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Draft articles on the law of treaties: text as finally adopted by the Commission on 18 July 1966 (reproduced at para. 38 of document A/6309/Rev.1)

Topic:
Law of Treaties

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30. Similarly, the draft articles do not contain provisions concerning either the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments, or the effect of the extinction of the international personality of a State upon the termination of treaties. In regard to the latter question, as is further explained in paragraph (6) of its commentary to article 58 and in its 1963 report.[29] the Commission

> "...did not think that any useful provisions could be formulated on this question without taking into account the problem of the succession of States to treaty rights and obligations."

31. The draft articles do not contain provisions concerning the question of the international responsibility of a State with respect to a failure to perform a treaty obligation. This question, the Commission noted in its 1964 report,[30] would involve not only the general principles governing the reparation to be made for a breach of a treaty, but also the grounds which may be invoked in justification for the non-performance of a treaty. As these matters form part of the general topic of the international responsibility of States, which is to be the subject of separate examination by the Commission, it decided to exclude them from its codification of the law of treaties and to take them up in connexion with its study of the international responsibility of States.

32. Moreover, the Commission, as explained in its 1964 report,[31] did not think it advisable to deal with the so-called "most-favoured-nation clause" in the present codification of the general law of treaties, although it felt that such clauses might at some future time appropriately form the subject of a special study. Likewise the Commission, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, found it unnecessary to make a specific exception regarding such clauses in articles 30-33 of the present draft, since it did not consider that these clauses were in any way touched by these articles.

33. Again, no provision regarding the application of treaties providing for obligations or rights to be performed or enjoyed by individuals has been included in the draft. It was stated in the 1964 report[32] that

> "Some members of the Commission desired to see a provision on that question included in the present group of draft articles. But other members considered that such a provision would go beyond the present scope of the law of treaties, and in view of the division of opinion the Special Rapporteur withdrew the proposal."

34. The Commission did not consider that it should cover the whole question of the relationship between treaty law and customary law, although aspects of that question are touched in certain articles. That question, it felt, would lead it far outside the scope of the law of treaties proper and would more appropriately be the subject of an independent study.

35. The Commission's work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute, and, as was the case with several previous drafts,[33] it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of Governments.

B. Recommendation of the Commission to convene an international conference on the law of treaties

36. At its 892nd meeting, on 18 July 1966, the Commission decided, in conformity with Article 23, paragraph 1(*d*), of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject.

37. The Commission wishes to refer to the titles given to parts, sections and articles of its draft, which it considers helpful for an understanding of the structure of the draft and for promoting ease of reference. It expresses the hope, as it did in regard to its draft articles on consular relations,[34] that these titles, subject to any appropriate changes, will be retained in any convention which may be concluded in the future on the basis of the Commission's draft articles.

C. Resolution adopted by the Commission

38. The Commission, at its 893rd meeting on 18 July 1966, after adopting the text of the articles on the law of treaties, unanimously adopted the following resolution:

> "*The International Law Commission,*
>
> "*Having adopted* the draft articles on the law of treaties,
>
> "*Desires to express* to the Special Rapporteur, Sir Humphrey Waldock, its deep appreciation of the invaluable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion and incessant labour, which have enabled the Commission to bring this important task to a successful conclusion."

Draft articles on the law of treaties

Part I.—Introduction

Article 1. The scope of the present articles

The present articles relate to treaties concluded between States.

[29] *Ibid.*

[30] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 175-176, para. 18.

[31] *Yearbook of the International Law Commission, 1964*, vol. II, p. 176, para. 21.

[32] *Ibid.*, para. 22.

[33] See, e.g., *Yearbook of the International Law Commission, 1956*, vol. II, pp. 255 and 256, paras. 25 and 26, and *1961*, vol. II, p. 91, para. 32.

[34] *Yearbook of the International Law Commission, 1961*, vol. II, p. 92, para. 35.

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(*b*) "Ratification", "Acceptance", "Approval", and "Accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.

(*c*) "Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

(*d*) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

(*e*) "Negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty.

(*f*) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.

(*g*) "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force.

(*h*) "Third State" means a State not a party to the treaty.

(*i*) "International organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not relate:

(*a*) To international agreements concluded between States and other subjects of international law or between such other subjects of international law; or

(*b*) To international agreements not in written form

shall not affect the legal force of such agreements or the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

Article 4. Treaties which are constituent instruments of international organizations or are adopted within international organizations

The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization.

Part II.—Conclusion and entry into force of treaties

Section 1: Conclusion of treaties

Article 5. Capacity of States to conclude treaties

1. Every State possesses capacity to conclude treaties.

2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

Article 6. Full powers to represent the State in the conclusion of treaties

1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if:

(*a*) He produces appropriate full powers; or

(*b*) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(*b*) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the adoption of the text of a treaty in that conference or organ.

Article 7. Subsequent confirmation of an act performed without authority

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 6 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

Article 8. Adoption of the text

1. The adoption of the text of a treaty takes place by the unanimous consent of the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to apply a different rule.

Article 9. Authentication of the text

The text of a treaty is established as authentic and definitive:

(*a*) By such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(*b*) Failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 10. Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(*a*) The treaty provides that signature shall have that effect;

(*b*) It is otherwise established that the negotiating States were agreed that signature should have that effect;

(*c*) The intention of the State in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(*a*) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(*b*) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 11. Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(*a*) The treaty provides for such consent to be expressed by means of ratification;

(*b*) It is otherwise established that the negotiating States were agreed that ratification should be required;

(*c*) The representative of the State in question has signed the treaty subject to ratification; or

(*d*) The intention of the State in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 12. Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(*a*) The treaty or an amendment to the treaty provides that such consent may be expressed by that State by means of accession;

(*b*) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(*c*) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Article 13. Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(*a*) Their exchange between the contracting States;

(*b*) Their deposit with the depositary; or

(*c*) Their notification to the contracting States or to the depositary, if so agreed.

Article 14. Consent relating to a part of a treaty and choice of differing provisions

1. Without prejudice to the provisions of articles 16 to 20, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made plain to which of the provisions the consent relates.

Article 15. Obligation of a State not to frustrate the object of a treaty prior to its entry into force

A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:

(*a*) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;

(*b*) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

(*c*) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Section 2: Reservations to multilateral treaties

Article 16. Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty authorizes specified reservations which do not include the reservation in question; or

(*c*) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

Article 17. Acceptance of and objection to reservations

1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(*a*) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(*b*) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(*c*) An act expressing the State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 18. Procedure regarding reservations

1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An objection to the reservation made previously to its confirmation does not itself require confirmation.

Article 19. Legal effects of reservations

1. A reservation established with regard to another party in accordance with articles 16, 17 and 18:

(*a*) Modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agrees to consider the treaty as in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 20. Withdrawal of reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States.

Section 3: Entry into force of treaties

Article 21. Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound is established after a treaty has come into force, the treaty enters into force for that State on the date when its consent was established unless the treaty otherwise provides.

Article 22. Entry into force provisionally

1. A treaty may enter into force provisionally if:

(*a*) The treaty itself prescribes that it shall enter into force provisionally pending ratification, acceptance, approval or accession by the contracting States; or

(*b*) The negotiating States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.

Part III.—Observance, application and interpretation of treaties

Section 1: Observance of treaties

Article 23. *Pacta sunt servanda*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Section 2: Application of treaties

Article 24. Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 25. Application of treaties to territory

Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party.

Article 26. Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as inconsistent with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 56, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;

(*c*) As between a State party to both treaties and a State party only to the later treaty, the later treaty governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 37, or to any question of the termination or suspension of the operation of a treaty under article 57 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Section 3: Interpretation of treaties

Article 27. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

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

(*b*) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 28. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

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

(*b*) Leads to a result which is manifestly absurd or unreasonable.

Article 29. Interpretation of treaties in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

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

3. 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 of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

Section 4: Treaties and third States

Article 30. General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 31. Treaties providing for obligations for third States

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be a means of establishing the obligation and the third State has expressly accepted that obligation.

Article 32. Treaties providing for rights for third States

1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 33. Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 31, the obligation may be revoked or modified only with the mutual consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 32, the right may not be revoked or modified

by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 34. Rules in a treaty becoming binding through international custom

Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.

Part IV.—Amendment and modification of treaties

Article 35. General rule regarding the amendment of treaties

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

Article 36. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to every party, each one of which shall have the right to take part in:

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

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

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4(*b*) applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) Be considered as a party to the treaty as amended; and

(*b*) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 37. Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole; and

(iii) is not prohibited by the treaty.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Article 38. Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

Part V.—Invalidity, termination and suspension of the operation of treaties

Section 1: General provisions

Article 39. Validity and continuance in force of treaties

1. The validity of a treaty may be impeached only through the application of the present articles. A treaty the invalidity of which is established under the present articles is void.

2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Article 40. Obligations under other rules of international law

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present articles or of the terms of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law.

Article 41. Separability of treaty provisions

1. A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may only be invoked with respect to the whole treaty except as provided in the following paragraphs or in article 57.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:

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

(*b*) Acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

4. Subject to paragraph 3, in cases falling under articles 46 and 47 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or to the particular clauses alone.

5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted.

Article 42. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 inclusive or articles 57 to 59 inclusive if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(*b*) It must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation.

Section 2: Invalidity of treaties

Article 43. Provisions of internal law regarding competence to conclude a treaty

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest.

Article 44. Specific restrictions on authority to express the consent of the State

If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was brought to the knowledge of the other negotiating States prior to his expressing such consent.

Article 45. Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

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

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 74 then applies.

Article 46. Fraud

A State which has been induced to conclude a treaty by the fraudulent conduct of another negotiating State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 47. Corruption of a representative of the State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 48. Coercion of a representative of the State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

Article 49. Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.

Article 50. Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Section 3: Termination and suspension of the operation of treaties

Article 51. Termination of or withdrawal from a treaty by consent of the parties

A treaty may be terminated or a party may withdraw from a treaty:

(*a*) In conformity with a provision of the treaty allowing such termination or withdrawal; or

(*b*) At any time by consent of all the parties.

Article 52. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Article 53. Denunciation of a treaty containing no provision regarding termination

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article.

Article 54. Suspension of the operation of a treaty by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) In conformity with a provision of the treaty allowing such suspension;

(*b*) At any time by consent of all the parties.

Article 55. Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only

When a multilateral treaty contains no provision regarding the suspension of its operation, two or more parties may conclude an agreement to suspend the operation of provisions of the treaty temporarily and as between themselves alone if such suspension:

(*a*) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and

(*b*) Is not incompatible with the effective execution as between the parties as a whole of the object and purpose of the treaty.

Article 56. Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty

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

(*a*) It appears from the treaty or is otherwise established that the parties intended that the matter should thenceforth be governed by the later treaty; or

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

2. The earlier treaty shall be considered as only suspended in operation if it appears from the treaty or is otherwise established that such was the intention of the parties when concluding the later treaty.

Article 57. Termination or suspension of the operation of a treaty as a consequence of its breach

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

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

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

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

(ii) as between all the parties;

(*b*) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present articles; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

Article 58. Supervening impossibility of performance

A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent 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.

Article 59. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

(*a*) As a ground for terminating or withdrawing from a treaty establishing a boundary;

(*b*) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

Article 60. Severance of diplomatic relations

The severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations established between them by the treaty.

Article 61. Emergence of a new peremptory norm of general international law

If a new peremptory norm of general international law of the kind referred to in article 50 is established, any existing treaty which is in conflict with that norm becomes void and terminates.

Section 4: Procedure

Article 62. Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 63. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 62 shall be carried out through an instrument communicated to the other parties.

2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 64. Revocation of notifications and instruments provided for in articles 62 and 63

A notification or instrument provided for in articles 62 and 63 may be revoked at any time before it takes effect.

Section 5: Consequences of the invalidity, termination or suspension of the operation of a treaty

Article 65. Consequences of the invalidity of a treaty

1. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) Acts performed in good faith before the nullity was invoked are not rendered unlawful by reason only of the nullity of the treaty.

3. In cases falling under articles 46, 47, 48 or 49, paragraph 2 does not apply with respect to the party to which the fraud, coercion or corrupt act is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 66. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws 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.

Article 67. Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law

1. In the case of a treaty void under article 50 the parties shall:

(*a*) Eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) Bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 61, the termination of the treaty:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 68. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(*a*) Relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(*b*) Does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to render the resumption of the operation of the treaty impossible.

Part VI.—Miscellaneous provisions

Article 69. Cases of State succession and State responsibility

The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State.

Article 70. Case of an aggressor State

The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Part VII.—Depositaries, notifications, corrections and registration

Article 71. Depositaries of treaties

1. The depositary of a treaty, which may be a State or an international organization, shall be designated by the negotiating States in the treaty or in some other manner.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

Article 72. Functions of depositaries

1. The functions of a depositary, unless the treaty otherwise provides, comprise in particular:

(*a*) Keeping the custody of the original text of the treaty, if entrusted to it;

(*b*) Preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty and transmitting them to the States entitled to become parties to the treaty;

(*c*) Receiving any signatures to the treaty and any instruments and notifications relating to it;

(*d*) Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;

(*e*) Informing the States entitled to become parties to the treaty of acts, communications and notifications relating to the treaty;

(*f*) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty has been received or deposited;

(*g*) Performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the other States entitled to become parties to the treaty or, where appropriate, of the competent organ of the organization concerned.

Article 73. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State under the present articles shall:

(*a*) If there is no depositary, be transmitted directly to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only upon the latter State's having been informed by the depositary in accordance with article 72, paragraph 1(*e*).

Article 74. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected:

(*a*) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) By executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter:

(*a*) Shall notify the contracting States of the error and of the proposal to correct it if no objection is raised within a specified time-limit;

(*b*) If on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the contracting States;

(*c*) If an objection has been raised to the proposed correction, shall communicate the objection to the other contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the contracting States agree should be corrected.

4. (*a*) The corrected text replaces the defective text *ab initio*, unless the contracting States otherwise decide.

(*b*) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy to the contracting States.

Article 75. Registration and publication of treaties

Treaties entered into by parties to the present articles shall as soon as possible be registered with the Secretariat of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations.

Draft articles on the law of treaties with commentaries

Part I.—Introduction

Article 1.[35] The scope of the present articles

The present articles relate to treaties concluded between States.

Commentary

(1) This provision defining the scope of the present articles as relating to "treaties concluded between States" has to be read in close conjunction not only with article 2(1)(*a*), which states the meaning with which the term "treaty" is used in the articles, but also with article 3, which contains a general reservation regarding certain other categories of international agreements. The sole but important purpose of this provision is to underline at the outset that all the articles which follow have been formulated with particular reference to treaties concluded between States and are designed for application only to such treaties.

(2) Article 1 gives effect to and is the logical consequence of the Commission's decision at its fourteenth session not to include any special provisions dealing with the treaties of international organizations and to confine the draft articles to treaties concluded between States. Treaties concluded by international organizations have many special characteristics; and the Commission considered that it would both unduly complicate and delay the drafting of the present articles if it were to attempt to include in them satisfactory provisions concerning treaties of international organizations. It is true that in the draft provisionally adopted in 1962, article 1 defined the term treaty "for the purpose of the present articles" as covering treaties "concluded between two or more States or other subjects of international law". It is also true that article 3 of that draft contained a very general reference to the capacity of "other subjects of international law" to conclude treaties and a very general rule concerning the capacity of international organizations in particular. But no other article of that draft or of those provisionally adopted in 1963 and 1964 made any specific reference to the treaties of international organizations or of any other "subject of international law".

(3) The Commission, since the draft articles were being prepared as a basis for a possible convention, considered it essential, first, to remove from former articles 1 and 3 (articles 2 and 5 of the present draft) the provisions relating to treaties not specifically the subject of the present articles and, secondly, to indicate clearly the restriction of the present articles to treaties concluded between States. Accordingly, it decided to make the appropriate adjustments in articles 1 and 5 and to insert article 1 restricting the scope of the draft articles to treaties concluded between States. The Commission examined whether the object could be more appropriately achieved by merely amending the definition of treaty in article 2. But considerations of emphasis and of drafting convenience led it to conclude that the definition of the scope of the draft articles in the first article is desirable.

(4) The Commission considered it no less essential to prevent any misconception from arising from the express restriction of the draft articles to treaties concluded between States or from the elimination of the references to treaties of "other subjects of international law" and of "international organizations". It accordingly decided to underline in the present commentary that the elimination of those references is not to be understood as implying any change of opinion on the part of the Commission as to the legal nature of those forms of international agreements. It further decided to add to article 3 (former article 2) a specific reservation with respect to their legal force and the rules applicable to them.

Article 2.[36] Use of terms

1. For the purposes of the present articles:

(*a*) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(*b*) "Ratification", "Acceptance", "Approval", and "Accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.

(*c*) "Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

(*d*) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

(*e*) "Negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty.

(*f*) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.

(*g*) "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force.

[35] 1965 draft, article 0.

[36] 1962 and 1965 drafts, article 1.

(*h*) "Third State" means a State not a party to the treaty.

(*i*) "International organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended only to state the meanings with which terms are used in the draft articles.

(2) "*Treaty*". The term "treaty" is used throughout the draft articles as a generic term covering all forms of international agreement in writing concluded between States. Although the term "treaty" in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an "agreed minute" or a "memorandum of understanding", could not appropriately be called *formal* instruments, but they are undoubtedly international agreements subject to the law of treaties. A general convention on the law of treaties must cover all such agreements, and the question whether, for the purpose of describing them, the expression "treaties" should be employed rather than "international agreements" is a question of terminology rather than of substance. In the opinion of the Commission a number of considerations point strongly in favour of using the term "treaty" for this purpose.

(3) First, the treaty in simplified form, far from being at all exceptional, is very common, and its use is steadily increasing.[37] Secondly, the juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements.[38] But these differences spring neither from the form, the appellation, nor any other outward characteristic of the instrument in which they are embodied: they spring exclusively from the content of the agreement, whatever its form. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a convention on the law of treaties merely because, in regard to the method of conclusion and entry into force, there may be certain differences between such agreements and formal agreements. Thirdly, even in the case of single formal agreements an extraordinarily varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to "treaty", "convention" and "protocol", one not infrequently finds titles such as "declaration", "charter", "covenant", "pact", "act", "statute", "agreement", "concordat", whilst names like "declaration" "agreement" and "*modus vivendi*" may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as "agreement", "exchange of notes", "exchange of letters", "memorandum of agreement", or "agreed minute" may be more common than others.[39] It is true that some types of instruments are used more frequently for some purposes rather than others; it is also true that some titles are more frequently attached to some types of transaction rather than to others. But there is no exclusive or systematic use of nomenclature for particular types of transaction. Fourthly, the use of the term "treaty" as a generic term embracing all kinds of international agreements in written form is accepted by the majority of jurists.

(4) Even more important, the generic use of the term "treaty" is supported by two provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed "*a.* the interpretation of a treaty". But clearly, this cannot be intended to mean that States cannot accept the compulsory jurisdiction of the Court for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments having another designation. Again, in Article 38, paragraph 1, the Court is directed to apply in reaching its decisions, "*a.* international conventions". But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled "conventions". On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements the term employed is "treaty" and in the other the even more formal term "convention" is used serves to confirm that the use of the term "treaty" generically in the present articles to embrace all international agreements is perfectly legitimate. Moreover, the only real alternative would be to use for the generic term the phrase "international agreement", which would not only make the drafting more cumbrous but would sound strangely today, when the "law of treaties" is the term almost universally employed to describe this branch of international law.

(5) The term "treaty", as used in the draft articles, covers only international agreements made between "two or more States". The fact that the term is so defined here and

[37] See first report by Sir H. Lauterpacht, *Yearbook of the International Law Commission, 1953*, vol. II, pp. 101-106.

[38] See on this subject the commentaries to Sir G. Fitzmaurice's second report (*Yearbook of the International Law Commission, 1957*, vol. II, p. 16, paras. 115, 120, 125-128 and 165-168); and his third report (*Yearbook of the International Law Commission, 1958*, vol. II, p. 20, paras. 90-93).

[39] See the list given in Sir H. Lauterpacht's first report (*Yearbook of the International Law Commission, 1953*, vol. II, p. 101), paragraph 1 of the commentary to his article 2. Article 1 of the General Assembly regulation concerning registration speaks of "every treaty or international agreement, whatever its form and descriptive name".

so used throughout the articles is not, as already underlined in the commentary to the previous article, in any way intended to deny that other subjects of international law, such as international organizations and insurgent communities, may conclude treaties. On the contrary, the reservation in article 3 regarding the legal force of and the legal principles applicable to their treaties was inserted by the Commission expressly for the purpose of refuting any such interpretation of its decision to confine the draft articles to treaties concluded between States.

(6) The phrase "governed by international law" serves to distinguish between international agreements regulated by public international law and those which, although concluded between States, are regulated by the national law of one of the parties (or by some other national law system chosen by the parties). The Commission examined the question whether the element of "intention to create obligations under international law" should be added to the definition. Some members considered this to be actually undesirable since it might imply that States always had the option to choose between international and municipal law as the law to govern the treaty, whereas this was often not open to them. Others considered that the very nature of the contracting parties necessarily made an inter-State agreement subject to international law, at any rate in the first instance. The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase "governed by international law", and it decided not to make any mention of the element of intention in the definition.

(7) The restriction of the use of the term "treaty" in the draft articles to international agreements expressed in writing is not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission's draft articles on the law of treaties may not have relevance in regard to oral agreements. But the term "treaty" is commonly used as denoting an agreement in written form, and in any case the Commission considered that, in the interests of clarity and simplicity, its draft articles on the law of treaties must be confined to agreements in written form. On the other hand, although the classical form of treaty was a single formal instrument, in modern practice international agreements are frequently concluded not only by less formal instruments but also by means of two or more instruments. The definition, by the phrase "whether embodied in a single instrument or in two or more related instruments", brings all these forms of international agreement within the term "treaty".

(8) The text provisionally adopted in 1962 also contained definitions of two separate categories of treaty: (*a*) a "treaty in simplified form" and (*b*) a "general multilateral treaty". The former term was employed in articles 4 and 12 of the 1962 draft in connexion with the rules governing respectively "full powers" and "ratification". The definition, to which the Commission did not find it easy to give sufficient precision, was employed in those articles as a criterion for the application of certain rules. On re-examining the two articles at its seventeenth session, the Commission revised the formulation of their provisions considerably and in the process found it possible to eliminate the distinctions made in them between "treaties in simplified form" and other treaties which had necessitated the definition of the term. In consequence, it no longer appears in the present article. The second term "general multilateral treaty" was employed in article 8 of the 1962 draft as a criterion for the application of the rules then included in the draft regarding "participation in treaties". The article, for reasons which are explained in a discussion of the question of participation in treaties appended to the commentary to article 12, has been omitted from the draft articles, which do not now contain any rules dealing specifically with participation in treaties. Accordingly this definition also ceases to be necessary for the purposes of the draft articles and no longer appears among the terms defined in the present article.

(9) "*Ratification*", "*Acceptance*", "*Approval*" and "*Accession*". The purpose of this definition is to underline that these terms, as used throughout the draft articles, relate exclusively to the international act by which the consent of a State to be bound by a treaty is established on the international plane. The constitutions of many States contain specific requirements of internal law regarding the submission of treaties to the "ratification" or the "approval" of a particular organ or organs of the State. These procedures of "ratification" and "approval" have their effects in internal law as requirements to be fulfilled before the competent organs of the State may proceed to the international act which will establish the State's consent to be bound. The international act establishing that consent, on the other hand, is the exchange, deposit or notification internationally of the instrument specified in the treaty as the means by which States may become parties to it. Nor is there any exact or necessary correspondence between the use of the terms in internal law and international law, or between one system of internal law and another. Since it is clear that there is some tendency for the international and internal procedures to be confused and since it is only the international procedures which are relevant in the international law of treaties, the Commission thought it desirable in the definition to lay heavy emphasis on the fact that it is purely the international act to which the terms ratification, acceptance, approval and accession relate in the present articles.

(10) "*Full powers*". The definition of this term does not appear to require any comment except to indicate the significance of the final phrase "or for accomplishing any other act with respect to a treaty". Although "full powers" normally come into consideration with respect to conclusion of treaties (see articles 6, 10 and 11), it is possible that they may be called for in connexion with other acts such as the termination or denunciation of a treaty (see article 63, paragraph 2).

(11) "*Reservation*". The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular pro-

vision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.

(12) "*Negotiating State*", "*Contracting State*", "*Party*". In formulating the articles the Commission decided that it was necessary to distinguish between four separate categories of State according as the particular context required, and that it was necessary to identify them clearly by using a uniform terminology. One category, "States entitled to become parties to the treaty", did not appear to require definition. The other three are those defined in sub-paragraphs 1(*e*), 1(*f*) and 1(*g*). "Negotiating States" require to be distinguished from both "contracting States" and "parties" in certain contexts, notably whenever an article speaks of the intention underlying the treaty. "States entitled to become parties" is the appropriate term in certain paragraphs of article 72. "Contracting States" require to be distinguished both from "negotiating States" and "parties" in certain contexts where the relevant point is the State's expression of consent to be bound independently of whether the treaty has yet come into force. As to "party", the Commission decided that, in principle, this term should be confined to States for which the treaty is in force. At the same time, the Commission considered it justifiable to use the term "party" in certain articles which deal with cases where, as in article 65, a treaty having purportedly come into force, its validity is challenged, or where a treaty that was in force has been terminated.

(13) "*Third State*". This term is in common use to denote a State which is not a party to the treaty and the Commission, for drafting reasons, considered it convenient to use the term in that sense in section 4 of part III.

(14) "*International organization*". Although the draft articles do not relate to the treaties of international organizations, their application to certain classes of treaties concluded between States may be affected by the rules of an international organization (see article 4). The term "international organization" is here defined as an *intergovernmental* organization in order to make it clear that the rules of non-governmental organizations are excluded.

(15) *Paragraph 2* is designed to safeguard the position of States in regard to their internal law and usages, and more especially in connexion with the ratification of treaties. In many countries, the constitution requires that international agreements in a form considered under the internal law or usage of the State to be a "treaty" must be endorsed by the legislature or have their ratification authorized by it, perhaps by a specific majority; whereas other forms of international agreement are not subject to this requirement. Accordingly, it is essential that the definition given to the term "treaty" in the present articles should do nothing to disturb or affect in any way the existing domestic rules or usages which govern the classification of international agreements under national law.

Article 3.[40] International agreements not within the scope of the present articles

The fact that the present articles do not relate:

(*a*) To international agreements concluded between States and other subjects of international law or between such other subjects of international law; or

(*b*) To international agreements not in written form

shall not affect the legal force of such agreements or the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

Commentary

(1) The text of this article, as provisionally adopted in 1962, contained only the reservation in paragraph (*b*) regarding the force of international agreements not in written form.

(2) The first reservation in sub-paragraph (*a*) regarding treaties concluded between States and other subjects of international law or between such other subjects of international law was added at the seventeenth session as a result of the Commission's decision to limit the draft articles strictly to treaties concluded between States and of the consequential restriction of the definition of "treaty" in article 2 to "an international agreement concluded *between States*". This narrow definition of "treaty", although expressly limited to the purposes of the present articles, might by itself give the impression that international agreements between a State and an international organization or other subject of international law, or between two international organizations, or between any other two non-Statal subjects of international law, are outside the purview of the law of treaties. As such international agreements are now frequent—especially between States and international organizations and between two organizations—the Commission considered it desirable to make an express reservation in the present article regarding their legal force and the possible relevance to them of certain of the rules expressed in the present articles.

(3) The need for the second reservation in sub-paragraph (*b*) arises from the definition of "treaty" in article 2 as an international agreement concluded "in written form", which by itself might equally give the impression that oral or tacit agreements are not to be regarded as having any legal force or as governed by any of the rules forming the law of treaties. While the Commission considered that in the interests of clarity and simplicity the present articles on the general law of treaties must be confined to agreements in written form, it recognized that oral international agreements may possess legal force and that certain of the substantive rules set out in the draft articles may have relevance also in regard to such agreements.

(4) The article accordingly specifies that the fact that the present articles do not relate to either of those categories of international agreements is not to affect their legal force or the "application to them of any of the rules set

[40] 1962 and 1965 drafts, article 2.

forth in the present articles to which they would be subject independently of these articles".

Article 4.[41] Treaties which are constituent instruments of international organizations or which are adopted within international organizations

The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization.

Commentary

(1) The draft articles, as provisionally adopted at the fourteenth, fifteenth and sixteenth sessions, contained a number of specific reservations with regard to the application of the established rules of an international organization. In addition, in what was then part II of the draft articles and which dealt with the invalidity and termination of treaties, the Commission had inserted an article (article 48 of that draft) making a broad reservation in the same sense with regard to all the articles on termination of treaties. On beginning its re-examination of the draft articles at its seventeenth session, the Commission concluded that the article in question should be transferred to its present place in the introduction and should be reformulated as a general reservation covering the draft articles as a whole. It considered that this would enable it to simplify the drafting of the articles containing specific reservations. It also considered that such a general reservation was desirable in case the possible impact of rules of international organizations in any particular context of the law of treaties should have been inadvertently overlooked.

(2) The Commission at the same time decided that the categories of treaties which should be regarded as subject to the impact of the rules of an international organization and to that extent excepted from the application of this or that provision of the law of treaties ought to be narrowed. Some reservations regarding the rules of international organizations inserted in articles of the 1962 draft concerning the conclusion of treaties had embraced not only constituent instruments and treaties drawn up within an organization but also treaties drawn up "under its auspices". In reconsidering the matter in 1963 in the context of termination and suspension of the operation of treaties, the Commission decided that only constituent instruments and treaties actually drawn up within an organization should be regarded as covered by the reservation. The general reservation regarding the rules of international organizations inserted in the text of the present article at the seventeenth session was accordingly formulated in those terms.

(3) Certain Governments, in their comments upon what was then part III of the draft articles (application, effects, modification and interpretation), expressed the view that care must be taken to avoid allowing the rules of international organizations to restrict the freedom of negotiating States unless the conclusion of the treaty was part of the work of the organization, and not merely when the treaty was drawn up within it because of the convenience of using its conference facilities. Noting these comments, the Commission revised the formulation of the reservation at its present session so as to make it cover only "constituent instruments" and treaties which are "*adopted* within an international organization". This phrase is intended to exclude treaties merely drawn up under the auspices of an organization or through use of its facilities and to confine the reservation to treaties the text of which is drawn up and adopted within an organ of the organization.

Part II.—Conclusion and entry into force of treaties

Section 1: Conclusion of treaties

Article 5.[42] Capacity of States to conclude treaties

1. Every State possesses capacity to conclude treaties.

2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

Commentary

(1) Some members of the Commission considered that there was no need for an article on capacity in international law to conclude treaties. They pointed out that capacity to enter into diplomatic relations had not been dealt with in the Vienna Convention on Diplomatic Relations and suggested that, if it were to be dealt with in the law of treaties, the Commission might find itself codifying the whole law concerning the "subjects" of international law. Other members felt that the question of capacity was more prominent in the law of treaties than in the law of diplomatic intercourse and immunities and that the draft articles should contain at least some general provisions concerning capacity to conclude treaties.

(2) In 1962 the Commission, while holding that it would not be appropriate to enter into all the detailed problems of capacity which might arise, decided to include in the present article three broad provisions concerning the capacity to conclude treaties of (i) States and other subjects of international law, (ii) Member States of a federal union and (iii) international organizations. The third of these provisions—capacity of international organizations to conclude treaties—was an echo from a period when the Commission contemplated including a separate part dealing with the treaties of international organizations. Although at its session in 1962 the Commission had decided to confine the draft articles to treaties concluded between States, it retained this provision in the present article dealing with capacity to conclude treaties. On re-examining the article, however, at its seventeenth session the Commission concluded that the logic of its decision that the draft articles should deal only with the treaties concluded between States necessitated the omission from the first paragraph of the

[41] 1963 draft, article 48; 1965 draft, article 3(*bis*).

[42] 1962 and 1965 drafts, article 3.

reference to the capacity of "other subjects of international law", and also required the deletion of the entire third paragraph dealing specifically with the treaty-making capacity of international organizations.

(3) Some members of the Commission were of the opinion that the two provisions which remained did not justify the retention of the article. They considered that to proclaim that States possess capacity to conclude treaties would be a pleonasm since the proposition was already implicit in the definition of the scope of the draft articles in article 1. They also expressed doubts about the adequacy of and need for the provision in paragraph 2 regarding the capacity of member States of a federal union; in particular, they considered that the role of international law in regard to this question should have been included in the paragraph. The Commission, however, decided to retain the two provisions, subject to minor drafting changes. It considered that it was desirable to underline the capacity possessed by every State to conclude treaties; and that, having regard to the examples which occur in practice of treaties concluded by member States of certain federal unions with foreign States in virtue of powers given to them by the constitution of the particular federal union, a general provision covering such cases should be included.

(4) *Paragraph 1* proclaims the general principle that every State possesses capacity to conclude treaties. The term "State" is used in this paragraph with the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations; i.e. it means a State for the purposes of international law.

(5) *Paragraph 2*, as already mentioned, deals with the case of federal States whose constitutions, in some instances, allow to their member States a measure of treaty-making capacity. It does not cover treaties made between two units of a federation. Agreements between two member states of a federal State have a certain similarity to international treaties and in some instances certain principles of treaty law have been applied to them in internal law by analogy. However, those agreements operate within the legal régime of the constitution of the federal State, and to bring them within the terms of the present articles would be to overstep the line between international and domestic law. Paragraph 2, therefore, is concerned only with treaties made by a unit of the federation with an outside State. More frequently, the treaty-making capacity is vested exclusively in the federal government, but there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States. Questions may arise in some cases as to whether the component State concludes the treaty as an organ of the federal State or in its own right. But on this point also the solution must be sought in the provisions of the federal constitution.

Article 6.[43] Full powers to represent the State in the conclusion of treaties

1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if:

(*a*) He produces appropriate full powers; or

(*b*) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(*b*) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the adoption of the text of a treaty in that conference or organ.

Commentary

(1) The rules contained in the text of the article provisionally adopted in 1962 have been rearranged and shortened. At the same time, in the light of the comments of Governments, the emphasis in the statement of the rules has been changed. The 1962 text set out the law from the point of view of the authority of the different categories of representatives to perform the various acts relating to the conclusion of a treaty. The text finally adopted by the Commission approaches the matter rather from the point of view of stating the cases in which another negotiating State may call for the production of full powers and the cases in which it may safely proceed without doing so. In consequence, the motif of the formulation of the rules is a statement of the conditions under which a person is considered in international law as representing his State for the purpose of performing acts relating to the conclusion of a treaty.

(2) The article must necessarily be read in conjunction with the definition of "full powers" in article 2(1)(*c*), under which they are expressed to mean: "a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty". The 1962 text of the present article dealt with certain special aspects of "full powers" such as the use of a letter or telegram as provisional evidence of a grant of full powers. On re-examining the matter the Commission concluded that it would be better to leave such details to practice and to the decision of those concerned rather than to try to cover them by a general

[43] 1962 and 1965 drafts, article 4.

rule. Those provisions of the 1962 text have therefore been dropped from the article.

(3) *Paragraph 1* lays down the general rule for all cases except those specifically listed in the second paragraph. It provides that a person is considered as representing his State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound only if he produces an appropriate instrument of full powers or it appears from the circumstances that the intention of the States concerned was to dispense with them. The rule makes it clear that the production of full powers is the fundamental safeguard for the representatives of the States concerned of each other's qualifications to represent their State for the purpose of performing the particular act in question; and that it is for the States to decide whether they may safely dispense with the production of full powers. In earlier times the production of full powers was almost invariably requested; and it is still common in the conclusion of more formal types of treaty. But a considerable proportion of modern treaties are concluded in simplified form, when more often than not the production of full powers is not required.

(4) *Paragraph 2* sets out three categories of case in which a person is considered in international law as representing his State without having to produce an instrument of full powers. In these cases, therefore, the other representatives are entitled to rely on the qualification of the person concerned to represent his State without calling for evidence of it. The first of these categories covers Heads of State, Heads of Government and Ministers for Foreign Affairs, who are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty. In the case of Foreign Ministers, their special position as representatives of their State for the purpose of entering into international engagements was expressly recognized by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case [44] in connexion with the "Ihlen declaration".

(5) The second special category of cases is heads of diplomatic missions, who are considered as representing their State for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited. Article 3, paragraph 1(*c*) of the Vienna Convention on Diplomatic Relations provides that the "functions of a diplomatic mission consist, *inter alia*, in...negotiating with the government of the receiving State". However, the qualification of heads of diplomatic missions to represent their States is not considered in practice to extend, without production of full powers, to expressing the consent of their State to be bound by the treaty. Accordingly, sub-paragraph (*b*) limits their automatic qualification to represent their State up to the point of "adoption" of the text.

(6) The third special category is representatives of States accredited to an international conference or to an organ of an international organization, for which the same rule is laid down as for the head of a diplomatic mission: namely, automatic qualification to represent their States for the purpose of adopting the text of a treaty but no more. This category replaces paragraph 2(*b*) of the 1962 text, which treated heads of permanent missions to international organizations on a similar basis to heads of diplomatic missions, so that they would automatically have been considered as representing their States in regard to treaties drawn up under the auspices of the organization and also in regard to treaties between their State and the organization. In the light of the comments of Governments and on a further examination of the practice, the Commission concluded that it was not justified in attributing to heads of permanent missions such a general qualification to represent the State in the conclusion of treaties. At the same time, it concluded that the 1962 rule was too narrow in referring only to heads of permanent missions since other persons may be accredited to an organ of an international organization in connexion with the drawing up of the text of the treaty, or to an international conference.

Article 7. [45] Subsequent confirmation of an act performed without authority

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 6 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

Commentary

(1) This article contains the substance of what appeared in the draft provisionally adopted in 1963 as paragraph 1 of article 32, dealing with lack of authority to bind the State as a ground of invalidity. That article then contained two paragraphs dealing respectively with acts purporting to express a State's consent to be bound (i) performed by a person lacking any authority from the State to represent it for that purpose; and (ii) performed by a person who had authority to do so subject to certain restrictions but failed to observe those restrictions. In re-examining article 32 at the second part of its seventeenth session, however, the Commission concluded that only the second of these cases could properly be regarded as one of invalidity of consent. It considered that in the first case, where a person lacking any authority to represent the State in this connexion purported to express its consent to be bound by a treaty, the true legal position was that his act was not attributable to the State and that, in consequence, there was no question of any consent having been expressed by it. Accordingly, the Commission decided that the first case should be dealt with in the present part in the context of representation of a State in the conclusion of treaties; and that the rule stated in the article should be that the unauthorized act of the representative *is without legal effect* unless afterwards confirmed by the State.

(2) Article 6 deals with the question of full powers to represent the State in the conclusion of treaties. The

[44] *P.C.I.J.* (1933) Series A/B, No. 53, p. 71.

[45] 1963 draft, article 32, para. 1.

present article therefore provides that "An act relating to the conclusion of a treaty *performed by a person who cannot be considered under article 6 as representing his State for that purpose* is without legal effect *unless afterwards confirmed by the competent authority of the State*". Such cases are not, of course, likely to happen frequently, but instances have occurred in practice. In 1908, for example, the United States Minister to Romania signed two conventions without having any authority to do so. [46] With regard to one of these conventions his Government had given him no authority at all, while he had obtained full powers for the other by leading his Government to understand that he was to sign a quite different treaty. Again, in 1951 a convention concerning the naming of cheeses concluded at Stresa was signed by a delegate on behalf both of Norway and Sweden, whereas it appears that he had authority to do so only from the former country. In both these instances the treaty was subject to ratification and was in fact ratified. A further case, in which the same question may arise, and one more likely to occur in practice, is where an agent has authority to enter into a particular treaty, but goes beyond his full powers by accepting unauthorized extensions or modifications of it. An instance of such a case was Persia's attempt, in discussions in the Council of the League, to disavow the Treaty of Erzerum of 1847 on the ground that the Persian representative had gone beyond his authority in accepting a certain explanatory note when exchanging ratifications.

(3) Where there is no authority to enter into a treaty, it seems clear, on principle, that the State must be entitled to disavow the act of its representative, and the article so provides. On the other hand, it seems equally clear that, notwithstanding the representative's original lack of authority, the State may afterwards endorse his act and thereby establish its consent to be bound by the treaty. It will also be held to have done so by implication if it invokes the provisions of the treaty or otherwise acts in such a way as to appear to treat the act of its representative as effective.

Article 8. [47] Adoption of the text

1. The adoption of the text of a treaty takes place by the unanimous consent of the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to apply a different rule.

Commentary

(1) This article deals with the voting rule by which the text of the treaty is "adopted", i.e. the voting rule by which the form and content of the proposed treaty are settled. At this stage, the negotiating States are concerned only with drawing up the text of the treaty as a document setting out the provisions of the proposed treaty and their votes, even when cast at the end of the negotiations in favour of adopting the text as a whole, relate solely to this process. A vote cast at this stage, therefore, is not in any sense an expression of the State's agreement to be bound by the provisions of the text, which can only become binding upon it by a further expression of its consent (signature, ratification, accession or acceptance).

(2) In former times the adoption of the text of a treaty almost always took place by the agreement of all the States participating in the negotiations and unanimity could be said to be the general rule. The growth of the practice of drawing up treaties in large international conferences or within international organizations has, however, led to so normal a use of the procedure of majority vote that, in the opinion of the Commission, it would be unrealistic to lay down unanimity as the general rule for the adoption of the texts of treaties drawn up at conferences or within organizations. Unanimity remains the general rule for bilateral treaties and for treaties drawn up between few States. But for other multilateral treaties a different general rule must be specified, although, of course, it will always be open to the States concerned to apply the rule of unanimity in a particular case if they should so decide.

(3) *Paragraph 1* states the classical principle of unanimity as the applicable rule for the adoption of the text except in the case of a text adopted at an international conference. This rule, as already indicated, will primarily apply to bilateral treaties and to treaties drawn up between only a few States. Of course, under paragraph 2, the States participating in a conference may decide beforehand or at the Conference to apply the unanimity principle. But in the absence of such a decision, the unanimity principle applies under the present article to the adoption of the texts of treaties other than those drawn up at an international conference.

(4) *Paragraph 2* concerns treaties the texts of which are adopted at an international conference, and the Commission considered whether a distinction should be made between conferences convened by the State concerned and those convened by an international organization. The question at issue was whether in the latter case the voting rule of the organization should automatically apply. When the General Assembly convenes a conference, the practice of the Secretariat of the United Nations is, after consultation with the States mainly concerned, to prepare provisional or draft rules of procedure for the conference, including a suggested voting rule, for adoption by the conference itself. But it is left to the conference to decide whether to adopt the suggested rule or replace it by another. The Commission therefore concluded that both in the case of a conference convened by the States themselves and of one convened by an organization, the voting rule for adopting the text is a matter for the States at the conference.

(5) The general rule proposed in paragraph 2 is that a two-thirds majority should be necessary for the adoption of a text at any international conference unless the States at the conference should by the same majority decide to apply a different voting rule. While the States at the conference must retain the ultimate power to decide the

[46] Hackworth's *Digest of International Law*, vol. IV, p. 467.

[47] 1962 and 1965 drafts, article 6.

voting rule by which they will adopt the text of the treaty, it appeared to the Commission to be desirable to fix in the present articles the procedure by which a conference is to arrive at its decision concerning that voting rule. Otherwise there is some risk of the work of the conference being delayed by long procedural debates concerning the preliminary voting rule by which it is to decide upon its substantive voting rule for adopting the text of the treaty. Some members of the Commission considered that the procedural vote should be taken by simple majority. Others felt that such a rule might not afford sufficient protection to minority groups at the conference, for the other States would be able in every case to decide by a simple majority to adopt the text of the treaty by the vote of a simple majority and in that way override the views of what might be quite a substantial minority group of States at the conference. The rule in paragraph 2 takes account of the interests of minorities to the extent of requiring at least two-thirds of the States to be in favour of proceeding by simple majorities before recourse can be had to simple majority votes for adopting the text of a treaty. It leaves the ultimate decision in the hands of the conference but at the same time establishes a basis upon which the procedural questions can be speedily and fairly resolved. The Commission felt all the more justified in proposing this rule, seeing that the use of a two-thirds majority for adopting the text of multilateral treaties is now so frequent.

(6) The Commission considered the further case of treaties like the Genocide Convention or the Convention on the Political Rights of Women, which are actually drawn up within an international organization. Here, the voting rule for adopting the text of the treaty must clearly be the voting rule applicable in the particular organ in which the treaty is adopted. This case is, however, covered by the general provision in article 4 regarding the application of the rules of an international organization, and need not receive mention in the present article.

Article 9.[48] Authentication of the text

The text of a treaty is established as authentic and definitive:

(*a*) By such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(*b*) Failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Commentary

(1) Authentication of the text of a treaty is necessary in order that the negotiating States, before they are called upon to decide whether they will become parties to the treaty, may know finally and definitively what is the content of the treaty to which they will be subscribing. There must come a point, therefore, at which the draft which the parties have agreed upon is established as being the text of the proposed treaty and not susceptible of alteration. Authentication is the process by which this definitive text is established, and it consists in some act or procedure which certifies the text as the correct and authentic text.

(2) In the past jurists have not usually spoken of authentication as a distinct part of the treaty-making process. The reason appears to be that until comparatively recently signature was the general method of authenticating a text and signature has another function as a first step towards ratification, acceptance or approval of the treaty or an expression of the State's consent to be bound by it. The authenticating function of signature is thus merged in its other function.[49] In recent years, however, other methods of authenticating texts of treaties on behalf of all or most of the negotiating States have been devised. Examples are the incorporation of unsigned texts of projected treaties in Final Acts of diplomatic conferences, the procedure of international organizations under which the signatures of the President or other competent authority of the organization authenticate the texts of conventions, and treaties whose texts are authenticated by being incorporated in a resolution of an international organization. It is these developments in treaty-making practice which emphasize the need to deal separately with authentication as a distinct procedural step in the conclusion of a treaty. Another consideration is that the text of a treaty may be "adopted" in one language but "authenticated" in two or more languages.

(3) The procedure of authentication will often be fixed either in the text itself or by agreement of the negotiating States. Failing any such prescribed or agreed procedure and except in the cases covered by the next paragraph authentication takes place by the signature, signature *ad referendum* or initialling of the text by the negotiating States, or alternatively of the Final Act of a conference incorporating the text.

(4) As already indicated, authentication today not infrequently takes the form of a resolution of an organ of an international organization or of an act of authentication performed by a competent authority of an organization. These, however, are cases in which the text of the treaty has been adopted within an international organization and which are therefore covered by the general provision in article 4 regarding the established rules of international organizations. Accordingly, they do not require specific mention here.

(5) The present article, therefore, simply provides for the procedures mentioned in paragraph (3) above and leaves the procedures applicable within international organizations to the operation of article 4.

Article 10.[50] Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

[48] 1962 and 1965 drafts, article 7.

[49] See *Yearbook of the International Law Commission, 1950*, vol. II, pp. 233 and 234.

[50] 1962 draft, articles 10 and 11, and 1965 draft, article 11.

(*a*) The treaty provides that signature shall have that effect;

(*b*) It is otherwise established that the negotiating States were agreed that signature should have that effect;

(*c*) The intention of the State in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(*a*) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(*b*) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Commentary

(1) The draft provisionally adopted in 1962 dealt with various aspects of "signature" in three separate articles: article 7, which covered the authenticating effect of signature, initialling and signature *ad referendum*; article 10, which covered certain procedural aspects of the three forms of signatures; and article 11, which covered their legal effects. This treatment of the matter involved some repetition of certain points and tended to introduce some complication into the rules. At the same time, certain provisions were expository in character rather than formulated as legal rules. Accordingly, in re-examining articles 10 and 11 at its seventeenth session, the Commission decided to deal with the authenticating effects of signature exclusively in the present article 9, to delete article 10 of the previous draft, to incorporate such of its remaining elements as required retention in what is now the present article, and to confine the article to operative legal rules.

(2) The present article, as its title indicates, deals with the institution of signature only as a means by which the definitive consent of a State to be bound by a treaty is expressed. It does not deal with signature subject to "ratification" or subject to "acceptance" or "approval", as had been the case in paragraph 2 of the 1962 text of article 11. The Commission noted that one of the points covered in that paragraph went without saying and that the other was no more than a cross-reference to former article 17 (now article 15). It also noted that the other principal effect of signature subject to ratification, etc.—authentication—was already covered in the present article 9. In addition, it noted that this institution received further mention in article 11. Accordingly, while not in any way underestimating the significance or usefulness of the institution of signature subject to ratification, acceptance or approval, the Commission concluded that it was unnecessary to give it particular treatment in a special article or provision.

(3) *Paragraph 1* of the article admits the signature of a treaty by a representative as an expression of his State's consent to be bound by the treaty in three cases. The first is when the treaty itself provides that such is to be the effect of signature as is common in the case of many types of bilateral treaties. The second is when it is otherwise established that the negotiating States were agreed that signature should have that effect. In this case it is simply a question of demonstrating the intention from the evidence. The third case, which the Commission included in the light of the comments of Governments, is when the intention of an individual State to give its signature that effect appears from the full powers issued to its representative or was expressed during the negotiation. It is not uncommon in practice that even when ratification is regarded as essential by some States from the point of view of their own requirements, another State is ready to express its consent to be bound definitively by its signature. In such a case, when the intention to be bound by signature alone is made clear, it is superfluous to insist upon ratification; and under paragraph 1(*c*) signature will have that effect for the particular State in question.

(4) *Paragraph 2* covers two small but not unimportant subsidiary points. Paragraph 2(*a*) concerns the question whether initialling of a text may constitute a signature expressing the State's consent to be bound by the treaty. In the 1962 draft [51] the rule regarding initialling of the text was very strict, initialling being treated as carrying only an authenticating effect and as needing in all cases to be followed by a further act of signature. In short it was put on a basis similar to that of signature *ad referendum*. Certain Governments pointed out, however, that in practice initialling, especially by a Head of State, Prime Minister or Foreign Minister, is not infrequently intended as the equivalent of full signature. The Commission recognized that this was so, but at the same time felt that it was important that the use of initials as a full signature should be understood and accepted by the other States. It also felt that it would make the rule unduly complicated to draw a distinction between intialling by a high minister of State and by other representatives, and considered that the question whether initialling amounts to an expression of consent to be bound by the treaty should be regarded simply as a question of the intentions of the negotiating States. Paragraph 2(*a*) therefore provides that initialling is the equivalent of a signature expressing such consent when it is established that the negotiating States so agreed.

(5) *Paragraph 2*(b) concerns signature *ad referendum* which, as its name implies, is given provisionally and subject to confirmation. When confirmed, it constitutes a full signature and will operate as one for the purpose of the rules in the present article concerning the expression of the State's consent to be bound by a treaty. Unlike "ratification", the "confirmation" of a signature *ad referendum* is not a confirmation of the treaty but simply of the signature; and in principle therefore the confirmation renders the State a signatory as of the original date of signature. The 1962 text of the then article 10 stated this specifically and as an absolute rule. A suggestion was made in the comments of Governments that the rule should be qualified by the words "unless the State concerned specifies a later date when it confirms its signature". As this would enable a State to choose unilaterally, in the light of what had happened in the interval, whether to be considered a party from the earlier or later date, the Commission felt that to add such an express qualifi-

[51] Article 10, para. 3 of that draft.

cation of the normal rule would be undesirable. The point, it considered, should be left in each case to the negotiating States. If these raised no objection to a later date's being specified at the time of confirmation of a signature *ad referendum*, the question would solve itself. Paragraph 2(*b*) therefore simply states that a signature *ad referendum*, if confirmed, constitutes a full signature for the purposes of the rules regarding the expression of a State's consent to be bound by a treaty.

Article 11. [52] **Consent to be bound by a treaty expressed by ratification, acceptance or approval**

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(*a*) The treaty provides for such consent to be expressed by means of ratification;

(*b*) It is otherwise established that the negotiating States were agreed that ratification should be required;

(*c*) The representative of the State in question has signed the treaty subject to ratification; or

(*d*) The intention of the State in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Commentary

(1) This article sets out the rules determining the cases in which ratification is necessary in addition to signature in order to establish the State's consent to be bound by the treaty. The word "ratification", as the definition in article 2 indicates, is used here and throughout these draft articles exclusively in the sense of ratification on the international plane. Parliamentary "ratification" or "approval" of a treaty under *municipal* law is not, of course, unconnected with "ratification" on the international plane, since without it the necessary constitutional authority to perform the international act of ratification may be lacking. But it remains true that the international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes.

(2) The modern institution of ratification in international law developed in the course of the nineteenth century. Earlier, ratification had been an essentially formal and limited act by which, after a treaty had been drawn up, a sovereign confirmed, or finally verified, the full powers previously issued to his representative to negotiate the treaty. It was then not an approval of the treaty itself but a confirmation that the representative had been invested with authority to negotiate it and, that being so, there was an obligation upon the sovereign to ratify his representative's full powers, if these had been in order. Ratification came, however, to be used in the majority of cases as the means of submitting the treaty-making power of the executive to parliamentary control, and ultimately the doctrine of ratification underwent a fundamental change. It was established that the treaty itself was subject to subsequent ratification by the State before it became binding. Furthermore, this development took place at a time when the great majority of international agreements were formal treaties. Not unnaturally, therefore, it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding.

(3) Meanwhile, however, the expansion of intercourse between States, especially in economic and technical fields, led to an ever-increasing use of less formal types of international agreements, amongst which were exchanges of notes, and these agreements are usually intended by the parties to become binding by signature alone. On the other hand, an exchange of notes or other informal agreement, though employed for its ease and convenience, has sometimes expressly been made subject to ratification because of constitutional requirements in one or the other of the contracting States.

(4) The general result of these developments has been to complicate the law concerning the conditions under which treaties need ratification in order to make them binding. The controversy which surrounds the subject is, however, largely theoretical. [53] The more formal types of instrument include, almost without exception, express provisions on the subject of ratification, and occasionally this is so even in the case of exchanges of notes or other instruments in simplified form. Moreover, whether they are of a formal or informal type, treaties normally either provide that the instrument shall be ratified or, by laying down that the treaty shall enter into force upon signature or upon a specified date or event, dispense with ratification. Total silence on the subject is exceptional, and the number of cases that remain to be covered by a general rule is very small. But, if the general rule is taken to be that ratification is necessary unless it is expressly or impliedly excluded, large exceptions qualifying the rule have to be inserted in order to bring it into accord with modern practice, with the result that the number of cases calling for the operation of the general rule is small. Indeed, the practical effect of choosing either that version of the general rule, or the opposite rule that ratification is unnecessary unless expressly agreed upon by the parties, is not very substantial.

(5) The text provisionally adopted in 1962 began by declaring in its first paragraph that treaties in principle required to be ratified except as provided in the second paragraph. The second paragraph then excluded from the principle four categories of case in which the intention to dispense with ratification was either expressed, established or to be presumed; and one of those categories was treaties "in simplified form". A third paragraph then qualified the second by listing three contrary categories of case where the intention to require ratification was expressed or established. The operation of paragraph 2

[52] 1962 draft, articles 12 and 14, and 1965 draft, article 12.

[53] See the reports of Sir H. Lauterpacht, *Yearbook of the International Law Commission, 1953*, vol. II, p. 112; and *ibid., 1954*, vol. II, p. 127; and the first report of Sir G. Fitzmaurice, *Yearbook of the International Law Commission, 1956*, vol. II, p. 123.

of the article was dependent to an important extent on its being possible to identify easily a "treaty in simplified form". But although the general concept is well enough understood, the Commission found it difficult to formulate a practical definition of such treaties. And article 1(*b*) of the 1962 text was a description rather than a definition of a treaty in simplified form.

(6) Certain Governments in their comments suggested that the basic rule in paragraph 1 of the 1962 text should be reversed so as to dispense with the need for ratification unless a contrary intention was expressed or established, or that the law should be stated in purely pragmatic terms; while others appeared to accept the basic rule. At the same time criticism was directed at the elaborate form of the rules in paragraphs 2 and 3 and at their tendency to cancel each other out.

(7) The Commission recognized that the 1962 text, which had been the outcome of an attempt to reconcile two opposing points of view amongst States on this question, might give rise to difficulty in its application and especially in regard to the presumption in the case of treaties in simplified form. It re-examined the matter *de novo* and, in the light of the positions taken by Governments and of the very large proportion of treaties concluded to-day without being ratified, it decided that its proper course was simply to set out the conditions under which the consent of a State to be bound by a treaty is expressed by ratification in modern international law. This would have the advantage, in its view, of enabling it to state the substance of paragraphs 2 and 3 of the 1962 text in much simpler form, to dispense with the distinction between treaties in simplified form and other treaties, and to leave the question of ratification as a matter of the intention of the negotiating States without recourse to a statement of a controversial residuary rule.

(8) The present article accordingly provides in paragraph 1 that the consent of a State to be bound by a treaty is expressed by ratification in four cases: (i) when there is an express provision to that effect in the treaty; (ii) when it is otherwise established that the negotiating States agreed ratification should be required; (iii) when the representative of an individual State has expressly signed "subject to ratification"; and (iv) when the intention of an individual State to sign "subject to ratification" appears from the full powers of its representative or was expressed during the negotiations. The Commission considered that these rules give every legitimate protection to any negotiating State in regard to its constitutional requirements; for under the rules it may provide for ratification by agreement with the other negotiating States either in the treaty itself or in a collateral agreement, or it may do so unilaterally by the form of its signature, the form of the full powers of its representative or by making its intention clear to the other negotiating States during the negotiations. At the same time, the position of the other negotiating States is safeguarded, since in each case the intention to express consent by ratification must either be subject to their agreement or brought to their notice.

(9) Paragraph 2 provides simply that the consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification. In the 1962 draft "acceptance" and "approval" were dealt with in a separate article. As explained in the paragraphs which follow, each of them is used in two ways: either as an expression of consent to be bound without a prior signature, or as a ratification after a non-binding prior signature. Nevertheless the Commission considered that their use also is essentially a matter of intention, and that the same rules should be applicable as in the case of ratification.

(10) Acceptance has become established in treaty practice during the past twenty years as a new procedure for becoming a party to treaties. But it would probably be more correct to say that "acceptance" has become established as a name given to two new procedures, one analogous to ratification and the other to accession. For, on the international plane, "acceptance" is an innovation which is more one of terminology than of method. If a treaty provides that it shall be open to signature "subject to acceptance", the process on the international plane is like "signature subject to ratification". Similarly, if a treaty is made open to "acceptance" without prior signature, the process is like accession. In either case the question whether the instrument is framed in the terms of "acceptance", on the one hand, or of ratification or acceptance, on the other, simply depends on the phraseology used in the treaty. [54] Accordingly the same name is found in connexion with two different procedures; but there can be no doubt that to-day "acceptance" takes two forms, the one an act establishing the State's consent to be bound after a prior signature and the other without any prior signature.

(11) "Signature subject to acceptance" was introduced into treaty practice principally in order to provide a simplified form of "ratification" which would allow the government a further opportunity to examine the treaty when it is not necessarily obliged to submit it to the State's constitutional procedure for obtaining ratification. Accordingly, the procedure of "signature subject to acceptance" is employed more particularly in the case of treaties whose form or subject matter is not such as would normally bring them under the constitutional requirements of parliamentary "ratification" in force in many States. In some cases, in order to make it as easy as possible for States with their varying constitutional requirements to enter into the treaty, its terms provide for either ratification or acceptance. Nevertheless, it remains broadly true that "acceptance" is generally used as a simplified procedure of "ratification".

(12) The observations in the preceding paragraph apply *mutatis mutandis* to "approval", whose introduction into the terminology of treaty-making is even more recent than that of "acceptance". "Approval", perhaps, appears more often in the form of "signature subject to approval" than in the form of a treaty which is simply made open to "approval" without signature. [55] But it appears in

[54] For examples, see *Handbook of Final Clauses* (ST/LEG/6), pp. 6-17.

[55] The *Handbook of Final Clauses* (ST/LEG/6), p. 18, even gives an example of the formula "signature subject to approval followed by acceptance".

both forms. Its introduction into treaty-making practice seems, in fact, to have been inspired by the constitutional procedures or practices of approving treaties which exist in some countries.

Article 12. [56] Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(*a*) The treaty or an amendment to the treaty provides that such consent may be expressed by that State by means of accession;

(*b*) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(*c*) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Commentary

(1) Accession is the traditional method by which a State, in certain circumstances, becomes a party to a treaty of which it is not a signatory. One type of accession is when the treaty expressly provides that certain States or categories of States may accede to it. Another type is when a State which was not entitled to become a party to a treaty under its terms is subsequently invited to become a party.

(2) Divergent opinions have been expressed in the past as to whether it is legally possible to accede to a treaty which is not yet in force and there is some support for the view that it is not possible. [57] However, an examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, either expressly by allowing accession to take place before the date fixed for the entry into force of the treaty, or impliedly by making the entry into force of the treaty conditional on the deposit, *inter alia*, of instruments of accession. The modern practice has gone so far in this direction that the Commission does not consider it appropriate to give any currency, even in the form of a residuary rule, to the doctrine that treaties are not open to accession until they are in force. In this connexion it recalls the following observation of a previous Special Rapporteur: [58]

> "Important considerations connected with the effectiveness of the procedure of conclusion of treaties seem to call for a contrary rule. Many treaties might never enter into force but for accession. Where the entire tendency in the field of conclusion of treaties is in the direction of elasticity and elimination of restrictive rules it seems undesirable to burden the subject of accession with a presumption which practice has shown to be in the nature of an exception rather than the rule."

Accordingly, in the present article accession is not made dependent upon the treaty having entered into force.

(3) Occasionally, a purported instrument of accession is expressed to be "subject to ratification", and the Commission considered whether anything should be said on the point either in the present article or in article 13 dealing with instruments of accession. The question arises whether it should be indicated in the present article that the deposit of an instrument of accession in this form is ineffective as an accession. The question was considered by the Assembly of the League of Nations in 1927, which, however, contented itself with emphasizing that an instrument of accession would be taken to be final unless the contrary were expressly stated. At the same time it said that the procedure was one which "the League should neither discourage or encourage". [59] As to the actual practice to-day, the Secretary-General has stated that he takes a position similar to that taken by the League of Nations Secretariat. He considers such an instrument "simply as a notification of the government's intention to become a party", and he does not notify the other States of its receipt. Furthermore, he draws the attention of the government to the fact that the instrument does not entitle it to become a party and underlines that "it is only when an instrument containing no reference to subsequent ratification is deposited that the State will be included among the parties to the agreement and the other governments concerned notified to that effect". [60] The attitude adopted by the Secretary-General towards an instrument of accession expressed to be "subject to ratification" is considered by the Commission to be entirely correct. The procedure of accession subject to ratification is somewhat anomalous, but it is infrequent and does not appear to cause difficulty in practice. The Commission has not, therefore, thought it necessary to deal with it specifically in these articles.

(4) If developments in treaty-making procedures tend even to blur the use of accession in some cases, it remains true that accession is normally the act of a State which was not a negotiating State. It is a procedure normally indicated for States which did not take part in the drawing up of the treaty but for the participation of which the treaty makes provision, or alternatively to which the treaty is subsequently made open either by a formal amendment to the treaty or by the agreement of the parties. The rule laid down for accession has therefore to be a little different from that set out in the previous article for ratification, acceptance and approval. The present article provides that consent of a State to be bound by a treaty is expressed by accession in three cases: (i) when a treaty or an amendment to the treaty provides for its accession; (ii) when it is otherwise established that the negotiating States intended to admit its accession; and (iii) when all the parties have subsequently agreed to admit its accession.

[56] 1962 draft, article 13.

[57] See Sir G. Fitzmaurice's first report on the law of treaties, *Yearbook of the International Law Commission, 1956*, vol. II, pp. 125-126; and Mr. Brierly's second report, *Yearbook of the International Law Commission, 1951*, vol. II, p. 73.

[58] See Sir H. Lauterpacht, *Yearbook of the International Law Commission, 1953*, vol. II, p. 120.

[59] *Official Journal of the League of Nations, Eighth Ordinary Session, Plenary Meetings*, p. 141.

[60] *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7), para. 48.

The third case is, of course, also a case of "amendment" of the treaty. But, as the procedures of formal amendment by the conclusion of an amending agreement under article 36 and of informal agreement to invite a State to accede are somewhat different, the Commission thought that they should be distinguished in separate sub-paragraphs. A recent example of the use of the procedure of informal agreement to open treaties to accession was the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, which formed the subject of General Assembly resolution 1903 (XVIII) and on which the Commission submitted its views in chapter III of its report on the work of its fifteenth session. [61]

Question of participation in a treaty

(1) Article 8 of the 1962 draft contained two provisions, the first relating to general multilateral treaties and the second to all other treaties. The second provision gave rise to no particular difficulty, but the Commission was divided with respect to the rule to be proposed for general multilateral treaties. Some members considered that these treaties should be regarded as open to participation by "every State" regardless of any provision in the treaty specifying the categories of States entitled to become parties. Some members, on the other hand, while not in favour of setting aside so completely the principle of the freedom of States to determine by the clauses of the treaty itself the States with which they would enter into treaty relations, considered it justifiable and desirable to specify as a residual rule that, in the absence of a contrary provision in the treaty, general multilateral treaties should be open to "every State". Other members, while sharing the view that these treaties should in principle be open to all States, did not think that a residuary rule in this form would be justified, having regard to the existing practice of inserting in a general multilateral treaty a formula opening it to all Members of the United Nations and members of the specialized agencies, all parties to the Statute of the International Court and to any other State invited by the General Assembly. By a majority the Commission adopted a text stating that unless otherwise provided by the treaty or by the established rules of an international organization, a general multilateral treaty should be open to participation by "every State". In short, the 1962 text recognized the freedom of negotiating States to fix by the provisions of the treaty the categories of States to which the treaty may be open; but in the absence of any such provision, recognized the right of "every State" to participate.

(2) The 1962 draft also included in article 1 a definition of "general multilateral treaty". This definition, for which the Commission did not find it easy to devise an altogether satisfactory formula, read as follows: "a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole".

(3) A number of Governments in their comments on article 8 of the 1962 draft expressed themselves in favour of opening general multilateral treaties to all States, and at the same time proposed that this principle should be recognized also in article 9 so as automatically to open to all States general multilateral treaties having provisions limiting participation to specified categories of States. Certain other Governments objected to the 1962 text from the opposite point of view, contending that no presumption of universal participation should be laid down, even as a residuary rule, for cases when the treaty is silent on the question. A few Governments in their comments on article 1 made certain criticisms of the Commission's definition of a "general multilateral treaty".

(4) At its seventeenth session, in addition to the comments of Governments, the Commission had before it further information concerning recent practice in regard to participation clauses in general multilateral treaties and in regard to the implications of an "every State" formula for depositaries of multilateral treaties. [62] It re-examined the problem of participation in general multilateral treaties *de novo* at its 791st to 795th meetings, at the conclusion of which a number of proposals were put to the vote but none was adopted. In consequence, the Commission requested its Special Rapporteur, with the assistance of the Drafting Committee, to try to submit a proposal for subsequent discussion. At its present session, it concluded that in the light of the division of opinion it would not be possible to formulate any general provision concerning the right of States to participate in treaties. It therefore decided to confine itself to setting out pragmatically the cases in which a State expresses its consent to be bound by signature, ratification, acceptance, approval or accession. Accordingly, the Commission decided that the question, which has more than once been debated in the General Assembly, and recently in the Special Committees on the Principles of International Law concerning Friendly Relations among States, [63] should be left aside from the draft articles. In communicating this decision to the General Assembly, the Commission decided to draw the General Assembly's attention to the records of its 791st-795th meetings [64] at which the question of participation in treaties was discussed at its seventeenth session, and to its commentary on articles 8 and 9 of the draft articles in its report for its fourteenth session, [65] which contains a summary of the points of view expressed by members in the earlier discussion of the question at that session.

[61] *Yearbook of the International Law Commission, 1963*, vol. II, p. 217.

[62] Fourth report of the Special Rapporteur (A/CN.4/177), commentary to article 8; answers of the Secretariat to questions posed by a member of the Commission concerning the practice of the Secretary-General as registering authority and as depositary and the practice of States as depositaries (*Yearbook of the International Law Commission, 1965*, vol. I, 791st meeting, para. 61 and 801st meeting, paras. 17-20).

[63] A/5746, Chapter VI, and A/6230, Chapter V.

[64] *Yearbook of the International Law Commission, 1965*, vol. I, pp. 113-142.

[65] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 168 and 169.

Article 13.[66] Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(*a*) Their exchange between the contracting States;

(*b*) Their deposit with the depositary; or

(*c*) Their notification to the contracting States or to the depositary, if so agreed.

Commentary

(1) The draft provisionally adopted in 1962 contained two articles (articles 15 and 16), covering respectively the procedure and legal effects of ratification, accession, acceptance and approval. On re-examining these articles at its seventeenth session the Commission concluded that certain elements which were essentially descriptive should be eliminated; that two substantive points regarding "consent to a part of a treaty" and "choice of differing provisions" should be detached and made the subject of a separate article; and that the present article should be confined to the international acts—exchange, deposit, or notification of the instrument—by which ratification, acceptance, approval and accession are accomplished and the consent of the State to be bound by the treaty is established.

(2) The present article thus provides that instruments of ratification, etc. establish the consent of a State upon either their exchange between the contracting States, their deposit with the depositary or their notification to the contracting States or to the depositary. These are the acts usually specified in a treaty, but if the treaty should lay down a special procedure, it will, of course, prevail, and the article so provides.

(3) The point of importance is the moment at which the consent to be bound is established and in operation with respect to other contracting States. In the case of exchange of instruments there is no problem; it is the moment of exchange. In the case of the deposit of an instrument with a depositary, the problem arises whether the deposit by itself establishes the legal nexus between the depositing State and other contracting States or whether the legal nexus arises only upon their being informed by the depositary. The Commission considered that the existing general rule clearly is that the act of deposit by itself establishes the legal nexus. Some treaties, e.g. the Vienna Conventions on Diplomatic and Consular Relations, specifically provide that the treaty is not to enter into force with respect to the depositing State until after the expiry of a short interval of time. But, even in these cases the legal nexus is established by the act of deposit alone. The reason is that the negotiating States, for reasons of practical convenience, have chosen to specify this act as the means by which participation in the treaty is to be established. This may involve a certain time-lag before each of the other contracting States is aware that the depositing State has established its consent to be bound by the treaty. But, the parties having prescribed that deposit of the instrument shall establish consent, the deposit by itself establishes the legal nexus at once with other contracting States, unless the treaty otherwise provides. This was the view taken by the International Court in the *Right of Passage over Indian Territory* (preliminary objections) case[67] in the analogous situation of the deposit of instruments of acceptance of the optional clause under Article 36, paragraph 2 of the Statute of the Court. If this case indicates the possibility that difficult problems may arise under the rule in special circumstances, the existing rule appears to be well-settled. Having regard to the existing practice and the great variety of the objects and purposes of treaties, the Commission did not consider that it should propose a different rule, but that it should be left to the negotiating States to modify it if they should think this necessary in the light of the provisions of the particular treaty.

(4) The procedure of notifying instruments to the contracting States or to the depositary mentioned in subparagraph (*c*), if less frequent, is sometimes used to-day as the equivalent, in the one case, of a simplified form of exchange of instruments and in the other, of a simplified form of deposit of the instrument. If the procedure agreed upon is notification to the contracting States, article 73 will apply and the consent of the notifying State to be bound by the treaty vis-à-vis another contracting State will be established only upon its receipt by the latter. On the other hand, if the procedure agreed upon is notification to the depositary, the same considerations apply as in the case of the deposit of an instrument; in other words, the consent will be established on receipt of the notification by the depositary.

Article 14.[68] Consent relating to a part of a treaty and choice of differing provisions

1. Without prejudice to the provisions of articles 16 to 20, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made plain to which of the provisions the consent relates.

Commentary

(1) The two paragraphs of this article contain the provisions of what were paragraphs 1(*b*) and 1(*c*) of article 15 of the draft provisionally adopted in 1962. At the same time, they frame those provisions as substantive legal rules rather than as descriptive statements of procedure.

(2) Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible. But in the absence of such a provision, the established rule is that the

[66] 1962 draft, articles 15 and 16, and 1965 draft, article 15.

[67] *I.C.J. Reports 1956*, p. 170.

[68] 1962 draft, article 15, paras. 1(*b*) and (*c*), and 1965 draft, article 16.

ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rules stated in article 16, it is inadmissible to subscribe only to selected parts of the treaty. Accordingly, paragraph 1 of the article lays down that without prejudice to the provisions of articles 16 to 20 regarding reservations to multilateral treaties, an expression of consent by a State to be bound by part of a treaty is effective only if the treaty or the other contracting States authorize such a partial consent.

(3) Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour conventions. The treaty offers to each State a choice between differing provisions of the treaty. The paragraph states that in such a case an expression of consent is effective only if it is made plain to which of the provisions the consent relates.

Article 15.[69] Obligation of a State not to frustrate the object of a treaty prior to its entry into force

A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:

(*a*) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;

(*b*) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

(*c*) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Commentary

(1) That an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted. Certainly, in the *Certain German Interests in Polish Upper Silesia* case,[70] the Permanent Court of International Justice appears to have recognized that, if ratification takes place, a signatory State's misuse of its rights in the interval preceding ratification may amount to a violation of its obligations in respect of the treaty. The Commission considered that this obligation begins at an earlier stage when a State agrees to enter into negotiations for the conclusion of a treaty. *A fortiori*, it attaches also to a State which actually ratifies, accedes to, accepts or approves a treaty if there is an interval before the treaty actually comes into force.

(2) Paragraph (*a*) of the article covers the stage when a State has merely agreed to enter into negotiations for the conclusion of a proposed treaty; and then the obligation to refrain from acts tending to frustrate the object of the treaty lasts only so long as the negotiations continue in progress.

(3) Paragraph (*b*) covers the case in which a State has signed the treaty subject to ratification, acceptance or approval, and provides that such a State is to be subject to the obligation provided for in the article until it shall have made its intention clear not to become a party.

(4) The obligation of a State which has committed itself to be bound by the treaty to refrain from such acts is obviously of particular cogency and importance. As, however, treaties, and especially multilateral treaties, sometimes take a very long time to come into force or never come into force at all, it is necessary to place some limit of time upon the obligation. Paragraph (*c*) therefore states that the obligation attaches "pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

Section 2: Reservations to multilateral treaties

Article 16.[71] Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty authorizes specified reservations which do not include the reservation in question; or

(*c*) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

Article 17.[72] Acceptance of and objection to reservations

1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(*a*) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(*b*) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(*c*) An act expressing the State's consent to be bound by the treaty and containing a reservation is effective as

[69] 1962 and 1965 drafts, article 17.

[70] *P.C.I.J.* (1926), Series A, No. 7, p. 30.

[71] 1962 and 1965 drafts, article 18.

[72] 1962 draft, articles 19 and 20, and 1965 draft, article 19.

soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Commentary

Introduction

(1) Articles 16 and 17 have to be read together because the legal effect of a reservation, when formulated, is dependent on its acceptance or rejection by the other States concerned. A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement—either adopting or rejecting the reservation—the treaty will be concluded; if not, it will fall to the ground. But as soon as more than two States are involved problems arise, since one State may be disposed to accept the reservation while another objects to it, and, when large multilateral treaties are in question, these problems become decidedly complex.

(2) The subject of reservations to multilateral treaties has been much discussed in recent years and has been considered by the General Assembly itself on more than one occasion, [73] as well as by the International Court of Justice in its opinion concerning the Genocide Convention [74] and by the Commission. Divergent views have been expressed in the Court, the Commission and the General Assembly on the fundamental question of the extent to which the consent of other interested States is necessary to the effectiveness of a reservation to this type of treaty.

(3) In 1951, the doctrine under which a reservation, in order to be valid, must have the assent of all the other interested States was not accepted by the majority of the Court as applicable in the particular circumstances of the Genocide Convention; moreover, while they considered the "traditional" doctrine to be of "undisputed value", they did not consider it to have been "transformed into a rule of law". [75] Four judges, on the other hand, dissented from this view and set out their reasons for holding that the traditional doctrine must be regarded as a generally accepted rule of customary law. The Court's reply to the question put to it by the General Assembly was as follows:

"On Question I:

"That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

"On Question II:

"(*a*) That if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

"(*b*) That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

"On Question III:

"(*a*) That an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

"(*b*) That an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect." [76]

In giving these replies to the General Assembly's questions the Court emphasized that they were strictly limited to the Genocide Convention; and said that, in determining what kind of reservations might be made to the Genocide Convention and what kind of objections might be taken to such reservations, the solution must be found in the special characteristics of that Convention. Amongst these special characteristics it mentioned: (*a*) the fact that the principles underlying the Convention—the condemnation and punishment of genocide—are principles recognized by civilized nations as binding upon governments even without a convention, (*b*) the consequently universal character of the Convention, and (*c*) its purely humanitarian and civilizing purpose without individual advantages or disadvantages for the contracting States.

(4) Although limiting its replies to the case of the Genocide Convention itself, the Court expressed itself more generally on certain points amongst which may be mentioned:

(*a*) In its treaty relations a State cannot be bound without its consent and consequently, no reservation can be effective against any State without its agreement thereto.

(*b*) The traditional concept, that no reservation is valid unless it has been accepted by all the contracting parties without exception, as would have been required if it had been stated during the negotiations, is of undisputed value.

(*c*) Nevertheless, extensive participation in conventions of the type of the Genocide Convention has already given rise to greater flexibility in the international practice concerning multilateral conventions, as manifested by the more general resort to reservations, the very great

[73] Notably in 1951 in connexion with reservations to the Genocide Convention and in 1959 concerning the Indian "reservation" to the IMCO Convention.

[74] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15.

[75] *Ibid.*, p. 24.

[76] *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), para. 16.

allowance made for tacit assent to reservations and the existence of practices which, despite the fact that a reservation has been rejected by certain States, go so far as to admit the reserving State as a party to the Convention vis-à-vis those States which have accepted it.

(*d*) In the present state of international practice it cannot be inferred from the mere absence of any article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

(*e*) The principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law.

(5) Later in 1951, as had been requested by the General Assembly, the Commission presented a general report on reservations to multilateral conventions.[77] It expressed the view that the Court's criterion—"compatibility with the object and purpose of the convention"—was open to objection as a criterion of general application, because it considered the question of "compatibility with the object and purpose of the convention" to be too subjective for application to multilateral conventions generally. Noting that the Court's opinion was specifically confined to the Genocide Convention and recognizing that no single rule uniformly applied could be wholly satisfactory to cover all cases, the Commission recommended the adoption of the doctrine requiring unanimous consent for the admission of a State as a party to a treaty subject to a reservation. At the same time, it proposed certain minor modifications in the application of the rule.

(6) The Court's opinion and the Commission's report were considered together at the sixth session of the General Assembly, which adopted resolution 598 (VI) dealing with the particular question of reservations to the Genocide Convention separately from that of reservations to other multilateral conventions. With regard to the Genocide Convention it requested the Secretary-General to conform his practice to the Court's Advisory Opinion and recommended to States that they should be guided by it. With regard to all other *future* multilateral conventions concluded under the auspices of the United Nations of which he is the depositary, it requested the Secretary-General:

(i) to continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) to communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

The resolution, being confined to *future* conventions, was limited to conventions concluded after 12 January 1952, the date of the adoption of the resolution, so that the former practice still applied to conventions concluded before that date. As to future conventions, the General Assembly did not endorse the Commission's proposal to retain the former practice subject to minor modifications. Instead, it directed the Secretary-General, in effect, to act simply as a channel for receiving and circulating instruments containing reservations or objections to reservations, without drawing any legal consequences from them.

(7) In the General Assembly, as already mentioned, opinion was divided in the debates on this question in 1951. One group of States favoured the unanimity doctrine, though there was some support in this group for replacing the need for unanimous consent by one of acceptance by a two-thirds majority of the States concerned. Another group of States, however, was definitely opposed to the unanimity doctrine and favoured a flexible system making the acceptance and rejection of reservations a matter for each State individually. They argued that such a system would safeguard the position of outvoted minorities and make possible a wider acceptance of conventions. The opposing group maintained, on the other hand, that a flexible system of this kind, although it might be suitable for a homogeneous community like the Pan-American Union, was not suitable for universal application. Opinion being divided in the United Nations, the only concrete result was the directives given to the Secretary-General for the performance of his depositary functions with respect to reservations.

(8) The situation with regard to this whole question has changed in certain respects since 1951. First, the international community has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable. Secondly, since 12 January 1952, i.e. during the past fourteen years, the system which has been in operation *de facto* for all new multilateral treaties of which the Secretary-General is the depositary has approximated to the "flexible" system. For the Secretariat's practice with regard to all treaties concluded after the General Assembly's resolution of 12 January 1952 has been officially stated to be as follows:

> "In the absence of any clause on reservations in agreements concluded after the General Assembly resolution on reservations to multilateral conventions, the Secretary-General adheres to the provisions of that resolution and communicates to the States concerned the text of the reservation accompanying an instrument of ratification or accession without passing on the legal effect of such documents, and 'leaving it to each State to draw legal consequences from such communications'. He transmits the observations received on reservations to the States concerned, also without comment. A general table is kept up to date for each convention, showing the reservations made and the observations transmitted thereon by the States concerned. A State which has deposited an

[77] *Ibid.*, paras. 12-34.

instrument accompanied by reservations is counted among the parties required for the entry into force of the agreement." [78]

It is true that the Secretary-General, in compliance with the General Assembly's resolution, does not "pass upon" the legal effect either of reservations or of objections to reservations, and each State is free to draw its own conclusions regarding their legal effects. But, having regard to the opposition of many States to the unanimity principle and to the Court's refusal to consider that principle as having been "transformed into a rule of law", a State making a reservation is now in practice considered a party to the convention by the majority of those States which do not give notice of their objection to the reservation.

(9) A further point is that in 1959 the question of reservations to multilateral conventions again came before the General Assembly in the particular context of a convention which was the constituent instrument of an international organization—namely the Inter-Governmental Maritime Consultative Organization. The actual issue raised by India's declaration in accepting that Convention was remitted to IMCO and settled without the legal questions having been resolved. But the General Assembly reaffirmed its previous directive to the Secretary-General concerning his depositary functions and extended it to cover all conventions concluded under the auspices of the United Nations (unless they contain contrary provisions), not merely those concluded after 12 January 1952.

(10) At its session in 1962, the Commission was agreed that, where the treaty itself deals with the question of reservations, the matter is concluded by the terms of the treaty. Reservations expressly or impliedly prohibited by the terms of the treaty are excluded, while those expressly or impliedly authorized are *ipso facto* effective. The problem concerns only the cases where the treaty is silent in regard to reservations, and here the Commission was agreed that the Court's principle of "compatibility with the object and purpose of the treaty" is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objection to them. The difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty. The Commission was agreed that where the treaty is one concluded between a small group of States, unanimous agreement to the acceptance of a reservation must be presumed to be necessary in the absence of any contrary indication, and that the problem essentially concerned multilateral treaties which contain no provisions in regard to reservations. On this problem, opinion in the Commission, as in the Court and the General Assembly, was divided.

(11) Some members of the Commission considered it essential that the effectiveness of a reservation to a multilateral treaty should be dependent on at least some measure of common acceptance of it by the other States concerned. They thought it inadmissible that a State, having formulated a reservation incompatible with the objects of a multilateral treaty, should be entitled to regard itself as a party to the treaty, on the basis of the acceptance of the reservation by a single State or by very few States. They instanced a reservation which undermined the basis of the treaty or of a compromise made in the negotiations. As tacit consent, derived from a failure to object to a reservation, plays a large role in the practice concerning multilateral treaties and is provided for in the draft articles, such a rule would mean in practice that a reserving State, however objectionable its reservation, could always be sure of being able to consider itself a party to the treaty vis-à-vis a certain number of States. Accordingly these members advocated a rule under which, if more than a certain proportion of the interested States (for example, one third) objected to a reservation, the reserving State would be barred altogether from considering itself a party to the treaty unless it withdrew the reservation.

(12) The Commission, while giving full weight to the arguments in favour of maintaining the integrity of the Convention as adopted to the greatest extent possible, felt that the detrimental effect of reservations upon the integrity of the treaty should not be overestimated. The treaty itself remains the sole authentic statement of the common agreement between the participating States. The majority of reservations relate to a particular point which a particular State for one reason or another finds difficult to accept, and the effect of the reservation on the general integrity of the treaty is often minimal; and the same is true even if the reservation in question relates to a comparatively important provision of the treaty, so long as the reservation is not made by more than a few States. In short, the integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by a number of States. This might, no doubt, happen; but even then the treaty itself would remain the master agreement between the other participating States. What is essential to ensure both the effectiveness and the integrity of the treaty is that a sufficient number of States should become parties to it, accepting the great bulk of its provisions. The Commission in 1951 said that the history of the conventions adopted by the Conference of American States had failed to convince it "that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party vis-à-vis non-objecting States". [79] Nevertheless, a power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty. Moreover, in the case of general multilateral treaties, it appears that not infrequently a number of States have, to all appearances, only found it possible to participate in the treaty subject to one or more reservations. Whether these States, if objection had been taken to their reservations,

[78] *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7), para. 80.

[79] *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), para. 22.

would have preferred to remain outside the treaty rather than to withdraw their reservation is a matter which is not known. But when to-day the number of the negotiating States may be upwards of one hundred States with very diverse cultural, economic and political conditions, it seems necessary to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties. Moreover, the failure of negotiating States to take the necessary steps to become parties to multilateral treaties appears a greater obstacle to the development of international law through the medium of treaties than the possibility that the integrity of such treaties may be unduly weakened by the liberal admission of reserving States as parties to them. The Commission also considered that, in the present era of change and of challenge to traditional concepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community.

(13) Another consideration which influenced the Commission was that, in any event the essential interests of individual States are in large measure safeguarded by the two well-established rules:

(*a*) That a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State;

(*b*) That a State which assents to another State's reservation is nevertheless entitled to object to any attempt by the reserving State to invoke against it the obligations of the treaty from which the reserving State has exempted itself by its reservation.

It has, it is true, been suggested that the equality between a reserving and non-reserving State, which is the aim of the above-mentioned rules, may in practice be less than complete. For a non-reserving State, by reason of its obligations towards other non-reserving States, may feel bound to comply with the whole of the treaty, including the provisions from which the reserving State has exempted itself by its reservation. Accordingly, the reserving State may be in the position of being exempt itself from certain of the provisions of the treaty, while having the assurance that the non-reserving States will observe those provisions. Normally however a State wishing to make a reservation would equally have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of its obligations to other States, even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the régime of the treaty. The position of the non-reserving State is not therefore made more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reservation. Even in those cases where there is such a close connexion between the provisions to which the reservation relates and other parts of the treaty that the non-reserving State is not prepared to become a party to the treaty at all vis-à-vis the reserving State on the limited basis which the latter proposes, the non-reserving State can prevent the treaty coming into force between itself and the reserving State by objecting to the reservation. Thus, the point only appears to have significance in cases where the non-reserving State would never itself have consented to become a party to the treaty, if it had known that the other State would do so subject to the reservation in question. And it may not be unreasonable to suggest that, if a State attaches so much importance to maintaining the absolute integrity of particular provisions, its appropriate course is to protect itself during the drafting of the treaty by obtaining the insertion of an express clause prohibiting the making of the reservations which it considers to be so objectionable.

(14) The Commission accordingly concluded in 1962 that, in the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a "collegiate" system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned. Having arrived at this decision, the Commission also decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of States for which the unanimity rule is retained.

(15) Governments, while criticizing one or another point in the articles proposed by the Commission, appeared in their comments to endorse its decision to try to work out a solution of the question of reservations to multilateral treaties on the basis of the flexible system embodied in the 1962 draft. Accordingly, at its seventeenth session the Commission confined itself to revising the articles provisionally adopted in 1962 in the light of the detailed points made by Governments. [79a]

(16) The 1962 draft contained five articles dealing with reservations to multilateral treaties covering: "Formulation of reservations" (article 18), "Acceptance of and objections to reservations" (article 19), "Effect of reservations" (article 20), "Application of reservations" (article 21) and "Withdrawal of reservations" (article 22). The two last-mentioned articles, subject to drafting changes, remain much as they were in the 1962 draft (present articles 19 and 20). The other three have undergone considerable rearrangement and revision. The procedural aspects of formulating, accepting and objecting to reservations have been detached from the former articles 18 and 19 and placed together in present article 18. Article 16 now deals only with the substantive rules regarding the formulation of reservations, while the substantive provisions of the former articles 19 and 20 regarding

[79a] The Commission also had before it a report from the Secretary-General on *Depositary Practice in Relation to Reservations* (A/5687).

acceptance of and objection to reservations have been brought together in present article 17. The final draft therefore sets out the topic of reservations also in five articles, but with the differences mentioned. The main foundations of the régime for reservations to multilateral treaties proposed by the Commission are laid down in articles 16 and 17, to which the remainder of this commentary is therefore devoted.

Commentary to article 16

(17) This article states the general principle that the formulation of reservations is permitted except in three cases. The first two are cases in which the reservation is expressly or impliedly prohibited by the treaty itself. The third case is where the treaty is silent in regard to reservation but the particular reservation is incompatible with the object and purpose of the treaty. The article, in short, adopts the Court's criterion as a general rule governing the formulation of reservations not provided for in the treaty. The legal position when a reservation is one expressly or impliedly prohibited in unambiguous terms under paragraphs (*a*) or (*b*) of the article is clear. The admissibility or otherwise of a reservation under paragraph (*c*), on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations.

Commentary to article 17

(18) Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty. No further acceptance of the reservation by them is therefore required.

(19) Paragraph 2, as foreshadowed in paragraph (14) of this commentary, makes a certain distinction between treaties concluded between a large group of States and treaties concluded between a limited number for the purpose of the application of the "flexible" system of reservations to multilateral treaties. The 1962 text simply excepted from that system "a treaty which has been concluded between a small group of States". Governments in their comments questioned whether the expression "a small group of States" was precise enough to furnish by itself a sufficient criterion of the cases excepted from the general rules of the flexible system. The Commission therefore re-examined the point and concluded that, while the limited number of the negotiating States is an important element in the criterion, the decisive point is their intention that the treaty should be applied in its entirety between all the parties. Accordingly, the rule now proposed by the Commission provides that acceptance of a reservation by all the parties is necessary "when it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty".

(20) Paragraph 3 lays down a special rule also in the case of a treaty which is a constituent instrument of an international organization and states that the reservation requires the acceptance of the competent organ of the organization unless the treaty otherwise provides. The question has arisen a number of times, and the Secretary-General's report in 1959 in regard to his handling of an alleged "reservation" to the IMCO Convention stated that it had "invariably been treated as one for reference to the body having authority to interpret the Convention in question".[80] The Commission considers that in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable. The Commission noted that the question would be partially covered by the general provision now included in article 4 regarding the rules of international organizations. But it considered the retention of the present paragraph to be desirable to provide a rule in cases where the rules of the international organization contain no provision touching the question.

(21) Paragraph 4 contains the three basic rules of the "flexible" system which are to govern the position of the contracting States in regard to reservations to any multilateral treaties not covered by the preceding paragraphs. Sub-paragraph (*a*) provides that acceptance of a reservation by another contracting State constitutes the reserving State a party to the treaty *in relation to that State* if or when the treaty is in force. Sub-paragraph (*b*), on the other hand, states that a contracting State's objection precludes the entry into force of the treaty *as between the objecting and reserving States*, unless a contrary intention is expressed by the objecting State. Although an objection to a reservation normally indicates a refusal to enter into treaty relations on the basis of the reservation, objections are sometimes made to reservations for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States. Sub-paragraph (*c*) then provides that an act expressing the consent of a State to be bound and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. This provision is important since it determines the moment at which a reserving State may be considered as a State which has ratified, accepted or otherwise become bound by the treaty.

(22) The rules in paragraph 4 establish a relative system of participation in a treaty, which envisages the possibility of every party to a multilateral treaty not being bound by the treaty vis-à-vis every other party. They have the result that a reserving State may be a party to the treaty vis-à-vis State X, but not vis-à-vis State Y, although States X and Y are themselves mutually bound. But in the case of a treaty drawn up between a large number

[80] *Official Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 65, document A/4235.

of States, the Commission considered this to be preferable to allowing State Y by its objection to prevent the treaty from coming into force between the reserving State and State X which accepted the reservation.

(23) Paragraph 5 completes the rules regarding acceptance of and objection to reservations by proposing that for the purposes of paragraphs 2 and 4 (i.e. for cases where the reservation is not expressly or impliedly authorized and is not a reservation to a constituent instrument of an international organization), absence of objection should under certain conditions be considered as constituting a tacit acceptance of it. The paragraph lays down that a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date in which it expressed its consent to be bound by the treaty, whichever is later. That the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the Court itself in the *Reservations to the Genocide Convention* case spoke of "very great allowance" being made in international practice for "tacit assent to reservations". Moreover, a rule specifically stating that consent will be presumed after a period of three, or in some cases six, months is to be found in some modern conventions;[81] while other conventions achieve the same result by limiting the right of objection to a period of three months.[82] Again, in 1959, the Inter-American Council of Jurists[83] recommended that, if no reply had been received from a State to which a reservation had been communicated, it should be presumed after one year that the State concerned had no objection to the reservation.

Article 18.[84] Procedure regarding reservations

1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An objection to the reservation made previously to its confirmation does not itself require confirmation.

Commentary

(1) This article reproduces, in a considerably revised and shortened form, procedural provisions regarding formulating, accepting and objecting to reservations which were formerly included in articles 18 and 19 of the 1962 draft.

(2) Paragraph 1 merely provides that a reservation, an express acceptance of a reservation and an objection to a reservation must be in writing and communicated to the other States entitled to become parties. In the case of acceptance the rule is limited to *express* acceptance, because tacit consent to a reservation plays a large role in the acceptance of reservations, as is specifically recognized in paragraph 5 of the previous article.

(3) Statements of reservations are made in practice at various stages in the conclusion of a treaty. Thus, a reservation is not infrequently expressed during the negotiations and recorded in the minutes. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. The Commission, however, considered it essential that the State concerned should formally reiterate the statement when signing, ratifying, accepting, approving or acceding to a treaty in order that it should make its intention to formulate the reservation clear and definitive. Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 as a method of formulating a reservation and equally receives no mention in the present article.

(4) Paragraph 2 concerns reservations made at a later stage: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article 17.

(5) On the other hand, the Commission did not consider that an objection to a reservation made previously to the latter's confirmation would need to be reiterated after that event; and paragraph 3 therefore makes it clear that the objection need not be confirmed in such a case.

Article 19.[85] Legal effects of reservations

1. A reservation established with regard to another party in accordance with articles 16, 17 and 18:

(*a*) Modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

[81] E.g., International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, 1952 (90 days); and International Convention for the Suppression of Counterfeiting Currency, 1929 (6 months).

[82] E.g., Conventions on the Declaration of Death of Missing Persons, 1950, and on the Nationality of Married Women, 1957 (both 90 days).

[83] Final Act of the Fourth Meeting of the Inter-American Council of Jurists, p. 29; A/CN.4/124, *Yearbook of the International Law Commission, 1960*, vol. II, p. 133.

[84] 1962 draft, articles 18 and 19, and 1965 draft, article 20.

[85] 1962 and 1965 drafts, article 21.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agrees to consider the treaty as in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Commentary

(1) Paragraphs 1 and 2 of this article set out the rules concerning the legal effects of a reservation which has been established under the provisions of articles 16, 17 and 18, assuming that the treaty is in force. These rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty. A reservation operates reciprocally between the reserving State and any other party, so that it modifies the treaty for both of them in their mutual relations to the extent of the reserved provisions. But it does not modify the provisions of the treaty for the other parties, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations.

(2) Paragraph 3 of the article covers the special case, contemplated in article 17, paragraph 4(*b*), where a State in objecting to a reservation nevertheless states that it agrees to the treaty's coming into force between it and the reserving State. The Commission concurred with the view expressed in the comments of certain Governments that it is desirable, for the sake of completeness, to cover this possibility and that in such cases the provisions to which the reservation relates should not apply in the relations between the two States to the extent of the reservation. Such is the rule prescribed in the paragraph.

Article 20.[86] Withdrawal of reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States.

Commentary

(1) It has sometimes been maintained that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a relation between the two States which cannot be changed without the agreement of both. The Commission, however, considered that the preferable rule is that unless the treaty otherwise provides, the reserving State should always be free to bring its position into full conformity with the provisions of the treaty as adopted by withdrawing its reservation. The parties to a treaty, in its view, ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty. Paragraph 1 of the article accordingly so states the general rule.

(2) Since a reservation is a derogation from the provisions of the treaty made at the instance of the reserving State, the Commission considered that the onus should lie upon that State to bring the withdrawal to the notice of the other States; and that the latter could not be responsible for any breach of a term of the treaty, to which the reservation relates, committed in ignorance of the withdrawal of the reservation. Paragraph 2 therefore provides that unless the treaty otherwise provides or the parties otherwise agree, a withdrawal of a reservation becomes operative only when notice of it has been received by the other contracting States. The Commission appreciated that, even when the other States had received notice of the withdrawal of the reservation, they might in certain types of treaty require a short period of time within which to adapt their internal law to the new situation resulting from it. It concluded, however, that it would be going too far to formulate this requirement as a general rule, since in many cases it would be desirable that the withdrawal of a reservation should operate at once. It felt that the matter should be left to be regulated by a specific provision in the treaty. It also considered that, even in the absence of such a provision, if a State required a short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned.

Section 3: Entry into force of treaties

Article 21.[87] Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound is established after a treaty has come into force, the treaty enters into force for that State on the date when its consent was established unless the treaty otherwise provides.

Commentary

(1) The text of this article, as provisionally adopted in 1962, was a little more elaborate since it recognized that, where a treaty fixed a date by which instruments of ratification, acceptance, etc. were to be exchanged or deposited, or signatures were to take place, there would be a certain presumption that this was intended to be the date of the entry into force of the treaty. Thus if the treaty failed to specify the time of its entry into force, paragraph 2 of the 1962 text would have made the date fixed for ratifications, acceptances, approvals

[86] 1962 and 1965 drafts, article 22.

[87] 1962 and 1965 drafts, article 23.

or signatures become the date of entry into force, subject to any requirement in the treaty as to the number of such ratifications, etc. necessary to bring it into force. Although this paragraph did not meet with objection from Governments, the Commission decided at its seventeenth session that it should be omitted. It doubted whether the negotiating States would necessarily have intended in all cases that the date fixed for deposit of instruments of ratification, etc. or for attaching signatures should be the date of entry into force. Accordingly, it concluded that it might be going too far to convert the indication given by the fixing of such dates into a definite legal presumption.

(2) Paragraph 1 of the article specifies the basic rule that a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree. The Commission noted that, if in a particular case the fixing of a date for the exchange or deposit of instruments or for signatures were to constitute a clear indication of the intended date of entry into force, the case would fall within the words "in such manner or upon such date as it may provide".

(3) Paragraph 2 states that failing any specific provision in the treaty or other agreement, a treaty enters into force as soon as all the negotiating States have consented to be bound by the treaty. This was the only general presumption which the Commission considered was justified by existing practice and should be stated in the article.

(4) Paragraph 3 lays down what is believed to be an undisputed rule, namely, that after a treaty has come into force, it enters into force for each new party on the date when its consent to be bound is established, unless the treaty otherwise provides. The phrase "enters into force for that State" is the one normally employed in this connexion in practice,[88] and simply denotes the commencement of the participation of the State in the treaty which is already in force.

(5) In re-examining this article in conjunction with article 73 regarding notifications and communications the Commission noted that there is an increasing tendency, more especially in the case of multilateral treaties, to provide for a time-lag between the establishment of consent to be bound and the entry into force of the treaty. The Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations, for example, provide for a thirty-day interval between these two stages of participation in a treaty. Having regard, however, to the great variety of treaties and of the circumstances in which they are concluded, the Commission concluded that it would be inappropriate to introduce *de lege ferenda* the concept of such a time-lag into the article as a general rule, and that it should be left to the negotiating States to insert it in the treaty as and when they deemed it necessary. The existing general rule, in its opinion, is undoubtedly that entry into force takes place at once upon the relevant consents having been established, unless the treaty otherwise provides.

[88] E.g., in the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations.

Article 22.[89] Entry into force provisionally

1. A treaty may enter into force provisionally if:

(*a*) The treaty itself prescribes that it shall enter into force provisionally pending ratification, acceptance, approval or accession by the contracting States; or

(*b*) The negotiating States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.

Commentary

(1) This article recognizes a practice which occurs with some frequency to-day and requires notice in the draft articles. Owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned may specify in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally. Whether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text may be a question. But there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis.

(2) An alternative procedure having the same effect is for the States concerned, without inserting such a clause in the treaty, to enter into an agreement in a separate protocol or exchange of letters, or in some other manner, to bring the treaty into force provisionally. Paragraph 1 of the article provides for these two contingencies.

(3) No less frequent to-day is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation or to prepare the way for the entry into force of the whole treaty a little later. What has been said above of the entry into force of the whole treaty also holds good in these cases. Accordingly, paragraph 2 of the article simply applies the same rule to the entry into force provisionally of part of a treaty.

(4) The text of the article, as provisionally adopted in 1962, contained a provision regarding the termination of the application of a treaty which has been brought into force provisionally. On re-examining the article and in the light of the comments of Governments, however, the Commission decided to dispense with the provision and to leave the point to be determined by the agreement of the parties and the operation of the rules regarding termination of treaties.

Part III.—Observance, application and interpretation of treaties

Section 1: Observance of treaties

Article 23.[90] *Pacta sunt servanda*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[89] 1962 and 1965 drafts, article 24.

[90] 1964 draft, article 55.

Commentary

(1) *Pacta sunt servanda*—the rule that treaties are binding on the parties and must be performed in good faith—is the fundamental principle of the law of treaties. Its importance is underlined by the fact that it is enshrined in the Preamble to the Charter of the United Nations. As to the Charter itself, paragraph 2 of Article 2 expressly provides that Members are to "fulfil in good faith the obligations assumed by them in accordance with the present Charter".

(2) There is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*. Thus, speaking of certain valuations to be made under articles 95 and 96 of the Act of Algeciras, the Court said in the *Case concerning Rights of Nationals of the United States of America in Morocco* (Judgment of 27 August 1954[91]): "The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith". Similarly, the Permanent Court of International Justice, in applying treaty clauses prohibiting discrimination against minorities, insisted in a number of cases,[92] that the clauses must be so applied as to ensure the absence of discrimination in fact as well as in law; in other words, the obligation must not be evaded by a merely literal application of the clauses. Numerous precedents could also be found in the jurisprudence of arbitral tribunals. To give only one example, in the *North Atlantic Coast Fisheries* arbitration the Tribunal dealing with Great Britain's right to regulate fisheries in Canadian waters in which she had granted certain fishing rights to United States nationals by the Treaty of Ghent, said:[93]

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

(3) Accordingly, the article provides that "A treaty in force is binding upon the parties to it and must be performed by them in good faith". Some members hesitated to include the words "in force" as possibly lending themselves to interpretations which might weaken the clear statement of the rule. Other members, however, considered that the words give expression to an element which forms part of the rule and that, having regard to other provisions of the draft articles, it was necessary on logical grounds to include them. The Commission had adopted a number of articles which dealt with the entry into force of treaties, with cases of provisional entry into force of treaties, with certain obligations resting upon the contracting States prior to entry into force, with the nullity of treaties and with their termination. Consequently, from a drafting point of view, it seemed necessary to specify that it is treaties in force in accordance with the provisions of the present articles to which the *pacta sunt servanda* rule applies. The words "in force" of course cover treaties in force *provisionally* under article 22 as well as treaties which enter into force definitively under article 21.

(4) Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible.

(5) The Commission considered whether this article containing the *pacta sunt servanda* rule should be placed in its present position in the draft articles or given special prominence by being inserted towards the beginning of the articles. Having regard to the introductory character of the provisions in part I and on logical grounds, it did not feel that the placing of the article towards the beginning would be appropriate. On the other hand, it was strongly of the opinion that a means should be found in the ultimate text of any convention on the law of treaties that may result from its work to emphasize the fundamental nature of the obligation to perform treaties *in good faith*. The motif of good faith, it is true, applies throughout international relations; but it has a particular importance in the law of treaties and is indeed reiterated in article 27 in the context of the interpretation of treaties. The Commission desired to suggest that the principle of *pacta sunt servanda* might suitably be given stress in the preamble to the convention just as it is already stressed in the Preamble to the Charter.

Section 2: Application of treaties

Article 24.[94] Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Commentary

(1) There is nothing to prevent the parties from giving a treaty, or some of its provisions, retroactive effects if they think fit. It is essentially a question of their intention. The general rule, however, is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms. This rule was endorsed and acted upon by the International Court of Justice in the *Ambatielos* case (Preliminary Objection),[95] where the Greek Government contended that under a treaty of 1926 it was entitled to present a claim based on acts which had taken place in 1922 and 1923.

[91] *I.C.J. Reports 1952*, p. 212.

[92] E.g. *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, P.C.I.J.* (1932), Series A/B, No. 44, p. 28; *Minority Schools in Albania, P.C.I.J.* (1935), Series A/B, No. 64, pp. 19 and 20.

[93] (1910) *Reports of International Arbitral Awards*, vol. XI, p. 188. The Tribunal also referred expressly to "the principle of international law that treaty obligations are to be executed in perfect good faith".

[94] 1964 draft, article 56.

[95] *I.C.J. Reports 1952*, p. 40.

Recognizing that its argument ran counter to the general principle that a treaty does not have retroactive effects, that Government sought to justify its contention as a special case by arguing that during the years 1922 and 1923 an earlier treaty of 1886 had been in force between the parties containing provisions similar to those of the 1926 treaty. This argument was rejected by the Court, which said:

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

A good example of a treaty having such a "special clause" or "special object" necessitating retroactive interpretation is to be found in the *Mavrommatis Palestine Concessions* case.[96] The United Kingdom contested the Court's jurisdiction on the ground, *inter alia*, that the acts complained of had taken place before Protocol XII to the Treaty of Lausanne had come into force, but the Court said:

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

(2) The question has come under consideration in international tribunals in connexion with jurisdictional clauses providing for the submission to an international tribunal of "disputes", or specified categories of "disputes", between the parties. The Permanent Court said in the *Mavrommatis Palestine Concessions* case:

> "The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment.... The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above."[97]

This is not to give retroactive effect to the agreement because, by using the word "disputes" without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes *existing* after the entry into force of the agreement. On the other hand, when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause. Thus in numerous cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission of Human Rights has held that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question.[98]

(3) If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. 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. Thus, while the European Commission of Human Rights has not considered itself competent to inquire into the propriety of legislative, administrative or judicial acts completed and made final before the entry into force of the European Convention, it has assumed jurisdiction where there were fresh proceedings or recurring applications of those acts after the Convention was in force.[99]

(4) The article accordingly states that unless it otherwise appears from the treaty, its provisions do not apply to a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party. In other words, the treaty will not apply to acts or facts which are *completed* or to situations which have ceased to exist before the treaty comes into force. The general phrase "unless a different intention appears from the treaty or is otherwise established" is used in preference to "unless the treaty otherwise provides" in order to allow for cases where the very nature of the

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

[97] *Ibid.*, p. 35; cf. the *Phosphates in Morocco* case, *P.C.I.J.* (1938) Series A/B, No. 74, p. 24. The application of the different forms of clause limiting *ratione temporis* the acceptance of the jurisdiction of international tribunals has not been free from difficulty, and the case law of the Permanent Court of International Justice and the International Court of Justice now contains a quite extensive jurisprudence on the matter. Important though this jurisprudence is in regard to the Court's jurisdiction, it concerns the application of particular treaty clauses, and the Commission does not consider that it calls for detailed examination in the context of the general law of treaties.

[98] See *Yearbook of the European Convention of Human Rights*, (1955-57) pp. 153-159; *ibid.* (1958-59) pp. 214, 376, 382, 407, 412, 492-494; *ibid.* (1960) pp. 222, 280, 444; and *ibid.* (1961) pp. 128, 132-145, 240, 325.

[99] Case of De Becker, see *Yearbook of the European Convention of Human Rights* (1958-59), pp. 230-235; Application No. 655/59; *Yearbook of the European Convention of Human Rights* (1960), p. 284.

treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects.

(5) The Commission re-examined the question whether it was necessary to state any rule concerning the application of a treaty with respect to acts, facts or situations which take place or exist after the treaty has ceased to be in force. Clearly, the treaty continues to have certain effects for the purpose of determining the legal position in regard to any act or fact which took place or any situation which was created in application of the treaty while it was in force. The Commission, however, concluded that this question really belonged to and was covered by the provisions of articles 66 and 67, paragraph 2, dealing with the consequences of the termination of a treaty. Accordingly, it decided to confine the present article to the principle of the non-retroactivity of treaties.

Article 25.[100] Application of treaties to territory

Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party.

Commentary

(1) Certain types of treaty, by reason of their subject-matter, are hardly susceptible of territorial application in the ordinary sense. Most treaties, however, have application to territory and a question may arise as to what is their precise scope territorially. In some cases the provisions of the treaty expressly relate to a particular territory or area, for example the Treaty of 21 October 1920 recognizing the sovereignty of Norway over Spitzbergen[101] and the Antarctic Treaty of 1 December 1959.[102] In other cases, the terms of the treaty indicate that it relates to particular areas. Certain United Kingdom treaties dealing with domestic matters are expressly limited to Great Britain and Northern Ireland and do not relate to the Channel Islands and the Isle of Man.[103] Again, States whose territory includes a free zone may find it necessary to except this zone from the scope of a commercial treaty. Another example is a boundary treaty which applies to particular areas and regulates problems arising from mixed populations, such as the languages used for official purposes. On the other hand, many treaties which are applicable territorially contain no indication of any restriction of their territorial scope, for example treaties of extradition or for the execution of judgments.

(2) The Commission considered that the territorial scope of a treaty depends on the intention of the parties and that it is only necessary in the present article to formulate the general rule which should apply in the absence of any specific provision or indication in the treaty as to its territorial application. State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the view that a treaty is to be presumed to apply to all the territory of each party unless it otherwise appears from the treaty.[104] Accordingly, it is this rule which is formulated in the present article.

(3) The term "the entire territory of each party" is a comprehensive term designed to embrace all the land and appurtenant territorial waters and air space which constitute the territory of the State. The Commission preferred this term to the term "all the territory or territories for which the parties are internationally responsible", which is found in some recent multilateral conventions. It desired to avoid the association of the latter term with the so-called "colonial clause". It held that its task in codifying the modern law of treaties should be confined to formulating the general rule regarding the application of a treaty to territory.

(4) One Government proposed that a second paragraph should be added to the article providing specifically that a State, which is composed of distinct autonomous parts, should have the right to declare to which of the constituent parts of the State a treaty is to apply. Under this proposal the declaration was not to be considered a reservation but a limitation of the consent to certain parts only of the State. The Commission was of the opinion that such a provision, however formulated, might raise as many problems as it would solve. It further considered that the words "unless a different intention appears from the treaty or is otherwise established" in the text now proposed give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory.

(5) Certain Governments in their comments expressed the view that the article was defective in that it might be understood to mean that the application of a treaty is necessarily confined to the territory of the parties. They proposed that the article should be revised so as to make it deal also with the extra-territorial application of treaties. The Commission recognized that the title of the article, as provisionally adopted in 1964, might create the impression that the article was intended to cover the whole topic of the application of treaties from the point of view of space; and that the limited provision which it in fact contained might in consequence give rise to misunderstandings of the kind indicated by these Governments. On the other hand, it considered that the proposal to include a provision regarding the extra-territorial application of treaties would at once raise difficult problems in regard to the extra-territorial competence of States; and that the drafts suggested in the comments of Governments were unsatisfactory in this respect. The article was intended by the Commission to deal only

[100] 1964 draft, article 57.

[101] League of Nations, *Treaty Series*, vol. II, p. 8.

[102] United Nations, *Treaty Series*, vol. 402, p. 71.

[103] E.g. Agreement between the Government of Great Britain and Northern Ireland and the USSR on Relations in the Scientific, Technological, Educational and Social Fields 1963-65 (*United Kingdom Treaty Series* No. 42 of 1963); the Convention of 1961 between Austria and Great Britain for the Reciprocal Recognition and Enforcement of Foreign Judgments defines the United Kingdom as comprising England and Wales, Scotland and Northern Ireland (*United Kingdom Treaty Series* No. 70 of 1962).

[104] *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7), paras. 102-103; *Succession of States in relation to General Multilateral Treaties of which the Secretary-General is Depositary* (A/CN.4/150), paras. 73, 74 and 138. *Yearbook of the International Law Commission, 1962*, vol. II, pp. 115, 123.

with the limited topic of the application of a treaty to the territory of the respective parties; and the Commission concluded that the preferable solution was to modify the title and the text of the article so as to make precise the limited nature of the rule. In its view, the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extra-territorial competence in the present article would be inappropriate and inadvisable.

(6) The point was raised in the Commission whether the territorial scope of a treaty may be affected by questions of State succession. The Commission, however, decided not to deal with this question and, as explained in paragraph (5) of the commentary to article 39, decided to reserve it in a general provision (article 69).

Article 26.[105] Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as inconsistent with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 56, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;

(*c*) As between a State party to both treaties and a State party only to the later treaty, the later treaty governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 37, or to any question of the termination or suspension of the operation of a treaty under article 57 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Commentary

(1) The rules set out in the text of this article provisionally adopted in 1964 were formulated in terms of the priority of application of treaties having incompatible provisions. On re-examining the article at the present session the Commission felt that, although the rules may have particular importance in cases of incompatibility, they should be stated more generally in terms of the application of successive treaties relating to the same subject-matter. One advantage of this formulation of the rules, it thought, would be that it would avoid any risk of paragraph 4(*c*) being interpreted as sanctioning the conclusion of a treaty incompatible with obligations undertaken towards another State under another treaty. Consequently, while the substance of the article remains the same as in the 1964 text, its wording has been revised in the manner indicated.

(2) Treaties not infrequently contain a clause intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals. Sometimes the clause concerns the relation of the treaty to a prior treaty, sometimes its relation to a future treaty and sometimes to any treaty past or future. Whatever the nature of the provision, the clause has necessarily to be taken into account in appreciating the priority of successive treaties relating to the same subject-matter.

(3) Pre-eminent among such clauses is Article 103 of the Charter of the United Nations which provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". The precise effect of the provision in the relations between Members of the United Nations and non-member States may not be entirely clear. But the position of the Charter of the United Nations in modern international law is of such importance, and the States Members of the United Nations constitute so large a part of the international community, that it appeared to the Commission to be essential to give Article 103 of the Charter special mention and a special place in the present article. Therefore, without prejudging in any way the interpretation of Article 103 or its application by the competent organs of the United Nations, it decided to recognize the overriding character of Article 103 of the Charter with respect to any treaty obligations of Members. Paragraph 1 accordingly provides that the rules laid down in the present article for regulating the obligations of parties to successive treaties are subject to Article 103 of the Charter.

(4) Paragraph 2 concerns clauses inserted in other treaties for the purpose of determining the relation of their provisions to those of other treaties entered into by the contracting States. Some of these clauses do no more than confirm the general rules of priority contained in paragraphs 3 and 4 of this article. Others, like paragraph 2 of article 73 of the Vienna Convention of 1963 on Consular Relations,[106] which recognizes the right to *supplement* its provisions by bilateral agreements, merely confirm the legitimacy of bilateral agreements which do not derogate from the obligations of the general Convention. Certain types of clause may, however, influence

[105] 1964 draft, article 63.

[106] United Nations Conference on Consular Relations, *Official Records*, vol. II, p. 187.

the operation of the general rules, and therefore require special consideration. For example, a number of treaties contain a clause in which the parties declare either that the treaty is not incompatible with, or that it is not to affect, their obligations under another designated treaty. Many older treaties [107] provided that nothing contained in them was to be regarded as imposing upon the parties obligations inconsistent with their obligations under the Covenant of the League; and to-day a similar clause giving pre-eminence to the Charter is found in certain treaties. [108] Other examples are: article XVII of the Universal Copyright Convention of 1952, [109] which disavows any intention to affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works; article 30 of the Geneva Convention of 1958 on the High Seas [110] and article 73 of the Vienna Convention on Consular Relations, all of which disavow any intention of overriding existing treaties. Such clauses, in so far as they relate to existing treaties concluded by the contracting States with third States, merely confirm the general rule *pacta tertiis non nocent*. But they may go beyond that rule because in some cases not only do they affect the priority of the respective treaties as between States parties to both treaties, but they may also concern future treaties concluded by a contracting State with a third State. They appear in any case of incompatibility to give pre-eminence to the other treaty. Paragraph 2 accordingly lays down that, whenever a treaty specifies that it is subject to, or is not to be considered as inconsistent with, an earlier or a later treaty, the provisions of that other treaty should prevail.

(5) On the other hand, Article 103 apart, clauses in treaties which purport to give the treaty priority over another treaty, whether earlier or later in date, do not by themselves appear to alter the operation of the general rules of priority set out in paragraphs 3 and 4 of the article.

(6) One form of such clause looks only to the past, providing for the priority of the treaty over earlier treaties relating to the same subject-matter. This form of clause presents no difficulty when all the parties to the earlier treaty are also parties to the treaty which seeks to override it. As is pointed out in the commentary to article 56, the parties to the earlier treaty are always competent to abrogate it, whether in whole or in part, by concluding another treaty with that object. That being so, when they conclude a second treaty incompatible with the first, they are to be presumed to have intended to terminate the first treaty or to modify it to the extent of the incompatibility, unless there is evidence of a contrary intention. Accordingly, in these cases the inclusion of a clause in the second treaty expressly proclaiming its priority over the first does no more than confirm the absence of any contrary intention. When, on the other hand, the parties to a treaty containing a clause purporting to override an earlier treaty do not include all the parties to the earlier one, the rule *pacta tertiis non nocent* automatically restricts the legal effect of the clause. The later treaty, clause or no clause, cannot deprive a State which is not a party thereto of its rights under the earlier treaty. It is, indeed, clear that an attempt by some parties to a treaty to deprive others of their rights under it by concluding amongst themselves a later treaty incompatible with those rights would constitute an infringement of the earlier treaty. For this reason clauses of this kind are normally so framed as expressly to limit their effects to States parties to the later treaty. Article XIV of the Convention of 25 May 1962 on the Liability of Operators of Nuclear Ships, for example, provides:

> "This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Conventions would be in conflict with it; however, nothing in this Article shall affect the obligations of Contracting States to non-Contracting States arising under such International Conventions." [111]

Similarly, many treaties amending earlier treaties provide for the supersession of the earlier treaty in whole or in part, but at the same time confine the operation of the amending instrument to those States which become parties to it. [112] In these cases therefore, as between two States which are parties to both treaties, the later treaty prevails, but as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty prevails. These are the very rules laid down in paragraphs 4(*a*) and (*b*) of the article, so that the insertion of this type of clause in no way modifies the application of the normal rules.

(7) Another form of clause looks only to the future, and specifically requires the parties not to enter into any future agreement which would be inconsistent with its obligations under the treaty. Some treaties, like the Statute on the Régime of Navigable Waterways of International Concern [113] contain both forms of clause; a few like the League Covenant (Article 20) and the United Nations Charter (Article 103), contain single clauses which look both to the past and the future. In these cases, the

[107] See e.g. article 16 of the Statute of 1921 on the Régime of Navigable Waterways of International Concern (League of Nations, *Treaty Series*, vol. VII, p. 61); and article 4 of the Pan-American Treaty of 1936 on Good Offices and Mediation (League of Nations, *Treaty Series*, vol. CLXXXVIII, p. 82).

[108] E.g. article 10 of the Inter-American Treaty of Reciprocal Assistance (United Nations, *Treaty Series*, vol. 21, p. 101).

[109] United Nations, *Treaty Series*, vol. 216, p. 148.

[110] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, p. 138.

[111] *American Journal of International Law*, vol. 57 (1963), p. 275.

[112] Article 1 of all the United Nations protocols amending League of Nations treaties declares: "The Parties to the present Protocol undertake that *as between themselves* they will, in accordance with the provisions of the present Protocol, attribute full legal force and effect to, and duly apply, the amendments to this instrument as they are set forth in the annex to the present Protocol." See, for example, Protocol of 1948 amending the International Convention of 1928 relating to Economic Statistics (United Nations, *Treaty Series*, vol. 20, p. 229); Protocol of 1953 amending the Geneva Slavery Convention of 1926 (United Nations, *Treaty Series*, vol. 182, p. 51). Cf. also article 59 of the Geneva Convention 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (United Nations, *Treaty Series*, vol. 75, p. 66).

[113] Articles 13 and 18, League of Nations, *Treaty Series*, vol. VII, p. 36.

clause can be of no significance if all the parties to the earlier treaty are also parties to the later one, because when concluding the later treaty they are fully competent to abrogate or modify the earlier treaty which they themselves drew up. More difficult, however, and more important, is the effect of such a clause in cases where the parties to the later treaty do not include all the parties to the earlier one. The clause in the earlier treaty may be so framed as to prohibit the parties from concluding with any State whatever a treaty conflicting with the earlier treaty; e.g. article 2 of the Nine-Power Pact of 1922 with respect to China.[114] Or it may refer only to agreements with third States, as in the case of article 18 of the Statute on the Régime of Navigable Waterways of International Concern:

> "Each of the contracting States undertakes not to grant, either by agreement or in any other way, to a non-contracting State treatment with regard to navigation over a navigable waterway of international concern which, as between Contracting States, would be contrary to the provisions of this Statute."[115]

Or, again, the aim of the clause may be to prohibit the contracting States from entering into agreement *inter se* which would derogate from their general obligations under a convention.[116] These clauses do not appear to modify the application of the normal rules for resolving conflicts between incompatible treaties. Some obligations contained in treaties are in the nature of things intended to apply generally to all the parties all the time. An obvious example is the Nuclear Test-Ban Treaty, and a subsequent agreement entered into by any individual party contracting out of its obligations under that Treaty would manifestly be incompatible with the Treaty. Other obligations may be of a purely reciprocal kind, so that a bilateral treaty modifying the application of the convention *inter se* the contracting States is compatible with its provisions. Even then the parties may in particular cases decide to establish a single compulsive régime for matters susceptible of being dealt with on a reciprocal basis, e.g. copyright or the protection of industrial property. The chief legal relevance of a clause asserting the priority of a treaty over subsequent treaties which conflict with it therefore appears to be in making explicit the intention of the parties to create a single "integral" or "interdependent" treaty régime not open to any contracting out; in short, by expressly forbidding contracting out, the clause predicates in unambiguous terms the incompatibility with the treaty of any subsequent agreement concluded by a party which derogates from the provisions of the treaty.

(8) The Commission accordingly concluded that none of the forms of clause asserting the priority of a particular treaty over other treaties requires to be dealt with specially in the article except Article 103 of the Charter. It considered that the real issue, which does not depend on the presence or absence of such a clause, is whether the conclusion of a treaty providing for obligations of an "interdependent" or "integral" character[117] affects the actual capacity of each party unilaterally to enter into a later treaty derogating from those obligations or leaves the matter as one of international responsibility for breach of the treaty. This issue arises in connexion with the rule in paragraph 4(*c*) of the article and is dealt with in paragraphs (12) and (13) below.

(9) Paragraph 3 states the general rule for cases where all the parties to a treaty (whether without or with additional States) conclude a later treaty relating to the same subject-matter. The paragraph has to be read in conjunction with article 56 which provides that in such cases the earlier treaty is to be considered as terminated if (*a*) it appears from the treaty or is otherwise established that the parties intended that the matter should thenceforth be governed by the later treaty, or (*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. The second paragraph of that article provides, however, that the treaty is only to be considered as suspended if it appears from the treaty or is otherwise established that such was the intention. The present article applies only when both treaties are in force and in operation: in other words, when the termination or suspension of the operation of the treaty has not occurred under article 56. Paragraph 3, in conformity with the general rule that a later expression of intention is to be presumed to prevail over an earlier one, then states that "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

(10) Paragraph 4 deals with the more complex problem of the cases where some, but not all, of the parties to the earlier treaty are parties to a later treaty relating to the same subject-matter. In such cases the rule in article 30 precludes the parties to the later treaty from depriving the other parties to the earlier treaty of their rights under that treaty without their consent. Accordingly, apart from

[114] League of Nations, *Treaty Series*, vol. XXXVIII, p. 281: "The Contracting Powers agree not to enter into any treaty, agreement, arrangement, or understanding, either with one another, or, individually or collectively, with any Power or Powers which would infringe or impair the principles stated in article 1."

[115] League of Nations, *Treaty Series*, vol. VII, pp. 36-61.

[116] E.g. article 15 of the 1883 Convention for the International Protection of Industrial Property (de Martens, *Nouveau Recueil général*, 2e série, vol. X, p. 133); article 20 of the Berlin Convention of 1908 for the Protection of Literary Property (de Martens, *Nouveau Recueil général*, 3e série, vol. IV, p. 590).

[117] A treaty containing "interdependent type" obligations as defined by a previous Special Rapporteur (Sir G. Fitzmaurice, third report in the *Yearbook of the International Law Commission, 1958*, vol. II, article 19 and commentary) is one where the obligations of each party are only meaningful in the context of the corresponding obligations of every other party, so that the violation of its obligations by one party prejudices the treaty régime applicable between them all and not merely the relations between the defaulting State and the other parties. Examples given by him were treaties of disarmament, treaties prohibiting the use of particular weapons, treaties requiring abstention from fishing in certain areas or during certain seasons, etc. A treaty containing "integral type" obligations was defined by the same Special Rapporteur as one where "the force of the obligation is self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others". The examples given by him were the Genocide Convention, Human Rights Conventions, the Geneva Conventions of 1949 on prisoners of war, etc., International Labour Conventions and treaties imposing an obligation to maintain a certain régime or system in a given area, such as the régime of the Sounds and the Belts at the entrance to the Baltic Sea.

the question whether the case of an earlier treaty containing obligations of an "interdependent" or "integral" character should be subject to a special rule, the rules generally applicable in such cases appeared to the Commission to work out automatically as follows:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;

(*c*) As between a State party to both treaties and a State party only to the later treaty, the later treaty governs their mutual rights and obligations.

The rules contained in sub-paragraphs (*a*) and (*c*) are, again, no more than an application of the general principle that a later expression of intention is to be presumed to prevail over an earlier one; and sub-paragraph (*b*) is no more than a particular application of the rule in article 30. These rules, the Commission noted, are the rules applied in cases of amendment of a multilateral treaty, as in the case of the United Nations protocols for amending League of Nations treaties,[118] when not all the parties to the treaty become parties to the amending agreement.

(11) The rules in paragraph 4 determine the mutual rights and obligations of the particular parties in each situation merely *as between themselves*. They do not relieve any party to a treaty of any international responsibilities it may incur by concluding or by applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty. If the conclusion or application of the treaty constitutes an infringement of the rights of parties to another treaty, all the normal consequences of the breach of a treaty follow with respect to that other treaty. The injured party may invoke its right to terminate or suspend the operation of the treaty under article 57 and it may equally invoke the international responsibility of the party which has infringed its rights. Paragraph 5 accordingly makes an express reservation with respect to both these matters. At the same time, it makes a reservation with respect to the provisions of article 37 concerning *inter se* modification of multilateral treaties. Those provisions lay down the conditions under which an agreement may be made to modify the operation of a multilateral treaty as between some of its parties only, and nothing in paragraph 4 of the present article is to be understood as setting aside those provisions.

(12) The Commission re-examined, in the light of the comments of Governments, the problem whether an earlier treaty which contains obligations of an "interdependent" or "integral" type should constitute a special case in which a later treaty incompatible with it should be considered as void, at any rate if all the parties to the later treaty were aware that they were infringing the rights of other States under the earlier treaty. An analogous aspect of this problem was submitted to the Commission by the Special Rapporteur in his second report,[119] the relevant passages from which were reproduced, for purposes of information, in paragraph (14) of the Commission's commentary to the present article contained in its report on the work of its sixteenth session.[120] Without adopting any position on the detailed considerations advanced by the Special Rapporteur, the Commission desired in the present commentary to draw attention to his analysis of certain aspects of the problem.

(13) Certain members of the Commission were inclined to favour the idea of a special rule in the case of an earlier treaty containing obligations of an "interdependent" or "integral" character, at any rate if the parties to the later treaty were all aware of its incompatibility with the earlier one. The Commission, however, noted that under the existing law the question appeared to be left as a matter of international responsibility if a party to a treaty of such a type afterwards concluded another treaty derogating from it. The Commission also noted that obligations of an "interdependent" or "integral" character may vary widely in importance. Some, although important in their own spheres, may deal with essentially technical matters; others may deal with vital matters, such as the maintenance of peace, nuclear tests or human rights. It pointed out that in some cases the obligations, by reason of their subject-matter, might be of a *jus cogens* character and the case fall within the provisions of articles 50 and 61. But the Commission felt that it should in other cases leave the question as one of international responsibility. At the same time, as previously mentioned, in order to remove any impression that paragraph 4(*c*) justifies the conclusion of the later treaty, the Commission decided to reorient the formulation of the article so as to make it refer to the priority of successive treaties dealing with the same subject-matter rather than of treaties having incompatible provisions. The conclusion of the later treaty may, of course, be perfectly legitimate if it is only a development of or addition to the earlier treaty.

Section 3: Interpretation of treaties

Article 27.[121] General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[118] See Resolutions of the General Assembly concerning the Law of Treaties (document A/CN.4/154, *Yearbook of the International Law Commission, 1963*, vol. II, pp. 5-9).

[119] Commentary to article 14 of that report, paras. 6-30; *Yearbook of the International Law Commission, 1963*, vol. II, pp. 54-61.

[120] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 189-191.

[121] 1964 draft, article 69.

3. There shall be taken into account, together with the context:

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

(*b*) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended. [122]

Article 28. [123] **Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

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

(*b*) Leads to a result which is manifestly absurd or unreasonable.

Commentary

Introduction

(1) The utility and even the existence of rules of international law governing the interpretation of treaties are sometimes questioned. The first two of the Commission's Special Rapporteurs on the law of treaties in their private writings also expressed doubts as to the existence in international law of any general rules for the interpretation of treaties. Other jurists, although they express reservations as to the obligatory character of certain of the so-called canons of interpretation, show less hesitation in recognizing the existence of some general rules for the interpretation of treaties. Sir G. Fitzmaurice, the previous Special Rapporteur on the law of treaties, in his private writings deduced six principles from the jurisprudence of the Permanent Court and the International Court which he regarded as the major principles of interpretation. In 1956, the Institute of International Law [124] adopted a resolution in which it formulated, if in somewhat cautious language, two articles containing a small number of basic principles of interpretation.

(2) Jurists also differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to:

(*a*) The text of the treaty as the authentic expression of the intentions of the parties;

(*b*) The intentions of the parties as a subjective element distinct from the text; and

(*c*) The declared or apparent objects and purposes of the treaty.

Some place the main emphasis on the intentions of the parties and in consequence admit a liberal recourse to the *travaux préparatoires* and to other evidence of the intentions of the contracting States as means of interpretation. Some give great weight to the object and purpose of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. The majority, however, emphasizes the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation. It is this view which is reflected in the 1956 resolution of the Institute of International Law mentioned in the previous paragraph.

(3) Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation. In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts. Treaty interpretation is, of course, equally part of the everyday work of Foreign Ministries.

(4) Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.

(5) Any attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable. Accordingly the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the inter-

[122] 1964 draft, article 71.

[123] 1964 draft, article 70.

[124] *Annuaire de l'Institut de droit international*, vol. 46 (1956), p. 359.

pretation of treaties. Admittedly, the task of formulating even these rules is not easy, but the Commission considered that there were cogent reasons why it should be attempted. First, the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning. Secondly, having regard to the divergent opinions concerning methods of interpretation, it seemed desirable that the Commission should take a clear position in regard to the role of the text in treaty interpretation. Thirdly, a number of articles adopted by the Commission contain clauses which distinguish between matters expressly provided in the treaty and matters to be implied in it by reference to the intention of the parties; and clearly, the operation of such clauses can be fully appreciated and determined only in the light of the means of interpretation admissible for ascertaining the intention of the parties. In addition the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties.

(6) Some jurists in their exposition of the principles of treaty interpretation distinguish between law-making and other treaties, and it is true that the character of a treaty may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case (e.g. the *contra proferentem* principle or the use of *travaux préparatoires*). But for the purpose of formulating the general rules of interpretation the Commission did not consider it necessary to make such a distinction. Nor did it consider that the principle expressed in the maxim *ut res magis valeat quam pereat* should not be included as one of the general rules. It recognized that in certain circumstances recourse to the principle may be appropriate and that it has sometimes been invoked by the International Court. In the *Corfu Channel* case,[125] for example, in interpreting a Special Agreement the Court said:

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

And it referred to a previous decision of the Permanent Court to the same effect in the *Free Zones of Upper Savoy and the District of Gex*[126] case. The Commission, however, took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose.* When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of "effective interpretation". The Court, which has by no means adopted a narrow view of the extent to which it is proper to imply terms in treaties, has nevertheless insisted that there are definite limits to the use which may be made of the principle *ut res magis valeat* for this purpose. In the *Interpretation of Peace Treaties* Advisory Opinion[127] it said:

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

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

(7) At its session in 1964 the Commission provisionally adopted three articles (69-71) dealing generally with the interpretation of treaties, and two articles dealing with treaties having plurilingual texts. The Commission's attempt to isolate and codify the basic rules of interpretation was generally approved by Governments in their comments and the rules contained in its draft appeared largely to be endorsed by them. However, in the light of the comments of Governments and as part of its normal process of tightening and streamlining the draft, the Commission has reduced these five articles to three by incorporating the then article 71 (terms having a special meaning) in the then article 69 (general rule of interpretation). and by amalgamating the then articles 72 and 73 (plurilingual treaties) into a single article. Apart from these changes the rules now proposed by the Commission do not differ materially in their general structure and substance from those transmitted to Governments in 1964.

(8) Having regard to certain observations in the comments of Governments the Commission considered it desirable to underline its concept of the relation between the various elements of interpretation in article 27 and the relation between these elements and those in article 28. Those observations appeared to indicate a possible fear that the successive paragraphs of article 27 might be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article. The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present

[125] *I.C.J. Reports 1949*, p. 24.

[126] *P.C.I.J.* (1929), Series A, No. 22, p. 13; cf. *Acquisition of Polish Nationality*, *P.C.I.J.* (1923), Series B, No. 7, pp. 16 and 17, and *Exchange of Greek and Turkish Populations*, *P.C.I.J.* (1925), Series B, No. 10, p. 25.

[127] *I.C.J. Reports 1950*, p. 229.

in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled "General *rule* of interpretation" in the singular, not "General *rules*" in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule. In the same way the word "context" in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word "context" in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 "There shall be taken into account *together with the context*" is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3. If the provision in paragraph 4 (article 71 of the 1964 draft) is of a different character, the word "special" serves to indicate its relation to the rule in paragraph 1.

(9) The Commission re-examined the structure of article 27 in the light of the comments of Governments and considered other possible alternatives. It concluded, however, that subject to transferring the provision regarding rules of international law from paragraph 1 to paragraph 3 and adding the former article 71 as paragraph 4, the general structure of the article, as provisionally adopted in 1964, should be retained. It considered that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article. Once it is established—and on this point the Commission was unanimous—that the starting point of interpretation is the meaning of the text, logic indicates that "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" should be the first element to be mentioned. Similarly, logic suggests that the elements comprised in the "context" should be the next to be mentioned since they form part of or are intimately related to the text. Again, it is only logic which suggests that the elements in paragraph 3—a subsequent agreement regarding the interpretation, subsequent practice establishing the understanding of the parties regarding the interpretation and relevant rules of international law applicable in the relations between the parties—should follow and not precede the elements in the previous paragraphs. The logical consideration which suggests this is that these elements are extrinsic to the text. But these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them.

(10) The Commission also re-examined in the light of the comments of Governments the relation between the further (supplementary) means of interpretation mentioned in former article 70 and those contained in former article 69, giving special attention to the role of preparatory work as an element of interpretation. Although a few Governments indicated a preference for allowing a larger role to preparatory work and even for including it in the present article, the majority appeared to be in agreement with the Commission's treatment of the matter. Certain members of the Commission also favoured a system which would give a more automatic role to preparatory work and other supplementary means in the process of interpretation. But the Commission considered that the relationship established between the "supplementary" elements of interpretation in present article 28 and those in present article 27—which accords with the jurisprudence of the International Court on the matter—should be retained. The elements of interpretation in article 27 all relate to the agreement between the parties *at the time when or after it received authentic expression in the text. Ex hypothesi* this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text. Moreover, it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation. Accordingly, the Commission was of the opinion that the distinction made in articles 27 and 28 between authentic and supplementary means of interpretation is both justified and desirable. At the same time, it pointed out that the provisions of article 28 by no means have the effect of drawing a rigid line between the "supplementary" means of interpretation and the means included in article 27. The fact that article 28 admits recourse to the supplementary means for the purpose of "confirming" the meaning resulting from the application of article 27 establishes a general link between the two articles and maintains the unity of the process of interpretation.

Commentary to article 27

(11) The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this—the textual—approach to treaty interpretation. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find expression in the proceedings of the Institute. The textual approach, on the other hand, commends itself by the fact that, as one authority[128] has put it, "*le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties*". Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of inter-

[128] *Annuaire de l'Institut de droit international*, vol. 44, tome 1 (1952), p. 199.

pretation to revise treaties or to read into them what they do not, expressly or by implication, contain.[129]

(12) *Paragraph 1* contains three separate principles. The first—interpretation in good faith—flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose. These principles have repeatedly been affirmed by the Court. The present Court in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* said:[130]

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

And the Permanent Court in an early Advisory Opinion[131] stressed that the context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole:

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

Again the Court has more than once had recourse to the statement of the object and purpose of the treaty in the preamble in order to interpret a particular provision.[132]

(13) *Paragraph 2* seeks to define what is comprised in the "context" for the purposes of the interpretation of the treaty. That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment, as is also the case with documents which are specifically made annexes to the treaty. The question is how far other documents connected with the treaty are to be regarded as forming part of the "context" for the purposes of interpretation. Paragraph 2 proposes that two classes of documents should be so regarded: (*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; and (*b*) any instrument which was made in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. The principle on which this provision is based is that a unilateral document cannot be regarded as forming part of the "context" within the meaning of article 27 unless not only was it made in connexion with the conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties. On the other hand, the fact that these two classes of documents are recognized in paragraph 2 as forming part of the "context" does not mean that they are necessarily to be considered as an integral part of the treaty. Whether they are an actual part of the treaty depends on the intention of the parties in each case.[133] What is proposed in paragraph 2 is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.

(14) *Paragraph 3*(a) specifies as a further authentic element of interpretation to be taken into account together with the context any subsequent agreement between the parties regarding the interpretation of the treaty. A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation.[134] But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case[135] the Court said: "...the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty...". Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.

(15) *Paragraph 3*(b) then similarly specifies as an element to be taken into account together with the context: "any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation". The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[136] Recourse to it as a means of

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

[130] *I.C.J. Reports 1950*, p. 8.

[131] *Competence of the ILO to Regulate Agricultural Labour*, *P.C.I.J.* (1922), Series B, Nos. 2 and 3, p. 23.

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

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

[134] Cf. the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* case, *I.C.J. Reports 1948*, p. 63.

[135] (Preliminary Objection), *I.C.J. Reports 1952*, p. 44.

[136] In the *Russian Indemnity* case the Permanent Court of Arbitration said: "*...l'exécution des engagements est, entre Etats, comme entre particuliers, le plus sûr commentaire du sens de ces engagements*". *Reports of International Abitral Awards*, vol. XI, p. 433. ("...the fulfilment of engagements between States, as between individuals, is the surest commentary on the effectiveness of those engagements". English translation from J. B. Scott, *The Hague Court* Reports (1916), p. 302.)

interpretation is well-established in the jurisprudence of international tribunals. In its opinion on the *Competence of the ILO to Regulate Agricultural Labour*[137] the Permanent Court said:

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

At the same time, the Court[138] referred to subsequent practice in confirmation of the meaning which it had deduced from the text and which it considered to be unambiguous. Similarly in the *Corfu Channel* case,[139] the International Court said:

> "The subsequent attitude of the Parties shows it has not been their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation."

The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms. The Commission considered that subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements. The text provisionally adopted in 1964 spoke of a practice which "establishes the understanding of all the parties". By omitting the word "all" the Commission did not intend to change the rule. It considered that the phrase "the understanding of the parties" necessarily means "the parties as a whole". It omitted the word "all" merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.

(16) *Paragraph 3*(c) adds as a third element to be taken into account together with the context: "any relevant rules of international law applicable in the relations between the parties". This element, as previously indicated, appeared in paragraph 1 of the text provisionally adopted in 1964, which stated that, *inter alia*, the ordinary meaning to be given to the terms of a treaty is to be determined "in the light of the general rules of international law *in force at the time of its conclusion*". The words in italics were a reflection of the general principle that a juridical fact must be appreciated in the light of the law contemporary with it. When this provision was discussed at the sixteenth session[140] some members suggested that it failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty and was therefore inadequate. Some Governments in their comments endorsed the provision, others criticized it from varying points of view. On re-examining the provision, the Commission considered that the formula used in the 1964 text was unsatisfactory, since it covered only partially the question of the so-called intertemporal law in its application to the interpretation of treaties and might, in consequence, lead to misunderstanding. It also considered that, in any event, the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties, and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties. It further considered that correct application of the temporal element would normally be indicated by interpretation of the term in good faith. The Commission therefore concluded that it should omit the temporal element and revise the reference to international law so as to make it read "any relevant rules of international law applicable in the relations between the parties". At the same time, it decided to transfer this element of interpretation to paragraph 3 as being an element which is extrinsic both to the text and to the "context" as defined in paragraph 2.

(17) *Paragraph 4* incorporates in article 27 the substance of what was article 71 of the 1964 text. It provides for the somewhat exceptional case where, notwithstanding the apparent meaning of a term in its context, it is established that the parties intended it to have a special meaning. Some members doubted the need to include a special provision on this point, although they recognized that parties to a treaty not infrequently employ a term with a technical or other special meaning. They pointed out that technical or special use of the term normally appears from the context and the technical or special meaning becomes, as it were, the ordinary meaning in the particular context. Other members, while not disputing that the technical or special meaning of the term may often appear from the context, considered that there was a certain utility in laying down a specific rule on the point, if only to emphasize that the burden of proof lies on the party invoking the special meaning of the term. They pointed out that the exception had been referred to more than once by the Court. In the *Legal Status of Eastern Greenland* case, for example, the Permanent Court had said:

> "The geographical meaning of the word 'Greenland', i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention."[141]

Commentary to article 28

(18) There are many dicta in the jurisprudence of international tribunals stating that where the ordinary meaning of the words is clear and makes sense in the context, there is no occasion to have recourse to other means of interpretation. Many of these statements relate to the use of *travaux préparatoires*. The passage from the Court's Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* cited in paragraph (12) above is one example,

[137] *P.C.I.J.* (1922), Series B, No. 2, p. 39; see also *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne*, *P.C.I.J.* (1925), Series B, No. 12, p. 24; the *Brazilian Loans* case, *P.C.I.J.* (1929), Series A, No. 21, p. 119.

[138] *Ibid.*, pp. 40 and 41.

[139] *I.C.J. Reports 1949*, p. 25.

[140] Paragraph (11) of the commentary to articles 69-71; *Yearbook of the International Law Commission, 1964*, vol. II, pp. 202 and 203.

[141] *P.C.I.J.* (1933), Series A/B, No. 53, p. 49.

and another is its earlier Opinion on *Admission of a State to the United Nations*:[142]

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

As already indicated, the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation. It formulated article 27 on that basis, making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty. Nevertheless, it felt that it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extrinsic means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in article 27 has disclosed no clear or reasonable meaning. In practice, international tribunals, as well as States and international organizations, have recourse to subsidiary means of interpretation, more especially *travaux préparatoires*, for the purpose of confirming the meaning that appears to result from an interpretation of the treaty in accordance with article 27. The Court itself has on numerous occasions referred to the *travaux préparatoires* for the purpose of confirming its conclusions as to the "ordinary" meaning of the text. For example, in its opinion on the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*[143] the Permanent Court said:

> "The preparatory work thus confirms the conclusion reached on a study of the text of the Convention that there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words."

(19) Accordingly, the Commission decided to specify in article 28 that recourse to further means of interpretation, including preparatory work, is permissible for the purpose of confirming the meaning resulting from the application of article 27 and for the purpose of determining the meaning when the interpretation according to article 27:

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

(*b*) Leads to a result which is manifestly absurd or unreasonable.

The word "supplementary" emphasizes that article 28 does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article 27. Sub-paragraph (*a*) admits the use of these means for the purpose of deciding the meaning in cases where there is no clear meaning. Sub-paragraph (*b*) does the same in cases where interpretation according to article 27 gives a meaning which is "manifestly absurd or unreasonable". The Court has recognized[144] this exception to the rule that the ordinary meaning of the terms must prevail. On the other hand, the comparative rarity of the cases in which it has done so suggest that it regards this exception as limited to cases where the absurd or unreasonable character of the "ordinary" meaning is manifest. The Commission considered that the exception must be strictly limited, if it is not to weaken unduly the authority of the ordinary meaning of the terms. Sub-paragraph (*b*) is accordingly confined to cases where interpretation under article 27 gives a result which is manifestly absurd or unreasonable.

(20) The Commission did not think that anything would be gained by trying to define *travaux préparatoires*; indeed, to do so might only lead to the possible exclusion of relevant evidence. It also considered whether, in regard to multilateral treaties, the article should authorize the use of *travaux préparatoires* only as between States which took part in the negotiations or, alternatively, only if they have been published. In the *Territorial Jurisdiction of the International Commission of the River Oder* case[145] the Permanent Court excluded from its consideration the *travaux préparatoires* of certain provisions of the Treaty of Versailles on the ground that three of the States before the Court had not participated in the conference which prepared the Treaty of Versailles; and in making this ruling it expressly refused to differentiate between published and unpublished documents. The Commission doubted, however, whether this ruling reflects the actual practice regarding the use of *travaux préparatoires* in the case of multilateral treaties that are open to accession by States which did not attend the conference at which they were drawn up. Moreover, the principle behind the ruling did not seem to be so compelling as might appear from the language of the Court in that case. A State acceding to a treaty in the drafting of which it did not participate is perfectly entitled to request to see the *travaux préparatoires*, if it wishes, before acceding. Nor did the rule seem likely to be practically convenient, having regard to the many important multilateral treaties open generally to accession. These considerations apply to unpublished, but accessible, *travaux préparatoires* as well as to published ones; and in the case of bilateral treaties or "closed" treaties between small groups of States, unpublished *travaux préparatoires* will usually be in the hands of all the parties. Accordingly, the Commission decided that it should not include any special provision in the article regarding the use of *travaux préparatoires* in the case of multilateral treaties.

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[142] *I.C.J. Reports 1948*, p. 63.

[143] *P.C.I.J.* (1932), Series A/B, No. 50, p. 380; cf. the *Serbian and Brazilian Loans* cases, *P.C.I.J.* (1929), Series A, Nos. 20-21, p. 30.

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

[145] *P.C.I.J.* (1929), Series A, No. 23.

Article 29.[146] Interpretation of treaties in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

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

3. 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 of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

Commentary

(1) The phenomenon of treaties drawn up in two or more languages has become extremely common and, with the advent of the United Nations, general multilateral treaties drawn up, or finally expressed, in five different languages have become quite numerous. When a treaty is plurilingual, there may or may not be a difference in the status of the different language versions for the purpose of interpretation. Each of the versions may have the status of an authentic text of the treaty; or one or more of them may be merely an "official text", that is a text which has been signed by the negotiating States but not accepted as authoritative;[147] or one or more of them may be merely an "official translation", that is a translation prepared by the parties or an individual Government or by an organ of an international organization.

(2) To-day the majority of more formal treaties contain an express provision determining the status of the different language versions. If there is no such provision, it seems to be generally accepted that each of the versions in which the text of the treaty was "drawn up" is to be considered authentic, and therefore authoritative for purposes of interpretation. In other words, the general rule is the equality of the languages and the equal authenticity of the texts in the absence of any provision to the contrary. In formulating this general rule *paragraph 1* refers to languages in which the text of the treaty has been "authenticated" rather than "drawn up" or "adopted". This is to take account of article 9 of the present articles in which the Commission recognized "authentication of the text" as a distinct procedural step in the conclusion of a treaty.

(3) The proviso in paragraph 1 is necessary for two reasons. First, treaties sometimes provide expressly that only certain texts are to be authoritative, as in the case of the Peace Treaties concluded after the Second World War which make the French, English and Russian texts authentic while leaving the Italian, Bulgarian, Hungarian etc. texts merely "official".[148] Indeed, cases have been known where one text has been made authentic between some parties and a different text between others.[149] Secondly, a plurilingual treaty may provide that in the event of divergence between the texts a specified text is to prevail. Indeed, it is not uncommon for a treaty between two States, because the language of one is not well understood by the other or because neither State wishes to recognize the supremacy of the other's language, to agree upon a text in a third language and designate it as the authoritative text in case of divergence. An example is the Treaty of Friendship concluded between Japan and Ethiopia in 1957[150] in Japanese, Amharic and French, article 6 of which makes the French text authentic "*en cas de divergence d'interprétation*". A somewhat special case was the Peace Treaties of St. Germain, Neuilly and Trianon, which were drawn up in French, English and Italian, and which provided that in case of divergence the French text should prevail, except with regard to parts I and XII, containing respectively the Covenant of the League of Nations and the articles concerning the International Labour Organisation.

(4) The application of provisions giving priority to a particular text in case of divergence may raise a difficult problem as to the exact point in the interpretation at which the provision should be put into operation. Should the "master" text be applied automatically as soon as the slightest difference appears in the wording of the texts? Or should recourse first be had to all, or at any rate some, of the normal means of interpretation in an attempt to reconcile the texts before concluding that there is a case of "divergence"? The jurisprudence of international tribunals throws an uncertain light on the solution of this problem. Sometimes the tribunal has simply applied the "master" text at once without going into the question whether there was an actual divergence between the authentic texts, as indeed the Permanent Court appears to have done in the case concerning the interpretation of the Treaty of Neuilly.[151] Sometimes the tribunal has made some comparison at least of the different texts in an attempt to ascertain the intention of the parties.[152] This was also the method adopted by the Supreme Court of Poland in the case of the *Archdukes of the Habsburg-Lorraine House* v. *The Polish State Treasury*.[153] The question is essentially one of the intention of the parties in inserting the provision in the treaty, and the Commission doubted whether it would be appropriate for the Commission to try to resolve the problem in a formulation of the general rules of interpretation. Accordingly, it seemed to the Commission sufficient in paragraph 1 to make a general reservation of cases where the treaty contains this type of provision.

[146] 1964 draft, articles 72 and 73.

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

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

[149] E.g., Treaty of Brest-Litovsk of 1918 (article 10).

[150] United Nations, *Treaty Series*, vol. 325, p. 300.

[151] *P.C.I.J.* (1924), Series A, No. 3.

[152] E.g., *De Paoli* v. *Bulgarian State*, *Tribunaux arbitraux mixtes*, *Recueil des décisions*, vol. 6, p. 456.

[153] *Annual Digest of International Law Cases*, 1929-1930, case No. 235.

(5) *Paragraph 2* provides for the case of a version of the treaty which is not "authenticated" as a text in the sense of article 9, but which is nevertheless prescribed by the treaty or accepted by the parties as authentic for purposes of interpretation. For example, a boundary treaty of 1897 between Great Britain and Ethiopia was drawn up in English and Amharic and it was stated that both texts were to be considered authentic,[154] but a French translation was annexed to the treaty which was to be authoritative in the event of a dispute.

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

(7) The existence of more than one authentic text clearly introduces a new element—comparison of the texts—into the interpretation of the treaty. But it does not involve a different system of interpretation. Plurilingual in expression, the treaty remains a single treaty with a single set of terms the interpretation of which is governed by the rules set out in articles 27 and 28. The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another. A term of the treaty may be ambiguous or obscure because it is so in all the authentic texts, or because it is so in one text only but it is not certain whether there is a difference between the texts, or because on their face the authentic texts seem not to have exactly the same meaning. But whether the ambiguity or obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation.

(8) *Paragraph 3* therefore provides, first, that the terms of a treaty are presumed to have the same meaning in each authentic text. Then it adds that—apart from cases where the parties have agreed upon the priority of a particular text—in the event of a divergence between authentic texts a meaning which so far as possible reconciles the different texts shall be adopted. These provisions give effect to the principle of the equality of texts. In the *Mavrommatis Palestine Concessions* case,[155] the Permanent Court was thought by some jurists to lay down a general rule of restrictive interpretation in cases of divergence between authentic texts when it said:

> "...where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it [the Court] is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English".

But the Court does not appear necessarily to have intended by the first sentence of this passage to lay down as a general rule that the more limited interpretation which can be made to harmonize with both texts is the one which must always be adopted. Restrictive interpretation was appropriate in that case. But the question whether in case of ambiguity a restrictive interpretation ought to be adopted is a more general one the answer to which hinges on the nature of the treaty and the particular context in which the ambiguous term occurs. The mere fact that the ambiguity arises from a difference of expression in a plurilingual treaty does not alter the principles by which the presumption should or should not be made in favour of a restrictive interpretation. Accordingly, while the *Mavrommatis* case[156] gives strong support to the principle of conciliating—i.e. harmonizing—the texts, it is not thought to call for a general rule laying down a presumption in favour of restrictive inter-

[154] The treaty actually said "official", but it seems clear that in this instance by "official" was meant "authentic"; Hertslet, *The Map of Africa by Treaty* (3rd ed.), vol. 2, pp. 42-47; cf. the Convention for the Unification of Certain Rules concerning Collisions in Inland Navigation, Hudson, *International Legislation*, vol. 5, pp. 819-822.

[155] *P.C.I.J.* (1924), Series A, No. 2, p. 19.

[156] Cf. *Venezuelan Bond* cases, Moore, *International Arbitrations*, vol. 4, p. 3623; and *German Reparations under Article 260 of the Treaty of Versailles* (1924), *Reports of International Arbitral Awards*, vol. I, pp. 437-439.

pretation in the case of an ambiguity in plurilingual texts.

(9) The Commission considered whether there were any further principles which it might be appropriate to codify as general rules for the interpretation of plurilingual treaties. For example, it examined whether it should be specified that there is a legal presumption in favour of the text with a clear meaning or of the language version in which the treaty was drafted. It felt, however, that this might be going too far, since much might depend on the circumstances of each case and the evidence of the intention of the parties. Nor did it think that it would be appropriate to formulate any general rule regarding recourse to non-authentic versions, though these are sometimes referred to for such light as they may throw on the matter.

Section 4: Treaties and third States

Article 30.[157] General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Commentary

(1) A third State, as defined in article 2(1)(*h*), is any State not a party to the treaty, and there appears to be almost universal agreement that in principle a treaty creates neither obligations nor rights for third States without their consent. The rule underlying the present article appears originally to have been derived from Roman law in the form of the well-known maxim *pacta tertiis nec nocent nec prosunt*—agreements neither impose obligations nor confer rights upon third parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States. There is abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists.

(2) *Obligations.* International tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose any obligation on States which are not parties to them nor modify in any way their legal rights without their consent. In the *Island of Palmas* case,[158] for example, dealing with a supposed recognition of Spain's title to the island in treaties concluded by that country with other States, Judge Huber said: "It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the 'Philippines' could not be binding upon the Netherlands...".[159] In another passage he said:[160] "...whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers"; and in a third passage[161] he emphasized that "...the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers". In short, treaties concluded by Spain with other States were *res inter alios acta* which could not, as treaties, be in any way binding upon the Netherlands. In the case of the *Free Zones of Upper Savoy and the District of Gex*[162] it was a major multilateral treaty—the Versailles Peace Treaty—which was in question, and the Permanent Court held that article 435 of the Treaty was "not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it". Similarly, in the *Territorial Jurisdiction of the International Commission of the River Oder* case[163] the Permanent Court declined to regard a general multilateral treaty—the Barcelona Convention of 1921 on the Régime of Navigable Waterways of International Concern—as binding upon Poland, who was not a party to the treaty. Nor in the *Status of Eastern Carelia* case[164] did the Permanent Court take any different position with regard to the Covenant of the League of Nations.

(3) *Rights.* Examples of the application of the underlying rule to rights can also be found in the decisions of arbitral tribunals, which show that a right cannot arise for a third State from a treaty which makes no provision for such a right; and that in these cases only parties may invoke a right under the treaty. In the *Clipperton Island*[165] arbitration the arbitrator held that Mexico was not entitled to invoke against France the provision of the Act of Berlin of 1885 requiring notification of occupations of territory, *inter alia*, on the ground that Mexico was not a signatory to that Act. In the *Forests of Central Rhodopia* case[166] the arbitrator, whilst upholding Greece's claim on the basis of a provision in the Treaty of Neuilly, went on to say:"... until the entry into force of the Treaty of Neuilly, the Greek Government, not being a signatory of the Treaty of Constantinople, had no legal grounds to set up a claim based upon the relevant stipulations of that Treaty".[167]

(4) The question whether the rule *pacta tertiis nec nocent nec prosunt* admits of any actual exceptions in international law is a controversial one which divided the Commission. There was complete agreement amongst the members that there is no exception in the case of obligations; a treaty never by its own force alone creates obligations for non-parties. The division of opinion related to the question whether a treaty may of its own force confer rights upon a non-party. One group of members considered that, if the parties so intend, a treaty may have this effect, although the non-party is not, of course, obliged to accept or exercise the right. Another group of members considered that no actual right exists in favour of the

[157] 1964 draft, article 58.

[158] (1928) *Reports of International Arbitral Awards*, vol. II, p. 831.

[159] *Ibid.*, p. 850.

[160] *Ibid.*, p. 842.

[161] *Ibid.*, p. 870.

[162] *P.C.I.J.* (1932), Series A/B, No. 46, p. 141; and *ibid.* (1929), Series A, No. 22, p. 17.

[163] *Ibid.* (1929), Series A, No. 23, pp. 19-22.

[164] *Ibid.* (1923), Series B, No. 5, pp. 27 and 28; cf. the somewhat special case of the *Aerial Incident of 27 July 1955*, *I.C.J. Reports 1959*, p. 138.

[165] *Reports of International Arbitral Awards*, vol. II, p. 1105.

[166] *Ibid.*, vol. III, p. 1405.

[167] English translation from *Annual Digest and Reports of International Law Cases*, 1933-34, case No. 39, p. 92.

non-party unless and until it is accepted by the non-party. This matter is discussed more fully in the commentary to article 32.

(5) The title of the article, as provisionally adopted in 1964, was "General rule limiting the effects of treaties to the parties". As this title gave rise to a misconception on the part of at least one Government that the article purports to deal generally with the question of the "effects of treaties on third States", the Commission decided to change it to "General rule regarding third States". For the same reason and in order not to appear to prejudge in any way the question of the application of treaties with respect to individuals, it deleted the first limb of the article "A treaty *applies only between the parties and*" etc. It thus confined the article to the short and simple statement: "A treaty does not create either obligations or rights for a third State without its consent". The formulation of both the title and the text were designed to be as neutral as possible so as to maintain a certain equilibrium between the respective doctrinal points of view of members of the Commission.

Article 31. [168] Treaties providing for obligations for third States

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be a means of establishing the obligation and the third State has expressly accepted that obligation.

Commentary

(1) The primary rule, formulated in the previous article, is that the parties to a treaty cannot impose an obligation on a third State without its consent. That rule is one of the bulwarks of the independence and equality of States. The present article also underlines that the consent of a State is always necessary if it is to be bound by a provision contained in a treaty to which it is not a party. Under it two conditions have to be fulfilled before a non-party can become bound: first, the parties to the treaty must have intended the provision in question to be the means of establishing an obligation for the State not a party to the treaty; and secondly, the third State must have expressly agreed to be bound by the obligation. The Commission appreciated that when these conditions are fulfilled there is, in effect, a second collateral agreement between the parties to the treaty, on the one hand, and the third State on the other; and that the juridical basis of the latter's obligation is not the treaty itself but the collateral agreement. However, even if the matter is viewed in this way, the case remains one where a provision of a treaty concluded between certain States becomes directly binding upon another State which is not and does not become a party to the treaty.

(2) The operation of the rule in this article is illustrated by the Permanent Court's approach to article 435 of the Treaty of Versailles in the *Free Zones* case. [169] Switzerland was not a party to the Treaty of Versailles, but the text of the article had been referred to her prior to the conclusion of the treaty. The Swiss Federal Council had further addressed a note [170] to the French Government informing it that Switzerland found it possible to "acquiesce" in article 435, but only on certain conditions. One of those conditions was that the Federal Council made the most express reservations as to the statement that the provisions of the old treaties, conventions, etc., were no longer consistent with present conditions, and said that it would not wish its acceptance of the article to lead to the conclusion that it would agree to the suppression of the régime of the free zones. France contended before the Court that the provisions of the old treaties, conventions, etc., concerning the free zones had been abrogated by article 435. In rejecting this contention, the Court pointed out that Switzerland had not accepted that part of article 435 which asserted the obsolescence and abrogation of the free zones:

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

(3) Some Governments in their comments referred to treaty provisions imposed upon an aggressor State and raised the question of the application of the present article to such provisions. The Commission recognized that such cases would fall outside the principle laid down in this article, provided that the action taken was in conformity with the Charter. At the same time, it noted that article 49, which provides for the nullity of any treaty procured by the threat or use of force, is confined to cases where the threat or use of force is "in violation of the principles of the Charter of the United Nations". A treaty provision imposed upon an aggressor State in conformity with the Charter would not run counter to the principle in article 49 of the present articles. The Commission decided by a majority vote to include in the draft a separate article containing a general reservation in regard to any obligation in relation to a treaty which arises for an aggressor State in consequence of measures taken in conformity with the Charter. The text of this reservation is in article 70.

Article 32. [171] Treaties providing for rights for third States

1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and

[168] 1964 draft, article 59.

[169] *P.C.I.J.* (1929), Series A, No. 22, pp. 17 and 18; *ibid.* (1932), Series A/B, No. 46, p. 141.

[170] The text of the relevant part of this note was annexed to article 435 of the Treaty of Versailles.

[171] 1964 draft, article 60.

the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Commentary

(1) This article deals with the conditions under which a State may be entitled to invoke a right under a treaty to which it is not a party. The case of rights is more controversial than that of obligations, because the question of the need for the consent of the third State presents itself in a somewhat different light. The parties to a treaty cannot, in the nature of things, effectively *impose* a right on a third State because a right may always be disclaimed or waived. Consequently, under the present article the question is simply whether the third State's "acceptance" of the provision is or is not legally necessary for the creation of the right, or whether the treaty of its own force creates the right.

(2) The Commission noted that treaty practice shows a not inconsiderable number of treaties containing stipulations in favour of third States. In some instances, the stipulation is in favour of individual States as, for example, provisions in the Treaty of Versailles in favour of Denmark[172] and Switzerland.[173] In some instances, it is in favour of a group of States, as in the case of the provisions in the Peace Treaties after the two world wars which stipulated that the defeated States should waive any claims arising out of the war in favour of certain States not parties to the treaties. A further case is Article 35 of the Charter, which stipulates that non-members have a right to bring disputes before the Security Council or General Assembly. Again, the Mandate and Trusteeship Agreements contain provisions stipulating for certain rights in favour respectively of members of the League and of the United Nations, though in these cases the stipulations are of a special character as being by one member of an international organization in favour of the rest.[174] In other instances, the stipulation is in favour of States generally, as in the case of provisions concerning freedom of navigation in certain international rivers, and through certain maritime canals and straits.

(3) Some jurists maintain that, while a treaty may certainly confer, either by design or by its incidental effects, a *benefit* on a third State, the latter can only acquire an actual right through some form of collateral agreement between it and the parties to the treaty. In other words, as with the case of an obligation they hold that a right will be created only when the treaty provision is intended to constitute an offer of a right to the third State which the latter has accepted. They take the position that neither State practice nor the pronouncements of the Permanent Court in the *Free Zones* case[175] furnish any clear evidence of the recognition of the institution of *stipulation pour autrui* in international law.

(4) Other jurists,[176] who include all the four Special Rapporteurs on the law of treaties, take a different position. Broadly, their view is that there is nothing in international law to prevent two or more States from effectively creating a right in favour of another State by treaty, if they so intend; and that it is always a question of the intention of the parties in concluding the particular treaty. According to them, a distinction has to be drawn between a treaty in which the intention of the parties is merely to confer a benefit on the other State and one in which their intention is to invest it with an actual right. In the latter case they hold that the other State acquires a legal right to invoke directly and on its own account the provision conferring the benefit, and does not need to enlist the aid of one of the parties to the treaty in order to obtain the execution of the provision. This right is not, in their opinion, conditional upon any specific act of acceptance by the other State or any collateral agreement between it and the parties to the treaty. These writers maintain that State practice confirms this view and that authority for it is also to be found in the report of the Committee of Jurists to the Council of the League on the Aaland Islands question,[177] and more especially in the judgment of the Permanent Court in 1932 in the *Free Zones* case where it said:

> "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such."[178]

(5) In 1964, some members of the Commission shared the view of the first group of jurists set out in paragraph (3) above, while other members in general shared the view of the second group set out in paragraph (4). The Commission, however, concluded that this division of opinion amongst its members was primarily of a doctrinal character and that the two opposing doctrines did not differ very substantially in their practical effects. Both groups considered that a treaty provision may be a means of establishing a right in favour of a third State, and that the third State is free to accept or reject the right as it

[172] Article 109 of the Treaty of Versailles.

[173] Articles 358 and 374 of the Treaty of Versailles.

[174] See the *South-West Africa* cases, *I.C.J. Reports 1962*, pp. 329-331 and p. 410; the *Northern Cameroons* case, *I.C.J. Reports 1963*, p. 29.

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

[176] E.g., Sir G. Fitzmaurice, fifth report on the law of treaties, *Yearbook of the International Law Commission, 1960*, vol. II, pp. 81 and 102-104.

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

[178] *P.C.I.J.* (1932), Series A/B, No. 46, pp. 147 and 148; in the course of that case, however, three judges expressly dissented from the view that a stipulation in favour of a State not a party to the treaty may of itself confer an actual right upon that State.

thinks fit. The difference was that according to one group the treaty provision constitutes no more than the offer of a right until the beneficiary State has in some manner manifested its acceptance of the right, whereas according to the other group the right arises at once and exists unless and until disclaimed by the beneficiary State. The first group, on the other hand, conceded that acceptance of a right by a third State, unlike acceptance of an obligation, need not be express but may take the form of a simple exercise of the right offered in the treaty. Moreover, the second group, for its part, conceded that a disclaimer of what they considered to be an already existing right need not be express but may in certain cases occur tacitly through failure to exercise it. Consequently, it seemed to the Commission that in practice the two doctrines would be likely to give much the same results in almost every case. Nor did the Commission consider that the difference in doctrine necessarily led to different conclusions in regard to the right of the parties to the treaty to revoke or amend the provisions relating to the right. On the contrary, it was unanimous in thinking that until the beneficiary State had manifested its assent to the grant of the right, the parties should remain free to revoke or amend the provision without its consent; and that afterwards its consent should always be required if it was established that the right was intended not to be revocable or subject to modification without the third State's consent. Being of the opinion that the two doctrines would be likely to produce different results only in very exceptional circumstances,[179] the Commission decided to frame the article in a form which, while meeting the requirements of State practice, would not prejudge the doctrinal basis of the rule.

(6) Governments in their comments showed no inclination to take up a position on the doctrinal point and, in general, appeared to endorse the rule proposed in the article. Certain Governments, if from somewhat divergent points of view, raised a query in regard to the second condition contained in paragraph 1(*b*) of the text provisionally adopted in 1964, namely "and the State *expressly or impliedly* assents thereto". As a result of these comments and in order to improve the formulation of the rule with reference to cases where the intention is to dedicate a right, such as a right of navigation, to States generally, the Commission modified the drafting of paragraph 1 of the article on this point. It deleted the words "expressly or impliedly" and at the same time added a provision that the assent of the third State was to be presumed so long as the contrary was not indicated. This modification, it noted, would still further diminish any practical significance there might be between the two doctrinal points of view as to the legal effect of a treaty provision purporting to confer a right on a third State.

(7) *Paragraph 1* lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question, or to a group of States to which it belongs, or to States generally. The intention to accord the right is of cardinal importance, since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision. Examples of stipulations in favour of individual States, groups of States or States generally have already been mentioned in paragraph (2). The second condition is the assent of the beneficiary State. The formulation of this condition in the present tense "and the State assents thereto" leaves open the question whether juridically the right is created by the treaty or by the beneficiary State's act of acceptance. In one view, as already explained, the assent of the intended beneficiary, even although it may merely be implied from the exercise of the right, constitutes an "acceptance" of an offer made by the parties; in the other view the assent is only significant as an indication that the right is not disclaimed by the beneficiary. The second sentence of the paragraph then provides that the assent of the State is to be presumed so long as the contrary is not indicated. This provision the Commission considered desirable in order to give the necessary flexibility to the operation of the rule in cases where the right is expressed to be in favour of States generally or of a large group of States. The provision, as previously mentioned, also has the effect of further narrowing the gap between the two theories as to the source of the right arising from the treaty.

(8) *Paragraph 2* specifies that in exercising the right a beneficiary State must comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. The words "or established in conformity with the treaty" take account of the fact that not infrequently conditions for the exercise of the right may be laid down in a supplementary instrument or in some cases unilaterally by one of the parties. For example, in the case of a provision allowing freedom of navigation in an international river or maritime waterway, the territorial State has the right in virtue of its sovereignty to lay down relevant conditions for the exercise of the right provided, of course, that they are in conformity with its obligations under the treaty. One Government expressed the fear that this paragraph might be open to the interpretation that it restricts the power of the parties to the treaty to amend the right conferred on third States. In the Commission's opinion, such an interpretation would be wholly inadmissible since the paragraph manifestly deals only with the obligation of the third State to comply with the conditions applicable to the exercise of the right. The question of the power of the parties to modify the right is certainly an important one, but it arises under article 33, not under paragraph 2 of the present article.

Article 33.[180] Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 31, the obligation may be revoked or modified only with the mutual consent of the parties

[179] For example, in the controversy between the United States Treasury and the State Department as to whether the Finnish Peace Treaty had actually vested a right in the United States to avail itself or not to avail itself of a waiver of Finland's claims.

[180] 1964 draft, article 61.

to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 32, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Commentary

(1) Article 33 deals with the position of the parties to a treaty in regard to the revocation or modification of an obligation or of a right which has arisen for a third State under article 31 or 32. The text of the article, as provisionally adopted in 1964, contained a single rule covering both obligations and rights and laying down that neither could be revoked or modified by the parties without the consent of the third State unless it appeared from the treaty that the provision giving rise to them was intended to be revocable. The formulation of this rule was criticized in some respects by certain Governments in their comments, and certain others expressed the view that the article went too far in protecting the right of the third State. The Commission, while not fully in accord with the particular criticisms, agreed that the rule proposed in 1964 was not altogether satisfactory and that the article needed to be reformulated in a slightly different way.

(2) The Commission considered that, although analogous, the considerations affecting revocation or modification of an obligation are not identical with those applicable in the case of a right. Indeed, the respective positions of the parties and of the third State are reversed in the two cases. It also considered that regard must be had to the possibility that the initiative for revoking or modifying an obligation might well come from the third State rather than from the parties; and that in such a case the third State, having accepted the obligation, could not revoke or modify it without the consent of the parties unless they had otherwise agreed. Accordingly, it decided to reformulate the article in two paragraphs, one covering the case of an obligation and the other the case of a right. The Commission also decided that the article should refer to the revocation or modification of the third State's obligation or right rather than of the provision of the treaty giving rise to the obligation or right; for the revocation or modification of the provision as such is a matter which concerns the parties alone and it is the mutual relations between the parties and the third State which are in question in the present article.

(3) *Paragraph 1* lays down that the obligation of a third State may be revoked or modified only with the mutual consent of the parties and of the third State, unless it is established that they had otherwise agreed. As noted in the previous paragraph, this rule is clearly correct if it is the third State which seeks to revoke or modify the obligation. When it is the parties who seek the revocation or modification, the position is less simple. In a case where the parties were simply renouncing their right to call for the performance of the obligation, it might be urged that the consent of the third State would be superfluous; and in such a case it is certainly very improbable that any difficulty would arise. But the Commission felt that in international relations such simple cases are likely to be rare, and that in most cases a third State's obligation is likely to involve a more complex relation which would make it desirable that any change in the obligation should be a matter of mutual consent. Accordingly it concluded that the general rule stated in the paragraph should require the mutual consent of the parties and of the third State, unless it was established that they had otherwise agreed.

(4) *Paragraph 2*, for the reason indicated above, deals only with the revocation or modification of a third State's right *by the parties to the treaty*. The Commission took note of the view of some Governments that the 1964 text went too far in restricting the power of the parties to revoke or modify a stipulation in favour of the third State and in giving the latter a veto over any modification of the treaty provision. It considered, however, that there are conflicting considerations to be taken into account. No doubt, it was desirable that States should not be discouraged from creating rights in favour of third States, especially in such matters as navigation in international waterways, by the fear that they might be hampering their freedom of action in the future. But it was no less important that such rights should have a measure of solidity and firmness. Furthermore, there was force in the argument that, if the parties wished the third State's rights to be revocable, they could so specify in the treaty or in negotiations with the third State. Taking account of these conflicting considerations and of the above-mentioned view expressed by certain Governments, the Commission reformulated the rule in paragraph 2 so as to provide that a third State's right may not be revoked if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State. The irrevocable character of the right would normally be established either from the terms or nature of the treaty provision giving rise to the right or from an agreement or understanding arrived at between the parties and the third State.

Article 34.[181] Rules in a treaty becoming binding through international custom

Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.

Commentary

(1) The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime régime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom,

[181] 1964 draft, article 62.

as for example the Hague Conventions regarding the rules of land warfare,[182] the agreements for the neutralization of Switzerland, and various treaties regarding international riverways and maritime waterways. So too a codifying convention purporting to state existing rules of customary law may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the convention.

(2) In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law. In short, for these States the source of the binding force of the rules is custom, not the treaty. For this reason the Commission did not think that this process should be included in the draft articles as a case of a treaty having legal effects for third States. It did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 30 to 33, it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from becoming binding on non-parties as customary rules of international law.

(3) The Commission desired to emphasize that the provision in the present article is purely and simply a reservation designed to negative any possible implication from articles 30 to 33 that the draft articles reject the legitimacy of the above-mentioned process. In order to make it absolutely plain that this is the sole purpose of the present article, the Commission slightly modified the wording of the text provisionally adopted in 1964.

(4) The Commission considered whether treaties creating so-called "objective régimes", that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case.[183] Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes*, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article. Since to lay down a rule recognizing the possibility of the creation of objective régimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. It considered that the provision in article 32, regarding treaties intended to create rights in favour of States generally, together with the process mentioned in the present article, furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which goes as far as is at present possible. Accordingly, it decided not to propose any special provision on treaties creating so-called objective régimes.

[182] Held by the International Military Tribunal at Nuremberg to enunciate rules which had become generally binding rules of customary law.

[183] See generally Sir G. Fitzmaurice's fifth report on the law of treaties, *Yearbook of the International Law Commission, 1960*, vol. II, pp. 69-107; and Sir H. Waldock's third report, A/CN.4/167, article 63 and commentary, *Yearbook of the International Law Commission, 1964*, vol. II, pp. 26-34.

Part IV.—Amendment and modification of treaties

Article 35.[184] General rule regarding the amendment of treaties

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

Article 36.[185] Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to every party, each one of which shall have the right to take part in:

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

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

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4(*b*) applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) Be considered as a party to the treaty as amended; and

(*b*) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Commentary

Introduction

(1) The development of international organization and the tremendous increase in multilateral treaty-making

[184] 1964 draft, article 65.

[185] 1964 draft, article 66.

have made a considerable impact on the process of amending treaties. In the first place, the amendment of many multilateral treaties is now a matter which concerns an international organization. This is clearly the case where the treaty is the constituent instrument of an organization or where the treaty, like international labour conventions, is drawn up within an organization. But it is also to some extent the case where the treaty is concluded under the auspices of an organization and the Secretariat of the organization is made the depositary for executing its procedural provisions. In all these cases the drawing up of an amending instrument is caught up in the machinery of the organization or in the functions of the depositary. As a result, the right of each party to be consulted with regard to the amendment or revision of the treaty is largely safeguarded. In the second place, the proliferation of multilateral treaties has led to an increased awareness of the importance of making provision in advance, in the treaty itself, for the possibility of its future amendment. In the third place, the growth of multilateral treaties having a very large number of parties has made it virtually impossible to limit the amending process to amendments brought into force by an agreement entered into by all the parties to the original treaty; and has led to an increasing practice of bringing amending agreements into force as between those States willing to accept the amendment, while at the same time leaving the existing treaty in force with respect to the other parties to the earlier treaty. Thus, in 1906 the Geneva Convention of 1864 for the Amelioration of the Condition of Wounded in Armies in the Field was revised by a new Convention which expressly provided that, when duly ratified, it should supersede the 1864 Convention in the relations between the contracting States, but that the 1864 Convention should remain in force in the relations of parties to that Convention who did not ratify the new Convention. A similar provision was inserted in the Hague Convention of 1907 on the Laws and Customs of War on Land, which revised the earlier Convention of 1899. There are numerous later examples of the same technique, notably the United Nations protocols revising certain League of Nations conventions.

(2) Amendment clauses found in multilateral treaties take a great variety of forms, as appears from the examples given in the *Handbook of Final Clauses*.[186] Despite their variety, many amendment clauses are far from dealing comprehensively with the legal aspects of amendment. Some, for example, merely specify the conditions under which a proposal for amendment may be put forward, without providing for the procedure for considering it. Others, while also specifying the procedure for considering a proposal, do not deal with the conditions under which an amendment may be adopted and come into force, or do not define the exact effect on the parties to the existing treaty. As to clauses regarding the adoption and entry into force of an amendment, some require its acceptance by all the parties to the treaty, but many admit some form of qualified majority as sufficient. In general, the variety of the clauses makes it difficult to deduce from the treaty practice the development of detailed customary rules regarding the amendment of multilateral treaties; and the Commission did not therefore think that it would be appropriate for it to try to frame a comprehensive code of rules regarding the amendment of treaties. On the other hand, it seemed to the Commission desirable that the draft articles should include a formulation of the basic rules concerning the process of amendment.

(3) Some treaties use the term "amendment" in relation to individual provisions of the treaty and the term "revision" for a general review of the whole treaty.[187] If this phraseology has a certain convenience, it is not one which is found uniformly in State practice, and there does not appear to be any difference in the legal process. The Commission therefore considered it sufficient in the present articles to speak of "amendment" as being a term which covers both the amendment of particular provisions and a general review of the whole treaty.[188] As to the term "revision", the Commission recognized that it is frequently found in State practice and that it is also used in some treaties. Nevertheless, having regard to the nuances that became attached to the phrase "revision of treaties" in the period preceding the Second World War, the Commission preferred the term "amendment". This term is here used to denote a *formal* amendment of a treaty intended to alter its provisions with respect to all the parties. The more general term "modification" is used in article 37 in connexion with an *inter se* agreement concluded between certain of the parties only, and intended to vary provisions of the treaty between themselves alone, and also in connexion with a variation of the provisions of a treaty resulting from the practice of the parties in applying it.

Commentary to article 35

(4) Article 35 provides that a treaty may be amended by agreement between the parties, and that the rules laid down in part II apply to it except in so far as the treaty may otherwise provide. Having regard to the modern practice of amending multilateral treaties by another multilateral treaty which comes into force only for those States which become bound by it, the Commission did not specify that the agreement must be that of all the parties, as in the case of termination of a treaty under article 51. It felt that the procedure for the adoption of the text and the entry into force of the amending agreement should simply be governed by articles 8, 21 and 22 of part II. On the other hand, it sought in article 36 to lay down strict rules guaranteeing the right of each party to participate in the process of amendment. The amendment of a treaty is normally effected through the conclusion of another treaty in written form and this is reflected in the provision that the rules of part II are to apply to the amending agreement. However, as explained in paragraph (3) of its commentary to article 51, the Commission did not consider that the theory of the "*acte contraire*" has any place in international law. An amend-

[186] ST/LEG/6, pp. 130-152.

[187] Articles 108 and 109 of the Charter; see also *Handbook of Final Clauses* (ST/LEG/6), pp. 130 and 150.

[188] Thus, while Chapter XVIII of the Charter is entitled "Amendments", Article 109 speaks of "reviewing" the Charter.

ing agreement may take whatever form the parties to the original treaty may choose. Indeed, the Commission recognized that a treaty may sometimes be modified even by an oral agreement or by a tacit agreement evidenced by the conduct of the parties in the application of the treaty. Accordingly, in stating that the rules of part II regarding the conclusion and entry into force of treaties apply to amending agreements, the Commission did not mean to imply that the modification of a treaty by an oral or tacit agreement is inadmissible. On the contrary, it noted that the legal force of an oral agreement modifying a treaty would be preserved by the provision in article 3, sub-paragraph (*b*), and it made express provision in article 38 for the modification of a treaty by the subsequent practice of the parties in its application.

Commentary to article 36

(5) This article deals with the complex process of the amendment of multilateral treaties. The Commission considered whether to formulate any rule specifically for bilateral treaties, but concluded that it would not serve any useful purpose. Where only two parties are involved, the question is essentially one of negotiation and agreement between them, and the rules contained in part II suffice to regulate the procedure and to protect the positions of the individual parties. Moreover, although the Commission was of the opinion that a party is under a certain obligation of good faith to give due consideration to a proposal from the other party for the amendment of a treaty, it felt that such a principle would be difficult to formulate as a legal rule without opening the door to arbitrary denunciations of treaties on the pretended ground that the other party had not given serious attention to a proposal for amendment.

(6) Article 36 is concerned only with the amendment *stricto sensu* of a multilateral treaty, that is, where the intention is to draw up a formal agreement between the parties generally for modifying the treaty between them all, and not to draw up an agreement between certain parties only for the purpose of modifying the treaty between themselves alone. The Commission recognized that an amending agreement drawn up between the parties generally may not infrequently come into force only with respect to some of them owing to the failure of the others to proceed to ratification, acceptance or approval of the agreement. Nevertheless, it considered that there is an essential difference between amending agreements designed to amend a treaty between the parties generally and agreements designed *ab initio* to modify the operation of the treaty as between certain of the parties only. Although an amending instrument may equally turn out to operate only between certain of the parties, the Commission considered that a clear-cut distinction must be made between the amendment process *stricto sensu* and *inter se* agreements modifying the operation of the treaty between a restricted circle of the parties. For this reason, *inter se* agreements are dealt with separately in article 37 while the opening phrase of paragraph 2 of the present article underlines that it is concerned only with proposals to amend the treaty as between *all* the parties.

(7) *Paragraph 1* merely emphasizes that the rules stated in the article are residuary rules in the sense that they apply only in the absence of a specific provision in the treaty laying down a different rule. Modern multilateral treaties, as indicated in paragraph (3) of this commentary, not infrequently contain some provisions regarding their amendment and the rules contained in the present articles must clearly be subject to any such specific provisions in the treaty.

(8) *Paragraph 2* provides that any proposal to amend a multilateral treaty as between all the parties must be notified to every party and that each party has the right to take part in the decision as to the action, if any, to be taken in regard to the proposal and to take part in the negotiation and conclusion of any agreement designed to amend the treaty. Treaties have often in the past been amended or revised by certain of the parties without consultation with the others. This has led some jurists to conclude that there is no general rule entitling every party to a multilateral treaty to take part in any negotiations for the amendment of the treaty and that, correspondingly, parties to a multilateral treaty are under no legal obligation to invite all the original parties to participate in such negotiations. Although recognizing that instances have been common enough in which individual parties to a treaty have not been consulted in regard to its revision, the Commission does not think that State practice leads to that conclusion or that such a view should be the one adopted by the Commission.

(9) If a group of parties has sometimes succeeded in effecting an amendment of a treaty régime without consulting the other parties, equally States left out of such a transaction have from time to time reacted against the failure to bring them into consultation as a violation of their rights as parties. Moreover, there are also numerous cases where the parties have, as a matter of course, all been consulted. The Commission, however, considers that the very nature of the legal relation established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty. The fact that this has not always happened in the past is not a sufficient reason for setting aside a principle which seems to flow directly from the obligation assumed by the parties to perform the treaty in good faith. There may be special circumstances when it is justifiable not to bring a particular party into consultation, as in the case of an aggressor. But the general rule is believed to be that every party is entitled to be brought into consultation with regard to an amendment of the treaty; and paragraph 2 of article 36 so states the law.

(10) *Paragraph 3*, which was added to the article at the present session, provides that every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended. This rule recognizes that States entitled to become parties to a treaty, and notably those which took part in its drawing up but have not yet established their consent to be bound by it, have a definite interest in the amendment of the treaty. The Commission considered whether this interest should be expressed in the form of an actual right to take part in the negotiation and conclusion of

the amending agreement, or whether it should be limited to a right to become a party to the amending agreement. The problem, in its view, was to strike a balance between the right of the parties to adapt the treaty to meet requirements which experience of the working of the treaty had revealed, and the right of the States which had participated in drawing up the text to become parties to the treaty which they had helped to fashion. The Commission appreciated that in practice the parties would very often think it desirable to associate States entitled to become parties with the negotiation and conclusion of an amending agreement in order to encourage the widest possible participation in the treaty as amended. But it concluded that the right of those which had committed themselves to be bound by the treaty to proceed alone, if they thought fit, to embody desired improvements in an amending agreement should be recognized. It therefore decided that paragraph 3 should not go beyond conferring on the States entitled to become parties to the treaty a right to become parties to it as modified by the amending agreement; in other words, the paragraph should give them a right to become parties simultaneously to the treaty and to the amending agreement.

(11) *Paragraph 4* provides that an amending agreement does not bind a party to the treaty which does not become a party to the amending agreement. And, by its reference to article 26, paragraph 4(*b*), it further provides that as between such a party to the treaty and one which has become bound by the amending agreement, it is the unamended treaty which governs their mutual rights and obligations. This paragraph is, of course, no more than an application, in the case of amending agreements, of the general rule in article 30 that a treaty does not impose any obligation upon a State not a party to it. Nevertheless, without this paragraph the question might be thought to be left open whether by its very nature an instrument amending a prior treaty necessarily has legal effects for parties to the treaty. In some modern treaties the general rule in this paragraph is indeed displaced by a different provision laid down in the original treaty or by a contrary rule applied to treaties concluded within a particular international organization.[189] Article 3 of the Geneva Convention on Road Traffic (1949), for example, provides that any amendment adopted by a two-thirds majority of a conference shall come into force for all parties except those which make a declaration that they do not adopt the amendment. Article 16 of the International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail provides for amendments to come into force for all parties unless it is objected to by at least one-third.

(12) *Paragraph 5*, which has also been added at the present session, deals with the rather more complex case of a State which becomes a party to the treaty after the amending agreement has come into force between at least some of the parties to the treaty. As previously indicated, it is in practice very common that an amending agreement is ratified only by some of the parties to the original treaty. As a result two categories of parties to the treaty come into being: (*a*) those States which are parties only to the unamended treaty, and (*b*) those which are parties both to the treaty and to the amending agreement. Yet all are, in a general sense, parties to the treaty and have mutual relations under the treaty. Any State party only to the unamended treaty is bound by the treaty alone in its relations both with any other such State and with any State which is a party both to the treaty and to the amending agreement; for that is the effect of the rule in paragraph 4. On the other hand, as between any two States which are parties both to the treaty and the amending agreement it is the treaty as amended which applies. The problem then is what is to be the position of a State which only becomes a party to the original treaty after the amending agreement is already in force. This problem raises two basic questions. (1) Must the new party become or, in the absence of a contrary expression of intention, be presumed to become, a party both to the treaty and the amending agreement? (2) Must the new party become or, in the absence of a contrary expression of intention, be presumed to become a party to the unamended treaty vis-à-vis any State party to the treaty but not party to the amending agreement? These questions are far from being theoretical since they are apt to arise in practice whenever a general multilateral treaty is amended. Moreover, the Commission was informed by the Secretariat that it is by no means uncommon for a State to ratify or otherwise establish its consent to the treaty without giving any indication as to its intentions regarding the amending agreement; and that in these cases the instrument of ratification, acceptance, etc. is presumed by the Secretary-General in his capacity as a depositary to cover the treaty with its amendments.

(13) Some modern treaties foresee and determine the matter by a specific provision but the majority of treaties do not. The Commission accordingly thought it necessary that the present article should lay down a general rule to apply in the absence of any expression of intention in the treaty or by the State concerned. It considered that this rule should be based on two principles: (*a*) the right of the State, on becoming a party to the treaty, to decide whether to become a party to the treaty alone, to the treaty plus the amending agreement or to the amended treaty alone; (*b*) in the absence of any indication by the State, it is desirable to adopt a solution which will bring the maximum number of States into mutual relations under the treaty. Paragraph 5 therefore provides that, failing an expression of a different intention, a State which becomes a party after the amending agreement has come into force is to be considered as: (*a*) a party to the treaty as amended, and (*b*) a party also to the unamended treaty in its relations with any party to the treaty which is not bound by the amending agreement.

(14) The text of the article provisionally adopted by the Commission in 1964 contained a provision (paragraph 3 of the 1964 text) applying the principle *nemo potest venire contra factum proprium* to States which participate in the drawing up of an amending agreement but after-

[189] See the *Handbook of Final Clauses* (ST/LEG/6) pp. 135-148.

wards fail to become parties to it. The effect of the provision was to preclude them from objecting to the amending agreement's being brought into force between those States which did become parties to it. On re-examining this provision in the light of the comments of Governments the Commission concluded that it should be dispensed with. While recognizing that it would be very unusual for States which participate in the drawing up of an amending agreement to complain of the putting into force of the agreement as a breach of their rights under the original treaty, the Commission felt that it might be going too far to lay down an absolute rule in the sense of paragraph 3 of the 1964 text, applicable for every case.

Article 37.[190] Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole; and

(iii) is not prohibited by the treaty.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications to the treaty for which it provides.

Commentary

(1) This article, as already explained in the commentary to articles 35 and 36, deals not with "amendment" of a treaty but with an "*inter se* agreement" for its "modification"; that is, with an agreement entered into by some only of the parties to a multilateral treaty and intended to modify it between themselves alone. Clearly, a transaction in which two or a small group of parties set out to modify the treaty between themselves alone without giving the other parties the option of participating in it is on a different footing from an amending agreement drawn up between the parties generally, even if ultimately they do not all ratify it. For an *inter se* agreement is more likely to have an aim and effect incompatible with the object and purpose of the treaty. History furnishes a number of instances of *inter se* agreements which substantially changed the régime of the treaty and which overrode the objections of interested States. Nor can there be any doubt that the application, and even the conclusion, of an *inter se* agreement incompatible with the object and purpose of the treaty may raise a question of State responsibility. Under the present article, therefore, the main issue is the conditions under which *inter se* agreements may be regarded as permissible.

(2) *Paragraph 1*(a) necessarily recognizes that an *inter se* agreement is permissible if the possibility of such an agreement was provided for in the treaty: in other words, if "contracting out" was contemplated in the treaty. *Paragraph 1*(b) states that *inter se* agreements are to be permissible in other cases only if three conditions are fulfilled. First, the modification must not affect the enjoyment of the rights or the performance of the obligations of the other parties; that is, it must not prejudice their rights or add to their burdens. Secondly, it must not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty; for example, an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty would be incompatible with its object and purpose and not permissible under the present article. Thirdly, the modification must not be one prohibited by the treaty, as for example the prohibition on contracting out contained in article 20 of the Berlin Convention of 1908 for the Protection of Literary Property. These conditions are not alternative, but cumulative. The second and third conditions, it is true, overlap to some extent since an *inter se* agreement incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty. Nevertheless, the Commission thought it desirable for the principle contained in the second condition to be stated separately; and it is always possible that the parties might explicitly forbid any *inter se* modifications, thus excluding even minor modifications not caught by the second condition.

(3) *Paragraph 2* seeks to add a further protection to the parties against illegitimate modifications of the treaty by some of the parties through an *inter se* agreement by requiring them to notify the other parties in advance of their intention to conclude the agreement and of the modifications for which it provides. The text of this paragraph, as provisionally adopted in 1964, would have required them to notify the other parties only of the actual *conclusion* of the *inter se* agreement. On re-examining the paragraph in the light of the comments of Governments, however, the Commission concluded at the present session that the rule should require the notice to be given in advance of the conclusion of the agreement. The Commission considered that it is unnecessary and even inadvisable to require notice to be given while a proposal is merely germinating and still at an exploratory stage. It therefore expressed the requirement in terms of notifying their "intention to conclude the agreement and... the modifications to the treaty for which it provides" in order to indicate that it is only when a negotiation of an *inter se* agreement has reached a mature stage that notification need be given to the other parties. The Commission also concluded at the present session that, when a treaty contemplates the possibility of *inter se* agreements, it is desirable that the intention to conclude one should be notified to the other parties, unless the treaty itself dispenses with the need for notification. Even in such cases, it thought, the other parties ought

[190] 1964 draft, article 67.

to have a reasonable opportunity of satisfying themselves that the *inter se* agreement does not exceed what is contemplated by the treaty.

Article 38.[191] Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

Commentary

(1) This article covers cases where the parties by common consent in fact apply the treaty in a manner which its provisions do not envisage. Subsequent practice in the application of a treaty, as stated in article 27, paragraph 3(*b*), is authoritative evidence as to its interpretation when the practice is consistent, and establishes their understanding regarding the meaning of the provisions of the treaty. Equally, a consistent practice, establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions, may have the effect of modifying the treaty. In a recent arbitration between France and the United States regarding the interpretation of a bilateral air transport services agreement the tribunal, speaking of the subsequent practice of the parties, said:

> "This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could properly claim." [192]

And the tribunal in fact found that the agreement had been modified in a certain respect by the subsequent practice. Although the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice, legally the processes are distinct. Accordingly, the effect of subsequent practice in amending a treaty is dealt with in the present article as a case of modification of treaties.

(2) The article thus provides that a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions. In formulating the rule in this way the Commission intended to indicate that the subsequent practice, even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question.

(3) The text of the article, as provisionally adopted in 1964, contained two other paragraphs recognizing that a treaty may be modified:

(i) by a subsequent treaty between the parties relating to the same subject-matter, to the extent that their provisions are incompatible; and

(ii) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.

However, after re-examining these paragraphs in the light of the comments of Governments, the Commission decided to dispense with them. It considered that the case of a modification effected through the conclusion of a subsequent treaty relating to the same subject-matter is sufficiently covered by the provisions of article 26, paragraphs 3 and 4. As to the case of modification through the emergence of a new rule of customary law, it concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties to the treaty. It further considered that the question formed part of the general topic of the relation between customary norms and treaty norms which is too complex for it to be safe to deal only with one aspect of it in the present article.

Part V.—Invalidity, termination and suspension of the operation of treaties

Section 1: General provisions

Article 39.[193] Validity and continuance in force of treaties

1. The validity of a treaty may be impeached only through the application of the present articles. A treaty the invalidity of which is established under the present articles is void.

2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Commentary

(1) The substantive provisions of the present part of the draft articles concern a series of grounds upon which the question of the invalidity or termination of a treaty or of the withdrawal of a party from a treaty or the suspension of its operation may be raised. The Commission accordingly considered it desirable, as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles.

(2) *Paragraph 1* thus provides that the validity of a treaty may be impeached only through the application of the present articles.

(3) *Paragraph 2* is necessarily a little different in its wording since a treaty not infrequently contains specific provisions regarding its termination or denunciation, the withdrawal of parties or the suspension of the opera-

[191] 1964 draft, article 68.

[192] Decided at Geneva on 22 December 1963, the arbitrators being R. Ago (President), P. Reuter and H. P. de Vries. (Mimeographed text of decision of the Tribunal, pp. 104 and 105.)

[193] 1963 draft, article 30.

tion of its provisions. This paragraph consequently provides that a treaty may be terminated or denounced or withdrawn from or its operation suspended only as a result of the application *of the terms of the treaty or of the present articles.*

(4) The phrase "application of the present articles" used in both paragraphs refers, it needs to be stressed, to the draft articles as a whole and not merely to the particular article dealing with the particular ground of invalidity or termination in question in any given case. In other words, it refers not merely to the article dealing with the ground of invalidity or termination relevant in the case but also to other articles governing the conditions for putting that article into effect; for example, article 4 (treaties which are constituent instruments of international organizations), article 41 (separability of treaty provisions), article 42 (loss of a right to invoke a ground for invalidating, terminating, etc.) and, notably, articles 62 (procedure to be followed) and 63 (instruments to be used).

(5) The words "only through the application of the present articles" and "only as a result of the application of the present articles" used respectively in the two paragraphs are also intended to indicate that the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles are exhaustive of all such grounds, apart from any special cases expressly provided for in the treaty itself. In this connexion, the Commission considered whether "obsolescence" or "desuetude" should be recognized as a distinct ground of termination of treaties. But it concluded that, while "obsolescence" or "desuetude" may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty. In the Commission's view, therefore, cases of "obsolescence" or "desuetude" may be considered as covered by article 51, paragraph (*b*), under which a treaty may be terminated "at any time by consent of all the parties". Again, although a change in the legal personality of a party resulting in its disappearance as a separate international person may be a factual cause of the termination of a bilateral treaty, this does not appear to be a distinct legal ground for terminating a treaty requiring to be covered in the present articles. A bilateral treaty, lacking two parties, may simply cease any longer to exist, while a multilateral treaty in such circumstances may simply lose a party. The Commission also considered the questions whether account should be taken of the possible implications of a succession of States or of the international responsibility of a State in regard to the termination of treaties. However, without adopting any position on the substance of these questions, the Commission decided that cases of a succession of States and of the international responsibility of a State, both of which topics it has under separate study, should be left aside from the present articles on the law of treaties. Since these cases may possibly have implications in other parts of the law of treaties, the Commission further decided to make in article 69 a general reservation regarding them covering the draft articles as a whole.

Article 40.[194] Obligations under other rules of international law

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present articles or of the terms of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law.

Commentary

(1) This article did not appear, in its present general form, among the articles of part II transmitted to Governments in 1963. A similar provision was included in paragraph 4 of article 53 but was there confined to cases of "termination". In that context the Commission considered that although the point might be regarded as axiomatic, it was desirable to underline that the termination of a treaty would not release the parties from obligations embodied in the treaty to which they were also subject under any other rule of international law. In re-examining the articles on invalidity and suspension of operation of treaties at the second part of its seventeenth session[195] the Commission concluded that it was no less desirable to underline the point in these contexts. Accordingly, it decided to delete paragraph 4 from article 53 of the 1963 draft and to replace it with a general article at the beginning of this part applying the rule in every case where a treaty is invalidated, terminated or denounced or its operation suspended.

Article 41.[196] Separability of treaty provisions

1. A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may only be invoked with respect to the whole treaty except as provided in the following paragraphs or in article 57.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:

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

(*b*) Acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

4. Subject to paragraph 3, in cases falling under articles 46 and 47 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or to the particular clauses alone.

[194] New article. A similar provision was included in article 53, paragraph 4, of the 1963 draft, but was there confined to cases of termination.

[195] See 842nd meeting.

[196] 1963 draft, article 46.

5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted.

Commentary

(1) The separability of treaty provisions was until comparatively recently considered almost exclusively in connexion with the right to terminate a treaty on the ground of a breach of the other party. Certain modern authorities, however, have advocated recognition of the principle of separability in cases of invalidity and in determining the effect of war upon treaties. They have urged that in some cases one provision of a treaty may be struck out or suspended without necessarily disturbing the balance of the rights and obligations established by the other provisions of the treaty. These authorities cite in support of their contentions certain pronouncements of the Permanent Court of International Justice in regard to the interpretation of self-contained parts of treaties.[197] The question of the separability of treaty provisions for the purposes of interpretation raises quite different issues from the application of the principle of separability to the invalidity or termination of treaties. However, if the jurisprudence of the two Courts does not throw much light on these latter questions, it is clear that certain judges in separate opinions in the *Norwegian Loans*[198] and *Interhandel*[199] cases accepted the applicability of the principle of separating treaty provisions in the case of the alleged nullity of a unilateral declaration under the Optional Clause, by reason of a reservation the validity of which was contested.

(2) In these circumstances, the Commission decided that it should examine *de novo* the appropriateness and utility of recognizing the principle of separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties. It further decided that in order to determine the appropriateness of applying the principle in these contexts each article should be examined in turn, since different considerations might well apply in the various articles. The Commission concluded that, subject to certain exceptions, it was desirable to admit the relevance of the principle of separability in the application of grounds of invalidity, termination and suspension. In general, it seemed to the Commission inappropriate that treaties between sovereign States should be capable of being invalidated, terminated or suspended in operation in their entirety even in cases where the ground of invalidity, termination or suspension may relate to quite secondary provisions in the treaty. It also seemed to the Commission that it would sometimes be possible in such cases to eliminate those provisions without materially upsetting the balance of the interests of the parties under the treaty. On the other hand, the Commission recognized that the consensual character of all treaties, whether contractual or law-making, requires that the principle of separability should not be applied in such a way as materially to alter the basis of obligation upon which the consents to the treaty were given. Accordingly, it sought to find a solution which would respect the original basis of the treaty and which would also prevent the treaty from being brought to nothing on grounds relating to provisions which were not an essential basis of the consent.

(3) The Commission did not consider that the principle of separability should be made applicable to a right of denunciation, termination, etc. provided for in the treaty. In the case of a right provided for in the treaty, it is for the parties to lay down the conditions for the exercise of the right; and, if they have not specifically contemplated a right to denounce, terminate, etc. parts only of the treaty, the presumption is that they intended the right to relate to the whole treaty. *Paragraph 1* of the article accordingly provides that a right provided for in the treaty is exercisable only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

(4) The Commission, while favouring the recognition of the principle of separability in connexion with the application of grounds of invalidity, termination, etc., considered it desirable to underline that the integrity of the provisions of the treaty is the primary rule. Accordingly, *paragraph 2* of the article lays down that a ground of invalidity, termination, etc. may be invoked only with respect to the whole treaty except in the cases provided for in the later paragraphs and in cases of breach of the treaty.

(5) *Paragraph 3* then lays down that, if a ground relates to particular clauses alone which are clearly separable from the remainder of the treaty in regard to their application and the acceptance of which was not an essential basis of the consent of the other party or parties to the treaty as a whole, the ground may only be invoked with respect to those clauses. Thus, if these conditions are satisfied, the paragraph requires the separation of the invalid, terminated, denounced or suspended clauses from the remainder of the treaty and the maintenance of the remainder in force. The question whether the condition in sub-paragraph (*b*)—whether acceptance of the clause was not an essential basis of the consent to the treaty as a whole—was met would necessarily be a matter to be established by reference to the subject-matter of the clauses, their relation to the other clauses, to the *travaux préparatoires* and to the circumstances of the conclusion of the treaty.

(6) *Paragraph 4*, while still making the question of the separability of the clauses subject to the conditions contained in paragraph 3, lays down a different rule for cases of fraud (article 46) and corruption (article 47). In these cases the ground of invalidity may, of course, be invoked only by the State which was the victim of the fraud or corruption, and the Commission considered that it should have the option either to invalidate the whole treaty or the particular clauses to which the fraud or corruption related.

(7) *Paragraph 5* excepts altogether from the principle of separability cases of coercion of a representative (article 48) and coercion of a State (article 49). The Com-

[197] E.g. the *Free Zones* case, Series A/B, No. 46, p. 140; the s.s. *Wimbledon* case, Series A, No. 1, p. 24.

[198] *I.C.J. Reports 1957*, pp. 55-59.

[199] *I.C.J. Reports 1959*, pp. 57, 77, 78, 116 and 117.

mission considered that where a treaty has been procured by the coercion either of the State or of its representative, there were imperative reasons for regarding it as absolutely void in all its parts. Only thus, in the opinion of the Commission, would it be possible to ensure that the coerced State, when deciding upon its future treaty relations with the State which had coerced it, would be able to do so in a position of full freedom from the coercion.

(8) Paragraph 5 also excepts altogether from the principle of separability the case of a treaty which, when concluded, conflicts with a rule of *jus cogens* (article 50). Some members were of the opinion that it was undesirable to prescribe that the whole treaty should be brought to the ground in cases where only one part—and that a small part—of the treaty was in conflict with a rule of *jus cogens*. The Commission, however, took the view that rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid. In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction.

Article 42.[200] Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 inclusive or articles 57 to 59 inclusive if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(*b*) It must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation.

Commentary

(1) The foundation of the principle that a party is not permitted to benefit from its own inconsistencies is essentially good faith and fair dealing (*allegans contraria non audiendus est*). The relevance of this principle in international law is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases.[201]

(2) The principle[202] has a particular importance in the law of treaties. As already mentioned in previous commentaries, the grounds upon which treaties may be invalidated, terminated or suspended in operation involve certain risks of abuse. Another risk is that a State, after becoming aware of an essential error in the conclusion of the treaty, an excess of authority committed by its representative, a breach by the other party, etc., may continue with the treaty as if nothing had happened, and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. The principle now under consideration places a limit upon the cases in which such claims can be asserted with any appearance of legitimacy. Such was the role played by the principle in the *Temple* case and in the case of the *Arbitral Award of the King of Spain*. Accordingly, while recognizing the general character of the principle, the Commission considered that its importance in the sphere of the invalidity and termination of treaties called for its particular mention in this part of the law of treaties.

(3) The most obvious instance is where after becoming aware of a possible ground of invalidity, termination, withdrawal or suspension the party concerned has expressly agreed that the treaty is, as the case may be, valid, in force or in operation. Clearly, in those circumstances the State must be considered to have given up once and for all its right to invoke the particular ground of invalidity, termination, withdrawal or suspension in question; and sub-paragraph (*a*) of the article so provides.

(4) Sub-paragraph (*b*) provides that a right to invoke a ground of invalidity, termination, etc. shall also be no longer exercisable if after becoming aware of the facts a State's conduct has been such that it must be considered as having acquiesced, as the case may be, in the validity of the treaty or its maintenance in force or in operation. In such a case the State is not permitted to take up a legal position which is in contradiction with the position which its own previous conduct must have led the other parties to suppose that it had taken up with respect to the validity, maintenance in force or maintenance in operation of the treaty. The Commission noted that in municipal systems of law this principle has its own particular manifestations reflecting technical features of the particular system. It felt that these technical features of the principle in municipal law might not necessarily be appropriate for the application of the principle in international law. For this reason, it preferred to avoid the use of such municipal law terms as "estoppel".

(5) The Commission considered that the application of the rule in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith. This being so, the principle would not operate if the State in question had not been aware of the facts giving rise to the right or had not been in a position freely to exercise its right to invoke the nullity of the treaty. For the latter reason the Commission did not think that the principle should be applicable at all in cases of coercion of a representative under article 48 or coercion of the State itself under article 49. The effects and the implications of coercion in international relations are of such gravity that the Commission felt that a consent so obtained must be treated as absolutely void in order to ensure that the victim of the coercion should afterwards be in a position freely to determine its future relations with the State which coerced it. To admit the

[200] 1963 draft, article 47.

[201] *The Arbitral Award made by the King of Spain, I.C.J. Reports 1960*, pp. 213 and 214; *The Temple of Preah Vihear, I.C.J. Reports 1962*, pp. 23-32.

[202] See opinion of Judges Alfaro and Fitzmaurice in *The Temple of Preah Vihear, I.C.J. Reports 1962*, pp. 39-51, 62-65.

application of the present article in cases of coercion might, in its view, weaken the protection given by articles 48 and 49 to the victims of coercion. The Commission also considered it inappropriate that the principle should be admitted in cases of *jus cogens* or of supervening *jus cogens*; and, clearly, it would not be applicable to termination under a right conferred by the treaty or to termination by agreement. Consequently, it confined the operation of the rule to articles 43-47 and 57-59.

Section 2: Invalidity of treaties

Article 43.[203] Provisions of internal law regarding competence to conclude a treaty

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest.

Commentary

(1) Constitutional limitations affecting the exercise of the treaty-making power take various forms.[204] Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the State unless "approved" or confirmed in some manner by a legislative organ; others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties. Legally, a distinction can be drawn under internal law between those types of provision which place constitutional limits upon the power of a government to enter into treaties and those which merely limit the power of a government to enforce a treaty within the State's internal law without some form of endorsement of the treaty by the legislature. The former can be said to affect the actual power of the executive to conclude a treaty, the latter merely the power to implement a treaty when concluded. The question which arises under this article is how far any of these constitutional limitations may affect the validity under international law of a consent to a treaty given by a State agent ostensibly authorized to declare that consent; and on this question opinion has been divided.

(2) Some jurists maintain that international law leaves it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty shall be formed and expressed; and that constitutional laws governing the formation and expression of a State's consent to a treaty have always to be taken into account in considering whether an international act of signature, ratification, acceptance, approval or accession is effective to bind the State. On this view, internal laws limiting the power of State organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the State in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty. If this view were to be accepted, it would follow that other States would not be entitled to rely on the authority to commit the State ostensibly possessed by a Head of State, Prime Minister, Foreign Minister, etc., under article 6; they would have to satisfy themselves in each case that the provisions of the State's constitution are not infringed or take the risk of subsequently finding the treaty void.

(3) In 1951 the Commission itself adopted an article based upon this view.[205] Some members, however, were strongly critical of the thesis that constitutional limitations are incorporated into international law, while the Assistant Secretary-General for Legal Affairs expressed misgivings as to the difficulties with which it might confront depositaries. During the discussion at that session it was said that the Commission's decision had been based less on legal principles than on a belief that States would not accept any other rule.

(4) Other jurists, while basing themselves on the incorporation of constitutional limitations into international law, recognize that some qualification of that doctrine is essential if it is not to undermine the security of treaties. According to them, good faith requires that only notorious constitutional limitations with which other States can reasonably be expected to acquaint themselves should be taken into account. On this view, a State contesting the validity of a treaty on constitutional grounds may invoke only those provisions of the constitution which are notorious. A compromise solution based upon the initial hypothesis of the invalidity in international law of an unconstitutional signature, ratification, etc., of a treaty presents certain difficulties. If a limitation laid down in the internal law of a State is to be regarded as effective in international law to curtail the authority of a Head of State or other State agent to declare the State's consent to a treaty, it is not clear upon what principle a "notorious" limitation is effective for that purpose but a "non-notorious" one is not. Under the State's internal law both kinds of limitation are legally effective to curtail the agent's authority to enter into the treaty. The practical difficulties are even greater, because in many cases it is quite impossible to make a clear-cut distinction between notorious and non-notorious limitations. Some constitutional provisions are capable of subjective interpretation, such as a requirement that "political" treaties or treaties of "special importance" should be submitted to the legislature; some laws do not make it clear on their face whether the limitation refers to the power to conclude the treaty or to its effectiveness within domestic law. But even when the provisions are

[203] 1963 draft, article 31.

[204] See *United Nations Legislative Series, Laws and Practices concerning the Conclusions of Treaties* (ST/LEG/SER.B/3).

[205] Article 2: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." (*Yearbook of the International Law Commission, 1951*, vol. II, p. 73.)

apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive. Where the constitution itself contains apparently strict and precise limitations it has usually been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in internal law; and this use of the treaty-making power is reconciled with the letter of the law either by a process of interpretation or by the development of political understandings. Furthermore, the constitutional practice in regard to treaties in simplified form tends to be somewhat flexible; and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judgment of the executive, whose decision may afterwards be challenged in the legislature or in the courts. Accordingly, in many cases it may be difficult to say with any certainty whether, if contested, a given treaty would be held under national law to fall within an internal limitation, or whether an international tribunal would hold the internal provision to be one that is "notorious" and "clear" for the purposes of international law.

(5) A third group of jurists considers that international law leaves to each State the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. According to this view, international law determines the procedures and conditions under which States express their consent to treaties on the international plane; and it also regulates the conditions under which the various categories of State organs and agents will be recognized as competent to carry out such procedures on behalf of their State. In consequence, if an agent, competent under international law to commit the State, expresscs the consent of the State to a treaty through one of the established procedures, the State is held bound by the treaty in international law. Under this view, failure to comply with internal requirements may entail the invalidity of the treaty as domestic law, and may also render the agent liable to legal consequences under domestic law; but it does not affect the validity of the treaty in international law so long as the agent acted within the scope of his authority under international law. Some of these writers [206] modify the stringency of the rule in cases where the other State is actually aware of the failure to comply with internal law or where the lack of constitutional authority is so manifest that the other State must be deemed to have been aware of it. As the basic principle, according to the third group, is that a State is entitled to assume the regularity of what is done within the authority possessed by an agent under international law, it is logical enough that the State should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.

(6) The decisions of international tribunals and State practice, if they are not conclusive, appear to support a solution based upon the position taken by the third group. The international jurisprudence is admittedly not very extensive. The *Cleveland* award [207] (1888) and the *George Pinson* case [208] (1928), although not involving actual decisions on the point, contain observations favouring the relevance of constitutional provisions to the international validity of treaties. On the other hand, the *Franco-Swiss Custom* case [209] (1912) and the *Rio Martin* case [210] (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the *Metzger* case [211] contains an observation in the same sense. Furthermore, pronouncements in the *Eastern Greenland* [212] and *Free Zones* [213] cases, while not directly in point, seem to indicate that international tribunals will not readily go behind the ostensible authority under international law of a State agent—a Foreign Minister and an Agent in international proceedings in the cases mentioned—to commit his State.

(7) State practice furnishes examples of claims that treaties were invalid on constitutional grounds, but in none of them was that claim admitted by the other party to the dispute. Moreover, in three instances—the admission of Luxembourg to the League, the Politis incident and the membership of Argentina—the League of Nations seems to have acted upon the principle that a consent given on the international plane by an ostensibly competent State agent is not invalidated by the subsequent disclosure that the agent lacked constitutional authority to commit his State. Again, in one case a depositary, the United States Government, seems to have assumed that an ostensibly regular notice of adherence to an agreement could not be withdrawn on a plea of lack of constitutional authority except with the consent of the other parties. Nor is it the practice of State agents, when concluding treaties, to cross-examine each other as to their constitutional authority to affix their signatures to a treaty or to deposit an instrument of ratification, acceptance, etc.

(8) The view that a failure to comply with constitutional provisions should not normally be regarded as vitiating a consent given in due form by an organ or agent ostensibly competent to give it, appears to derive support from two further considerations. The first is that international law has devised a number of treaty-making procedures—ratification, acceptance, approval and accession—specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the State should become a party to it, and also of enabling them to take account of any domestic constitutional requirements. When a treaty has been made subject to ratification, acceptance or approval, the negotiating States would seem to have done all that

[206] UNESCO, "*Survey on the Ways in which States interpret their International Obligations*", p. 8.

[207] Moore, *International Arbitrations*, vol. 2, p. 1946.

[208] *Reports of International Arbitral Awards*, vol. V, p. 327.

[209] *Ibid.*, vol. XI, p. 411.

[210] *Ibid.*, vol. II, p. 724.

[211] *Foreign Relations of the United States*, 1901, p. 262.

[212] *P.C.I.J.*, Series A/B, No. 53, pp. 56-71 and p. 91.

[213] *P.C.I.J.*, Series A/B, No. 46, p. 170.

can reasonably be demanded of them in the way of taking account of each other's constitutional requirements. It would scarcely be reasonable to expect each Government subsequently to follow the internal handling of the treaty by each of the other Governments, while any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. The same considerations apply in cases of accession where the Government has the fullest opportunity to study the treaty and give effect to constitutional requirements before taking any action on the international plane to declare the State's accession to the treaty. Again, in the case of a treaty binding upon signature it is the Government which authorizes the use of this procedure; the Government is aware of the object of the treaty before the negotiations begin and, with modern methods of communication, it normally has knowledge of the exact contents of the treaty before its representative proceeds to the act of signature; moreover, if necessary, its representative can be instructed to sign *ad referendum*. Admittedly, in the case of treaties binding upon signature, and more especially those in simplified form, there may be a slightly greater risk of a constitutional provision being overlooked. But even in those cases the Government had the necessary means of controlling the acts of its representative and of giving effect to any constitutional requirements. In other words, in every case any failure to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the Government of the State concerned.

(9) The second consideration is that the majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. Confronted with a challenge under national law of the constitutional validity of a treaty, a Government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere.

(10) At the fifteenth session some members of the Commission expressed the opinion that international law has to take account of internal law to the extent of recognizing that internal law determines the organ or organs competent in the State to exercise the treaty-making power. On this view, any treaty concluded by an organ or representative not competent to do so under internal law would be invalidated by reason of the lack of authority under internal law to give the State's consent to the treaty. The majority, however, considered that the complexity and uncertain application of provisions of internal law regarding the conclusion of treaties creates too large a risk to the security of treaties. They considered that the basic principle of the present article should be that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a State organ or agent competent under international law to give that consent. Some members, indeed, took the view that it was undesirable to weaken this basic principle in any way by admitting any exception to it. Other members, however, considered that it would be admissible to allow an exception in cases where the violation of the internal law regarding competence to enter into treaties was absolutely manifest. They had in mind cases, such as have occurred in the past, where a Head of State enters into a treaty on his own responsibility in contravention of an unequivocal provision of the constitution. They did not feel that to allow this exception would compromise the basic principle, since the other State could not legitimately claim to have relied upon a consent given in such circumstances. This view prevailed in the Commission.

(11) The great majority of the Governments which have commented on this article have indicated their approval of the position taken up by the Commission on this problem: namely, that a violation of a provision of internal law regarding competence to conclude treaties may not be invoked as invalidating consent unless that violation was manifest. Some Governments suggested that the text should indicate, on the one hand, to whom the violation must be "manifest" for the purpose of bringing the exception into play and, on the other, what constitutes a "manifest violation". The Commission considered, however, that it is unnecessary to specify further to whom the violation must be manifest. The rule embodied in the article is that, when the violation of internal law regarding competence to conclude treaties would be *objectively evident to any State dealing with the matter normally and in good faith*, the consent to the treaty purported to be given on behalf of the State may be repudiated. In the Commission's view, the word "manifest" according to its ordinary meaning is sufficient to indicate the objective character of the criterion to be applied. It was also of the opinion that it would be impracticable and inadvisable to try to specify in advance the cases in which a violation of internal law may be held to be "manifest", since the question must depend to a large extent on the particular circumstances of each case.

(12) In order to emphasize the exceptional character of the cases in which this ground of invalidity may be invoked, the Commission decided that the rule should be stated in negative form. The article thus provides that "A State may *not* invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent *unless* that violation of its internal law was manifest".

Article 44.[214] Specific restrictions on authority to express the consent of the State

If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a

[214] 1963 draft, article 32, para. 2.

consent expressed by him unless the restriction was brought to the knowledge of the other negotiating States prior to his expressing such consent.

Commentary

(1) This article covers cases where a representative has purported to execute an act binding his State but in fact lacked authority to do so, because in the particular case his authority was made subject to specific restrictions which he omitted to observe.

(2) Where a treaty is not to become binding without subsequent ratification, acceptance or approval, any excess of authority committed by a representative in establishing the text of the treaty will automatically be dealt with at the subsequent stage of ratification, acceptance or approval. The State in question will then have the clear choice either of repudiating the text established by its representative or of ratifying, accepting or approving the treaty; and if it does the latter, it will necessarily be held to have endorsed the unauthorized act of its representative and, by doing so, to have cured the original defect of authority. Accordingly, the article is confined to cases in which the defect of authority relates to the execution of an act by which a representative purports *finally* to establish his State's consent to be bound. In other words, it is confined to cases where a representative authorized, subject to specific conditions, reservations or limitations, to express the consent of his State to be bound by a particular treaty exceeds his authority by omitting to observe those restrictions upon it.

(3) The Commission considered that in order to safeguard the security of international transactions, the rule must be that specific instructions given by a State to its representative are only effective to limit his authority vis-à-vis other States if they are made known to them in some appropriate manner before the State in question concludes the treaty. That this is the rule acted on by States is suggested by the rarity of cases in which a State has sought to disavow the act of its representative by reference to undisclosed limitations upon his authority. The article accordingly provides that specific restrictions on a representative's authority are not to affect a consent to a treaty expressed by him unless they had been brought to the notice of the other negotiating States prior to his expressing that consent.

Article 45.[215] Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

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

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 74 then applies.

[215] 1963 draft, article 34.

Commentary

(1) In municipal law error occupies a comparatively large place as a factor which vitiates consent to a contract. Some types of error found in municipal law are, however, unlikely to arise in international law. Moreover, treaty-making processes are such as to reduce to a minimum the risk of errors on material points of substance. In consequence, the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent. Almost all the recorded instances concern geographical errors, and most of them concern errors in maps. In some instances, the difficulty was disposed of by a further treaty; in others the error was treated more as affecting the application of the treaty than its validity and the point was settled by arbitration.

(2) The effect of error was discussed in the *Legal Status of Eastern Greenland* case before the Permanent Court of International Justice, and again in the *Temple of Preah Vihear* case before the present Court. In the former case[216] the Court contented itself with saying that the Norwegian Foreign Minister's reply had been definitive and unconditional and appears not to have considered that there was any relevant error in the case. Judge Anzilotti, while also considering that there was no error, said: "But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty..."[217]

(3) In the first stage of the *Temple* case[218] the Court said: "Any error of this kind would evidently have been an error of law, but in any event the Court does not consider that the issue in the present case is really one of error. Furthermore, the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given." A plea of error was also raised in the second stage of the case on the merits; and the error, which was geographical, arose in somewhat special circumstances. There was no error in the conclusion of the original treaty, in which the parties were agreed that the boundary in a particular area should be the line of a certain watershed; the error concerned the subsequent acceptance of the delimitation of the boundary on a map. As to this error, the Court said: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."[219]

[216] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 71 and 91.

[217] *Ibid.*, p. 92.

[218] *I.C.J. Reports 1961*, p. 30.

[219] *I.C.J. Reports 1962*, p. 26. See also the individual opinion of Sir G. Fitzmaurice (*Ibid.*, p. 57).

(4) The *Eastern Greenland* and *Temple* cases throw light on the conditions under which error will *not* vitiate consent rather than on those under which it will do so. However, in the *Readaptation of the Mavrommatis Jerusalem Concessions* case,[220] which concerned a concession not a treaty, the Court held that an error in regard to a matter not constituting a *condition* of the agreement would not suffice to invalidate the consent; and it seems to be generally agreed that, to vitiate the consent of a State to a treaty, an error must relate to a matter constituting an essential basis of its consent to the treaty.

(5) The Commission recognized that some systems of law distinguish between mutual and unilateral error; but it did not consider that it would be appropriate to make this distinction in international law. Accordingly, the present article applies to an error made by only one party no less than to a mutual error made by both or all the parties.

(6) *Paragraph 1* formulates the general rule that an error in a treaty may be invoked by a party as vitiating its consent where the error related to a fact or situation assumed by that party to exist at the time that the treaty was concluded and constituting an essential basis of its consent to the treaty. The Commission appreciated that an error in a treaty may sometimes involve mixed questions of fact and of law and that the line between an error of fact and of law may not always be an easy one to draw. Nevertheless, it considered that to introduce into the article a provision appearing to admit an error of law as in itself a ground for invalidating consent would dangerously weaken the stability of treaties. Accordingly, the paragraph speaks only of errors relating to a "fact" or "situation".

(7) Under paragraph 1 error affects consent only if it was an essential error in the sense of an error as to a matter which formed an essential basis of the consent given to the treaty. Furthermore, such an error does not make the treaty automatically void, but gives a right to the party whose consent to the treaty was caused by the error to invoke the error as invalidating its consent. On the other hand, if the invalidity of the treaty is established in accordance with the present articles, the effect will be to make the treaty void *ab initio*.

(8) *Paragraph 2* excepts from the rule cases where the mistaken party in some degree brought the error upon itself. The terms in which the exception is formulated are drawn from those used by the Court in the sentence from its judgment in the *Temple* case which is cited at the end of paragraph (3) above. The Commission felt, however, that there is substance in the view that the Court's formulation of the exception "if the party contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error" is so wide as to leave little room for the operation of the rule. This applies particularly to the words "or could have avoided it". Accordingly, without questioning the Court's formulation of the exception in the context of the particular case, the Commission concluded that, in codifying the general rule regarding the effect of error in the law of treaties, those words should be omitted.

(9) *Paragraph 3*, in order to prevent any misunderstanding, distinguishes errors in the *wording* of the text from errors in the treaty. The paragraph merely underlines that such an error does not affect the validity of the consent and falls under the provisions of article 74 relating to the correction of errors in the texts of treaties.

Article 46.[221] Fraud

A State which has been induced to conclude a treaty by the fraudulent conduct of another negotiating State may invoke the fraud as invalidating its consent to be bound by the treaty.

Commentary

(1) Clearly, cases in which Governments resort to deliberate fraud in order to procure the conclusion of a treaty are likely to be rare, while any fraudulent misrepresentation of a material fact inducing an essential error would be caught by the provisions of the preceding article dealing with error; the question therefore arises whether it is necessary to have a separate article dealing specifically with fraud. On balance the Commission considered that it was advisable to keep fraud and error distinct in separate articles. Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely affect the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties.

(2) Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. In international law, the paucity of precedents means that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept. In these circumstances, the Commission considered whether it should attempt to define fraud in the law of treaties. The Commission concluded, however, that it would suffice to formulate the general concept of fraud applicable in the law of treaties and to leave its precise scope to be worked out in practice and in the decisions of international tribunals.

(3) The article uses the English word "fraud", the French word "*dol*" and the Spanish word "*dolo*" as the nearest terms available in those languages for identifying the concept with which the article is concerned. These words are not intended to convey that all the detailed connotations given to them in internal law are necessarily applicable in international law. It is the broad concept comprised in each of these words, rather than its detailed applications in internal law, that is dealt with in the present article. The word used in each of the three texts is accordingly intended to have the same meaning and

[220] *P.C.I.J.*, Series A, No. 11.

[221] 1963 draft, article 33.

scope in international law. The Commission sought to find a non-technical expression of as nearly equivalent meaning as possible: fraudulent conduct, *conduite frauduleuse* and *conducta fraudulenta*. This expression is designed to include any false statements, misrepresentations or other deceitful proceedings by which a State is induced to give a consent to a treaty which it would not otherwise have given.

(4) The effect of fraud, the Commission considers, is not to render the treaty *ipso facto* void but to entitle the injured party, if it wishes, to invoke the fraud as invalidating its consent; the article accordingly so provides.

Article 47.[222] Corruption of a representative of the State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Commentary

(1) The draft articles on the invalidity of treaties provisionally adopted by the Commission in 1963 and transmitted to Governments for their observations did not contain any provision dealing specifically with the corruption of a State's representative by another negotiating State. The only provision of the 1963 text under which the corruption of a representative might be subsumed was article 33 dealing with fraud. At the second part of the seventeenth session, however, in connexion with its re-examination of article 35 (personal coercion of a representative)—now article 48—some members of the Commission expressed doubts as to whether corruption of a representative can properly be regarded as a case of fraud. The Commission therefore decided to reconsider the question at the present session with a view to the possible addition of a specific provision concerning corruption in either former article 33 or 35.

(2) At the present session certain members of the Commission were opposed to the inclusion in the draft articles of any specific provision regarding "corruption". These members considered such a provision to be unnecessary especially since the use of corruption, if it occurred, would in their view fall under the present article 46 as a case of fraud. Corruption, they maintained, is not an independent cause of defective consent but merely one of the possible means of securing consent through "fraud" or "*dol*". It would thus be covered by the expression "fraudulent conduct" (*conduite frauduleuse, conducta fraudulenta*) in article 46.

(3) The majority of the Commission, however, considered that the corruption of a representative by another negotiating State undermines the consent which the representative purports to express on behalf of his State in a quite special manner which differentiates the case from one of fraud. Again, although the corruption of a representative may in some degree be analogous to his coercion by acts directed against him personally, the Commission considered that cases of threat or use of force against a representative are of such particular gravity as to make it desirable to treat the two grounds of invalidity in separate articles. Nor did it think that "corruption" could be left aside altogether from the draft articles. It felt that in practice attempts to corrupt are more likely than attempts to coerce a representative; and that, having regard to the great volume of treaties concluded to-day and the great variety of the methods of concluding them, a specific provision on the subject is desirable. Accordingly, it decided to cover "corruption" in a new article inserted between the article dealing with "fraud" and that dealing with "coercion of a representative of a State".

(4) The strong term "corruption" is used in the article expressly in order to indicate that only acts calculated to exercise a substantial influence on the disposition of the representative to conclude the treaty may be invoked as invalidating the expression of consent which he has purported to give on behalf of his State. The Commission did not mean to imply that under the present article a small courtesy or favour shown to a representative in connexion with the conclusion of a treaty may be invoked as a pretext for invalidating the treaty.

(5) Similarly, the phrase "directly or indirectly by another negotiating State" is used in the article in order to make it plain that the mere fact of the representative's having been corrupted is not enough. The Commission appreciated that corruption by another negotiating State, if it occurs, is unlikely to be overt. But it considered that, in order to be a ground for invalidating the treaty, the corrupt acts must be shown to be directly or indirectly imputable to the other negotiating State.

(6) The Commission was further of the opinion that in regard to its legal incidents "corruption" should be assimilated to "fraud" rather than to "coercion of a representative". Accordingly, for the purposes of article 41, paragraph 4, concerning the separability of treaty provisions, article 42, concerning loss of a right to invoke a ground of invalidity, and article 65, paragraph 3, concerning the consequences of the invalidity of a treaty, cases of corruption are placed on the same footing as cases of fraud.

Article 48.[223] Coercion of a representative of the State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

Commentary

(1) There is general agreement that acts of coercion or threats applied to individuals *with respect to their own persons or in their personal capacity* in order to procure the signature, ratification, acceptance or approval of a

[222] New article.

[223] 1963 draft, article 35.

treaty will unquestionably invalidate the consent so procured. History provides a number of instances of the employment of coercion against not only negotiators but also members of legislatures in order to procure the signature or ratification of a treaty. It is true that in some instances it may not be possible to distinguish completely between coercion of a Head of State or Minister as a means of coercing the State itself and coercion of them in their personal capacities. For example, something like third-degree methods of pressure were employed in 1939 for the purpose of extracting the signatures of President Hacha and the Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, as well as the gravest threats against their State. Nevertheless, the two forms of coercion, although they may sometimes be combined, are, from a legal point of view, somewhat different; the Commission has accordingly placed them in separate articles.

(2) The present article deals with the coercion of the individual representatives "through acts or threats directed against him personally". This phrase is intended to cover any form of constraint of or threat against a representative affecting him as an individual and not as an organ of his State. It would therefore include not only a threat to his person, but a threat to ruin his career by exposing a private indiscretion, as also a threat to injure a member of the representative's family with a view to coercing the representative.

(3) The Commission gave consideration to the question whether coercion of a representative, as distinct from coercion of the State, should render the treaty *ipso facto* void or whether it should merely entitle it to invoke the coercion of its representative as invalidating its consent to the treaty. It concluded that the use of coercion against the representative of a State for the purpose of procuring the conclusion of a treaty would be a matter of such gravity that the article should provide for the absolute nullity of a consent to a treaty so obtained.

Article 49.[224] Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.

Commentary

(1) The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which held that such treaties should no longer be recognized as legally valid. The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2(4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law. The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of to-day.

(2) Some jurists, it is true, while not disputing the moral value of the principle, have hesitated to accept it as a legal rule. They fear that to recognize the principle as a legal rule may open the door to the evasion of treaties by encouraging unfounded assertions of coercion, and that the rule will be ineffective because the same threat or compulsion that procured the conclusion of the treaty will also procure its execution, whether the law regards it as valid or invalid. These objections do not appear to the Commission to be of such a kind as to call for the omission from the present articles of a ground of invalidity springing from the most fundamental provisions of the Charter, the relevance of which in the law of treaties as in other branches of international law cannot to-day be regarded as open to question.

(3) If the notion of coercion is confined, as the Commission thinks it must be, to a threat or use of force in violation of the principles of the Charter, this ground of invalidity would not appear to be any more open to the possibility of illegitimate attempts to evade treaty obligations than other grounds. Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter", and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

(4) Again, even if sometimes a State should initially be successful in achieving its objects by a threat or use of force, it cannot be assumed in the circumstances of to-day that a rule nullifying a treaty procured by such unlawful means would not prove meaningful and effective. The existence, universal character and effective functioning of the United Nations in themselves provide for the necessary framework for the operation of the rule formulated in the present article.

(5) The Commission considered that the rule should be stated in as simple and categorical terms as possible. The article therefore provides that "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations". The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are to-day of universal application. It accordingly appears to be both legitimate and appropriate to frame

[224] 1963 draft, article 36.

the article in terms of the principles of the Charter. At the same time, the phrase "violation of the principles of the Charter" has been chosen rather than "violation of the Charter", in order that the article should not appear to be confined in its application to Members of the United Nations. Clearly the same rule would apply in the event of an individual State's being coerced into expressing its consent to be bound by a multilateral treaty. The Commission discussed whether it should add a second paragraph to the article specifically applying the rule to such a case, but concluded that this was unnecessary, since the nullity of the consent so procured is beyond question implicit in the general rule stated in the article.

(6) The Commission further considered that a treaty procured by a threat or use of force in violation of the principles of the Charter must be characterized as void, rather than as voidable at the instance of the injured party. The prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State. Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void *ab initio*. This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State. If, therefore, the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations.

(7) The question of the time element in the application of the article was raised in the comments of Governments from two points of view: (*a*) the undesirability of allowing the rule contained in the article to operate retroactively upon treaties concluded prior to the establishment of the modern law regarding recourse to the threat or use of force; and (*b*) the date from which that law should be considered as having been in operation. The Commission considered that there is no question of the article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law.[225] "A juridical fact must be appreciated in the light of the law contemporary with it."[226] The present article concerns the conditions for the valid conclusion of a treaty—the conditions, that is, for the *creation* of a legal relation by treaty. An evolution of the law governing the conditions for the carrying out of a legal act does not operate to deprive of validity a legal act already accomplished in conformity with the law previously in force. The rule codified in the present article cannot therefore be properly understood as depriving of validity *ab initio* a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force.

[225] See also paragraph (6) of the commentary on article 50.

[226] *Island of Palmas* arbitration, *Reports of International Arbitral Awards*, vol. II, p. 845.

(8) As to the date from which the modern law should be considered as in force for the purposes of the present article, the Commission considered that it would be illogical and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties. As pointed out in paragraph (1) above, the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata*. Moreover, whatever differences of opinion there may be about the state of the law prior to the establishment of the United Nations, the great majority of international lawyers to-day unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force. The present article, by its formulation, recognizes by implication that the rule which it lays down is applicable at any rate to all treaties concluded since the entry into force of the Charter. On the other hand, the Commission did not think that it was part of its function, in codifying the modern law of treaties, to specify on what precise date in the past an existing general rule in another branch of international law came to be established as such. Accordingly, it did not feel that it should go beyond the temporal indication given by the reference in the article to "the principles of the Charter of the United Nations".

Article 50.[227] Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

(1) The view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain, although some jurists deny the existence of any rules of *jus cogens* in international law, since in their view even the most general rules still fall short of being universal. The Commission pointed out that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*. Moreover, if some Governments in their comments have expressed doubts as to the advisability of this article unless it is accompanied by provision for independent adjudication, only one questioned the existence of rules of *jus cogens* in the international law of to-day. Accordingly, the Commission concluded that in codifying the law of treaties it must start from the basis that to-day there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character.

(2) The formulation of the article is not free from difficulty, since there is no simple criterion by which to

[227] 1963 draft, article 37.

identify a general rule of international law as having the character of *jus cogens*. Moreover, the majority of the general rules of international law do not have that character, and States may contract out of them by treaty. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law. Nor would it be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void. Such a stipulation may be inserted in any treaty with respect to any subject-matter for any reasons which may seem good to the parties. The conclusion by a party of a later treaty derogating from such a stipulation may, of course, engage its responsibility for a breach of the earlier treaty. But the breach of the stipulation does not, simply as such, render the treaty void (see article 26). It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.

(3) The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals. Some members of the Commission felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested included (*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples. The Commission decided against including any examples of rules of *jus cogens* in the article for two reasons. First, the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.

(4) Accordingly, the article simply provides that a treaty is void "if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". This provision makes it plain that nullity attaches to a treaty under the article only if the rule with which it conflicts is a peremptory norm of general international law from which no derogation is permitted, even by agreement between particular States. On the other hand, it would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As a modification of a rule of *jus cogens* would to-day most probably be effected through a general multilateral treaty, the Commission thought it desirable to indicate that such a treaty would fall outside the scope of the article. The article, therefore defines rules of *jus cogens* as peremptory norms of general international law from which no derogation is permitted "and which can be modified only by a subsequent norm of general international law having the same character".

(5) The Commission thinks it desirable to state its point of view with regard to two matters raised in the comments of Governments. The first, already mentioned above, concerns the difficulty of applying the article in a satisfactory manner unless it is accompanied by a system of independent adjudication or by some provision for an authoritative determination of the rules which are rules of *jus cogens*. The Commission considered that the question of the means of resolving a dispute regarding the invalidity of a treaty, if it may have particular importance in connexion with the present article, is a general one affecting the application of all the articles on the invalidity, termination and suspension of the operation of treaties. It has sought, so far as is practicable in the present state of international opinion regarding acceptance of compulsory means of pacific settlement, to cover the question by the procedural safeguards laid down in article 62. This article is designed to exclude the arbitrary determination of the invalidity, termination or suspension of a treaty by an individual State such as has happened not infrequently in the past and to ensure that recourse shall be had to the means of peaceful settlement indicated in Article 33 of the Charter. In the Commission's view, the position is essentially the same in the cases of an alleged conflict with a rule of *jus cogens* as in the case of other grounds of invalidity alleged by a State.

(6) The second matter is the non-retroactive character of the rule in the present article. The article has to be read in conjunction with article 61 (Emergence of a new rule of *jus cogens*), and in the view of the Commission, there is no question of the present article having retroactive effects. It concerns cases where a treaty is void *at the time of its conclusion* by reason of the fact that its provisions are in conflict with an already existing rule of *jus cogens*. The treaty is wholly void because its actual conclusion conflicts with a peremptory norm of general international law from which no States may derogate even by mutual consent. Article 61, on the other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by reason of the subsequent establishment of a new rule of *jus cogens* with which its provisions are in conflict. The words "*becomes* void and *termi-*

nates" make it quite clear, the Commission considered, that the emergence of a new rule of *jus cogens* is not to have retroactive effects on the validity of a treaty. The invalidity is to attach only as from the time of the establishment of the new rule of *jus cogens*. The non-retroactive character of the rules in articles 50 and 61 is further underlined in article 67, paragraph 2 of which provides in the most express manner that the *termination* of a treaty as a result of the emergence of a new rule of *jus cogens* is not to have retroactive effects.

Section 3: Termination and suspension of the operation of treaties

Article 51.[228] Termination of or withdrawal from a treaty by consent of the parties

A treaty may be terminated or a party may withdraw from a treaty:

(*a*) In conformity with a provision of the treaty allowing such termination or withdrawal; or

(*b*) At any time by consent of all the parties.

Commentary

(1) The majority of modern treaties contain clauses fixing their duration or the date of their termination or a condition or event which is to bring about their termination, or providing for a right to denounce or withdraw from the treaty. In these cases the termination of the treaty is brought about by the provisions of the treaty itself, and how and when this is to happen is essentially a question of interpreting and applying the treaty. The present article sets out the basic rules governing the termination of a treaty through the application of its own provisions.

(2) The treaty clauses are very varied.[229] Many treaties provide that they are to remain in force for a specified period of years or until a particular date or event; others provide for the termination of the treaty through the operation of a resolutory condition. Specific periods fixed by individual treaties may be of very different lengths, periods between one and twelve years being usual but longer periods up to twenty, fifty and even ninety-nine years being sometimes found. More common in modern practice are treaties which fix a comparatively short initial period for their duration, such as five or ten years, but at the same time provide for their continuance in force after the expiry of the period subject to a right of denunciation or withdrawal. These provisions normally take the form either of an indefinite continuance in force of the treaty subject to a right of denunciation on six or twelve months' notice, or of a renewal of the treaty for successive periods of years subject to a right of denunciation or withdrawal on giving notice to that effect six months before the expiry of each period. Some treaties fix no period for their duration and simply provide for a right to denounce or withdraw from the treaty, either with or without a period of notice. Occasionally, a treaty which fixes a single specific period, such as five or ten years, for its duration allows a right of denunciation or withdrawal even during the currency of the period.

(3) The Commission considered that, whatever may be the provisions of a treaty regarding its own termination, it is always possible for all the parties to agree together to put an end to the treaty. It also considered that the particular form which such an agreement may take is a matter for the parties themselves to decide in each case. The theory has sometimes been advanced that an agreement terminating a treaty must be cast in the same form as the treaty which is to be terminated or at least constitute a treaty form of equal weight. The Commission, however, concluded that this theory reflects the constitutional practice of particular States[230] and not a rule of international law. In its opinion, international law does not accept the theory of the "*acte contraire*". The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination. At the same time, the Commission considered it important to underline that, when a treaty is terminated otherwise than under its provisions, the consent of *all* the parties is necessary. The termination, unlike the amendment, of a treaty necessarily deprives all the parties of all their rights and, in consequence, the consent of all of them is necessary.

(4) The Commission gave careful consideration to the question whether, at any rate for a certain period of time after the adoption of the text of a treaty, the consent even of all the *parties* should not be regarded as sufficient for its termination. It appreciated that the other States still entitled to become parties to the treaty have a certain interest in the matter; and it examined the possibility of providing that until the expiry of a specified period of years the consent of not less than two-thirds of all the States which adopted the text should be necessary. Such a provision might, it was suggested, be particularly needed in the case of treaties brought into force on the deposit only of very few instruments of ratification, etc. Although the comments of some Governments appeared not to be unfavourable to the inclusion of such a provision, the Commission concluded that it might introduce an undesirable complication into the operation of the rule regarding termination by consent of the parties. Nor did it understand this question ever to have given rise to difficulties in practice. Accordingly, it decided not to insert any provision on the point in the article.

(5) The article is thus confined to two clear and simple rules. A treaty may be terminated or a party may terminate its own participation in a treaty by agreement in two ways: (*a*) in conformity with the treaty, and (*b*) at any time by consent of all the parties.

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[228] 1963 draft, article 38.

[229] See *Handbook of Final Clauses* (ST/LEG/6), pp. 54-73.

[230] See an observation of the United States representative at the 49th meeting of the Social Committee of the Economic and Social Council (E/AC.7/SR.49, p. 8) to which Sir G. Fitzmaurice drew attention.

Article 52.[231] Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Commentary

(1) A multilateral treaty which is subject to denunciation or withdrawal sometimes provides for termination of the treaty itself, if denunciations or withdrawals should reduce the number of parties below a certain figure. For example, the Convention on the Political Rights of Women[232] states that it "shall cease to be in force as from the date when the denunciation which reduces the number of parties to less than six becomes effective". In some cases the minimum number of surviving parties required to keep the treaty alive is even smaller, e.g. five in the case of the Customs Convention on the Temporary Importation of Commercial Road Vehicles[233] and three in the case of the Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation.[234] In other cases a larger number of parties is required. Clearly, provisions of this kind establish a resolutory condition and the termination of the treaty, should it occur, falls under article 51, sub-paragraph (*a*).

(2) A further point arises, however, as to whether a multilateral treaty, the entry into force of which was made dependent upon its ratification, acceptance, etc. by a given minimum number of States, automatically ceases to be in force, should the parties afterwards fall below that number as a result of denunciations or withdrawals. The Commission considers that this is not a necessary effect of a drop in the number of the parties below that fixed for the treaty's entry into force. The treaty provisions in question relate exclusively to the conditions for the entry into force of the treaty and, if the negotiating States had intended the minimum number of parties fixed for that purpose to be a continuing condition for the maintenance in force of the treaty, it would have been both easy and natural for them so to provide. In some cases, it is true, a treaty which fixes a low minimum number of parties for entry into force prescribes the same number for the cessation of the treaty. But there is no general practice to that effect, and the fact that this has not been a regular practice in cases where a larger minimum number, such as ten or twenty, has been fixed for entry into force seems significant. At any rate, when the number for entry into force is of that order of magnitude, it does not seem desirable that the application of the treaty should be dependent on the number of parties not falling below that number. The remaining parties, if unwilling to continue to operate the treaty with the reduced number, may themselves either join together to terminate it or separately exercise their own right of denunciation or withdrawal.

(3) More often than not multilateral treaties fail to cover the point mentioned in the previous paragraph, thereby leaving the question of the continuance of the treaty in doubt. The Commission accordingly considered it desirable that the draft articles should contain a general provision on the point. The present article, for the reasons given above, lays down as the general rule that unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Article 53.[235] Denunciation of a treaty containing no provision regarding termination

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article.

Commentary

(1) Article 53 covers the termination of treaties which neither contain any provision regarding their duration or termination nor mention any right for the parties to denounce or withdraw from them. Such treaties are not uncommon, recent examples being the four Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations. The question is whether they are to be regarded as terminable only by unanimous agreement or whether individual parties are under any conditions to be considered as having an implied right to withdraw from the treaty upon giving reasonable notice to that effect.

(2) In principle, the answer to the question must depend on the intention of the parties in each case, and the very character of some treaties excludes the possibility that the contracting States intended them to be open to unilateral denunciation or withdrawal at the will of an individual party. Treaties of peace and treaties fixing a territorial boundary are examples of such treaties. Many treaties, however, are not of a kind with regard to which it can be said that to allow a unilateral right of denunciation or withdrawal would be inconsistent with the character of the treaty. No doubt, one possible point of view might be that, since the parties in many cases do provide expressly for a unilateral right of denunciation or withdrawal, their silence on the point in other cases must be interpreted as excluding such a right. Some jurists, basing themselves on the Declaration of London of 1871 and certain State practice, take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is

[231] 1963 draft, article 38, para. 3(*b*).

[232] United Nations *Treaty Series*, vol. 193, p. 135, art. 8.

[233] *Handbook of Final Clauses* (ST/LEG/6), p. 58.

[234] *Ibid.*, pp. 72 and 73.

[235] 1963 draft, article 39.

provided for in the treaty or consented to by all the other parties. A number of other jurists,[236] however, take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties.

(3) The difficulty of the problem is well illustrated by the discussions which took place at the Geneva Conference on the Law of the Sea concerning the insertion of denunciation clauses in the four conventions drawn up at that conference.[237] None of the conventions contains a denunciation clause. They provide only that after five years from the date of their entry into force any party may at any time request the revision of the Convention, and that it will be for the General Assembly to decide upon the steps, if any, to be taken in respect of the request. The Drafting Committee, in putting forward this revision clause, observed that its inclusion "made unnecessary any clause on denunciation". Proposals had previously been made for the inclusion of a denunciation clause and these were renewed in the plenary meeting, notwithstanding the view of the Drafting Committee. Some delegates thought it wholly inconsistent with the nature of codifying conventions to allow denunciation; some thought that a right of denunciation existed anyhow under customary law; others considered it desirable to provide expressly for denunciation in order to take account of possible changes of circumstances. The proposal to include the clause in the "codifying" conventions was rejected by 32 votes to 12, with 23 abstentions. A similar proposal was also made with reference to the Convention on Fishing and Conservation of the Living Resources of the High Seas, which formulated entirely new law. Here, opponents of the clause argued that a right of denunciation would be out of place in a convention which created new law and was the result of negotiation. Advocates of the clause, on the other hand, regarded the very fact that the convention created new law as justifying and indeed requiring the inclusion of a right of denunciation. Again, the proposal was rejected, by 25 votes to 6, with no less than 35 abstentions. As already mentioned, no clause of denunciation or withdrawal was inserted in these conventions and at the subsequent Vienna Conferences on Diplomatic and Consular Relations, the omission of the clause from the conventions on those subjects was accepted without discussion. However, any temptation to generalize from these Conferences as to the intentions of the parties in regard to the denunciation of "law-making" treaties is discouraged by the fact that other conventions, such as the Genocide Convention and the Geneva Conventions of 1949 for the Protection of War Victims, expressly provide for a right of denunciation.

(4) Some members of the Commission considered that in certain types of treaty, such as treaties of alliance, a right of denunciation or withdrawal after reasonable notice should be implied in the treaty unless there are indications of a contrary intention. Other members took the view that, while the omission of any provision for it in the treaty does not exclude the possibility of implying a right of denunciation or withdrawal, the existence of such a right is not to be implied from the character of the treaty alone. According to these members, the intention of the parties is essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case. This view prevailed in the Commission.

(5) The article states that a treaty not making any provision for its termination or for denunciation or withdrawal is not subject to denunciation or withdrawal unless "it is established that the parties intended to admit the possibility of denunciation or withdrawal". Under this rule, the character of the treaty is only one of the elements to be taken into account, and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal.

(6) The Commission considered it essential that any implied right to denounce or withdraw from a treaty should be subject to the giving of a reasonable period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where the treaty is of the renewable type and is open to denunciation by a notice given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually twelve months, though admittedly in some cases no period of notice is required. In formulating a general rule, the Commission considered it to be desirable to lay down a longer rather than a shorter period in order to give adequate protection to the interests of the other parties to the treaty. Accordingly, it preferred in paragraph 2 to specify that not less than twelve months' notice must be given of an intention to denounce or withdraw from a treaty under the present article.

Article 54.[238] Suspension of the operation of a treaty by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) In conformity with a provision of the treaty allowing such suspension;

(*b*) At any time by consent of all the parties.

Commentary

(1) This article parallels for the suspension of the operation of a treaty the provisions of article 51 relating to the termination of a treaty. Treaties sometimes specify that in certain circumstances or under certain conditions the operation of a treaty or of some of its provisions may be suspended. Whether or not a treaty contains such a clause, it is clear that the operation of the treaty or of some of its provisions may be suspended at any time by

[236] Sir G. Fitzmaurice, second report on the law of treaties, *Yearbook of the International Law Commission, 1957*, vol. II, p. 22.

[237] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, pp. 19, 56 and 58.

[238] 1963 draft, article 40.

consent of *all* the parties. Similarly, it is equally possible by consent of *all* the parties to suspend the operation of the treaty in regard only to a particular party (or group of parties) which finds itself in temporary difficulties concerning the performance of its obligations under the treaty.

(2) The question, on the other hand, whether a multilateral treaty may be suspended by agreement of only some of the parties raises the quite different problem of the conditions under which suspension of the operation of the treaty *inter se* two parties or a group of parties is admissible. This question, which is a delicate one, is covered in the next article.

(3) The present article accordingly provides that the operation of a treaty in regard to all the parties or to a particular party may be suspended either in conformity with the treaty or at any time by consent of all the parties.

Article 55.[239] Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only

When a multilateral treaty contains no provision regarding the suspension of its operation, two or more parties may conclude an agreement to suspend the operation of provisions of the treaty temporarily and as between themselves alone if such suspension:

(*a*) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and

(*b*) Is not incompatible with the effective execution as between the parties as a whole of the object and purpose of the treaty.

Commentary

(1) In re-examining article 40[240] of the 1963 draft at the second part of its seventeenth session in January 1966, the Commission concluded that, whereas the *termination* of a treaty must, on principle, require the consent of *all* the parties, this might not necessarily be so in the case of the suspension of a treaty's operation. Since many multilateral treaties function primarily in the bilateral relations of the parties, it seemed to the Commission that the possibility of *inter se* suspension of the operation of a multilateral treaty in certain cases called for further investigation.[241] At the present session the Commission considered that the question is analogous to that raised by the *inter se* modification of multilateral treaties but that, as the situation is not identical in the two cases, the *inter se* suspension of the operation of a treaty could not be completely equated with its *inter se* modification. The Commission decided that it was desirable to deal with it in the present article and to attach to it the safeguards necessary to protect the position of other parties.

(2) The present article accordingly provides that, in the absence of any specific provision in the treaty on the subject, two or more parties may agree to suspend the operation of provisions of the treaty temporarily and as between themselves alone under two conditions. The first is that the suspension does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations. The second is that the suspension is not incompatible with the effective execution as between the parties as a whole of the object and purpose of the treaty. Article 37, dealing with the modification of a treaty as between certain parties only, prescribes a third condition, namely, that formal notice of the intended modification should be given in advance. Although the Commission did not think that this requirement should be made a specific condition for a temporary suspension of the operation of a treaty, its omission from the present article is not to be understood as implying that the parties in question may not have a certain general obligation to inform the other parties of their *inter se* suspension of the operation of the treaty.

Article 56.[242] Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty

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

(*a*) It appears from the treaty or is otherwise established that the parties intended that the matter should thenceforth be governed by the later treaty, or

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

2. The earlier treaty shall be considered as only suspended in operation if it appears from the treaty or is otherwise established that such was the intention of the parties when concluding the later treaty.

Commentary

(1) The present article deals with cases where the parties, without expressly terminating or modifying the first treaty, enter into another treaty which is so far incompatible with the earlier one that they must be considered to have intended to abrogate it. Where the parties to the two treaties are identical, there can be no doubt that, in concluding the second treaty, they are competent to abrogate the earlier one; for that is the very core of the rule contained in article 51. Even where the parties to the two treaties are not identical, the position is clearly the same if the parties to the later treaty include all the parties to the earlier one; for what the parties to the earlier treaty are competent to do together, they are competent to do in conjunction with other States. The sole question therefore is whether and under what conditions the conclusion of the further incompatible treaty must be held by implication to have terminated the earlier one. This question is essentially one of the construction of the two treaties in order to determine

[239] New article.

[240] Article 40 then covered "termination or suspension of the operation of treaties by agreement".

[241] See 829th and 841st meetings.

[242] 1963 draft, article 41.

the intentions of the parties with respect to the maintenance in force of the earlier one.

(2) *Paragraph 1* therefore seeks to formulate the conditions under which the parties to a treaty are to be understood as having intended to terminate it by concluding a later treaty conflicting with it. The wording of the two clauses in paragraph 1 is based upon the language used by Judge Anzilotti in his separate opinion in the *Electricity Company of Sofia and Bulgaria* case,[243] where he said:

> "There was no express abrogation. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions."

That case, it is true, concerned a possible conflict between unilateral declarations under the Optional Clause and a treaty, and the Court itself did not accept Judge Anzilotti's view that there was any incompatibility between the two instruments. Nevertheless, the two tests put forward by Judge Anzilotti for determining whether a tacit abrogation had taken place appeared to the majority of the Commission to contain the essence of the matter.

(3) *Paragraph 2* provides that the earlier treaty shall not be considered to have been terminated where it appears from the circumstances that a later treaty was intended only to suspend the operation of the earlier one. Judge Anzilotti, it is true, in the above-mentioned opinion considered that the declarations under the Optional Clause, although in his view incompatible with the earlier treaty, had not abrogated it because of the fact that the treaty was of indefinite duration whereas the declarations were for limited terms. But it could not be said to be a general principle that a later treaty for a fixed term does not abrogate an earlier treaty expressed to have a longer or indefinite duration. It would depend entirely upon the intention of the States in concluding the second treaty, and in most cases it is probable that their intention would have been to cancel rather than suspend the earlier treaty.

(4) Article 26 also concerns the relation between successive treaties relating to the same subject-matter, paragraphs 3 and 4(*a*) of that article stating that the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. The practical effect of those paragraphs, no doubt, is temporarily to negative and in that way suspend the operation of the incompatible provisions of the earlier treaty so long as the later treaty is in force. But article 26 deals only with the *priority* of inconsistent obligations of treaties both of which are to be considered as in force and in operation. That article does not apply to cases where it is clear that the parties intended the earlier treaty to be abrogated or its operation to be wholly suspended by the conclusion of the later treaty; for then there are not two sets of incompatible treaty provisions in force and in operation, but only those of the later treaty. In other words, article 26 comes into play only *after it has been determined under the present article that the parties did not intend to abrogate, or wholly to suspend the operation of, the earlier treaty.* The present article, for its part, is not concerned with the *priority* of treaty provisions which are incompatible, but with cases where it clearly appears that the intention of the parties in concluding the latcr treaty was either definitively or temporarily to supersede the régime of the earlier treaty by that of the later one. In these cases the present article terminates or suspends the operation of the earlier treaty altogether, so that it is either no longer in force or no longer in operation. In short, the present article is confined to cases of termination or of the suspension of the operation of a treaty implied from entering into a subsequent treaty.

Article 57.[244] Termination or suspension of the operation of a treaty as a consequence of its breach

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

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

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

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

(ii) as between all the parties;

(*b*) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present articles; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

Commentary

(1) The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. A violation of a treaty obligation, as of any other obligation,

[243] *P.C.I.J.* (1939), Series A/B, No. 77, p. 92.

[244] 1963 draft, article 42.

may give rise to a right in the other party to take non-forcible reprisals, and these reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of the right to abrogate the treaty and the conditions under which it may be exercised. Some jurists, in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. They tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach. Other jurists are more impressed with the risk that a State may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing. These jurists tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.

(2) State practice does not give great assistance in determining the true extent of this right or the proper conditions for its exercise. In many cases, the denouncing State has decided for quite other reasons to put an end to the treaty and, having alleged the violation primarily to provide a pretext for its action, has not been prepared to enter into a serious discussion of the legal principles involved. The other party has usually contested the denunciation primarily on the basis of the facts; and, if it has sometimes used language appearing to deny that *unilateral* denunciation is ever justified, this has usually appeared rather to be a protest against the one-sided and arbitrary pronouncements of the denouncing State than a rejection of the right to denounce when serious violations are established.

(3) Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty, and they have not found it necessary to examine the conditions for the application of the principle at all closely. [245]

(4) In the case of the *Diversion of Water from the Meuse*,[246] Belgium contended that, by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against it. Belgium did not claim to denounce the treaty, but it did assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision, although it pleaded its claim rather as an application of the principle *inadimplenti non est adimplendum*. The Court, having found that Holland had not violated the treaty, did not pronounce upon the Belgian contention. In a dissenting opinion, however, Judge Anzilotti expressed the view [247] that the principle underlying the Belgian contention is "so just, so equitable, so universally recognized that it must be applied in international relations also". The only other case that seems to be of much significance is the *Tacna-Arica* arbitration [248] There Peru contended that by preventing the performance of article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from her obligations under that article. The Arbitrator, [249] after examining the evidence, rejected the Peruvian contention, saying:

> "It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown."

This pronouncement seems to assume that only a "fundamental" breach of article 3 by Chile could have justified Peru in claiming to be released from its provisions.

(5) The Commission was agreed that a breach of a treaty, however serious, does not *ipso facto* put an end to the treaty, and also that it is not open to a State simply to allege a violation of the treaty and pronounce the treaty at an end. On the other hand, it considered that within certain limits and subject to certain safeguards the right of a party to invoke the breach of a treaty as a ground for terminating it or suspending its operation must be recognized. Some members considered that it would be dangerous for the Commission to endorse such a right, unless its exercise were to be made subject to control by compulsory reference to the International Court of Justice. The Commission, while recognizing the importance of providing proper safeguards against arbitrary denunciation of a treaty on the ground of an alleged breach, concluded that the question of providing safeguards against arbitrary action was a general one which affected several articles. It, therefore, decided to formulate in the present article the substantive conditions under which a treaty may be terminated or its operation suspended in consequence of a breach, and to deal with the question of the procedural safeguards in article 62.

(6) *Paragraph 1* provides that a "material" breach of a bilateral treaty by one party entitles the other to *invoke* the breach as a ground for terminating the treaty or suspending its operation in whole or in part. The formula "invoke as a ground" is intended to underline that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated. If the other party contests the breach or its character as a "material" breach, there will be a "difference" between the parties with regard to which the normal obligations incumbent upon the parties under the Charter and under general international law to seek a solution of the question

[245] E.g. *Ware* v. *Hylton* (1796), 3 Dallas 261; *Charlton* v. *Kelly*, 229 U.S.447; *Lepeschkin* v. *Gosweiler et Cie.*, *Journal du droit international* (1924) vol. 51, p. 1136; *In re Tatarko*, *Annual Digest and Reports of Public International Law Cases*, 1949, No. 110, p. 314.

[246] *P.C.I.J.* (1937), Series A/B, No. 70.

[247] *Ibid.*, p. 50; cf. Judge Hudson, pp. 76 and 77.

[248] *Reports of International Arbitral Awards*, vol. II, pp. 929, 943 and 944.

[249] President Coolidge.

through pacific means will apply. The Commission considered that the action open to the other party in the case of a material breach is to invoke either the termination or the suspension of the operation of the treaty, in whole or in part. The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil its obligations under a treaty when the other party fails to fulfil those which it undertook under the same treaty. This right would, of course, be without prejudice to the injured party's right to present an international claim for reparation on the basis of the other party's responsibility with respect to the breach.

(7) *Paragraph 2* deals with a material breach of a multilateral treaty, and here the Commission considered it necessary to distinguish between the right of the other parties to react jointly to the breach and the right of an individual party specially affected by the breach to react alone. Sub-paragraph (*a*) provides that the other parties may, by a unanimous agreement, suspend the operation of the treaty or terminate it and may do so either only in their relations with the defaulting State or altogether as between all the parties. When an individual party reacts alone the Commission considered that its position is similar to that in the case of a bilateral treaty, but that its right should be limited to suspending the operation of the treaty in whole or in part as between itself and the defaulting State. In the case of a multilateral treaty the interests of the other parties have to be taken into account and a right of suspension normally provides adequate protection to the State specially affected by the breach. Moreover, the limitation of the right of the individual party to a right of suspension seemed to the Commission to be particularly necessary in the case of general multilateral treaties of a law-making character. Indeed, a question was raised as to whether even suspension would be admissible in the case of law-making treaties. The Commission felt, however, that it would be inequitable to allow a defaulting State to continue to enforce the treaty against the injured party, whilst itself violating its obligations towards that State under the treaty. Moreover, even such treaties as the Genocide Convention and the Geneva Conventions on the treatment of prisoners of war, sick and wounded allowed an express right of denunciation independently of any breach of the convention. The Commission concluded that general law-making treaties should not, simply as such, be dealt with differently from other multilateral treaties in the present connexion. Accordingly, sub-paragraph (*b*) lays down that on a material breach of a multilateral treaty any party specially affected by the breach may *invoke* it as a *ground* for suspending the operation of the treaty in whole or in part *in the relations between itself and the defaulting State.*

(8) Paragraph 2(*c*) is designed to deal with the problem raised in the comments of Governments of special types of treaty, e.g. disarmament treaties, where a breach by one party tends to undermine the whole régime of the treaty as between all the parties. In the case of a material breach of such a treaty the interests of an individual party may not be adequately protected by the rules contained in paragraphs 2(*a*) and (*b*). It could not suspend the performance of its own obligations under the treaty vis-à-vis the defaulting State without at the same time violating its obligations to the other parties. Yet, unless it does so, it may be unable to protect itself against the threat resulting from the arming of the defaulting State. In these cases, where a material breach of the treaty by one party radically changes the position of every party with respect to the further performance of its obligations, the Commission considered that any party must be permitted without first obtaining the agreement of the other parties to suspend the operation of the treaty with respect to itself generally in its relations with all the other parties. Paragraph 2(*c*) accordingly so provides.

(9) *Paragraph 3* defines the kind of breach which may give rise to a right to terminate or suspend the treaty. Some authorities have in the past seemed to assume that any breach of any provision would suffice to justify the denunciation of the treaty. The Commission, however, was unanimous that the right to terminate or suspend must be limited to cases where the breach is of a serious character. It preferred the term "material" to "fundamental" to express the kind of breach which is required. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching the *central* purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character. Clearly, an unjustified repudiation of the treaty—a repudiation not sanctioned by any of the provisions of the present articles—would automatically constitute a material breach of the treaty; and this is provided for in sub-paragraph (*a*) of the definition. The other and more general form of material breach is that in sub-paragraph (*b*), and is there defined as a violation of a provision essential to the accomplishment of any object or purpose of the treaty.

(10) *Paragraph 4* merely reserves the rights of the parties under any specific provisions of the treaty applicable in the event of a breach.

Article 58.[250] Supervening impossibility of performance

A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent 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.

Commentary

(1) The present article concerns the termination of a treaty or the suspension of its operation in consequence of the permanent or temporary total disappearance or destruction of an object indispensable for its execution. The next article concerns the termination of a treaty in

[250] 1963 draft, article 43.

consequence of a fundamental change in the circumstances existing at the time when it was entered into. Cases of supervening impossibility of performance are *ex hypothesi* cases where there has been a fundamental change in the circumstances existing at the time when the treaty was entered into. Some members of the Commission felt that it was not easy to draw a clear distinction between the types of cases dealt with in the two articles and were in favour of amalgamating them. The Commission, however, considered that juridically "impossibility of performance" and "fundamental change of circumstances" are distinct grounds for regarding a treaty as having been terminated, and should be kept separate. Although there might be borderline cases in which the two articles tended to overlap, the criteria to be employed in applying the articles were not the same, and to combine them might lead to misunderstanding.

(2) The article provides that the permanent disappearance or destruction of an object indispensable for the execution of the treaty may be invoked as a ground for putting an end to the treaty. State practice furnishes few examples of the termination of a treaty on this ground. But the type of cases envisaged by the article is the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty.

(3) The article further provides that, if the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty. The Commission appreciated that such cases might be regarded simply as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But it considered that, when there is a continuing impossibility of performing recurring obligations of a treaty, it is desirable to recognize, *as part of the law of treaties*, that the operation of a treaty may be suspended temporarily.

(4) The fact that the article deals first with cases of termination is not meant to imply that termination is to be regarded as the normal result in such cases or that there is any presumption that the disappearance or destruction of an object indispensable to the execution of the treaty will be permanent. On the contrary, the Commission considered it essential to underline that, unless it is clear that the impossibility will be permanent, the right of the party must be limited to invoking it as a ground for suspending the operation of the treaty. In other words, it regarded "suspension of the operation of the treaty" rather than "termination" as the desirable course of action, not *vice versa*.

(5) The Commission appreciated that in cases under this article, unlike cases of breach, the ground of termination, when established, might be said to have automatic effects on the validity of the treaty. But it felt bound to state the rule in the form not of a provision automatically terminating the treaty but one entitling the parties to invoke the impossibility of performance as a ground for terminating the treaty. The point is that disputes may arise as to whether a total disappearance or destruction of the subject-matter of the treaty has in fact occurred, and in the absence of compulsory adjudication it would be inadvisable to adopt, without any qualification, a rule bringing about the automatic abrogation of the treaty by operation of law. Otherwise, there would be a risk of arbitrary assertions of a supposed impossibility of performance as a mere pretext for repudiating a treaty. For this reason, the Commission formulated the article in terms of a right to *invoke* the impossibility of performance as a ground for terminating the treaty and made this right subject to the procedural requirements of article 62.

(6) The Commission appreciated that the total extinction of the international personality of one of the parties to a bilateral treaty is often cited as an instance of impossibility of performance, but decided against including it in the present article for two reasons. First, it would be misleading to formulate a provision concerning the extinction of the international personality of a party without at the same time dealing with, or at least reserving, the question of the succession of States to treaty rights and obligations. The subject of succession is a complex one which is already under separate study in the Commission and it would be undesirable to prejudge the outcome of that study. Accordingly, the Commission did not think that it should deal with this subject in the present article, and, as already mentioned in paragraph (5) of the commentary to article 39, it decided to reserve the question in a general provision in article 69.

(7) Certain Governments in their comments raised the question whether, in connexion with both the present article and article 59 (fundamental change of circumstances), special provision should be made for cases where the treaty has been partly performed and benefits obtained by one party before the cause of termination supervenes. The Commission, while recognizing that problems of equitable adjustment may arise in such cases, doubted the advisability of trying to regulate them by a general provision in articles 58 and 59. It did not seem to the Commission possible to go beyond the provisions of article 66 and 67, paragraph 2, dealing with the consequences of the termination of a treaty.

Article 59.[251] Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

(*a*) As a ground for terminating or withdrawing from a treaty establishing a boundary;

[251] 1963 draft, article 44.

(*b*) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

Commentary

(1) Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*. Just as many systems of municipal law recognize that, quite apart from any actual *impossibility* of performance, contracts may become inapplicable through a fundamental change of circumstances, so also treaties may become inapplicable for the same reason. Most jurists, however, at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are obvious. The circumstances of international life are always changing and it is easy to allege that the changes render the treaty inapplicable.

(2) The evidence of the principle in customary law is considerable, but the International Court has not yet committed itself on the point. In the *Free Zones* case,[252] having held that the facts did not in any event justify the application of the principle, the Permanent Court expressly reserved its position. It observed that it became unnecessary for it to consider "any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the methods by which effect can be given to the theory, if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816".

(3) Municipal courts, on the other hand, have not infrequently recognized the relevance of the principle in international law, though for one reason or another they have always ended by rejecting the application of it in the particular circumstances of the case before them.[253] These cases contain the propositions that the principle is limited to changes in circumstances the continuance of which, having regard to the evident intention of the parties at the time, was regarded as a tacit condition of the agreement,[254] that the treaty is not dissolved automatically by law upon the occurrence of the change but only if the doctrine is invoked by one of the parties,[255] and that the doctrine must be invoked within a reasonable time after the change in the circumstances was first perceived.[256] Moreover, in *Bremen* v. *Prussia*[257] the German *Reichsgericht*, while not disputing the general relevance of the doctrine, considered it altogether inapplicable to a case where one party was seeking to release itself not from the whole treaty but only from certain restrictive clauses which had formed an essential part of an agreement for an exchange of territory.

(4) The principle of *rebus sic stantibus* has not infrequently been invoked in State practice either *eo nomine* or in the form of a reference to a general principle claimed to justify the termination or modification of treaty obligations by reason of changed circumstances. Detailed examination of this State practice is not possible in the present report. Broadly speaking, it shows a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground. The most illuminating indications as to the attitude of States regarding the principle are perhaps statements submitted to the Court in the cases where the doctrine has been invoked. In the *Nationality Decrees* case the French Government contended that "perpetual" treaties are always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over Morocco had for that reason had the effect of extinguishing certain Anglo-French treaties.[258] The British Government, while contesting the French Government's view of the facts, observed that the most forceful argument advanced by France was that of *rebus sic stantibus*.[259] In the case concerning *The Denunciation of the Sino-Belgian Treaty of 1865*, China invoked, in general terms, changes of circumstances as a justification of her denunciation of a sixty-year-old treaty, and supported her contention with a reference to Article 19 of the Covenant of the League of Nations.[260] The article, however, provided that the Assembly of the League should "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable", and the Belgian Government replied that neither Article 19 nor the doctrine of *rebus sic stantibus* contemplated the unilateral denunciation of treaties. It further maintained that there could be no question of China's denouncing the treaty because of a change of circumstances unless she had at least tried to obtain its revision through Article 19; that where both parties were subject to the Court's jurisdiction, the natural course for China, in case of dispute, was to obtain a ruling

[252] *P.C.I.J.* (1932), Series A/B, No. 46, pp. 156-158.

[253] E.g. *Hooper* v. *United States*, Hudson, *Cases on International Law*, second edition, p. 930; *Lucerne* v. *Aargau* (1888), *Arrêts du Tribunal Fédéral Suisse*, vol. 8, p. 57; *In re Lepeschkin*, *Annual Digest of Public International Law Cases*, 1923-24, Case No. 189; *Bremen* v. *Prussia*, *ibid.*, 1925-26, Case No. 266; *Rothschild and Sons* v. *Egyptian Government*, *ibid.*, 1925-26, Case No. 14; *Canton of Thurgau* v. *Canton of St. Gallen*, *ibid.*, 1927-28, Case No. 289; *Bertaco* v. *Bancel*, *ibid.*, 1935-37, Case No. 201; *Stransky* v. *Zivnostenska Bank*, *International Law Reports*, 1955, pp. 424-427.

[254] *Lucerne* v. *Aargau*; *Canton of Thurgau* v. *Canton of St. Gallen*; *Hooper* v. *United States*.

[255] *In re Lepeschkin*; *Stransky* v. *Zivnostenska Bank*.

[256] *Canton of Thurgau* v. *Canton of St. Gallen*.

[257] *Annual Digest of Public International Law Cases*, 1925-26, Case No. 266.

[258] *P.C.I.J.*, Series C, No. 2, pp. 187 and 188.

[259] *Ibid.*, pp. 208 and 209.

[260] *Ibid.*, No. 16, I. p. 52.

from the Court; and that if she did not, she could not denounce the treaty without Belgium's consent.[261] In the *Free Zones* case[262] the French Government, the Government invoking the *rebus sic stantibus* principle, itself emphasized that the principle does not allow unilateral denunciation of a treaty claimed to be out of date. It argued that the doctrine would cause a treaty to lapse only "*lorsque le changement de circonstances aura été reconnu par un acte faisant droit entre les deux Etats intéressés*"; and it further said: "*cet acte faisant droit entre les deux Etats intéressés peut être soit un accord, lequel accord sera une reconnaissance du changement des circonstances et de son effet sur le traité, soit une sentence du juge international compétent s'il y en a un*".[263] Switzerland, emphasizing the differences of opinion amongst jurists in regard to the principle, disputed the existence in international law of any such *right* to the termination of a treaty because of changed circumstances enforceable through the decision of a competent tribunal. But she rested her case primarily on three contentions: (*a*) the circumstances alleged to have changed were not circumstances on the basis of whose continuance the parties could be said to have entered into the treaty; (*b*) in any event, the doctrine does not apply to treaties creating *territorial* rights; and (*c*) France had delayed unreasonably long after the alleged changes of circumstances had manifested themselves.[264] France does not appear to have disputed that the doctrine is inapplicable to territorial rights; instead, she drew a distinction between territorial rights and "personal" rights created on the occasion of a territorial settlement.[265] The Court upheld the Swiss Government's contentions on points (*a*) and (*c*), but did not pronounce on the application of the *rebus sic stantibus* principle to treaties creating territorial rights.

(5) The principle has also been invoked in debates in political organs of the United Nations, either expressly or by implication. In these debates, the existence of the principle has not usually been disputed, though emphasis has been placed on the conditions restricting its application. The Secretary-General also, in a study of the validity of the minorities treaties concluded during the League of Nations era, while fully accepting the existence of the principle in international law, emphasized the exceptional and limited character of its application.[266] In their comments some Governments expressed doubts as to how far the principle could be regarded as an already accepted rule of international law; and others emphasized the dangers which the principle involved for the security of treaties unless the conditions for its application were closely defined and adequate safeguards were provided against its arbitrary application.

(6) The Commission concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty may remain in force for a long time and its stipulations come to place an undue burden on one of the parties as a result of a fundamental change of circumstances. Then, if the other party were obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties might impose a serious strain on the relations between the States concerned; and the dissatisfied State might ultimately be driven to take action outside the law. The number of cases calling for the application of the rule is likely to be comparatively small. As pointed out in the commentary to article 51, the majority of modern treaties are expressed to be of short duration, or are entered into for recurrent terms of years with a right to denounce the treaty at the end of each term, or are expressly or implicitly terminable upon notice. In all these cases either the treaty expires automatically or each party, having the power to terminate the treaty, has the power also to apply pressure upon the other party to revise its provisions. Nevertheless, there may remain a residue of cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It is in these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties.

(7) In the past the principle has almost always been presented in the guise of a tacit condition implied in every "perpetual" treaty that would dissolve it in the event of a fundamental change of circumstances. The Commission noted, however, that the tendency to-day was to regard the implied term as only a fiction by which it was attempted to reconcile the principle of the dissolution of treaties in consequence of a fundamental change of circumstances with the rule *pacta sunt servanda*. In most cases the parties gave no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner. Furthermore, the Commission considered the fiction to be an undesirable one since it increased the risk of subjective interpretations and abuse. For this reason, the Commission was agreed that the theory of an implied term must be rejected and the doctrine formulated as an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty. It further decided that, in order to emphasize the objective character of the rule, it would be better not to use the term "*rebus sic stantibus*" either in the text of the article or even in the title, and so avoid the doctrinal implication of that term.

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[261] *Ibid.*, pp. 22-23; the case was ultimately settled by the conclusion of a new treaty.

[262] *Ibid.*, Series A/B, No. 46.

[263] *Ibid.*, Series C, No. 58, pp. 578-579, 109-146, and 405-415; see also Series C, No. 17, I, pp. 89, 250, 256, 283-284.

[264] *Ibid.*, Series C, No. 58, pp. 463-476.

[265] *Ibid.*, pp. 136-143.

[266] E/CN.4/367, p. 37, see also E/CN.4/367/Add.1.

(8) The Commission also recognized that jurists have in the past often limited the application of the principle to so-called perpetual treaties, that is, to treaties not making any provision for their termination. The reasoning by which this limitation of the principle was supported by these authorities did not, however, appear to the Commission to be convincing. When a treaty had been given a duration of ten, twenty, fifty or ninety-nine years, it could not be excluded that a fundamental change of circumstances might occur which radically affected the basis of the treaty. The cataclysmic events of the present century showed how fundamentally circumstances may change within a period of only ten or twenty years. If the doctrine were regarded as an objective rule of law founded upon the equity and justice of the matter, there did not seem to be any reason to draw a distinction between "perpetual" and "long term" treaties. Moreover, practice did not altogether support the view that the principle was confined to "perpetual" treaties. Some treaties of limited duration actually contained what were equivalent to *rebus sic stantibus* provisions.[267] The principle had also been invoked sometimes in regard to limited treaties, as for instance, in the resolution of the French Chamber of Deputies of 14 December 1932, expressly invoking the principle of *rebus sic stantibus* with reference to the Franco-American war debts agreement of 1926.[268] The Commission accordingly decided that the rule should not be limited to treaties containing no provision regarding their termination, though for obvious reasons it would seldom or never have relevance for treaties of limited duration or which are terminable upon notice.

(9) *Paragraph 1* defines the conditions under which a change of circumstances may be invoked as a ground for terminating a treaty or for withdrawing from a multilateral treaty. This definition contains a series of limiting conditions: (1) the change must be of circumstances existing at the time of the conclusion of the treaty; (2) that change must be a fundamental one; (3) it must also be one not foreseen by the parties; (4) the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and (5) the effect of the change must be radically to transform the scope of obligations still to be performed under the treaty. The Commission attached great importance to the strict formulation of these conditions. In addition, it decided to emphasize the exceptional character of this ground of termination or withdrawal by framing the article in negative form: "a fundamental change of circumstances...may *not* be invoked as a ground for terminating or withdrawing from a treaty *unless* etc.".

(10) The question was raised in the Commission whether general changes of circumstances quite outside the treaty might not sometimes bring the principle of fundamental change of circumstances into operation. But the Commission considered that such general changes could properly be invoked as a ground for terminating or withdrawing from a treaty only if their effect was to alter a circumstance constituting an essential basis of the consent of the parties to the treaty. Some members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a Government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty. They represented that, if this were not the case, the security of treaties might be prejudiced by recognition of the principle in the present article. Other members, while not dissenting from the view that mere changes of policy on the part of a Government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that a change of policy could never in any circumstances be invoked as a ground for terminating a treaty. They instanced a treaty of alliance as a possible case where a radical change of political alignment by the Government of a country might make it unacceptable, *from the point of view of both parties*, to continue with the treaty. The Commission considered that the definition of a "fundamental change of circumstances" in paragraph 1 should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change of policy, and that it was unnecessary to go further into the matter in formulating the article.

(11) *Paragraph 2* excepts from the operation of the article two cases. The first concerns treaties establishing a boundary, a case which both States concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most jurists. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed. The expression "treaty *establishing* a boundary" was substituted for "treaty fixing a boundary" by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties.

(12) The second exception, dealt with in paragraph 2(*b*), provides that a fundamental change may not be invoked if it has been brought about by a breach of the treaty by the party invoking it or by that party's breach of

[267] E.g., article 21 of the Treaty on Limitation of Naval Armament, signed at Washington, 6 February 1922 (Hudson, *International Legislation*, vol. II, p. 820); article 26 of the Treaty for the Limitation of Naval Armament, signed at London, 25 March 1936 (*Ibid.*, vol. VII, p. 280); and Convention regarding the régime of the Straits, signed at Montreux, 20 July 1936 (*L.N.T.S.*, vol. 173, p. 229).

[268] For the text of the resolution, see A.-C. Kiss, *Répertoire français de droit international*, vol. 5, pp. 384-385.

other international obligations owed to the parties to the treaty. This rule is, of course, simply an application of the general principle of law that a party cannot take advantage of its own wrong (*Factory at Chorzow* case, *P.C.I.J.* (1927), Series A, No. 9 at page 31). As such it is clearly applicable in any case arising under any of the articles. Nevertheless, having regard to the particular risk that a fundamental change of circumstances may result from a breach, or series of breaches, of a treaty, the Commission thought it desirable specifically to exclude from the operation of the present article a fundamental change of circumstances so brought about.

(13) Certain Governments in their comments emphasized the dangers which this article may have for the security of treaties unless it is made subject to some form of independent adjudication. Many members of the Commission also stressed the importance which they attached to the provision of adequate procedural safeguards against arbitrary application of the principle of fundamental change of circumstances as an essential condition of the acceptability of the article. In general, however, the Commission did not consider the risks to the security of treaties involved in the present article to be different in kind or degree from those involved in the articles dealing with the various grounds of invalidity or in articles 57, 58 and 61. It did not think that a principle, valid in itself, could or should be rejected because of a risk that a State acting in bad faith might seek to abuse the principle. The proper function of codification, it believed, was to minimize those risks by strictly defining and circumscribing the conditions under which recourse may properly be had to the principle; and this it has sought to do in the present article. In addition, having regard to the extreme importance of the stability of treaties to the security of international relations, it has attached to the present article, as to all the articles dealing with grounds of invalidity or termination, the specific procedural safeguards set out in article 62.

Article 60.[269] Severance of diplomatic relations

The severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations established between them by the treaty.

Commentary

(1) This article contemplates only the situation which arises when diplomatic relations are severed between two parties to a treaty, whether bilateral or multilateral, between which normal diplomatic relations had previously subsisted. For the reasons stated in paragraph 29 of this report the question of the effect upon treaties of the outbreak of hostilities—which may obviously be a case when diplomatic relations are severed—is not dealt with in the present articles. Similarly, any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments, which is excluded from the present discussion for the reasons indicated in paragraph 30 of the Introduction to this chapter, or recognition of States and Governments, which the Commission in 1949 decided to include in its provisional list of topics selected for codification.[270]

(2) There is wide support for the general proposition that the severance of diplomatic relations does not in itself lead to the termination of treaty relationships between the States concerned.[271] Indeed, many jurists do not include the severance of diplomatic relations in their discussion of the grounds for the termination or suspension of the operation of treaties. That the breaking off of diplomatic relations does not as such affect the operation of the rules of law dealing with other aspects of international intercourse is indeed recognized in article 2(3) of the Vienna Convention on Consular Relations of 1963[272] which provides: "The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations"; while the Vienna Convention on Diplomatic Relations of 1961 contains an article—article 45—dealing specifically with the rights and obligations of the parties in the event that diplomatic relations are broken off. It therefore seems correct to state that in principle the mere breaking off of diplomatic relations does not of itself affect the continuance in force of the treaty, or the continuance of the obligation of the parties to apply it in accordance with the rule *pacta sunt servanda.*

(3) The text of the article provisionally adopted in 1964 contained a second paragraph which expressly provided that 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". In other words, an exception was admitted to the general rule in the event that the severance of relations resulted in something akin to a temporary impossibility of performing the treaty through a failure of a necessary means. Certain Governments in their comments expressed anxiety lest this exception, unless it was more narrowly defined, might allow the severance of diplomatic relations to be used as a pretext for evading treaty obligations. In the light of these comments the Commission examined the question *de novo*. It noted that the text of article 58 dealing with supervening impossibility of performance, as revised at the second part of its seventeenth session, contemplates the suspension of the operation of a treaty on the ground of impossibility of performance only in case of the temporary "disappearance or destruction of an *object indispensable for the execution of the treaty*"; and that the severance of diplomatic relations relates to "means" rather than to an "object".

[269] 1964 draft, article 64.

[270] *Yearbook of the International Law Commission*, 1949, p. 281.

[271] Cf. Sir G. Fitzmaurice, second report on the law of treaties (A/CN.4/107), article 5 (iii) and paragraph 34 of the commentary, *ibid.*, *1957*, vol. II, p. 42; and fourth report on the law of treaties (A/CN.4/120), article 4, *ibid.*, *1959*, vol. II, p. 54.

[272] United Nations Conference on Consular Relations, *Official Records*, vol. II, p. 175.

(4) Furthermore, the Commission revised its opinion on the question of admitting the interruption of the normal diplomatic channels as a case of the disappearance of means indispensable for the execution of a treaty. It considered that to-day the use of third States and even of direct channels as means for making necessary communications in case of severance of diplomatic relations are so common that the absence of the normal channels ought not to be recognized as a disappearance of a "means" or of an "object" indispensable for the execution of a treaty. It appreciated that, as some members pointed out, the severance of diplomatic relations might be incompatible with implementation of certain kinds of political treaty such as treaties of alliance. But it concluded that any question of the termination or suspension of the operation of such treaties in consequence of the severance of diplomatic relations should be left to be governed by the general provisions of the present articles regarding termination, denunciation, withdrawal from and suspension of the operation of treaties. It therefore decided to confine the present article to the general proposition that severance of diplomatic relations does not in itself affect the legal relations established by a treaty, and to leave any special case to be governed by the other articles.

(5) The article accordingly provides simply that the severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations between them established by the treaty. The expression "*severance of diplomatic relations*", which appears in Article 41 of the Charter and in article 2, paragraph 3, of the Vienna Convention of 1963 on Consular Relations, is used in preference to the expression "breaking off of diplomatic relations" found in article 45 of the Vienna Convention of 1961 on Diplomatic Relations.

Article 61.[273] Emergence of a new peremptory norm of general international law

If a new peremptory norm of general international law of the kind referred to in article 50 is established, any existing treaty which is in conflict with that norm becomes void and terminates.

Commentary

(1) The rule formulated in this article is the logical corollary of the rule in article 50 under which a treaty is void if it conflicts with a "peremptory norm of general international law from which no derogation is permitted". Article 50, as explained in the commentary to it, is based upon the hypothesis that in international law to-day there are a certain number of fundamental rules of international public order from which no State may derogate even by agreement with another State. Manifestly, if a new rule of that character—a new rule of *jus cogens*—emerges, its effect must be to render void not only future but existing treaties. This follows from the fact that a rule of *jus cogens* is an over-riding rule depriving any act or situation which is in conflict with it of legality. An example would be former treaties regulating the slave trade, the performance of which later ceased to be compatible with international law owing to the general recognition of the total illegality of all forms of slavery.

(2) The Commission discussed whether to make this rule part of article 50, but decided that it should be placed among the articles concerning the termination of treaties. Although the rule operates to deprive the treaty of validity, its effect is not to render it void *ab initio*, but only from the date when the new rule of *jus cogens* is established; in other words it does not annul the treaty, it forbids its further existence and performance. It is for this reason that the article provides that "If a new peremptory norm of general international law...is established", a treaty becomes void and terminates.

(3) Similarly, although the Commission did not think that the principle of separability is appropriate when a treaty is void *ab initio* under article 50 by reason of an existing rule of *jus cogens*, it felt that different considerations apply in the case of a treaty which was entirely valid when concluded but is now found with respect to some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions can properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid.

(4) In paragraph (6) of its commentary to article 50 the Commission has already emphasized that a rule of *jus cogens* does not have retroactive effects and does not deprive any existing treaty of its validity prior to the establishment of that rule as a rule of *jus cogens*. The present article underlines that point since it deals with the effect of the emergence of a new rule of *jus cogens* on the validity of a treaty as a case of the termination of the treaty. The point is further underlined by article 67 which limits the consequences of the termination of a treaty by reason of invalidity attaching to it under the present article to the period *after* the establishment of the new rule of *jus cogens*.

Section 4: Procedure

Article 62.[274] Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

[273] 1963 draft, article 45.

[274] 1963 draft, article 51.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Commentary

(1) Many members of the Commission regarded the present article as a key article for the application of the provisions of the present part dealing with the invalidity, termination or suspension of the operation of treaties. They thought that some of the grounds upon which treaties may be considered invalid or terminated or suspended under those sections, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real dangers for the security of treaties. These dangers were, they felt, particularly serious in regard to claims to denounce or withdraw from a treaty by reason of an alleged breach by the other party or by reason of a fundamental change of circumstances. In order to minimize these dangers the Commission has sought to define as precisely and as objectively as possible the conditions under which the various grounds may be invoked. But whenever a party to a treaty invokes one of these grounds, the question whether or not its claim is justified will nearly always turn upon facts the determination or appreciation of which may be controversial. Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation.

(2) States in the course of disputes have not infrequently used language in which they appeared to maintain that the nullity or termination of a treaty could not be established except by consent of both parties. This presentation of the matter, however, subordinates the application of the principles governing the invalidity, termination and suspension of the operation of treaties to the will of the objecting State no less than the arbitrary assertion of the nullity, termination or suspension of a treaty subordinates their application to the will of the claimant State. The problem is the familiar one of the settlement of differences between States. In the case of treaties, however, there is the special consideration that the parties by negotiating and concluding the treaty have brought themselves into a relationship in which there are particular obligations of good faith.

(3) In 1963, some members of the Commission were strongly in favour of recommending that the application of the present articles should be made subject to compulsory judicial settlement by the International Court of Justice, if the parties did not agree upon another means of settlement. Other members, however, pointed out that the Geneva Conventions on the Law of the Sea and the two Vienna Conventions respectively on Diplomatic and on Consular Relations did not provide for compulsory jurisdiction. While not disputing the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles, these members expressed the view that in the present state of international practice it would not be realistic for the Commission to put forward this solution of the procedural problem. After giving prolonged consideration to the question, the Commission concluded that its appropriate course was, first, to provide a procedure requiring a party which invoked the nullity of a treaty or a ground for terminating it to notify the other parties and give them a proper opportunity to state their views, and then, in the event of an objection being raised by the other party, to provide that the solution of the question should be sought through the means indicated in Article 33 of the Charter. In other words, the Commission considered that in dealing with this problem it should take as its basis the general obligation of States under international law to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" which is enshrined in Article 2, paragraph 3 of the Charter, and the means for the fulfilment of which are indicated in Article 33 of the Charter.

(4) Governments in their comments appeared to be at one in endorsing the general object of the article, namely, the surrounding of the various grounds of invalidity, termination and suspension with procedural safeguards against their arbitrary application for the purpose of getting rid of inconvenient treaty obligations. A number of Governments took the position that paragraphs 1 to 3 of the article did not go far enough in their statement of the procedural safeguards and that specific provisions, including independent adjudication, should be made for cases where the parties are unable to reach agreement. Others, on the other hand, expressed the view that these paragraphs carry the safeguards as far as it is proper to go in the present state of international opinion in regard to acceptance of compulsory jurisdiction. The Commission re-examined the question in the light of these comments and in the light also of the discussions regarding the principle that States "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered", which have taken place in the two Special Committees on Principles of International Law concerning Friendly Relations and Co-operation between States. [275] It further took into account other evidence of recent State practice, including the Charter and Protocol of the Organization of African Unity. The Commission concluded that the article, as provisionally adopted in 1963, represented the highest measure of common ground that could be found among Governments as well as in the Commission on this question. In consequence,

[275] Report of the 1964 Special Committee (A/5746), chapter IV; report of the 1966 Special Committee (A/6230), chapter III.

it decided to maintain the rules set out in the 1963 text of the article, subject only to certain drafting changes.

(5) *Paragraph 1* provides that a party claiming the nullity of the treaty or alleging a ground for terminating it or withdrawing from it or suspending its operation shall put in motion a regular procedure under which it must first notify the other parties of its claim. In doing so it must indicate the measure which it proposes to take with respect to the treaty, i.e. denunciation, termination, suspension, etc. and its grounds for taking that measure. Then by *paragraph 2* it must give the other parties a reasonable period within which to reply. Except in cases of special urgency, the period must not be less than three months. The second stage of the procedure depends on whether or not objection is raised by any party. If there is none or there is no reply before the expiry of the period, the party may take the measure proposed in the manner provided in article 63, i.e. by an instrument duly executed and communicated to the other parties. If, on the other hand, objection is raised, the parties are required by *paragraph 3*, to seek a solution to the question through the means indicated in Article 33 of the Charter. The Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution to the question at issue between the parties. If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands. There would also remain the right of every State, whether or not a Member of the United Nations, under certain conditions, to refer the dispute to the competent organ of the United Nations.

(6) Even if, for the reasons previously mentioned in this commentary, the Commission felt obliged not to go beyond Article 33 of the Charter in providing for procedural checks upon arbitrary action, it considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties would be a valuable step forward. The express subordination of the substantive rights arising under the provisions of the various articles to the procedure prescribed in the present article and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty.

(7) *Paragraph 4* merely provided that nothing in the article is to affect the position of the parties under any provisions regarding the settlement of disputes in force between the parties.

(8) *Paragraph 5* reserves the right of any party to make the notification provided in paragraph 1 by way of answer to a demand for its performance or to a complaint in regard to its violation, even though it may not previously have initiated the procedure laid down in the article. In cases of error, impossibility of performance or change of circumstances, for example, a State might well not have invoked the ground in question before being confronted with a complaint—perhaps even before a tribunal. Subject to the provisions of article 42 concerning the effect of inaction in debarring a State from invoking a ground of nullity, termination or suspension, it would seem right that a mere failure to have made a prior notification should not prevent a party from making it in answer to a demand for performance of the treaty or to a complaint alleging its violation.

Article 63.[276] Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 62 shall be carried out through an instrument communicated to the other parties.

2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Commentary

(1) This article and article 64 replace, with considerable modifications, articles 49 and 50 of the draft provisionally adopted in 1963.

(2) Article 50 of the 1963 draft dealt only with the procedure governing notices of termination, withdrawal or suspension under a right provided for in the treaty. In re-examining the article, the Commission noted that the procedure governing the *giving* of notices of termination under a treaty would be adequately covered by the general article on notifications and communications—now article 73—which it had decided to introduce into the draft articles. In other words, it came to the conclusion that the new article made paragraph 1 of article 50 of the 1963 draft otiose. At the same time, it decided that a general provision was required dealing with the instruments by which, either under the terms of the treaty or pursuant to paragraphs 2 and 3 of article 51 (present article 62), an act declaring invalid, terminating or withdrawing from or suspending the operation of a treaty may be carried out. This provision is contained in paragraph 1 of the present article, which the Commission considered should logically be placed after article 62, since the provision in paragraph 1 would necessarily operate only after the application of the procedures in article 62.

(3) Paragraph 2 of the present article replaces article 49 of the 1963 draft, which was entitled "authority to denounce, terminate, etc." and which in effect would have made the rules relating to "full powers" to represent the State in the *conclusion* of a treaty equally applicable in all stages of the procedure for denouncing, terminating, withdrawing from or suspending the operation of a treaty.

[276] 1963 draft, articles 49 and 50, para. 1.

One Government in its comments questioned whether the matter could be disposed of satisfactorily by a simple cross reference to the article concerning "full powers". Meanwhile the Commission had itself considerably revised the formulation of the article concerning "full powers". Accordingly, it re-examined the whole question of evidence of authority to denounce, terminate, withdraw from or suspend the operation of a treaty dealt with in article 49 of the 1963 draft. It concluded that in the case of the denunciation, termination, etc. of a treaty there was no need to lay down rules governing evidence of authority in regard to the notification and negotiation stages contemplated in paragraphs 1-3 of article 51 of the 1963 draft, since the matter could be left to the ordinary workings of diplomatic practice. In consequence it decided to confine paragraph 2 of the present article to the question of evidence of authority to execute the final act purporting to declare the invalidity, termination, etc. of a treaty. The Commission considered that the rule concerning evidence of authority to denounce, terminate, etc., should be analogous to that governing "full powers" to express the consent of a State to be bound by a treaty. Paragraph 2 therefore provides that "If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers".

(4) The importance of the present article, in the view of the Commission, is that it calls for the observance of a measure of formality in bringing about the invalidation, termination, etc. of a treaty, and thereby furnishes a certain additional safeguard for the security of treaties. In moments of tension the denunciation or threat to denounce a treaty has sometimes been made the subject of a public utterance not addressed directly to the other State concerned. But it is clearly essential that any such declaration purporting to put an end to or to suspend the operation of a treaty, at whatever level it is made, should not be a substitute for the formal act which diplomatic propriety and legal regularity would seem to require.

Article 64.[277] Revocation of notifications and instruments provided for in articles 62 and 63

A notification or instrument provided for in articles 62 and 63 may be revoked at any time before it takes effect.

Commentary

(1) The present article replaces and reproduces the substance of paragraph 2 of article 50 of the 1963 draft.

(2) The Commission appreciated that in their comments certain Governments had questioned the desirability of stating the rule in a form which admitted a complete liberty to revoke a notice of denunciation, termination, withdrawal or suspension prior to the moment of its taking effect. It also recognized that one of the purposes of treaty provisions requiring a period of notice is to enable the other parties to take any necessary steps in advance to adjust themselves to the situation created by the termination of the treaty or the withdrawal of a party. But, after carefully re-examining the question, it concluded that the considerations militating in favour of encouraging the revocation of notices and instruments of denunciation, termination, etc. are so strong that the general rule should admit a general freedom to do so prior to the taking effect of the notice or instrument. The Commission also felt that the right to revoke the notice is really implicit in the fact that it is not to become effective until a certain date and that it should be left to the parties to lay down a different rule in the treaty in any case where the particular subject-matter of the treaty appeared to render this necessary. Moreover, if the other parties were aware that the notice was not to become definitive until after the expiry of a given period, they would, no doubt, take that fact into account in any preparations which they might make. The rule stated in the present article accordingly provides that a notice or instrument of denunciation, termination, etc. may be revoked at any time unless the treaty otherwise provides.

Section 5: Consequences of the invalidity, termination or suspension of the operation of a treaty

Article 65.[278] Consequences of the invalidity of a treaty

1. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) Acts performed in good faith before the nullity was invoked are not rendered unlawful by reason only of the nullity of the treaty.

3. In cases falling under articles 46, 47, 48 or 49, paragraph 2 does not apply with respect to the party to which the fraud, coercion or corrupt act is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Commentary

(1) This article deals only with the legal effects of the invalidity of a treaty. It does not deal with any questions of responsibility or of redress arising from acts which are the cause of the invalidity of a treaty. Fraud and coercion, for example, may raise questions of responsibility and redress as well as of nullity. But those questions are excluded from the scope of the present articles by the general provision in article 69.

(2) The Commission considered that the establishment of the nullity of a treaty on any of the grounds set forth in section 2 of part V would mean that the treaty was void *ab initio* and not merely from the date when the

[277] 1963 draft, article 50, para. 2.

[278] 1963 draft, article 52.

ground was invoked. Only in the case of the treaty's becoming void and terminating under article 61 of section 3 of that part would the treaty not be invalid as from the very moment of its purported conclusion. Paragraph 1 of this article, in order to leave no doubt upon this point, states simply that the provisions of a void treaty have no legal force.

(3) Although the nullity attaches to the treaty *ab initio*, the ground of invalidity may, for unimpeachable reasons, have not been invoked until after the parties have for some period acted in reliance on the treaty in good faith as if it were entirely valid. In such cases the question arises as to what should be their legal positions in regard to those acts. The Commission considered that where neither party was to be regarded as a wrong-doer in relation to the cause of nullity (i.e. where no fraud, corruption or coercion was imputable to either party), the legal position should be determined on the basis of taking account both of the invalidity of the treaty *ab initio* and of the good faith of the parties. Paragraph 2(*a*) accordingly provides that each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed. It recognizes that in principle the invalidation of the treaty as from the date of its conclusion is to have its full effects and that any party may therefore call for the establishment, so far as possible, of the *status quo ante*. Paragraph 2(*b*), however, protects the parties from having acts performed in good faith in reliance on the treaty converted into wrongful acts simply by reason of the fact that the treaty has turned out to be invalid. The phrase "by reason only of the nullity of the treaty" was intended by the Commission to make it clear that, if the act in question were unlawful for any other reason independent of the nullity of the treaty, this paragraph would not suffice to render it lawful.

(4) Paragraph 3, for obvious reasons, excepts from the benefits of paragraph 2 a party whose fraud, coercion or corrupt act has been the cause of the nullity of the treaty. The case of a treaty void under article 50 by reason of its conflict with a rule of *jus cogens* is not mentioned in paragraph 3 because it is the subject of a special provision in article 67.

(5) Paragraph 4 applies the provisions of the previous paragraphs also in the case of the nullity of the consent of an individual State to be bound by a multilateral treaty. In that case they naturally operate only in the relations between that State and the parties to the treaty.

Article 66.[279] Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws 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.

Commentary

(1) Article 66, like the previous article, does not deal with any question of responsibility or redress that may arise from acts which are the cause of the termination of a treaty, such as breaches of the treaty by one of the parties; questions of State responsibility are excluded from the draft by article 69.

(2) Some treaties contain express provisions regarding consequences which follow upon their termination or upon the withdrawal of a party. Article XIX of the Convention on the Liability of Operators of Nuclear Ships,[280] for example, provides that even after the termination of the Convention, liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the Convention. Again some treaties, for example, the European Convention on Human Rights and Fundamental Freedoms,[281] expressly provide that the denunciation of the treaty shall not release the State from its obligations with respect to acts done during the currency of the Convention. Similarly, when a treaty is about to terminate or a party proposes to withdraw, the parties may consult together and agree upon conditions to regulate the termination or withdrawal. Clearly, any such conditions provided for in the treaty or agreed upon by the parties must prevail, and the opening words of paragraph 1 of the article (which are also made applicable to paragraph 2) so provide.

(3) Subject to any conditions contained in the treaty or agreed between the parties, paragraph 1 provides, first, that the termination of a treaty releases the parties from any obligation further to perform it. Secondly, it provides that the treaty's termination does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. The Commission appreciated that different opinions are expressed concerning the exact legal basis, after a treaty has been terminated, of rights, obligations or situations resulting from executed provisions of the treaty, but did not find it necessary to take a position on this theoretical point for the purpose of formulating the rule in paragraph 1(*a*). On the other hand, by the words "any right, obligation or legal situation of the parties created through the execution of the treaty", the Commission wished to make it clear that paragraph 1(*b*) relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the "vested interests" of individuals.

[279] 1963 draft, article 53.

[280] Signed at Brussels on 25 May 1962.

[281] Article 65; United Nations *Treaty Series*, vol. 213, p. 252.

(4) The Commission appreciated that in connexion with article 58 (supervening impossibility of performance) certain Governments raised the question of equitable adjustment in the case of a treaty which has been partially executed by one party only. The Commission, though not in disagreement with the concept behind the suggestions of these Governments, felt that the equitable adjustment demanded by each case would necessarily depend on its particular circumstances. It further considered that, having regard to the complexity of the relations between sovereign States, it would be difficult to formulate in advance a rule which would operate satisfactorily in each case. Accordingly, it concluded that the matter should be left to the application of the principle of good faith in the application of the treaties demanded of the parties by the rule *pacta sunt servanda.*

(5) Paragraph 2 applies the same rules to the case of an individual State's denunciation of or withdrawal from a multilateral treaty in the relation between that State and each of the other parties to the treaty.

(6) The present article has to be read in the light of article 67, paragraph 2 of which lays down a special rule for the case of a treaty which becomes void and terminates under article 61 by reason of the establishment of a new rule of *jus cogens* with which its provisions are in conflict.

(7) The article also has to be read in conjunction with article 40 which provides, *inter alia*, that the termination or denunciation of a treaty or the withdrawal of a party from it is not in any way to impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law. This provision is likely to be of particular importance in cases of termination, denunciation or withdrawal. Moreover, although a few treaties, such as the Geneva Conventions of 1949 for the humanizing of warfare, expressly lay down that denunciation does not impair the obligations of the parties under general international law, the majority do not.

Article 67.[282] Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law

1. In the case of a treaty void under article 50 the parties shall:

(*a*) Eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) Bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 61, the termination of the treaty:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Commentary

(1) The nullity of a treaty *ab initio* by reason of its conflict with a rule of *jus cogens* in force at the time of its conclusion is a special case of nullity. The question which arises in consequence of the invalidity is not so much one of the adjustment of the position of the parties in relation to each other as of the obligation of each of them to bring its position into conformity with the rule of *jus cogens*. Similarly, the termination of a treaty which becomes void and terminates under article 61 by reason of its conflict with a new rule of *jus cogens* is a special case of termination (and indeed also a special case of invalidity, since the invalidity does not operate *ab initio*). Although the rules laid down in article 66, paragraph 1, regarding the consequences of termination are applicable in principle, account has to be taken of the new rule of *jus cogens* in considering the extent to which any right, obligation or legal situation of the parties created through the previous execution of the treaty may still be maintained.

(2) The consequences of the nullity of a treaty under article 50 and of the termination of a treaty under article 61 both being special cases arising out of the application of a rule of *jus cogens*, the Commission decided to group them together in the present article. Another consideration leading the Commission to place these cases in the same article was that their juxtaposition would serve to give added emphasis to the distinction between the original nullity of a treaty under article 50 and the subsequent annulment of a treaty under article 61 as from the time of the establishment of the new rule of *jus cogens*. Having regard to the misconceptions apparent in the comments of certain Governments regarding the possibility of the retroactive operation of these articles, this additional emphasis on the distinction between the nullifying effect of article 50 and the terminating effect of article 61 seemed to the Commission to be desirable.

(3) *Paragraph 1* requires the parties to a treaty void *ab initio* under article 50 first to eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with the rule of *jus cogens*, and secondly, to bring their mutual relations into conformity with that rule. The Commission did not consider that in these cases the paragraph should concern itself with the mutual adjustment of their interests as such. It considered that the paragraph should concern itself solely with ensuring that the parties restored themselves to a position which was in full conformity with the rule of *jus cogens*.

(4) *Paragraph 2* applies to cases under article 61 and the rules regarding the consequences of the termination of a treaty set out in paragraph 1 of article 66 with the addition of one important proviso. Any right, obligation or legal situation of the parties created through the execution of the treaty may afterwards be maintained

[282] New article.

only to the extent that its maintenance is not in itself in conflict with the new rule of *jus cogens*. In other words, a right, obligation or legal situation valid when it arose is not to be made retroactively invalid; but its *further* maintenance after the establishment of the new rule of *jus cogens* is admissible only to the extent that such further maintenance is not in itself in conflict with that rule.

Article 68.[283] Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(*a*) Relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(*b*) Does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to render the resumption of the operation of the treaty impossible.

Commentary

(1) This article, like articles 65 and 66, does not touch the question of responsibility, which is reserved by article 69, but concerns only the direct consequences of the suspension of the operation of the treaty.

(2) Since a treaty may sometimes provide for, or the parties agree upon, the conditions which are to apply during the suspension of a treaty's operation, the rule contained in paragraph 1 is subject to any such provision or agreement. This rule states in paragraph (*a*) that the suspension of the operation of a treaty relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension. The sub-paragraph speaks of relieving "the parties between which the operation of the treaty is suspended" because in certain cases the suspension may occur between only some of the parties to a multilateral treaty, for example, under article 55 (*inter se* agreement to suspend) and article 57, paragraph 2 (suspension in case of breach).

(3) Paragraph 1(*b*), however, emphasizes that the suspension of a treaty's operation "does not otherwise affect the legal relations between the parties established by the treaty". This provision is intended to make it clear that the legal nexus between the parties established by the treaty remains intact and that it is only the operation of its provisions which is suspended.

(4) This point is carried further in paragraph 2, which specifically requires the parties, during the period of the suspension, to refrain from acts calculated to render the operation of the treaty impossible as soon as the ground or cause of suspension ceases. The Commission considered this obligation to be implicit in the very concept of "suspension", and to be imposed on the parties by their obligation under the *pacta sunt servanda* rule (article 23) to perform the treaty in good faith.

[283] 1963 draft, article 54.

Part VI.—Miscellaneous provisions

Article 69.[284] Cases of State succession and State responsibility

The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State.

Commentary

(1) The Commission, for the reasons explained in paragraphs 29-31 of the Introduction to the present chapter of this Report, decided not to include in the draft articles any provisions relating (1) to the effect of the outbreak of hostilities upon treaties, (2) to the succession of States with respect to treaties, and (3) to the application of the law of State responsibility in case of a breach of an obligation undertaken in a treaty. In reviewing the final draft, and more especially its provisions concerning the termination and suspension of the operation of treaties, the Commission concluded that it would not be adequate simply to leave the exclusion from the draft articles of provisions connected with the second and third topics for explanation in the introduction to this chapter. It decided that an express reservation in regard to the possible impact of a succession of States or of the international responsibility of a State on the application of the present articles was desirable in order to prevent any misconceptions from arising as to the interrelation between the rules governing those matters and the law of treaties. Both these matters may have an impact on the operation of certain parts of the law of treaties in conditions of entirely normal international relations, and the Commission felt that considerations of logic and of the completeness of the draft articles indicated the desirability of inserting a general reservation covering cases of succession and cases of State responsibility.

(2) Different considerations appeared to the Commission to apply to the case of an outbreak of hostilities between parties to a treaty. It recognized that the state of facts resulting from an outbreak of hostilities may have the practical effect of preventing the application of the treaty in the circumstances prevailing. It also recognized that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties. But it considered that in the international law of to-day the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. Thus, the Geneva Conventions codifying the law of the sea contain no reservation in

[284] New article.

regard to the case of an outbreak of hostilities notwithstanding the obvious impact which such an event may have on the application of many provisions of those Conventions; nor do they purport in any way to regulate the consequences of such an event. It is true that one article in the Vienna Convention on Diplomatic Relations (article 44) and a similar article in the Convention on Consular Relations (article 26) contain a reference to cases of "armed conflict". Very special considerations, however, dictated the mention of cases of armed conflict in those articles and then only to underline that the rules laid down in the articles hold good even in such cases. The Vienna Conventions do not otherwise purport to regulate the consequences of an outbreak of hostilities; nor do they contain any general reservation with regard to the effect of that event on the application of their provisions. Accordingly, the Commission concluded that it was justified in considering the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles.

(3) The reservation regarding cases of a succession of States and of international responsibility is formulated in the present article in entirely general terms. The reason is that the Commission considered it essential that the reservation should not appear to prejudge any of the questions of principle arising in connexion with these topics, the codification of both of which the Commission already has in hand.

Article 70.[285] Case of an aggressor State

The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Commentary

(1) In its commentary on article 31, which specifies that an obligation arises for a third State from a provision in a treaty only with its consent, the Commission noted that the case of an aggressor State would fall outside the principle laid down in the article. At the same time, it observes that article 49 prescribes the nullity of a treaty procured by the coercion of a State by the threat or use of force "in violation of the principles of the Charter of the United Nations", and that a treaty provision imposed on an aggressor State would not therefore infringe article 49. Certain Governments also made this point in their comments on article 59 of the 1964 draft (present article 31), and suggested that a reservation covering the case of an aggressor should be inserted in the article. In examining this suggestion at the present session, the Commission concluded that, if such a reservation were to be formulated, a more general reservation with respect to the case of an aggressor State applicable to the draft articles as a whole might be preferable. It felt that there might be other articles, for example, those on termination and suspension of the operation of treaties, where measures taken against an aggressor State might have implications.

(2) Two main points were made in the Commission in this connexion. First, if a general reservation were to be introduced covering the draft articles as a whole, some members stressed that it would be essential to avoid giving the impression that an aggressor State is to be considered as completely *exlex* with respect to the law of treaties. Otherwise, this might impede the process of bringing the aggressor State back into a condition of normal relations with the rest of the international community.

(3) Secondly, members stressed the possible danger of one party unilaterally characterizing another as an aggressor for the purpose of terminating inconvenient treaties; and the need, in consequence, to limit any reservation relating to the case of an aggressor State to measures taken against it in conformity with the Charter.

(4) Some members questioned the need to include a reservation of the kind proposed in a general convention on the law of treaties. They considered that the case of an aggressor State belonged to a quite distinct part of international law, the possible impact of which on the operation of the law of treaties in particular circumstances could be assumed and need not be provided for in the draft articles. The Commission, however, concluded that, having regard to the nature of the above-mentioned provisions of articles 49 and 31, a general reservation in regard to the case of an aggressor State would serve a useful purpose. At the same time, it concluded that the reservation, if it was to be acceptable, must be framed in terms which would avoid the difficulties referred to in paragraphs (2) and (3) above.

(5) Accordingly, the Commission decided to insert in the present article a reservation formulated in entirely general terms and stating that the present articles on the law of treaties are "without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression".

Part VII.—Depositaries, notifications, corrections and registration

Article 71.[286] Depositaries of treaties

1. The depositary of a treaty, which may be a State or an international organization, shall be designated by the negotiating States in the treaty or in some other manner.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

[285] New article.

[286] 1962 draft, articles 28 and 29, para, 1, and 1965 draft, article 28.

Commentary

(1) The depositary of a treaty, whose principal functions are set out in the next article, plays an essential procedural role in the smooth operation of a multilateral treaty. A multilateral treaty normally designates a particular State or international organization as depositary. In the case of a treaty adopted within an international organization or at a conference convened under its auspices, the usual practice is to designate the competent organ of the organization as depositary, and in other cases the State in whose territory the conference is convened. The text of this article, as provisionally adopted in 1962, gave expression to this practice in the form of residuary rules which would govern the appointment of the depositary of a multilateral treaty in the absence of any nomination in the treaty itself. No Government raised any objection to those residuary rules, but in re-examining the article at its seventeenth session, the Commission revised its opinion as to the utility of the rules and concluded that the matter should be left to the States which drew up the treaty to decide. Paragraph 1 of the article, as finally adopted, therefore simply provides that "The depositary of a treaty, which may be a State or an international organization, shall be designated by the negotiating States in the treaty or in some other manner".

(2) At its seventeenth session the Commission also decided to transfer to the present article the substance of what had appeared in its 1962 draft as paragraph 1 of article 29. This paragraph stressed the representative character of the depositary's functions and its duty to act impartially in their performance. In revising the provision the Commission decided that it was preferable to speak of a depositary's functions being *international* in character. Accordingly, paragraph 2 of the present article now states that "The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance". When the depositary is a State, in its capacity as a party it may of course express its own policies; but as depositary it must be objective and perform its functions impartially.

Article 72.[287] Functions of depositaries

1. The functions of a depositary, unless the treaty otherwise provides, comprise in particular:

(*a*) Keeping the custody of the original text of the treaty, if entrusted to it;

(*b*) Preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty and transmitting them to the States entitled to become parties to the treaty;

(*c*) Receiving any signatures to the treaty and any instruments and notifications relating to it;

(*d*) Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;

(*e*) Informing the States entitled to become parties to the treaty of acts, communications and notifications relating to the treaty;

(*f*) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty has been received or deposited;

(*g*) Performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the other States entitled to become parties to the treaty or, where appropriate, of the competent organ of the organization concerned.

Commentary

(1) Mention is made of the depositary in various provisions of the present articles and the Commission considered it desirable to state in a single article the principal functions of a depositary. In doing so, it gave particular attention to the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements.*[288] Paragraph 1, therefore, without being exhaustive, specifies the principal functions of a depositary. The statement of these functions in the text of an article provisionally adopted in 1962 has been shortened and modified in the light of the comments of Governments.

(2) *Paragraph 1*(a) speaks of the depositary's function of "keeping the custody of the original text of the treaty, *if entrusted to it*". This is because sometimes, for example, the original text is permanently or temporarily deposited with the host State of a conference while an international organization acts as the depositary, as in the case of the Vienna Conventions on Diplomatic and Consular Relations.

(3) *Paragraph 1*(b) needs no comment other than to mention that the requirement for the preparation of texts in additional languages may possibly arise from the rules of an international organization, in which case the matter is covered by article 4. *Paragraph 1*(c) needs no comment.

(4) *Paragraph 1*(d) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary's duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation. If an instrument or reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity

[287] 1962 and 1965 drafts, article 29.

[288] ST/LEG/7.

to their attention in accordance with paragraph 2 of the present article.

(5) *Paragraph 1*(e) needs no comment except to recall the significance of article 73 in this connexion and to underline the obvious desirability of the prompt performance of this function by a depositary.

(6) *Paragraph 1*(f) notes the duty of the depositary to inform the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, etc. required for the entry into force of the treaty have been received or deposited. The question whether the required number has been reached may sometimes pose a problem, as when questionable reservations have been made. In this connexion, as in others, although the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other States concerned. However normal it may be for States to accept the depositary's appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged by another State and that then it would be the duty of the depositary to consult all the other interested States as provided in paragraph 2 of the present article.

(7) *Paragraph 1*(g) needs no comment.

(8) *Paragraph 2* lays down the general principle that in the event of any differences appearing between any State and the depositary as to the performance of the latter's functions, the proper course and the duty of the depositary is to bring the question to the attention of the other negotiating States or, where appropriate, of the competent organ of the organization concerned. This principle really follows from the fact that, as indicated above, the depositary is not invested with any competence to adjudicate upon or to determine matters arising in connexion with the performance of its functions.

Article 73.[289] Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State under the present articles shall:

(*a*) If there is no depositary, be transmitted directly to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only upon the latter State's having been informed by the depositary in accordance with article 72, paragraph 1(*e*).

Commentary

(1) The drafts provisionally adopted by the Commission at its fourteenth, fifteenth and sixteenth sessions contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter. Article 29 of the 1962 draft also contained provisions regarding the duty of a depositary to transmit such notifications or communications to the interested States. In re-examining certain of these provisions at its seventeenth session the Commission concluded that it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications.

(2) If the treaty itself contains provisions regulating the making of notifications or communications required under its clauses, they necessarily prevail, as the opening phrase of the article recognizes. But the general rule contained in sub-paragraph (*a*), which reflects the existing practice, is that if there is no depositary, a notification or communication is to be transmitted directly to the State for which it is intended, whereas if there is a depositary it is to be transmitted to the latter, whose function it will be under article 72 to inform the other States of the notification or communication. Such is, therefore, the rule given in sub-paragraph (*a*) of this article. This rule relates essentially to notifications and communications relating to the "life" of the treaty—acts establishing consent, reservations, objections, notices regarding invalidity, termination, etc. Treaties which have depositaries, such as the Vienna Conventions on Diplomatic and Consular Relations, may contain provisions relating to substantive matters which require notifications. Normally, the context in which they occur will make it plain that the notifications are to be made directly to the State for which they are intended; and in any event the Commission considered that in such cases the procedure to be followed would be a matter of the interpretation of the treaty.

(3) The problem which principally occupied the Commission related to the legal questions as to the points of time at which a notification or communication was to be regarded as having been accomplished by the State making it, and as operative with respect to the State for which it was intended. Sub-paragraphs (*b*) and (*c*) express the Commission's conclusions on these questions. The Commission did not consider that there was any difficulty when the notification or communication was transmitted directly to the State for which it was intended. In these cases, in its opinion, the rule must be that a notification or communication is not to be considered as "made" by the State transmitting it until it has been received by the State for which it is intended. Equally, of course, it is not to be considered as received by, and legally in operation with respect to, the latter State until that moment. Such is the rule laid down in paragraph (*b*) for these cases.

(4) The main problem is the respective positions of the transmitting State and of the other States when a notification or communication is sent by the former to the depositary of the treaty. In these cases, there must in the nature of things be some interval of time before the notification is received by the State for which it is intended.

[289] 1965 draft, article 29(*bis*).

Inevitably, the working of the administrative processes of the depositary and the act of retransmission will entail some delay. Moreover, the Commission was informed that in practice cases are known to occur where the delay is a matter of weeks rather than of days. The question of principle at issue is whether the depositary is to be considered the agent of each party so that receipt of a notification or communication by a depositary must be treated as the equivalent of receipt by the State for which it was intended. On this question the majority of the Commission concluded that the depositary is to be considered as no more than a convenient mechanism for the accomplishment of certain acts relating to a treaty and for the transmission of notifications and communications to the States parties to or entitled to become parties to the treaty. Consequently, in its view the depositary should not be regarded as the general agent of each party, and receipt by the depositary of a notification or communication should not be regarded as automatically constituting a receipt also by every State for which it is intended. If the contrary view were to be adopted, the operation of various forms of time-limits provided for in the present articles or specified in treaties might be materially affected by any lack of diligence on the part of a depositary, to the serious prejudice of the intended recipient of a notification or communication, for example, under article 17, paragraphs 4 and 5, relating to objections to reservations, and article 62, paragraphs 1 and 2, relating to notification of a claim to invalidate, terminate, etc. a treaty. Equally, the intended recipient, still unaware of a notification or communication, might in all innocence commit an act which infringed the legal rights of the State making it.

(5) The Commission recognized that, owing to the time-lag which may occur between transmission by the sending State to the depositary and receipt of the information by the intended addressee from the depositary, delicate questions of the respective rights and obligations of the two States vis-à-vis each other may arise in theory and occasionally in practice. It did not, however, think that it should attempt to solve all such questions in advance by a general rule applicable in all cases and to every type of notification or communication. It considered that they should be left to be governed by the principle of good faith in the performance of treaties in the light of the particular circumstances of each case. The Commission therefore decided to confine itself, in cases where there is a depositary, to stating two basic procedural rules regarding (*a*) the making of a notification or communication by the sending State and (*b*) its receipt by the State for which it is intended.

(6) Accordingly, paragraph (*b*) provides that, so far as the sending State is concerned, the State will be considered as having *made* a notification or communication on its receipt by the depositary; a sending State will thus be considered as having, for example, made a notice of objection to a reservation or a notice of termination when it has reached the depositary. Paragraph (*b*), on the other hand, provides that a notification or communication shall be considered as received by the State for which it is intended only upon this State's having been informed of it by the depositary. Thus, the commencing date of any time-limit fixed in the present articles would be the date of receipt of the information by the State for which the notification or communication was intended.

(7) The rules set out in paragraphs (*a*), (*b*) and (*c*) of the article are prefaced by the words "Except as the treaty or the present articles may otherwise provide". Clearly, if the treaty, as not infrequently happens, contains any specific provisions regarding notification or communication, these will prevail. The exception in regard to the "present articles" is stressed in the opening phrase primarily in order to prevent any misconception as to the relation between the present article and articles 13 (exchange or deposit of instruments of ratification, acceptance, etc.) and 21 (entry into force of treaties). As already explained in the commentary to article 13, what is involved in sub-paragraphs (*b*) and (*c*) of that article is only the performance of an act required by the treaty to establish the consent of a State to be bound. The parties have accepted that the act of deposit will be sufficient by itself to establish a legal nexus between the depositing State and any other State which has expressed its consent to be bound by the treaty. The depositary has the duty to inform the other States of the deposit but the notification, under existing practice, is not a substantive part of the transaction by which the depositing State establishes legal relations with them under the treaty. Some conventions, such as the Vienna Conventions on Diplomatic and Consular Relations, for that very reason provide that a short interval of time shall elapse before the act of ratification, etc. comes into force for the other contracting States. But unless the treaty otherwise states, "notification" is not, as such, an integral part of the process of establishing the legal nexus between the depositing State and the other contracting States. Similarly, in the case of entry into force, notification is not, unless the treaty so stipulates, an integral element in the process of entry into force. In consequence, it is not considered that there is, in truth, any contradiction between articles 13 and 21 and the present article. But in any event, the specific provisions of those articles prevail.

(8) The scope of the article is limited to notifications and communications "to be made...under the present articles". As already mentioned in paragraph (2) of this commentary, the notifications and communications requiring to be made under treaties are of different kinds. As the rules set out in the present article would be inappropriate in some cases, the Commission decided to limit the operation of the article to notices and communications to be made under any of the present articles.

Article 74.[290] Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected:

(*a*) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

[290] 1962 draft, articles 26 and 27, and 1965 draft, article 26.

(*b*) By executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter:

(*a*) Shall notify the contracting States of the error and of the proposal to correct it if no objection is raised within a specified time-limit;

(*b*) If on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the contracting States;

(*c*) If an objection has been raised to the proposed correction, shall communicate the objection to the other contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the contracting States agree should be corrected.

4. (*a*) The corrected text replaces the defective text *ab initio*, unless the contracting States otherwise decide;

(*b*) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy to the contracting States.

Commentary

(1) Errors and inconsistencies are sometimes found in the texts of treaties and the Commission considered it desirable to include provisions in the draft articles concerning methods of rectifying them. The error or inconsistency may be due to a typographical mistake or to a misdescription or mis-statement due to a misunderstanding and the correction may affect the substantive meaning of the text as authenticated. If there is a dispute as to whether or not the alleged error or inconsistency is in fact such, the question is not one simply of correction of the text but becomes a problem of mistake which falls under article 45. The present article only concerns cases where there is no dispute as to the existence of the error or inconsistency.

(2) As the methods of correction differ somewhat according to whether there is or is not a depositary, the draft provisionally adopted in 1962 dealt with the two cases in separate articles.[291] This involved some repetition, and at its seventeenth session the Commission decided to combine the two articles. At the same time, in the light of the comments of Governments, it streamlined their provisions. The present article thus contains in shortened form the substance of the two articles adopted in 1962.

(3) *Paragraph 1* covers the correction of the text when there is no depositary. Both the decision whether to proceed to a formal correction of the text and the method of correction to be adopted are essentially matters for the States in question. The rule stated in paragraph 1 is, therefore, purely residuary and its object is to indicate the appropriate method of proceeding in the event of the discovery of an error in a text. It provides that the text should be corrected by one of three regular techniques.[292] The normal methods in use are those in sub-paragraphs (*a*) and (*b*). Only in the extreme case of a whole series of errors would there be occasion for starting afresh with a new revised text as contemplated in sub-paragraph (*c*).[293]

(4) *Paragraph 2* covers the cases where the treaty is a multilateral treaty for which there is a depositary. Here the process of obtaining the agreement of the interested States to the correction or rectification of the text is affected by the number of States, and the technique used hinges upon the depositary. In formulating the paragraph the Commission based itself upon the information contained in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.[294] The technique is for the depositary to notify all the interested States of the error or inconsistency and of the proposal to correct the text, while at the same time specifying an appropriate time-limit within which any objection must be raised. Then, if no objection is raised, the depositary, as the instrument of the interested States, proceeds to make the correction, draw up a *procès-verbal* recording the fact and circulate a copy of the *procès-verbal* to the States concerned. The precedent on page 9 of the *Summary of Practice* perhaps suggests that the Secretary-General considers it enough, in the case of a typographical error, to obtain the consent of those States which have already signed the offending text). In laying down a general rule, however, it seems safer to say that notification should be sent to all the contracting States, since it is conceivable that arguments might arise as to whether the text did or did not contain a typographical error, e.g. in the case of punctuation that may affect the meaning.

(5) *Paragraph 3* applies the techniques of paragraphs 1 and 2 also to cases where there is a discordance between two or more authentic language versions one of which it is agreed should be corrected. The Commission noted that the question may also arise of correcting not the authentic text but versions of it prepared in other languages; in other words, of correcting errors of translation. As, however, this is not a matter of altering an authentic text of the treaty, the Commission did not think it necessary that the article should cover the point. In these cases, it would be open to the contracting States to modify the translation by mutual agreement without any special formality. Accordingly, the Commission

[291] Articles 26 and 27.

[292] See *Hackworth's Digest of International Law*, vol. 5, pp. 93-101, for instances in practice.

[293] For an example, see *Hackworth's Digest of International Law*, *loc. cit.*

[294] See pages 8-10, 12, 19-20, 39 (footnote), and annexes 1 and 2.

thought it sufficient to mention the point in the commentary.

(6) *Paragraph 4*(a), in order to remove any possible doubts, provides that the corrected text replaces the defective text *ab initio* unless it is otherwise agreed. Since what is involved is merely the correction or rectification of an already accepted text, it seems clear that, unless the contracting States otherwise agree, the corrected or rectified text should be deemed to operate from the date when the original text came into force.

(7) The rules contained in the article contemplate that in cases where there is a depositary it will be necessary to seek the assent of the "contracting States" to the making of the correction. The Commission appreciated that "negotiating States" which have not yet established their consent to be bound by the treaty also have a certain interest in any correction of the text, and that in practice a depositary will normally notify the "negotiating" as well as the "contracting" States of any proposal to make a correction to the text. Indeed, the Commission considered whether, at any rate for a certain period after the adoption of the text, the article should specifically require the depositary to notify all "negotiating States" as well as "contracting States". However, it concluded that to do this would make the article unduly complicated and that, placing the matter on the plane of a right rather than simply of diplomacy, only "contracting States" should be considered as having an actual *legal right* to a voice in any decision regarding a correction. Accordingly, it decided to confine the obligation of a depositary to notifying and seeking the assent of "contracting States". At the same time, it emphasized that the restriction of the provisions of the article to "contracting States" was not to be understood as in any way denying the desirability, on the diplomatic plane, of the depositary's also notifying all the "negotiating States", especially if no long period of time has elapsed since the adoption of the text of the treaty.

(8) *Paragraph 4*(b) provides that the correction of a text that has been registered shall be notified to the Secretariat of the United Nations. Its registration with the Secretary-General would clearly be in accordance with the spirit of article 2 of the General Assembly's Regulations concerning the Registration and Publication of Treaties and International Agreements, [295] and appeared to the Commission to be desirable.

(9) Certified copies of the text are of considerable importance in the operation of multilateral treaties, since it is the certified copy which represents a text of the treaty in the hands of the individual State. Since there exists a correct authentic text and it is only a question of making the copy accord with the correct text, the detailed procedure laid down in paragraph 2 for correcting an authentic text is unnecessary. *Paragraph 5*, therefore, provides for an appropriate *procès-verbal* to be executed and communicated to the contracting States.

Article 75. [296] Registration and publication of treaties

Treaties entered into by parties to the present articles shall as soon as possible be registered with the Secretariat of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations.

Commentary

(1) Article 102 of the Charter, repeating in somewhat different terms an analogous provision in Article 18 of the Covenant of the League of Nations, provides in paragraph 1 that every treaty and every international agreement entered into by any Member of the United Nations after the Charter came into force shall "as soon as possible be registered with the Secretariat and published by it". Although the Charter obligation is limited to Member States, non-member States have in practice "registered" their treaties habitually with the Secretariat of the United Nations. Under article 10 of the Regulations concerning the Registration and Publication of Treaties and International Agreements adopted by the General Assembly, the term used instead of "registration" when no Member of the United Nations is party to the agreement is "filing and recording", but in substance this is a form of voluntary registration. The Commission considered that it would be appropriate that all States becoming parties to a convention on the law of treaties should undertake a positive obligation to register treaties with the Secretariat of the United Nations. The Commission appreciated that certain other international organizations have systems of registration for treaties connected with the organization. But these special systems of registration do not affect the obligation laid down in the Charter to register treaties and international agreements with the Secretariat of the United Nations nor, in the Commission's view, the desirability of generalizing this obligation so as to make the central system of registration with the United Nations as complete as possible.

(2) The present article accordingly provides that "treaties entered into by *parties to the present articles* shall as soon as possible be registered with the Secretariat of the United Nations". The term "registration" is used in its general sense to cover both "registration" and "filing and recording" within the meaning of those terms in the regulations of the General Assembly. Whether the term "filing and recording" should continue to be used, rather than "registration", would be a matter for the General Assembly and the Secretary-General to decide. The Commission hesitated to propose that the sanction applicable under Article 102 of the Charter should also be specifically applied to non-members. But since it is a matter which touches the procedures of organs of the United Nations it thought that breach of such an obligation accepted by non-members in a general Con-

[295] Article 2 reads : "When a treaty or international agreement has been registered with the Secretariat, a certified statement regarding any subsequent action which effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat".

[296] 1962 and 1965 drafts, article 25.

vention could logically be regarded in practice as attracting that sanction.

(3) The second sentence of the article provides that the registration and publication are to be governed by the regulations adopted by the General Assembly. The Commission considered whether it should incorporate in the draft articles the provisions of the General Assembly's Regulations adopted in its resolution 97 (I) of 14 December 1946 (as amended by its resolutions 364B (IV) of 1 December 1949 and 482 (V) of 12 December 1950). These regulations are important as they define the conditions for the application of Article 102 of the Charter. However, having regard to the administrative character of these regulations and to the fact that they are subject to amendment by the General Assembly, the Commission concluded that it should limit itself to incorporating the regulations in article 75 by reference to them in general terms.

CHAPTER III

Special missions

A. HISTORICAL BACKGROUND

39. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft dealt only with permanent diplomatic missions. Diplomatic relations between States also assumed other forms that might be placed under the heading of "*ad hoc* diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session.[297] The Commission decided at its eleventh session (1959) to place the question of *ad hoc* diplomacy as a special topic on the agenda for its twelfth session (1960).

40. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report[298] to the twelfth session, and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions.[299] The Commission's draft was very brief. It was based on the idea that the rules on diplomatic intercourse and immunities in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed that it had not been able to give this draft the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.[300]

41. At its 943rd plenary meeting on 12 December 1960, the General Assembly decided, on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities.[301] The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee to study it.[302]

42. The Sub-Committee noted that the draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted. For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study of the topic, i.e., that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At its fourth plenary meeting, on 10 April 1961, the Conference adopted the Sub-Committee's recommendation.[303]

43. The matter was again submitted to the General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1687 (XVI), in which it requested the International Law Commission to study the subject further and to report thereon to the General Assembly.

44. In pursuance of that resolution, the question was referred back to the International Law Commission, which decided, at its 669th meeting, on 27 June 1962, to place it on the agenda for its fifteenth session. The Commission also requested the Secretariat to prepare a working paper on the subject.

45. During its fifteenth session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.

46. On that occasion, the Commission took the following decision:

> "With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by

[297] *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, para. 51.

[298] *Op. cit., 1960*, vol. II, p. 108, document A/CN.4/129.

[299] *Ibid.*, pp. 179 and 180.

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

[301] Resolution 1504 (XV).

[302] The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, the USSR, the United Kingdom, the United States of America and Yugoslavia.

[303] *Yearbook of the International Law Commission, 1963*, vol. II, p. 157, document A/CN.4/155, paras. 44 and 45.