done in relation to the treaty. Those articles may therefore properly be regarded as relating to the modification of treaties. The same is true of sub-paragraph (*b*) of the present article, since it concerns the subsequent practice of the parties in the application of the treaty. But sub-paragraphs (*a*) and (*c*) concern the impact on a treaty of acts done outside and not in relation to it.

15. In the light of the foregoing observations, the Special Rapporteur thinks that the Commission should reconsider the whole article; and pending that reconsideration his own suggestions are necessarily of a very tentative character. A possible solution, he feels, may be: (1) to remove sub-paragraph (*a*) and regard it as covered by article 63; (2) to omit sub-paragraph (*c*) and re-examine how the question of the inter-temporal law should be dealt with in article 69, paragraph 1; and (3) to retain only sub-paragraph (*b*) in the present article. In that case, it may perhaps be desirable to expand the rule regarding subsequent practice slightly in order to take account of the problem of "*inter se*" modification of multilateral treaties, so that the article might read on the following lines:

Modification of a treaty by subsequent practice

The operation of a treaty may be modified by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions. In the case of a multilateral treaty, the rules set out in article 67, paragraph 1, apply to an alteration or extension of its provisions as between certain of the parties alone.

Article 69.—General rule of interpretation
Article 70.—Further means of interpretation
Article 71.—Terms having a special meaning

Comments of Governments

Cyprus. While reserving the right to make detailed comments later, the Government of Cyprus expresses the view that it might have been preferable to attach more weight to the principle contained in the maxim *ut res magis valeat quam pereat* by its express mention.

Czechoslovakia. The Czechoslovak Government considers that the principle that the text must be the starting point of interpretation should receive express mention in the text; and it therefore proposes that article 69, paragraph 1, should be revised so as to read as follows:

"A treaty, whose text is presumed to be the authentic expression of the intentions of the parties, shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term."

Finland. The Government of Finland considers the rules concerning the interpretation of treaties to be both useful and appropriate.

Hungary. Noting that the commentary to article 69 explains the textual approach adopted by the Commission, the Hungarian Government observes that the text does not even mention the intention of the contracting parties. In its view, it is desirable to draft the article more flexibly and to give expression in it to the notion that it is the intention of the parties which is sought and that their intention is presumed to be that which appears from the text.

Mentioning that article 70 refers to preparatory work merely as a further means of interpretation, the Hungarian Government expresses the view that this is out of harmony with article 69, paragraph 3, under which "subsequent practice" is stated to be a primary means of interpretation. In its view preparatory work done prior to the conclusion of a treaty is of the same importance as subsequent practice for determining the intention.

Israel. While reserving its freedom of decision when the question comes before political organs, the Government of Israel expresses the view that the draft articles should contain provisions concerning interpretation on the lines of those formulated by the Commission. It also feels that those provisions should appear early in the draft articles. On the substance, it endorses the general philosophy of the Commission's treatment of the subject as expressed in paragraph (9) of the commentary; i.e. the textual approach to interpretation.

Paragraph 2 of article 69 it considers not to be part of any general rule of interpretation but in reality a definition which, in some respects, completes that of a "treaty" in article 1 and is applicable throughout the draft articles. In its view, the removal of paragraph 2 from article 69 would make the general rule of interpretation clearer; and it suggests the transfer of the definition in that paragraph to article 1. At the same time, it suggests that the expression "drawn up" in paragraph 2 may be ambiguous since it is capable of meaning a draft instrument, whereas the intention is clearly to refer to the final text.

If paragraph 2 is removed from article 69 in the manner already indicated, the Government of Israel suggests that the elements comprised in paragraph 3 could be moved into paragraph 1 to form sub-paragraphs (*c*) and (*d*) of that paragraph. In this connexion it states that the word "also" in paragraph 3 may cause confusion. Noting that paragraph (13) of the commentary refers to

paragraph 3 as specifying "further authentic elements of interpretation", while article 70 is entitled "further means of interpretation", it expresses the opinion that the appropriate point of departure for the process of interpretation is to be found in each one of the four elements of paragraphs 1 and 3 of article 69. All these, it suggests, stand on an equal footing.

The Government of Israel thinks that the expression "ordinary meaning to be given to each term" in paragraph 1 of article 69 may become a source of confusion to the extent that it seems to leave open the question of changes in linguistic usage subsequent to the establishment of the treaty text. It cites in this connexion a dictum of the International Court on the *United States Nationals in Morocco* case interpreting the word "dispute" by reference to the linguistic usage at the time of the conclusion of the treaty. [91]

In addition, it warns against formulating the rule as a whole in such a way as would lead to "excessive molecularization of the treaty". Here it refers to a dictum of the International Court in the *Maritime Safety Committee* caze regarding the meaning of the word "elected", in which it emphasized that the meaning of a word cannot be determined in isolation by reference to its usual or common meaning and that a word "obtains its meaning from the context in which it is used". [92] It suggests that, leaving aside the question of the time factor previously mentioned, this point could be met by revising the opening words of article 69 so as to make them read:

> "A treaty shall be interpreted in good faith and in accordance with the ordinary meaning given to the language used in its context."

In that event, the reference to the "context of the treaty" in sub-paragraph (*a*) would be deleted. At the same time it suggests that the order of sub-paragraphs (*a*) and (*b*) should be reversed.

In sub-paragraph (*b*) the Government of Israel suggests that the text needs adjustment so as to make it clear that the rules of general international law there referred to are the substantive rules of international law, including rules of interpretation, and not the rules of interpretation alone.

In addition, the Government of Israel considers that, in view of the proliferation of multilingual versions of treaties, comparison between two or more authentic versions ought to be mentioned in article 69, since in its view, such comparison is normal practice in interpretation. It observes that article 73 deals only with the specific problem of what happens when the comparison discloses a difference; but that comparison is of a greater importance, for it frequently assists in determining the meaning of the text and the intention of the parties to the treaty. To that extent, in its opinion, comparison forms part of any general rule of interpretation in the case of multilingual treaties.

The Government of Israel further states that if article 69 is reconstructed on the lines which it proposes, including the transfer of paragraph 2 to article 1, it may be unnecessary and, indeed, confusing to refer specifically to the preparatory work of the treaty in article 70.

Finally, it suggests that article 71 should either be combined with article 69 or placed immediately after it.

Netherlands. The Netherlands Government comments that, where a treaty refers or appears to refer to concepts of international law, observance of the rule in paragraph 1(*b*) of article 69 would mean that efforts must be made to discover the intention of the parties by considering the meaning of these concepts elsewhere in international law and independently of the treaty to be interpreted. In its view, it is essential that the intention of the parties should be ascertained from the treaty itself under paragraph 1(*a*), and any attempt to discover that intention from international law in general is of secondary importance. It thinks the rules in sub-paragraphs (*a*) and (*b*) not to be of equal value and that sub-paragraph (*b*) should not be applied until sub-paragraph (*c*) has proved ineffective. Nor does it agree with the reference in sub-paragraph (*b*) to "law in force at the time of the conclusion of the treaty". Although this may be the correct criterion in some cases, it is of the opinion that in others legal terms will have to be interpreted according to the law in force either at the time the dispute arises or at the time of interpretation. For example, in interpreting the terms "territorial sea" or "open sea", regard must, it considers, be had to changing legal views. The Netherlands Government favours the total deletion of sub-paragraph 1(*b*) rather than merely the words "in force at the time of its conclusion". It would be quite enough, it considers, to leave the question of the time element to be determined on the basis of "good faith". It proposes that paragraph 1 should be revised so as to make it read:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term in the context of the treaty and in the light of its objects and purposes".

The Netherlands Government also considers that paragraph 3(*b*) of article 69, by requiring the "understanding of all the parties", may rule out or greatly restrict the possible influence of what is conventional within an international organization. Even if the word "all" is deleted, the clause would still, it thinks, place an undesirable curb on the interpretation procedure and make it unnecessarily rigid. It suggests that all the words from "which clearly" to "its interpretation" should be deleted from paragraph 3(*b*). It proposes that the sub-paragraph should read simply as follows:

> "Any subsequent practice in the application of the treaty...".

Turkey. The Turkish Government approves of the effort of the Commission to codify the rules for the interpretation of treaties, and is in general accord with the principles adopted by the Commission as the basis of the rules formulated in the articles.

United Kingdom. The United Kingdom Government supports the Commission's view that the text of a treaty must be presumzd to be the authentic expression of the intentions of the parties. It further expresses its support for the Commission's proposal in paragraph 1(*b*). It

[91] *I.C.J. Reports 1952*, p. 182.

[92] *Ibid., 1960*, p. 158.

also considers the concept of the "context" of a treaty to be a useful one, not only with regard to interpretation but also with regard to such expressions as "unless the treaty otherwise provides" and "unless it appears from the treaty", found in other articles. At the same time it suggests that in paragraph 2 of article 69 the words "including its preamble and annexes" should be omitted from the definition of the "context of the treaty".

United States. While expressing the view that articles 69-71 appear to serve a useful purpose, the United States Government suggests that there may be a question whether their provisions should be stated as guidelines rather than as rules; and also a question whether additional means of interpretation should be enumerated. It further assumes that the order in which the means of interpretation are given has no significance in determining the relative weight to be given to them. At the same time, it questions the apparent primacy given to the ordinary meaning even when an agreement between the parties requires that some terms be given a special or technical meaning. It suggests that this possible conflict could be avoided by listing in paragraph 1 six rules of interpretation *seriatim:* (*a*) ordinary meaning: (*b*) context; (*c*) objects and purposes; (*d*) rules of international law; (*e*) agreement regarding interpretation; (*f*) subsequent practice in interpretation. Paragraph 3 of article 69 would then be eliminated. As to paragraph 2, it feels that if "context" is to be defined, the definition should be improved; for example, by clarifying whether it includes (*a*) a unilateral document and (*b*) a document on which several but not all of the parties to a multilateral instrument have agreed.

The United States Government considers that, *mutatis mutandis*, the Commission's formulation of the six rules is, in general, satisfactory. It feels, however, that in paragraph 1(*b*) of article 69, the reference to "general international law" may add an element of confusion and that the word "general" should be deleted. Again, in paragraph 3(*b*), it suggests that the reference to "the understanding of all the parties" may be open to the construction that some affirmative action is required of each and every party. In its view, a course of action by one party not objected to by others may be a substantial guide to interpretation.

Article 70 it thinks may be unduly restrictive with respect to recourse to preparatory work and other means of interpretation. It observes that, if a provision seems clear on its face but a dispute has arisen with respect to its meaning, recourse to other means of interpretation should not be dependent on the conditions specified in (*a*) and (*b*) of the article. It suggests that recourse to further means of interpretation should be permissible if the rules set forth in article 69 are not sufficient to establish the correct interpretation.

In article 71 it suggests that the word "conclusively" is unnecessary and may be a source of confusion.

Finally, the United States Government remarks that further study should be given to the relationship of the articles on interpretation with other articles which have "interpretive overtones", e.g. articles 43 (supervening impossibility of performance), 44 (fundamental change of circumstances) and 68 (modification by a subsequent treaty, subsequent practice or customary law).

Yugoslavia. The Yugoslav Government considers that the articles on interpretation require to be made more complete. First, it suggests the desirability of a special provision for the purpose of excluding the possibility of depriving a treaty of its true force and effect by means of a procedure of interpretation. Secondly, it remarks that States acceding to a multilateral treaty ordinarily have in view only the text itself and not its *travaux préparatoires*; and that this point ought also to be covered. It endorses the Commission's proposal that recourse may be had to the *travaux préparatoires* only in the circumstances envisaged in article 70. Indeed, it thinks that the point might be formulated in sharper form, namely, that when the text of a treaty is clear and unambiguous it is inadmissible to refer to the provisional understandings arrived at in the course of the negotiations. In these cases, it considers that the parties are entitled in good faith to refer only to the agreement definitively adopted.

In addition, the Yugoslav Government considers it necessary to envisage the case of an international instrument produced by several States having different legal systems and concepts in which the interpretation of the agreement must conform to the legal concepts of all the contracting parties.

Greek delegation. The Greek delegation does not accept that priorities should be established among the various means of interpreting a treaty. In its view, since a treaty is an expression of the common intention of the parties the only basic rule of interpretation is to ascertain that intention by every possible means in every possible way. It remarks that the Permanent Court in its Advisory Opinion on the Interpretation of the Convention concerning Employment of Women during the Night,[93] although it relied upon "the natural meaning of the words", discovered that meaning by studying the *travaux préparatoires* of the convention. In article 69 it would prefer to see the expression "word" used rather than "term". Even so, it does not think that "words" always have an ordinary meaning and the intention of the parties is the only thing that matters. Paragraph 1(*b*), by referring to the rules of general international law in force at the time of a treaty's conclusion, has the effect, it emphasizes, of excluding so-called evolutionary interpretation. By way of example, it instances the term "exchange control" in the Articles of Agreement[94] of the International Monetary Fund.[95]

Kenyan delegation. The Kenyan delegation considers that articles 69-71 represent a reasonable compromise of conflicting views. At the same time, it underlines that, as the essence of any treaty is the intention of the parties, the goal of any method of interpretation must be to use all intrinsic and external aids to find out what that intention really was.[96]

[93] *P.C.I.J.*, Series A/B, No. 50, 1932.

[94] United Nations, *Treaty Series*, vol. 2, No. 20, Art. VIII.

[95] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 845th meeting, para. 42.

[96] *Ibid.*, 850th meeting, para. 40.

Syrian delegation. The Syrian delegation says of article 69, paragraph 1(*b*) that it stipulates advisedly that a treaty is to be interpreted "in the light of the general rules of international law in force at the time of its conclusion"; and it adds that it is only in that context that the wish of the parties can be validly interpreted.[97]

Thai delegation. The Thai delegation considers that in article 69 the first rule of interpretation should be that the terms of the treaty, if clear and precise, are the only guide to the intention of the parties. Citing Vattel, it says that the text should be subject to interpretation only if it is ambiguous. As to paragraph 3(*b*), it is of the opinion that, although subsequent practice may provide evidence of facts, it is not conclusive, and cannot be automatically applied but must be invoked by a party. The probative value of subsequent practice, it maintains, depends on all the surrounding circumstances and must be weighed with all other relevant evidence. In its view, subsequent practice may afford aid in the interpretation of ambiguous provisions, but may not be used to frustrate the natural meaning of the words or to extend the scope of the original terms.[98]

Observations and proposals of the Special Rapporteur

1. It appears from the comments of Governments that in principle they endorse the attempt of the Commission to isolate and codify the general principles which constitute general rules for the interpretation of treaties. The United States Government, it is true, while it considers articles 69-71 to serve a useful purpose, and makes suggestions for their improvement, raises a query as to whether their provisions should be stated as "guidelines" rather than as rules. The Special Rapporteur understands this query primarily as a *caveat* against formulating the general principles for the interpretation of treaties in such a manner as to give them a rigidity which might deprive the process of interpretation of the degree of flexibility necessary to it. The Commission was fully conscious in 1964 of the undesirability—if not impossibility—of confining the process of interpretation within rigid rules, and the provisions of articles 69-71 when read together, as they must be, do not appear to constitute a code of rules incompatible with the required degree of flexibility. No doubt the formulation of those provisions and their interrelation with each other can and will be improved by the Commission in the light of the comments of Governments. But if satisfactory texts can be found, it seems desirable than any "principles" found by the Commission to be "rules" should, so far as seems advisable, be formulated as such. In a sense, all "rules" of interpretation have the character of "guidelines" since their application in a particular case depends so much on the appreciation of the context and the circumstances of the point to be interpreted. But in the international community, where the role of treaty interpretation is so important and where recourse to adjudication depends on the will of the parties, there may be particular value in codifying as rules such basic principles of interpretation as are found to be generally accepted as law.

2. Governments appear also to endorse, in general, the Commission's view that the elucidation of the meaning of the text should be the starting point of interpretation rather than an investigation *ab initio* into the intentions of the parties. One Government (Czechoslovakia) has indeed suggested that this concept should receive express mention in article 69 in the form of a presumption: "A treaty, whose text is presumed to be the authentic expression of the intentions of the parties, shall be interpreted, etc." On the other hand, another Government (Hungary) would prefer expression to be given to the notion that it is the intention of the parties which is sought in interpretation and that "their intention is presumed to be that which appears from the text". Whichever way the presumption is framed, its introduction into the article would seem to have disadvantages. The presumption suggested by the Czechoslovak Government is closely in line with the concept of interpretation expressed in the article. But the statement of the presumption may tend to raise the question how far the presumption is rebuttable and what precisely is the relation between the presumption and other elements of interpretation mentioned in articles 69-71. In other words, it may slightly tend to increase the rigidity of the rule formulated in the articles. The presumption suggested by the Hungarian Government, while open to the same objection, tends to present the intention of the parties rather than the text as the starting point of interpretation and thus to diverge somewhat from the Commission's approach to the rules of interpretation. (See also this Government's suggestion that preparatory work should be given the same importance as subsequent practice for determining the intention of the parties.)

3. Two Governments (United States and Israel) make proposals for the rearrangement of the provisions of articles 69 and 71 which, if their explanations of the proposals are different, would give a somewhat similar result. The United States Government first expresses the opinion that the order in which the means of interpretation are stated ought not to have any significance in determining their relative weight. It then queries what it calls the "apparent primacy given to the ordinary meaning even when an agreement between the parties requires that some terms be given a special or technical meaning". The validity of this objection may be open to doubt since, if the intention of the parties to give a special or technical meaning to terms is clear, that intention will certainly prevail under the combined effect of the rules stated in article 69, paragraphs 1 and 3(*a*), and article 71. But if that intention is not clear, the onus put by article 71 upon the State alleging the special or technical meaning to establish the intention to set aside the ordinary meaning would seem to be justified, whether the intention is said to be expressed in the treaty itself or in "an agreement regarding the interpretation of the treaty". Nevertheless, the general point made regarding the relation between the various rules set out in article 69 remains. This point, the United States Government suggests, should be met by listing *seriatim* in article 69, paragraph 1, the following six rules of interpretation: (*a*) ordinary meaning; (*b*) context; (*c*) objects and purposes; (*d*) rules of international law;

[97] *Ibid.*, 845th meeting, para. 9.

[98] *Ibid.*, 850th meeting, para. 17.

(*e*) agreement regarding interpretation; and (*f*) subsequent practice in interpretation. Paragraph 3 would then, as a separate paragraph, disappear. Under the United States scheme, article 71, dealing with terms intended to have a special meaning, would, it seems, remain where it is as a distinct article.

The Government of Israel, also proposes that the two matters covered in paragraph 3 of article 69—agreement regarding interpretation and subsequent practice—should be moved up into paragraph 1. At the same time it underlines that, in its view, "the appropriate point of departure for the process of interpretation is to be found in each one of the four elements of paragraphs 1 and 3"; and it considers each of these elements to stand on an equal footing. If "ordinary meaning" is added from the opening phrase of article 69 and the elements of "context" and "objects and purposes" combined in paragraph 1(*a*) are separated, the four elements of the Israel proposal become the six elements of the United States proposal. The two proposals differ, however, in that the United States Government suggests that "ordinary meaning" should be removed from its governing position in the opening phrase and placed alongside the other elements, whereas the Government of Israel assumes that the "ordinary meaning" will retain its position in the opening phrase. The United States Government does not indicate very clearly how it relates the "ordinary meaning" to the "context", to "objects and purposes" or to "rules of international law".

The Government of Israel it should be added, proposes that article 71 (intention to give a special meaning) should either be moved up into article 69 or placed immediately after it.

4. Leaving aside the question of the "ordinary meaning", the Commission did not, it is believed, intend in 1964 to establish any positive hierarchy for the application of the means of interpretation mentioned in the four sub-paragraphs of paragraphs 1 and 3 of article 69. It headed the article "General rule of interpretation", in the singular, and it regarded the application of the means of interpretation set out in the article as a combined operation. All the various elements, so far as they are present in any given case, would be thrown into the crucible and their interaction would then give the legally relevant interpretation. The problem is perhaps reminiscent of the so-called sources of international law listed in Article 38 of the Statute of the International Court. In the nature of things the various elements have to be arranged in some order, and considerations of logic lead the mind to find one arrangement more satisfying than another. Then, no matter how general or neutral the formulation, alert minds may see in the arrangement chosen a basis for deducing a hierarchical order for the application of the norms. Although he doubts whether the change affects the legal position very much, the Special Rapporteur suggests that it may be advisable to move the contents of paragraph 3 up into paragraph 1 in order to emphasize the unity of the process of interpretation under the "general rule" laid down in article 69 and to minimize the significance of the order in which the various elements make their appearance in the article. Paragraph 2, if retained, can then readily enough follow the enlarged paragraph 1.

5. The United States proposal to detach the "ordinary meaning" rule from the opening phrase and make it the first of six rules involves a point of presentation which may also be one of substance. In 1964 the Commission took the view that the "ordinary meaning" of terms cannot properly be determined without reference to their context and to the objects and purposes of the treaty and to any relevant rules of international law. Indeed, some members even thought article 71 to be unnecessary on the ground that, in its context, the technical or special meaning of terms will appear as their ordinary meaning. But, if paragraph 1 of article 69 is revised, as the United States Government suggests, so as to read:

> "The terms of a treaty shall be interpreted in good faith:
> (*a*) in accordance with their ordinary meaning;
> (*b*) in the context of the treaty;
> (*c*) in the light of the objects and purposes of the treaty etc.",

the article will seem to recognize that terms have an ordinary meaning which is independent of their context and of the objects and purposes of the treaty. This may be true as a matter of pure linguistics but it may be doubted whether it is true as a matter of interpretation. As the precedents cited in paragraph (10) of the commentary illustrate, the "ordinary meaning of terms" is always in international jurisprudence associated with the "context".

6. At the same time, it is necessary to consider the United States observation that, in the present text of article 69, there may be a certain appearance of conflict between the primacy given to the ordinary meaning and the rule in paragraph 3(*a*) concerning "an agreement between the parties regarding the interpretation of the treaty". This observation does not perhaps give full weight to the opening phrase of paragraph 3: "There shall also be taken into account, together with the context: (*a*) any agreement between the parties etc." These words were intended by the Commission to put such interpretative agreements on the same level as the "context" and to indicate that an interpretative agreement is to be taken into account as if it were part of the treaty. It seems that the force of these words may have been obscured by the intervention of the definition of "context" between paragraphs 1 and 3; but this would be remedied if the contents of paragraph 3 are moved up into paragraph 1.

7. The Government of Israel makes two criticisms of the expression "ordinary meaning to be given to each term", found at the beginning of article 69. First, it suggests that the expression may become a source of confusion by leaving open the question of changes in linguistic usage subsequent to the establishment of the treaty text; and it refers in this connexion to a dictum in the *United States Nationals in Morocco* case regarding the need to interpret the word "dispute" by reference to the meaning which it had at the time of the conclusion

of the treaty.[99] Attention was drawn to this point by Sir G. Fitzmaurice in an article where he referred to it as the "principle of contemporaneity" and by the Special Rapporteur in his third report.[100] The Commission regarded the point as simply an aspect of the inter-temporal law and did not seek to spell out a separate rule of "inter-temporal linguistics". This view is believed by the Special Rapporteur to be correct; and he shares the view of the Netherlands Government that at root the application of the inter-temporal law to interpretation is a matter of good faith. He also feels that the requirement that a treaty should be interpreted by reference to the linguistic usage current at the time of its conclusion is really one both of common sense and good faith, and is also implicit in the rule that the meaning of terms is to be determined by reference to the context of the treaty and to its objects and purposes. This is not to belie the practical importance of the inter-temporal law, but it may unduly complicate matters to introduce as a separate principle in the present article the concept of "inter-temporal" linguistics. Moreover, as the Special Rapporteur pointed out in his third report[101] the rule cannot be formulated in the simple form in which it is stated by Sir G. Fitzmaurice and by the Court in the *United States Nationals in Morocco* case; for the content of a word, e.g. "bay" or "territorial waters", may change with the evolution of the law if the parties used it in the treaty as a general concept and not as a word of fixed content. Indeed, one Government questioned the advisability even of dealing with the inter-temporal law in the present article (see paragraph 11 below).

8. The second criticism is that the words as formulated —"ordinary meaning to be given to each term"—may lead to "excessive molecularization of the treaty"; and in this connexion the Government of Israel refers to a dictum of the International Court that a "word obtains its meaning from the context in which it is used".[102] It proposes that the opening phrase of article 69 should be revised to read: "A treaty shall be interpreted in good faith and in accordance with the ordinary meaning of the language used in its context" and that the word "context" should then be deleted from sub-paragraph (*a*). The Special Rapporteur doubts the force of this criticism, even although he may still prefer his original formulation "ordinary meaning to be given to each term in its context in the treaty and in the context of the treaty as a whole". The existing text relates the meaning of each term to "the context of the treaty" and to "its objects and purposes", which seems sufficient to discourage "excessive molecularization" of the treaty. And a simpler expedient to meet the point would seem to be to change "each term" to "its terms". Nor does the phrase "language used in its context" seem felicitous. Terms—"*termes*" in French—is the word whose use is hallowed in this connexion and it seems natural to employ it in article 69. True, it has the disadvantage of having two senses: "term" in the linguistic sense and "term" in the legal sense of "provision". But the two senses are concordant and the rule is meaningful and valid for both. Otherwise, it would seem preferable to adopt the Greek Government's suggestion and to speak of the "words" of the treaty.

9. Paragraph 1(*b*) has attracted comments from a number of governments. The United Kingdom and Syrian Governments express their support of the rule formulated in this sub-paragraph. The United States Government also supports the rule, merely suggesting that the word "general" should be deleted from the phrase "general international law", as it feels that this word may add an element of confusion. The Netherlands Government, on the other hand, takes exception to the sub-paragraph and advocates its total deletion. In its view, the sub-paragraph would require that, wherever a treaty appears to refer to a concept of international law, an effort should be made to determine the intention of the parties by considering the meaning of those concepts elsewhere in international law and independently of the treaty. It considers that the principle regarding context and objects and purposes in sub-paragraph (*a*) does not possess the same value as the principle regarding rules of international law in sub-paragraph (*b*); and that recourse should only be had to the latter when the application of sub-paragraph (*a*) has proved ineffective. The Government of Israel, on the other hand, suggests that sub-paragraph (*b*) should be placed before sub-paragraph (*a*) (which, in its view, should contain a reference to "objects and purposes"). This Government at the same time suggests that sub-paragraph (*b*) should be revised so as to make it clear that the expression "rules of general international law" denotes the substantive rules of international law, including rules of interpretation, and not the rules of interpretation alone. The Special Rapporteur thinks that it may be convenient if he examines the foregoing comments on paragraph 1(*b*) before turning to the other comments dealing with the question of the inter-temporal law.

10. The objection taken by the Netherlands Government to sub-paragraph (*b*) does not seem to the Special Rapporteur to carry conviction; for it involves interpreting the sub-paragraph in a manner which could hardly be justified as an interpretation in good faith. Certainly, it is a manner of interpreting the reference to rules of international law which has not occurred to any other Government and which did not occur to members of the Commission in 1964 or to members of the Institute of International Law in 1956 when they adopted the resolution on the interpretation of treaties mentioned in the Special Rapporteur's third report.[103] Paragraph 1 has to be read as a whole and, when this is done, it does little more than say that the terms of a treaty have to be interpreted in the light of the fact that it is an instrument concluded under the international legal order existing at the time of its conclusion.

Indeed, the Government of Israel's proposal for the reversal of the order of the sub-paragraphs goes in the

[99] *I.C.J. Reports 1952*, p. 189.

[100] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 55-57.

[101] *Ibid.*, pp. 9 and 10.

[102] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960*, p. 158.

[103] *Yearbook of the International Law Commission, 1964*, vol. II, p. 55.

opposite direction from that of the Netherlands Government, since it would, if anything, give more prominence to the rules of international law. No reason is given for this proposal, and the advantage of it is not apparent to the Special Rapporteur. On the contrary, he sees every reason for not separating the "context of the treaty" from the "objects and purposes" of the treaty, in the formulation of article 69. In his view, both are aspects of the "context of the treaty" and although, as already stated, he himself might have preferred a slightly different formulation of the element of "context", he does not favour this proposal of the Government of Israel. Nor does he find convincing its other suggestion that the text needs revision so as to make it clear that "the general rules of international law" cover the substantive rules of international law. Unless the Commission can rely on words being interpreted in good faith according to their ordinary meaning in their context, its drafts may have to become much more complicated than they now are. There remains the United States proposal for the deletion of the word "general". Its comment that this word may introduce an element of confusion is considered to be justified. Indeed, the Special Rapporteur doubts whether the Commission ever decided to include the word in the text. At its 770th meeting he introduced a final draft which spoke only of "the rules of international law". A proposal was made by one member of the Commission to introduce the word "general" into the text; and a discussion then ensued as to whether the phrase should be "rules" or "principles" of international law. But the record [104] does not indicate that any vote was taken on the proposal to include the word "general"; while the trend of the discussion was against it.

11. Three Governments question the adequacy of paragraph 1(*b*) in regard to the inter-temporal element. The Government of Israel, in its comments on article 68, sub-paragraph (*c*) (Modification of a treaty by the emergence of a new rule of customary law), proposes the transfer of the contents of that sub-paragraph to article 69. It considers that the question raised by the emergence of a new customary rule is primarily the impact of the new rule on the interpretation of the treaty under the second branch of the inter-temporal law mentioned by Judge Huber in the *Island of Palmas* case. The Netherlands Government, for its part, questions the words "in force at the time of the conclusion of the treaty" in paragraph 1(*b*) of article 69, observing that in some cases legal terms may have to be interpreted according to the law in force at the time of their interpretation. It suggests that the time element in interpretation should be left to "good faith". The Greek Government also questions the words "in force at the time of the conclusion of the treaty" as having the effect of excluding "evolutionary interpretation" of treaties.

12. The Special Rapporteur, in his comments on article 68, has suggested that the rule regarding the emergence of a new rule of customary law should be removed from article 68, since it does not seem to be a case of "modification of treaties" in the same sense as the cases dealt with in articles 65-67. He has also pointed out that the emergence of a new rule of customary law has two aspects: (1) its impact on the interpretation of terms and (2) its possible impact on the application of the treaty by setting up a customary legal norm, i.e. by raising a question of the relative priority of the treaty and the customary norm. The present arrangement under which the "interpretative" aspect is half dealt with in article 69 and the "application" aspect is incompletely covered in article 68 under the head of "modification", does not seem justifiable. The Commission, it is thought, has to decide, first, whether it is going to cover the inter-temporal element at all in the draft article and, secondly, if it is to do so, how the rules regarding its two aspects can be formulated in a manner to render them complete or at any rate not misleading.

13. Paragraph 1(*b*), as at present drafted, is incomplete in that it may be open to the interpretation that it negatives the possibility that a term may ever change its content with the evolution of international law. The choice before the Commission, it is thought, is either to spell out in article 69 the second branch of the inter-temporal law which recognizes that such a change may occur in certain cases, or else to adopt the point of view of the Netherlands Government that the temporal element in interpretation is implicit in interpretation in good faith. The second branch of the inter-temporal law, as the Special Rapporteur pointed out in his third report, [105] cannot be altogether divorced from the intention of the parties at the time of the conclusion of the treaty. Thus, in the *North Atlantic Coast Fisheries* arbitration [106] it was held that the word "bay" in the Treaty of Ghent of 1818 had been intended to denote a bay in the popular rather than legal sense. Even when a term, e.g. "bay", "territorial waters", "continental shelf", is used in its legal sense, a question may arise whether the parties had a particular concept of the term in mind and intended to fix their rights definitively in the treaty by reference to that concept, or whether they intended the term to be given whatever meaning it might from time to time possess under international law. Accordingly, if the second branch is incorporated in article 69, its formulation will require close attention. In 1964, the Commission did not show itself very receptive to the idea of dealing with both branches of the inter-temporal law in article 69. If the Commission remains of this mind, the Special Rapporteur suggests that the words "in force at the time of its conclusion" should be deleted, and that sub-paragraph (*b*) should refer simply to "the rules of international law", (or to the principles of international law) leaving the application of the inter-temporal law to be implied.

14. Paragraph 2 of article 69 is commented on by three Governments. The United Kingdom Government considers the concept of the "context" of a treaty to be a useful one, both with regard to interpretation and to such expressions as "unless it appears from the treaty". It merely suggests that the words "including its preamble and annexes" should be omitted from the definition. The United States Government, on the other hand, perhaps

[104] *Ibid., 1964*, vol. I, pp. 316 and 317.

[105] *Ibid., 1964*, vol. II, pp. 9 and 10.

[106] *Reports of International Arbitral Awards*, vol. XI, p. 196.

indicates a doubt as to the value of the concept when it suggests that if "context" is to be defined, it should be improved by clarifying whether it includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed. The Government of Israel considers paragraph 2 not to be part of any general rule of interpretation but a definition which, in some respects, completes that of a "treaty" in article 1 and is applicable throughout the draft articles. Accordingly, it suggests the transfer of the definition to article 1. It also questions the expression "drawn up" as being open to the interpretation that it refers to a draft instrument.

15. The definition of what is comprised in the "context of the treaty", as the Commission pointed out in paragraph (12) of its commentary, is important not only for the general application of the rules of interpretation but also for indicating the scope of such expressions as "unless the treaty otherwise provides", "unless it appears from the treaty", etc. These expressions occur at various places throughout the draft articles, including articles on the conclusion of treaties which in any arrangement of the articles will precede those on interpretation. That being so, the Government of Israel's suggestion that the definition should be transferred to article 1 has a certain attraction. But the Government of Israel does not make clear whether it has in mind "context of the treaty" as the term to be defined in article 1, or a further clause "completing" the definition of what the term "treaty" means in the draft articles. In any case, neither of those solutions seem viable. Probably, only a further clause completing the definition of "treaty" by adding to it the elements in paragraph 2 of article 69 would be very helpful in article 1 in connexion with the later interpretation of expressions like "it appears from the treaty". But to expand the definition of "treaty" in that way, generally and not thereby for purposes of interpretation, might have unexpected consequences in the sections on "invalidity" and "termination" of treaties. On the other hand, to define "context of the treaty" in article 1 independently of the provisions of article 69 might not be very meaningful. Accordingly, the Special Rapporteur feels that the better course is to retain the definition of "context" in article 69, but, as already indicated above, to place it at the end of the article and move the contents of paragraph 3 into paragraph 1.

16. As to the substance of paragraph 2, the Special Rapporteur sees no objection to the proposal to delete the words "including the preamble and annexes" which were inserted in 1964 only *ex abundanti cautela*. The suggestion of the United States Government that it should be made clear whether the "context" includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session. In the *Anglo-Iranian Oil Company* case[107] the International Court upheld the relevance of a purely unilateral declaration for the interpretation of a unilateral instrument. But it would seem clear on principle that a unilateral document cannot be regarded as part of the "context" for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties. Whether a "unilateral" or a "group" document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of the principle—the need for express or implied assent. The Government of Israel's point regarding the expression "drawn up" will no doubt be borne in mind by the Drafting Committee, which in 1964 did not find it easy to arrive at a combination of words in paragraph 2 that would be satisfactory from every point of view.

17. Paragraph 3(*b*) (subsequent practice) is commented on by three Governments. The Netherlands Government considers that to require the "understanding of all the parties" may restrict unduly the influence of what is "conventional" (customary usage?) within an international organization. But even the deletion of the word "all" would, in its view, still be too restrictive; and it proposes that the sub-paragraph should read: "Any subsequent practice in the application of the treaty". The United States Government, though from a somewhat different point of view, also thinks that the word "all" is too strong, as being open to the construction that some affirmative action is required by each and every party. In its view, a course of action even by one party not objected to by others may be a substantial guide to interpretation. The Government of Thailand, on the other hand, questions the inclusion of "subsequent practice" in this paragraph. In its view, although evidence of intention, subsequent practice is never conclusive, has to be weighed against all other relevant evidence, and may afford aid only in the interpretation of ambiguous provisions.

18. The original proposals of the Special Rapporteur in his third report[108] mentioned subsequent practice among the "other evidence and indications of the intentions of the parties" additional to the context. But the Commission decided to differentiate subsequent practice establishing the common understanding of all the parties and to classify this as an authentic interpretation comparable to an interpretative agreement. At the same time, it said in paragraph (13) of the commentary that the practice of individual States in the application of a treaty may be taken into account under article 70 as one of the further means of interpretation there mentioned. But it did not refer to subsequent practice *eo nomine* in that article. The comments of the Netherlands Government suggest that this omission may have led it to read paragraph 3(*b*) as covering every application of subsequent

[107] *I.C.J. Reports 1952*, p. 105.

[108] *Yearbook of the International Law Commission, 1964*, vol. II, p. 52.

practice. Clearly, to amount to an "authentic interpretation", the practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally. As to the United States objection that the word "all" may be construed as requiring some affirmative action from each and every party, it is doubted whether the objection is wholly valid. The word "understanding" was chosen by the Commission instead of "agreement" expressly in order to indicate that the assent of a party to the interpretation may be inferred from its reaction or absence of reaction to the practice. But although the existing text of paragraph 3(*b*) may not be inexact, the Special Rapporteur feels that the rigorous terms in which the rule is formulated—"clearly establishes", "all the parties"—may perhaps go a little beyond the way in which its operation is viewed in practice. He suggests that the word "clearly", which is unnecessary, should be omitted and that the paragraph might be reworded on the following lines:

> any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally.

19. In article 70, the chief point which has attracted attention is the Commission's treatment of the question of "preparatory work" and, having regard to the controversial character of this question, the number of Governments which have made comments on it is comparatively small. The views of three Governments appear to diverge substantially from that of the Commission in regard to the place to be accorded to *travaux préparatoires* in the process of interpretation. The Hungarian Government considers that preparatory work ought to be given the same importance as subsequent practice, that is, should be classed as a primary means of interpretation. The United States Government, while not going quite as far as this, considers that article 70, as at present drafted, may be unduly restrictive with respect to recourse to preparatory work and other means of interpretation. Its view appears to be that, whenever a dispute has arisen regarding the meaning of a treaty, recourse to further means of interpretation should be admissible independently of whether the conditions specified in sub-paragraphs (*a*) and (*b*) are fulfilled; and that the only requirement to be met should be that application of the rules in article 69 have failed to establish the correct interpretation. The Greek Government, considering that the only basic rule of interpretation is to ascertain the intention of the parties by every possible means in every possible way, appears to take the position that recourse to preparatory work should in every case be automatically admissible in order to determine that intention. A fourth Government (Kenya), while stating that articles 69-71 represent a reasonable compromise of conflicting views, underlines that the goal of any method of interpretation must be to use all intrinsic and external aids to ascertain the intention of the parties. The Yugoslav Government, on the other hand, would prefer to see the conditions for recourse to *travaux préparatoires* stated in even stricter form, namely, that when the text is clear and unambiguous, recourse to them is inadmissible.

The Government of Israel, without taking a position on the question of substance, in effect proposes the deletion of the specific reference to preparatory work. It argues that, if the definition of "context" is transferred to article 1 (as it recommends) it may become "unnecessary and indeed confusing" to refer specifically to preparatory work in article 70.

20. The particular reason given by the Government of Israel for omitting any reference to preparatory work does not seem convincing. The "context of the treaty", as defined by the Commission, comprises not "drafts" and other preparatory material but separate operative documents formally related to the treaty. The Commission's definition of "context"—whether or not this may need amendment—does not dispose of the problem of *travaux préparatoires*: moreover, the formulation of such a definition seems to make it more, rather than less, necessary to refer specifically to *travaux préparatoires* in order to avoid any risk of its being supposed that the rule regarding the "context of the treaty" covers all aspects of *travaux préparatoires*. The expression "further means of interpretation" is, of course, wide enough to cover *travaux préparatoires*, but in 1964 the Commission considered it desirable on general grounds to indicate specifically the rule laid down for *travaux préparatoires* in the draft articles.

So far as concerns the substance of the question and the formulation of the rule in article 70, the Special Rapporteur does not feel that he should make any new proposal in the present report on the basis of the above-mentioned comments of Governments. The content and drafting of article 70 received close consideration in the Commission in 1964, when some differences of opinion appeared among members regarding the precise way in which recourse to *travaux préparatoires* should be related to the textual approach to interpretation. Some members felt that in practice *travaux préparatoires* play a somewhat more significant role in interpretation than might perhaps appear from a strict reading of certain pronouncements of the International Court. The Commission itself said in paragraph (15) of its commentary that "it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extensive means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in article 69 has disclosed no clear or reasonable meaning". Accordingly, the rule which it formulated was carefully balanced so as to allow recourse to *travaux préparatoires* in order to "verify or confirm the meaning resulting from the application of article 69", but only to allow it for the purpose of determining the meaning in cases where interpretation according to article 69 leaves the meaning ambiguous or obscure, or gives a meaning which is manifestly absurd or unreasonable. This formulation seemed to the Commission to be about as near as it is possible to get to reconciling the principle of the primacy of the text, frequently laid down by the Court and adopted by the Commission, with the frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear. Moreover, the rule formulated in article 70 is inherently

flexible, since the question whether the text can be said to be "clear" is in some degree subjective. But this does not detract from the importance of stating the rule in order to furnish the necessary directive for interpretation in good faith on the basis of the text and the *travaux préparatoires*; and without such a rule, the cardinal principle of the primacy of the text might be undermined.

The Commission will wish to re-examine its position in regard to the whole problem of *travaux préparatoires* at its eighteenth session and in doing so will certainly give every attention to the comments of Governments. But the Special Rapporteur, as already stated, does not think that these comments should lead him to propose changes in the text to the Commission. He does not, for example, feel that the modification suggested by the United States—that recourse to preparatory work for the purpose of determining the meaning should be admitted whenever application of article 69 has failed to establish the correct interpretation—would be an improvement on the rule proposed by the Commission. To make recourse to *travaux préparatoires* dependent on a determination whether the rules in article 69 have given a "correct interpretation" seems to the Special Rapporteur rather to beg the question to be solved.

21. The special question of recourse to *travaux préparatoires* in the case of multilateral treaties is raised by the Yugoslav Government. In its opinion, States acceding to a multilateral treaty ordinarily have in view only the text itself and not the *travaux préparatoires*; and it proposes that the point should be covered in the article. The Commission examined this question in 1964 and decided that it should not include any special provision regarding the use of *travaux préparatoires* in the case of multilateral treaties. The considerations on which this decision was based are set out in paragraph (17) of its commentary and need not be repeated here. In view of the Commission's previous examination of the point, the Special Rapporteur does not feel that he should do more than draw its attention to the proposal of the Yugoslav Government.

22. Article 71 has been the subject of two comments. The United States Government proposes the deletion of the word "conclusively", which it considers to be unnecessary and a possible source of confusion. The Special Rapporteur feels that this comment is well-founded and that the word should be omitted.

The Government of Israel suggests that the article should either be combined with article 69, or placed immediately after it. The rule regarding terms used with a special meaning contained in article 71 at present seems somewhat detached from the "general rule"; and its relation to the various elements in article 69 and to "further means of interpretation" (article 70) is left somewhat in the air. If it is not easy to indicate very precisely the relation between article 71 and articles 69 and 70, the Special Rapporteur believes that it will be an improvement if the rule in article 71 is moved up into article 69 as a new paragraph 2. The establishment of a "special meaning" is not one of the purposes for which article 70 admits recourse to *travaux préparatoires*; and unless the "special meaning" rule is made part of article 69, means of interpretation necessary to establish a special meaning may appear to be excluded.

23. The Government of Israel further proposes that, having regard to the proliferation of multilingual versions of treaties, comparison between two or more versions ought to be included in article 69 as an additional principal means of interpretation; for such comparison is, in its view, normal practice in interpretation. However plausible this proposal may be when stated in these simple terms, it is not one which the Special Rapporteur feels that the Commission should adopt without very careful consideration of its implications. The legal relation between authentic texts (versions) of a treaty in different languages is a question of some delicacy, as appears from the Commission's examination of the matter in paragraphs (5) to (9) of its commentary on articles 72 and 73. The Special Rapporteur fears that the insertion of "comparison of authentic versions" among the general elements of interpretation contained in article 69, so far from being a simple recognition of something done in practice, might have far-reaching implications by undermining the security of the individual texts. Each language has its own genius, and it is not always possible to express the same idea in identical phraseology or syntax in different languages. It is one thing to admit interaction between two versions when each has been interpreted in accordance with its own genius and a divergence has appeared between them or an ambiguity in one of them. But it is another thing to attribute legal value to a comparison for the purpose of determining the ordinary meaning of the terms in the context of the treaty; for this may encourage attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning. Nor is it to be forgotten that today many important treaties have five authentic versions, or that plurilingual treaties not infrequently have provisions giving one version a certain measure of priority over the other. The Commission will, no doubt, wish to examine the Government of Israel's proposal in this connexion; pending that examination, the Special Rapporteur confines himself to the above preliminary observations.

24. Finally, the Special Rapporteur does not overlook the suggestion of the United States Government that further study should be given to the relationship of the articles on interpretation to other articles which have "interpretive overtones", e.g. articles 43, 44 and 68. Numerous articles, in fact, have such interpretative overtones. But, as the bearing of the articles concerning interpretation on those other articles is already very much in the mind of the Commission and of the Drafting Committee, it suffices for the Special Rapporteur to make this suggestion.

25. In the light of the foregoing observations and in order that the Commission may have before it a text showing the broad result of accepting certain of the suggestions of Governments for the reformulation of the three articles, the Special Rapporteur has prepared the following draft illustrating the effect of incorporating the contents of paragraph 3 of article 69 and of article 71 in paragraph 1 of article 69:

Article 69

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the light of:

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

(*b*) The rules of international law;

(*c*) Any agreement between the parties regarding the interpretation of the treaty;

(*d*) Any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally.

2. Nevertheless, a meaning other than its ordinary meaning shall be given to a term if it is established that the parties intended the term to have that special meaning.

3. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty any agreement or instrument related to the treaty which has either been made by the parties or has been made by some of them and assented to by the others as an instrument related to the treaty.

Article 70

Further means of interpretation

Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 69, or to determine the meaning when the interpretation according to article 69:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty.

Article 71 (deleted and contents transferred to article 69 as new paragraph 2).

Article 72.—Treaties drawn up in two or more languages
Article 73.—Interpretation of treaties having two or more texts

Comments of Governments

Finland. The Government of Finland considers the rules in these articles to be both useful and appropriate.

Israel. The Government of Israel defers its general comments on these articles until the Secretariat's information regarding practice in the drafting of multilingual instruments is available. Meanwhile, it suggests that the word "versions" should be substituted for "texts" throughout article 73, in order to make it more consistent with article 72.

Netherlands. The Netherlands Government states that it has no comment to make on these articles.

United States. In article 72, the United States Government considers paragraph 1 to state a widely accepted rule. Paragraph 2(*b*), on the other hand, it feels to be of questionable utility. In its view, when negotiators have an opportunity to examine and react to a version which they personally authenticate, there is a basis for considering that they have accepted it as accurate. A provision that a version drawn up separately, and with respect to which the negotiators have no opportunity to make suggestions, shall also be authoritative, would introduce a new factor that should not, it maintains, be crystallized as a part of the law of treaties. If any such non-authenticated version is to have authenticity, it considers that it should be effected by the treaty to which that version applies or else by a supplementary agreement between the parties. In consequence, it proposes that sub-paragraph (*b*) regarding the established rules of an international organization should be deleted.

In article 73, the United States Government questions the use of the word "texts", while recognizing that the usage is becoming more frequent. It says that a treaty is more properly conceived of as a unit, consisting of one text; and that when the text is expressed in two or more different languages, the several versions are an integral part of and constitute a single text. The use of the word "texts" seems, in its view, to derogate from the unity of the treaty as a single document. It accordingly suggests that the title to article 73 should read:

"*Interpretation of treaties drawn up in two or more languages*".

It further suggests that paragraph 1 should be revised to read as follows:

> "Each of the language versions in which the text of a treaty is authenticated is equally authoritative, unless the treaty itself provides that, in the event of divergence, a particular language version shall prevail".

This formulation, it says, avoids the use of the word "different" when the emphasis should be upon similarity and equality. And for similar reasons it suggests that paragraph 2 should be reworded to read as follows:

> "2. The terms of a treaty are presumed to have the same meaning in each of the languages in which the text is authenticated. Except in the case referred to in paragraph 1, when a comparison between two or more language versions discloses a difference in the expressions of a term or concept and any resulting ambiguity or obscurity is not removed by the application of articles 69-72, a meaning which so far as possible reconciles the two or more language versions shall be adopted."

Kenyan delegation. In the view of the Kenyan delegation, paragraph 2(*b*) of article 72 is unnecessary and should be deleted. [109]

Romanian delegation. In comments covering articles 65, 66 and 72, the Romanian delegation also takes exception to paragraph 2(*b*) of article 72. [110]

Observations and proposals of the Special Rapporteur

1. At its sixteenth session, the Commission requested the Secretariat to furnish further information on the practice of the United Nations in drawing up the texts of multilingual instruments. This information is contained in the Secretariat memorandum "Preparation of Multilingual Treaties" which is printed in this volume of the *Yearbook*. The memorandum confirms the information already available to the Commission in the Secretariat memoranda "The Summary of the Practice of the Secre-

[109] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 850th meeting, para. 41.

[110] *Ibid.*, 842nd meeting, para. 16.

tary-General as Depositary of Multilateral Agreements" (ST/Leg/7) and "The Handbook of Final Clauses" (ST/Leg/6). It throws an interesting light on the practice in the preparation of multilingual instruments, including the use of "working languages" for the purpose of facilitating the drafting of the treaty. But it does not appear to the Special Rapporteur to present any such new element as might require the Commission to modify its approach to the matters covered in articles 72 and 73.

2. A point of terminology is raised by the comments of two Governments which question the use of the expression "authentic texts" in article 73. The Government of Israel suggests that the word "versions" should be substituted for "texts" throughout article 73 in order to make it more consistent with article 72. This suggestion is thought to be misconceived since the effect would be to make article 73 inconsistent with article 72, paragraph 2 of which differentiates between a mere version and a "text". Nor would it be in accord with the linguistic usage found in practice to speak of "versions" rather than "texts" in articles 72 and 73, as is explained in the next paragraph.

3. The use of the word "texts" in article 73 is also questioned by the United States Government, which at the same time concedes that the "usage is becoming more frequent". It maintains that a treaty is more properly conceived of as a unit, consisting of one text; and that the several language versions are an integral part of and constitute a single text. In its view, the use of the word "texts" tends to "derogate from the unity of the treaty as a single document". The statement that the use of the word "texts" is "becoming more frequent" is, however, a serious underestimate of the treaty practice in the matter. The general practice has always been and most certainly is today to speak of authentic "texts" and not authentic "versions" of a treaty. All the precedents mentioned in the "Handbook of Final Clauses" (pages 164-168 and footnotes 69 and 70 containing long lists of treaties having similar clauses) speak of "texts" not "versions". This usage is also reflected in "The Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (pages 7 and 8) and in the "Preparation of Multilingual Treaties". It is, of course, perfectly correct and normal to speak in general terms of different language "versions" of a treaty but, whenever the question of "different language versions" is provided for in a treaty, the practice is almost invariably to refer to "texts", not "versions". Such is the practice found in the Charter itself (Article 111) and in the treaties drawn up within or under the auspices of the United Nations. (See paragraphs 18, 21, 25 and 31 of "Preparation of Multilingual Treaties".) These treaties include all the codifying conventions—and their accompanying protocols—which have resulted from the work of the Commission and the relevant final clauses of which are all on the following model:

> "The original of the present Convention [Protocol], of which the Chinese, English, French, Russian and Spanish texts are equally authentic, etc."

Again, the "model final clauses" used for treaties concluded under the auspices of the Council of Europe[111] refer to the treaty's being "done in French and English, both texts being equally authoritative". The modern practice of the Organization of American States is similar, as is also that of the States of the Warsaw Treaty.

4. The doctrinal basis of the United States Government's objection to the word "texts" also appears to the Special Rapporteur to be open to question. The concept of the treaty as a unity, in however many languages its terms are expressed, is certainly of the highest importance and is, indeed, the basis of the rules laid down in paragraph 2 of article 73. But it may be doubted whether the principle of the unity of the treaty is derogated from by speaking of "texts" any more than by speaking of "versions". It does not seem to improve matters to speak of the text having more than one "version" instead of the treaty having more than one "text". If recourse is had to the fiction that the treaty has only one text, the "text" becomes only another name for the treaty and if the text is to be regarded as having more than one "version", precisely the same element of multiplicity is present as when the treaty is regarded as having more than one text. Moreover, so far as the English language is concerned, the word "version" is more indicative of difference than the word "text", and it may be doubted whether any advantage would be gained by introducing the fiction that a plurilingual treaty has only one text of which there may be different "versions". That this concept is a pure fiction seems to the Special Rapporteur to be self-evident; and it is a fiction to which, as already indicated, treaty practice gives no support.

5. A further consideration is that it is desirable to distinguish sharply between language "versions" of a treaty which have the status of an authentic text and those which do not, even although they may possess a certain "official" character. For example, the European Convention of Human Rights is authentic in two languages, English and French, but governs the enjoyment of human rights in countries whose languages may be German, Greek, Italian, Turkish or a Scandinavian language. In some of these countries it is applicable as law, and for internal purposes an official translation in the local language has been drawn up. The word "version", being a word of entirely general meaning and not a term of art, clearly covers according to its ordinary meaning any such renderings of the treaty in other languages. It is for this reason that the Commission was careful in paragraph 2 of article 72 to distinguish between "versions" which have expressly been given the status of "authentic texts", and those which have not and therefore remain mere translations of the treaty into other languages. The existing State practice of referring to authentic "texts" rather than to language versions makes it easier to keep this important distinction clear and sharp.

6. The above observations are not meant to suggest that the formulation of article 73 is in all respects satisfactory; only that the transfer of the emphasis from

[111] See *Pratique du Conseil de l'Europe en matière de traités interétatiques*, annexe, p. 12.

"texts" to "versions" may not be the appropriate remedy. Before re-examining the drafting of article 73, however, it is necessary to consider the comments of Governments on article 72.

7. In article 72 three Governments take objection to paragraph 2(*b*), which makes an exception in the case of "the established rules of an international organization". The Government of Kenya proposes its deletion, merely observing that the sub-paragraph is unnecessary. The Romanian delegation, which also proposes its deletion, considers that, as in the case of the similar provisions in articles 65 and 66, the sub-paragraph "opens the way to contradictions between the desires of States parties to treaties and the rules established by international organizations". The third Government, that of the United States, observes that when negotiators have an opportunity to examine and react to a version which they personally authenticate, there is a basis for considering that they have accepted it as accurate; but that a provision that a version drawn up separately, and with respect to which the negotiators have no opportunity to make suggestions shall also be authoritative, would introduce a new factor that ought not to be crystallized as a part of the law of treaties. It considers that if such a version is to have authenticity, authentication should be effected by the treaty or by a supplementary agreement between the parties—in other words, under paragraph 2(*a*).

8. The objection taken by these Governments to paragraph 2(*b*) is primarily due, it is thought, to the too-general nature of the exception regarding the rules of international organizations which the sub-paragraph would create. The point is the same as that which arises under a number of other articles and which has been discussed by the Special Rapporteur in paragraphs 2 and 3 of his observations on article 65. As there noted, the Commission has decided to deal with the problem of the rules of international organizations in a general article, which now appears as article 3(*bis*). Accordingly, quite apart from the comments of the three Governments, the Commission's decision to cover the matter in article 3(*bis*) would have called for the deletion of this sub-paragraph from article 72.

9. A minor point of drafting arises under paragraph 2(*a*). As the above-mentioned comment of the United States Government indicates, the status of an authentic text may be accorded to a "version" either by a provision in the treaty or by agreement of the parties. In other articles, the Commission has used a formula spelling out both these possibilities. In order to be consistent, it would therefore seem desirable to revise paragraph 2(*a*) to read: "if the treaty so provides or it is so agreed".

10. In article 73 the United States Government, in addition to querying the use of the word "texts", suggests that the use of the word "different" in paragraph 1 is undesirable when the emphasis should be upon similarity and equality. The word "different" was not intended by the Commission to mean more than "several" and the United States Government is clearly correct in saying that it is not well chosen. If the paragraph is slightly modified on the lines indicated in paragraph 11 below, this point will be met because no adjective at all will be necessary. In paragraph 2, where the existing text speaks of a "difference in the expression of a term" the United States Government, in its revised draft, puts "a difference in the expression of a term or concept". The Special Rapporteur is inclined to suggest that the appropriate course may be simply to refer to "a difference in the expression of the treaty". The phrase "different texts" appears also in this paragraph, but again the word "different" can be easily eliminated by a slight modification of the drafting.

11. The Special Rapporteur suggests that articles 72 and 73 should be amalgamated into a single article of four paragraphs. His reasons are, first, that the rule in paragraph 1 of article 73 is at least as closely connected with the rules in article 72 as it is with the rule in paragraph 2 of its own article; and, secondly, that the presentation of the rules in a single article may help to avoid any appearance of over-emphasizing the significance of the multilingual character of a treaty as an element in treaty interpretation. Certain minor drafting amendments also appear to be desirable and the Special Rapporteur suggests that the whole matter of multilingual treaties might be dealt with in a new article 72 formulated on the following lines:

Article 72

Interpretation of treaties drawn up in two or more languages

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, unless the treaty otherwise provides.

2. A version of the treaty drawn up in a language other than one of those in which the text was authenticated shall also be considered as an authentic text and authoritative if the treaty so provides or the parties so agree.

3. Authentic texts are equally authoritative in each language unless the treaty provides that, in the event of divergence, a particular text shall prevail.

4. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference in the expression of the treaty and any resulting ambiguity or obscurity is not removed by the application of article 69-70,[112] a meaning which as far as possible reconciles the texts shall be adopted.

[112] The reference here to articles 69 and 70 assumes that article 71 will become amalgamated with article 69.