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Eleventh report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

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QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 2]

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Introduction

1. In order to enable the International Law Commission to begin at its thirty-third session the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations, previously adopted on a provisional basis, the Special Rapporteur included in his tenth report[1] general observations and a review of articles 1–41 of the draft articles as adopted in first reading, in the light of the written comments and observations of Governments and principal international organizations[2] and views expressed in the Sixth Committee of the General Assembly.[3] The Commission reviewed and discussed articles 1–41, referred them to the Drafting Committee, and adopted in second reading the text of articles 1, 2 (para. 1 (*a*), (*b*), (*b bis*), (*b ter*), (*c*), (*c bis*), (*d*), (*e*), (*f*), (*g*), (*i*) and (*j*) and para. 2) and articles 3–26.[4] Consequently, although articles 27–41 have been considered by the Commission, they will have to be considered again.

2. The purpose of this report is to resubmit to the Commission articles 27–41, and also articles 42–80 and the annex, which were adopted in first reading but not covered by the preceding report, because the Commission hopes to complete the second reading at its thirty-fourth session and to formulate appropriate recommendations to the General Assembly concerning the final form of the draft[5] and also because the General Assembly, in paragraph 3 (*a*) of its resolution 36/114 of 10 December 1981, recommended that the Commission should:

> Complete at its thirty-fourth session the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations . . .;

3. Throughout the course of its work on this topic, the Commission has been particularly careful to obtain all relevant information and observations from international organizations.[6] A detailed questionnaire was sent to a large number of international organizations through the Secretary-General and the Special Rapporteur was able to use a substantial amount of the information thus collected in his second report.[7] In 1979, before completing its first reading, the Commission requested the comments and observations of Governments and of international organizations on the articles it had adopted provisionally. In 1980 the Commission requested the Secretary-General again to invite Governments and the international organizations concerned to submit their comments and observations on the draft articles, particularly the newly-adopted articles. Lastly, in 1981 it reminded Governments and principal international organizations, through the Secretary-General, of its invitation for the submission to the Secretary-General of comments and observations on the draft articles. The Commission has thus made every effort to obtain, particularly from the organizations most concerned, all the information that it could take into account in accordance with the desire repeatedly expressed by the General Assembly, in particular in resolution 36/114.

4. In fact, after the end of the most recent session of the Commission, the Special Rapporteur was in possession not only of the observations of a number of Governments and of international organizations[8] but also of a substantial body of comments made during the discussion in the Sixth Committee at the thirty-sixth session of the General Assembly.[9] Although most of the international organizations indicated that for the time being they had no comments or observations to present, a great many specific observations will be taken into account.

5. The observation thus made available to the Commission since its thirty-third session can be divided into three groups: those of a general nature, those relating to the articles already considered by the Commission in second reading (arts. 1–26) and those relating to the articles to be considered by the Commission at its thirty-fourth session (arts. 27–80 and the annex).

6. A number of general observations relate to aspects of the draft articles that were discussed at length in the course of the Commission's earlier work: the need to follow the 1969 Vienna Convention on the Law of Treaties[10] as closely as possible, while taking into account the specific differences between States and international organizations, the need to simplify the text of the articles as much as possible without sacrificing clarity, and so on.

7. Some of these general observations are particularly important because they concern, directly or indirectly, the ultimate fate of the draft articles, a question that will be settled by the General Assembly but which the Commission, as noted above, will doubtless wish to consider at its thirty-fourth session. The general feeling prevailing during the debate in the Sixth Committee seemed to be that after the second reading the draft articles could be referred to a codification conference

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[1] *Yearbook . . . 1981*, vol. II (Part One), p. 43, document A/CN.4/341 and Add.1.

[2] See *Yearbook . . . 1981*, vol. II (Part Two), p. 181, annex II.

[3] See particularly "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fourth session of the General Assembly" (A/CN.4/L.311), and "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326).

[4] For a summary of the discussion in the Commission at its thirty-third session, see *Yearbook . . . 1981*, vol. II (Part Two), pp. 116–120, paras. 103–128; and for the text of draft articles 1–26, adopted in second reading, *ibid.*, pp. 120 *et seq.*, para. 129.

[5] *Ibid.*, p. 117, para. 107.

[6] According to the practice followed in this regard, the organizations consulted were, in addition to the United Nations, the intergovernmental organizations invited to send observers to United Nations codification conferences.

[7] *Yearbook . . . 1973*, vol. II, pp. 76–77 and 93, document A/CN.4/271, paras. 2–5 and annex.

[8] The comments and observations of Governments and of principal international organizations received before and after the drafting of the present report were distributed under the symbol A/CN.4/350 and Add.1–11, and are reproduced in *Yearbook . . . 1982*, vol. II (Part Two), annex.

[9] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 34–110.

[10] Hereinafter called "Vienna Convention". For the text, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

for transformation into a treaty. Other views were expressed, and the need for a special conventional instrument covering treaties to which international organizations are parties was called in question. It was observed once again that it would be possible to prepare a draft referring broadly to the relevant articles of the Vienna Convention and containing only a minimum of articles embodying provisions that differ substantially from the latter Convention. In that case it would not even be necessary to prepare a special convention; a "declaration" adopted by the General Assembly would suffice to sanction the codification work, based on the close analogy that exists between treaties between States and treaties to which international organizations are parties.

8. For the purpose of this eleventh report, it will suffice for the Special Rapporteur to observe that it is not impossible that the Commission will recommend the convening of a general conference to which the draft articles will be submitted. If so, the only form which the draft articles can be given, at least at the current stage, is that of a set of articles that could become an autonomous convention, independent of the Vienna Convention. Even if the Commission were to recommend to the Sixth Committee that it should propose a simple "declaration" on the topic to the General Assembly, there would be no reason why the provisions to be included in the declaration should not retain their current form. In fact, the very considerable shortening of the text of the draft articles by the use of "*renvois*" would not only create the technical difficulties mentioned by the Special Rapporteur in his tenth report,[11] but would also no longer provide, materially, a complete picture of the applicable text and would thus unnecessarily complicate the the reader's task. The real choice is between the form of a *declaration* and that of a *convention*; in both cases, the text of the draft articles must retain its current form until it is submitted to the organ competent to take a decision on its future.

It has also been suggested that the draft should be supplemented (or even replaced) by a set of guidelines concerning the conclusion of such treaties. The Special Rapporteur believes that in its resolution 36/114, the General Assembly rejected that suggestion and that the Commission cannot assume the task of guiding the practice of States or even that of international organizations.

9. A second group of observations concerns the articles already considered in second reading, namely articles 1–26. These observations were made basically in the Sixth Committee. Most of them concern points which have been discussed at length in the Commission and on which compromises have been reached, sometimes with difficulty: for example, the use and meaning of expressions such as "treaty", "act of formal confirmation", "international organization", "rules of the organization" and "full powers". The Special Rapporteur considers that there is no need for the Commission to consider these points again. Some observations call in question both an article already considered in second reading and an article which has not yet been considered in second reading; in this case, the Special Rapporteur will mention the observation in connection with the consideration of the latter article (for example, article 7 and article 46). Lastly, it may be necessary to accord special treatment to articles 5 and 20; article 5 was adopted for the first time in second reading and its tardy adoption made it impossible to draw certain conclusions deriving from that article with regard to article 20; the Special Rapporteur will therefore re-examine both articles in this report, after articles 27–80 and the annex.

10. Lastly, there are the observations concerning articles 27–41, on the one hand, and articles 42–80 and the annex, on the other. With regard to articles 27–41, the Special Rapporteur will supplement the information already given in the addendum to his tenth report by the observations made at the thirty-third session of the Commission and by the observations and comments submitted since the end of that session by Governments and international organizations.[12] As regards articles 42–80 and the annex, he will take into consideration all the comments and observations submitted since the completion of the first reading.

[11] *Yearbook . . . 1981*, vol. II (Part One), p. 47, document A/CN.4/341 and Add.1, paras. 11 *et seq.* Furthermore, as the Special Rapporteur pointed out (*ibid.*, p. 47, footnote 16), it would doubtless be necessary to bring the terminology of the draft articles completely into line with that of the Vienna Convention, which would entail a great deal of work involving a number of substantive problems. Is it necessary, for example, to recall that the word "treaty" is used in different senses in the two texts?

[12] See footnote 8 above.

Consideration of the draft articles

PART III.[13] OBSERVATION, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

11. From the outset, article 27 was the subject of extensive discussion in the Commisssion and subsequently of many observations and comments.

12. In first reading the Commission adopted a draft article reading as follows:[14]

Article 27

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the

[13] For the purpose of harmonization, it would be desirable, in the French text, to replace the titles "Première partie", "Deuxième partie", etc., adopted in first reading, by the wording of the Vienna Convention: "Partie I", "Partie II", etc.

[14] *Yearbook . . . 1977*, vol. II (Part Two), p. 118.

intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

The Commission decided, however, to reconsider this text during the second reading.

13. In his tenth report[15] the Special Rapporteur proposed the following text:

1. Without prejudice to article 46, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. Without prejudice to articles 46 and 73, an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

14. This text was considered in second reading by the Commission at its thirty-third session, and referred to the Drafting Committee, which did not have time to consider it.[16] Generally speaking, the members of the Commission expressed a preference for a text having three paragraphs, such as that adopted in first reading. Moreover, they considered on the whole that there was no point in including a *renvoi* to article 73, which would add nothing to the text. With regard to the wording of the exception beginning "unless performance of the treaty . . .", included without change in both versions of the draft article, they criticized the reference to "the intention of the parties", a subjective criterion that was difficult to apply, and to "the exercise of the functions and powers of the organization", a vague and general concept. The Special Rapporteur agreed with those three observations.

15. What the members of the Commission had in mind was a simple case, which occurs frequently, in which an organization concludes an agreement with a State in order to implement a decision taken by one of its organs, while reserving its freedom to maintain or modify that decision. This occurs, for example, when the Security Council adopts a resolution concerning the conditions of a cease-fire and the United Nations concludes an agreement with one or more States with a view to the implementation of that resolution.

16. It was pointed out that similar situations might arise in the case of treaties concluded by States (with States or even with international organizations). A State might well conclude a treaty for the purpose of applying a law, *as long as that law remains in force*; in other words, the legislator retains the right to amend that law. This is a situation which simply arises less frequently in the case of States than in that of international organizations.

17. In fact, this involves a question relating to the interpretation of the scope of a treaty. There are thus two possible solutions. After close consideration, the Special Rapporteur considers that the simplest solution would be to revert to the version of paragraphs 1 and 3 adopted in first reading and to delete the exception from paragraph 2 as follows:

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

The commentary to article 27 reflects the problems examined by the Commission. If the Commission wishes to retain the exception, paragraph 2 should be drafted as follows:

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless the latter, by reason of its subject, depends on the adoption or maintenance of a decision of the organization.

18. Concern was expressed that the proviso in article 46 might not protect an organization sufficiently against undertakings that violate rules of the organization other than those relating to its competence to conclude agreements. It is conceivable, for example, that an international organization might conclude a treaty in violation of a *substantive* rule of its constituent instrument and would subsequently be prevented, by reason of article 27, from withdrawing from that undertaking. However, there would seem to be little justification for this hypothesis: an organization is bound by its constituent instrument and has no capacity to conclude agreements in violation of that instrument; none of its organs is competent to do so and consequently the proviso embodied in article 46 is sufficiently broad in scope to protect the organization effectively.

SECTION 2. APPLICATION OF TREATIES

ARTICLE 28 (Non-retroactivity of treaties),

ARTICLE 29 (Territorial scope of treaties between one or more States and one or more international organizations) *and*

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)

19. No observations were made on articles 28–30 as adopted in first reading. In his tenth report[17] the Special Rapporteur proposed a purely drafting change in article 30, paragraph 4, which could easily be made much less cumbersome:

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

(*a*) as between two parties, which are each parties to both treaties, the same rule applies as in paragraph 3;

(*b*) as between two parties, of which one is party to both treaties and the other to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

20. A question of principle was raised in the Commission. One member considered[18] that there were two categories of treaties, which were quite different in character: treaties between one or more States and one or more international organizations and treaties between international organizations, and that in the case of conflicts between successive treaties that distinction might give rise to solutions that would introduce more numerous distinctions in the rules set forth in article 30. However, the exchange of views on that subject which took place in the Commission showed that it might be sufficient to mention that aspect of the problem in the commentary. Article 30 of the Vienna Convention and draft article 30 were designed to resolve a certain number of simple cases of conflicts between treaties,

[15] *Yearbook . . . 1981*, vol. II (Part One), p. 65, document A/CN.4/341 and Add.1, para. 88.

[16] *Yearbook . . . 1981*, vol. I, pp. 157–166, 1673rd meeting, paras. 4–42; 1674th meeting, pararas. 1–27.

[17] *Yearbook . . . 1981*, vol. II (Part One), p. 65, document A/CN./341 and Add.1, para. 89.

[18] *Yearbook . . . 1981*, vol. I, p. 167, 1674th meeting, paras. 33–34 (Mr. Ushakov).

and not all such conflicts. Following its traditional course, the Commission did not seek to complete or correct, *mutatis mutandis*, the solutions adopted in the case of treaties between States. Although all the members of the Commission acknowledged that treaties between one or more States and one or more organizations and treaties between organizations were of equal value, it is not impossible that in some cases not covered in article 30 that distinction could provide the basis for a solution in the consideration of certain conflicts between treaties.

21. The Commission referred articles 28–30 to the Drafting Committee, which did not have time to consider them. The Special Rapporteur is not submitting any proposals other than that set forth in his tenth report, which he recalled above.

SECTION 3. INTERPRETATION OF TREATIES

ARTICLE 31 (General rule of interpretation),

ARTICLE 32 (Supplementary means of interpreation) *and*

ARTICLE 33 (Interpretation of treaties authenticated in two or more languages)

22. Articles 31–33, which are identical to the corresponding provisions of the Vienna Convention, were not the subject of any comment. They did not give rise to any objection in the debates at the thirty-third session of the Commission,[19] which referred them to the Drafting Committee.

SECTION 4. TREATIES AND THIRD STATES OR THIRD INTERNATIONAL ORGANIZATIONS

ARTICLE 34 (General rule regarding third States and third international organizations),

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations),

ARTICLE 36 (Treaties providing for rights for third States or third international organizations),

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization),

ARTICLE 37 (Revocation or modification of obligations or rights of third States or third international organizations) *and*

ARTICLE 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom)

23. At its thirty-third session, the Commission examined articles 34–36, 36 *bis* and 37–38 and referred them to the Drafting Committee, which did not have time to consider them. All the discussions were centred on article 36 *bis*, and they call for fairly substantial coverage, while it is possible to be fairly brief on the other articles.

24. At its twenty-ninth session,[20] the Commission adopted in first reading a draft article 34 worded as follows:

Article 34

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

In his tenth report[21] the Special Rapporteur proposed reducing the text to a single paragraph as follows:

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

The Commission approved that simplification, and suggested that the expression "third international organization" should be used instead, in conformity with article 2, para. 1 (*h*),[22] and referred the text to the Drafting Committee, which did not have time to consider it.[23] The Special Rapporteur suggests that the text as amended should be adopted. As the discussion had called in question article 2, para. 1 (*h*), worded as follows:

"third State" or "third international organization" means a State or an international organization not a party to the treaty;

that too was referred to the Drafting Committee, and the Special Rapporteur proposes that it should be adopted in that form.

25. Articles 35–36 were considered in the Commission without any new suggestion being submitted and then referred to the Drafting Committee, which did not have time to consider them. The Special Rapporteur is not formulating any new proposal concerning them, and they are therefore presented now as adopted by the Commission in first reading at its thirtieth session,[24] with the reference to article 36 *bis* in square brackets so long as the Commission's position on that article remains unchanged.

Article 35

1. [Subject to article 36 *bis*], an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

Article 36

1. [Subject to article 36 *bis*,] a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

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[19] *Ibid.*, p. 169, 1674th meeting, paras. 49–53.

[20] *Yearbook . . . 1977*, vol. II (Part Two), p. 123.

[21] *Yearbook . . . 1981*, vol. II (Part One), p. 65, document A/CN.4/341 and Add.1, para. 91.

[22] *Yearbook . . . 1981*, vol. I, p. 173, 1675th meeting, paras. 30–31 (Mr. Ushakov) and para. 32 (Mr. Jagota).

[23] *Ibid.*, pp. 175–176, 1676th meeting, paras. 1–3.

[24] *Yearbook . . . 1978*, vol. II (Part Two), pp. 132–133.

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

26. Since article 36 *bis* was first considered by the Commission at its thirtieth session, it has caused much controversy, both within the Commission and in the observations of Governments and the debates of the Sixth Committee. In order to take that situation into account, the Commission, in first reading, placed an initial version of article 36 *bis* in square brackets.[25] In his tenth report,[26] the Special Rapporteur reconsidered draft article 36 *bis* and proposed a new version as follows:

The assent of States members of an international organization to obligations arising from a treaty concluded by that organization shall derive from:

(*a*) the relevant rules of the organization applicable at the moment of the conclusion of the treaty which provide that States members of the organization are bound by such a treaty; or

(*b*) the acknowledgment by the States and organizations participating in the negotiation of the treaty as well as the States members of the organizations that the application of the treaty necessarily entails such effects.

27. In his report, as in submitting this new wording to the Commission,[27] the Special Rapporteur indicated that the purpose of article 36 *bis*, as reworded, was not to change the fundamental principle set forth in article 35, i.e., the need for assent to establish an obligation, but to render more flexible the modalities of assent which article 35 has made subject to very strict formal requirements, which do not always seem to meet the requirements of practice. It was thus a question of introducing two exceptions for which it was easy to furnish examples, in particular, those of tariff agreements concluded by an organization administering a customs union, a headquarters agreement concluded by an organization with a host State, and a fisheries agreement between an organization and a State.

28. In the discussions in the Commission, opposition was expressed to article 36 *bis*, based on the assertion that that draft article applied only to the European Economic Community, that the latter constituted a quite exceptional case and that the Commission's draft should not be tied to particular situations. The feeling was also expressed that, in general, it was not entirely correct to present States members of an organization as third parties in relation to treaties concluded by the organization; draft article 36 *bis* thus referred to a real problem, though a fairly complicated one for some; certain members said that it would be more appropriate to place article 36 *bis* after article 35; others thought that the wording of paragraph (*b*) might be made more precise. It was in those circumstances that article 36 *bis* was referred to the Drafting Committee, which did not have time to consider it.

29. It may be noted that, during the debates of the Sixth Committee at the thirty-sixth session of the General Assembly, although that article was not referred to in the report of the Commission then under discussion, some allusions were made either to article 36 *bis* or to particular difficulties to which article 36 *bis* endeavoured to provide a partial answer.[28] For the time being, however, the Special Rapporteur sees no need to make new suggestions with regard to article 36 *bis*.

30. With regard to draft article 37, its text did not elicit any particular comment from Governments. In the Commission, it was paragraphs 5–6, placed in square brackets, of the version adopted in first reading which attracted attention. Those paragraphs extend the application of the rules set forth in articles 35–36 to the two hypothetical instances envisaged in article 36 *bis*. Two consequences derive from this. On the one hand, if the Commission should decide to remove draft article 36 *bis*, paragraphs 5–6 of article 37 should also disappear. On the other, if the Commission should decide to follow for article 36 *bis* the new proposal made by the Special Rapporteur, the text of the two paragraphs would become as follows:

5. When an obligation has arisen for States which are members of an international organization under the conditions provided for in subparagraph (*a*) of article 36 *bis*, the obligation may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.

6. When an obligation has arisen for States which are members of an international organization under the conditions provided for in subparagraph (*b*) of article 36 *bis*, the obligation may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.

31. The members of the Commission in general acknowledged that the above-mentioned paragraphs 5–6 were logically justified if article 36 *bis* was accepted, because it is the conjuncture of a number of consents which justifies the two paragraphs of article 36 *bis*. Nevertheless, some members considered that, in those hypothetical instances, so strong an effect should not be attributed to conjunctures of consents and that it would be better to delete paragraphs 5–6, even if the Commission retained article 36 *bis*. It was in those circumstances that article 37 as a whole was referred to the Drafting Committee.

32. Article 38 was not the subject of comment either by Governments or in the Commission and was referred to the Drafting Committee, which did not have time to consider it. The Special Rapporteur does not propose any amendment to its text.

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[25] *Ibid.*, p. 134.

[26] *Yearbook . . . 1981*, vol. II (Part One), pp. 65–69, document A/CN.4/341 and Add.1, paras. 92–104.

[27] *Yearbook . . . 1981*, vol. I, pp. 170–173, 1675th meeting, paras. 6–29.

[28] *Official Records of the General Assembly, Thirty-sixth session, Sixth Committee*, 40th meeting, para. 54 (Netherlands) and 42nd meeting, para. 37 (Japan).

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

ARTICLE 39 (General rule regarding the amendment of treaties),
ARTICLE 40 (Amendment of multilateral treaties) *and*
ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)

33. Generally speaking, the three articles of part IV have not particularly attracted the attention of Governments and international organizations. One such organization, however, thought, with regard to article 39, paragraph 1, that there might be some advantage in bringing the wording closer into line with that of article 39 of the Vienna Convention of 1969 by restoring, in the second sentence of that paragraph, the reservation formulated at Vienna: "in so far as the treaty may otherwise provide". Paragraph 1 of the draft article thus modified would then read:

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

The main advantage of thus reverting to the text of the Vienna Convention would be the following. When a convention is drafted and adopted in the organ of an organization, as are the conventions of the Council of Europe, it is normal for the same procedure to be followed for the amendments, and the treaties make provision accordingly. This possibility is already covered by the wording of new article 5, which is re-examined below (para. 49); the Special Rapporteur is nevertheless pleased to accept the suggestion made. The text of article 39 thus modified therefore makes provision, as does the Vienna Convention, for the possibility of particular rules for amendment and is thus more consistent with practice.

34. It was also pointed out that article 39, paragraph 2, is quite useless because it merely repeats a rule deriving as much from the constituent instrument of the organization as from the draft articles. Logically speaking, this observation is correct, but it calls in question a number of other articles in which the Commission recalled that the organization must comply with "the relevant rules of the organization" (art. 35, para. 3; art. 36, para. 3; art. 37, para. 7; art. 45, para. 3; annex, section I, para. 2 *bis*) and, since these reminders were intentionally included in all these texts, the Special Rapporteur does not propose to modify paragraph 2.

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

ARTICLE 42 (Validity and continuance in force of treaties),
ARTICLE 43 (Obligations imposed by international law independently of a treaty),
ARTICLE 44 (Separability of treaty provisions) *and*
ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

35. Two of the four articles of section 1, articles 43–44, do not call, and have not called, for any comment. On the other hand, while there were no comments on article 42, the Special Rapporteur thinks that there is nothing to prevent the first two paragraphs from being combined as one; actually there is no reason in terms of either substance or drafting which makes it necessary to distinguish treaties between two or more international organizations. If article 42 were thus condensed, it would be closer to the corresponding article of the Vienna Convention. Paragraph 3 adopted in first reading and unamended would become paragraph 2, and new paragraph 1 would read as follows:

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present articles.

36. While there is no need to propose further modifications of article 42, its tenor prompts the Special Rapporteur to recall two problems. First, the strict rule laid down by this article will raise a question with regard to article 73: is article 73 drafted in sufficiently broad and sufficiently precise terms to cover the provisos to which article 42 gives rise? Secondly, when the Commission adopted articles 30 and 42 in first reading, it raised the question whether the proviso mentioned in draft article 30, paragraph 6, should not be expressed in a separate article extending the proviso regarding the application of Article 103 of the Charter to the draft articles as a whole.[29] Finally it decided to re-examine the question in second reading (see paras. 51–53 below).

37. Article 45 elicited critical comments on the part of certain Governments which had, moreover, already been submitted in the Commission. The origin and purpose of these criticisms are as follows. The Vienna Convention nowhere deals with the prohibition which might affect the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty; on the other hand, it admits, with the same effects, acquiescence given by reason of the conduct of the State. In the present draft articles, the Commission has maintained this rule in respect of States; but, with regard to international organizations, one member pointed out that an organization was structured in a less unitary way than a State and that it had greater need than a State for protection against itself; or again, in other words, that the States members of the organization required to be protected against the weaknesses or inertia of certain organs of the organization, even at the expense of the co-contracting States. To accommodate this concern the Commission adopted special provisions for organizations.

38. First of all, the Commission somewhat altered the rule regarding the effects of the conduct of the organization. Instead of requiring that the organization's conduct should involve *acquiescence* in the validity, or maintenance in force or in operation of the treaty, the Commission requires that the conduct should involve *renunciation* of the right to invoke the ground referred

[29] *Yearbook . . . 1979*, vol. II (Part Two), p. 149, para. (3) of the commentary to article 42.

to in paragraph 1. Consequently the organization's conduct cannot have merely passive effects but must involve an actual renunciation. Furthermore, in a paragraph 3, the Commission states that "The agreement and conduct provided for in paragraph 2 shall be governed by the relevant rules of the organization".

39. Some Governments felt that these precautions were not sufficient. They would prefer it if the conduct of an organization could have no effects on the organization's right to invoke a ground for invalidation or termination, withdrawal or suspension. It was also proposed that it should not be possible to raise the question of the conduct of an organization in connection with article 46. But the vast majority of opinions expressed hold that in the text adopted in first reading an acceptable compromise was struck between the need to protect the treaty partners of an international organization and the need to protect the member States. Furthermore, the effects of legal personality cannot be disregarded to too great an extent; for, if an organization has been recognized as having some capacity in matters concerning the conclusion of treaties, it must by the same token be considered to bear some responsibility for its conduct. In conclusion, the Special Rapporteur has no other changes to propose to the text adopted in first reading except the deletion of the square brackets in paragraphs 1 and 2 around the reference to article 62.

SECTION 2. INVALIDITY OF TREATIES

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties),

ARTICLE 47 (Specific restrictions on authority to express or communicate consent to be bound by a treaty),

ARTICLE 48 (Error),

ARTICLE 49 (Fraud),

ARTICLE 50 (Corruption of a representative of a State or of an international organization),

ARTICLE 51 (Coercion of a representative of a State or of an international organization),

ARTICLE 52 (Coercion of a State or of an international organization by the threat or use of force) *and*

ARTICLE 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))

40. Articles 46–53, comprised in this section, have largely been approved by Governments. For drafting purposes the square brackets around article 79, in article 48, paragraph 3, should be deleted. Also, Governments have pointed to the unnecessarily cumbersome drafting of article 47. However, the article could not be made less unwieldy without abandoning the distinction between *expressing* and *communicating* consent in the case of a State and an international organization respectively. Since this distinction was maintained during the second reading in article 7,[30] it should also be kept in article 47.

41. Article 46 has given rise to a number of comments. Some Governments felt, first of all, that there was no reason to relinquish, in the case of international organizations, one of the conditions set for States, namely the violation of a rule of fundamental importance. This view met with some favour in the Commission, but it may nevertheless be noted that article 45, indicating that the conduct of organizations can have certain effects, can offset any drawbacks occasioned by the removal of this condition. It has also been observed that the rule laid down in article 46 would have different effects in the case of members of an organization and in that of those treaty partners of the organization which were not members of that organization. This observation is quite true but the matter has, in fact, been taken care of in the wording of article 46, paragraph 4. This paragraph states that a violation is "manifest if it is or ought to be within the cognizance of any contracting State or any other contracting organization". However, a State or any other organization, which is a member of an organization, ought to be perfectly cognizant of the rules of that organization regarding competence to conclude treaties, which is not necessarily so in the case of the other contracting parties. It has also been said that the title of article 46 departs too far from the title of the Vienna Convention by placing unnecessary emphasis on the violation of provisions regarding competence to conclude treaties. If the Commission agreed, it would suffice to word the title of article 46 as follows:

Provisions regarding competence to conclude treaties

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

ARTICLE 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties),

ARTICLE 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force),

ARTICLE 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal),

ARTICLE 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties),

ARTICLE 58 (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only),

ARTICLE 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty),

ARTICLE 60 (Termination or suspension of the operation of a treaty as a consequence of its breach),

ARTICLE 61 (Supervening impossibility of performance),

ARTICLE 62 (Fundamental change of circumstances),

ARTICLE 63 (Severance of diplomatic or consular relations) *and*

ARTICLE 64 (Emergence of a new peremptory norm of general international law (*jus cogens*))

42. Articles 54–64, which make up this section, did not give rise to any comments calling for changes in the text adopted in first reading. The awkward construction of the wording of paragraph (*b*) of articles 54 and 57, which has been criticized, is due to the need for precision. In connection with article 56, it was pointed out that the ICJ, in its Advisory Opinion of 20 December 1980, had referred to the work of the Commission,[31] and criticism was also voiced over the fact that the Commission mentioned headquarters agreements as an example of treaties coming within the scope of article 56, paragraph 1 (*b*).[32] One Government

[30] *Yearbook . . . 1981*, vol. II (Part Two), p. 128.

[31] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 96, para. 49.

[32] *Yearbook . . . 1979*, vol. II (Part Two), p. 158, commentary to article 56.

suggested that the Commission should add to draft article 63 a provision mentioning that, where they are based on an agreement between the organization and a State, the special organic relations established between the organization and that State (appointment of local representatives, commissions, and experts of a permanent nature) could be suspended without affecting the treaty. This possibility had been considered by the Commission[33] and accepted. If the Commission deems it necessary, article 63 could be supplemented to include such a provision.

SECTION 4. PROCEDURE

ARTICLE 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty),

ARTICLE 66 (Procedures for judicial settlement, arbitration and conciliation),

ARTICLE 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) *and*

ARTICLE 68 (Revocation of notifications and instruments provided for in articles 65 and 67)

43. Few comments have been made in respect of articles 65–68. The most important concerns article 65, paragraph 2, which provides for a moratorium of three months in which an objection can be raised to an act intended to suspend the operation of the treaty. The Commission had considered the question whether this moratorium might not be too short in the case of an organization, and had indicated[34] that in doubtful cases an organization could always submit an objection, only to withdraw it subsequently. It has been suggested that it would be preferable to extend the moratorium. The Special Rapporteur takes the view that a system which extends greater privileges to organizations than to States cannot be established; it should not be forgotten that the three-month moratorium has the effect of suspending a measure taken by a treaty partner which may in certain cases be a State; such a measure does not necessarily have to be an exception, in that it may be a denunciation of a treaty in conformity with the clauses of that treaty; in providing for the three-month moratorium, the Vienna Convention and draft article 65 are already imposing a sufficiently rigorous rule on States, and a more rigorous rule would not be reasonable; it is up to organizations to ensure that their permanent organs are competent to take all necessary measures to protect their interests.

44. A further problem concerns article 66, which should be considered in relation to the annex. Generally speaking, these texts have not been commented upon. As far as substantive matters are concerned, there is perhaps no need for the Commission to dwell on their content. It is customary for the Commission to rely on the deliberations of the conferences or the intergovernmental bodies to which these texts are submitted. In formulating the draft articles in first reading, the Commission's intention was to provide Governments with the elements they need to take a decision; it is not necessary for the Commission to devise other formulations. Furthermore, the draft articles will only be relevant if the General Assembly decides that it is timely to confer the form of a convention on the draft articles as a whole. The Special Rapporteur will therefore not re-examine the texts of article 66 and the annex.

45. From the point of view of drafting, however, the Special Rapporteur wondered whether the text of article 66 might not be reviewed. If a more general formulation is used instead of a description of the different types of disagreement to which an objection may give rise, paragraphs 2–3 of the draft article could be reduced to a single paragraph, so that the draft article would read as follows:

Article 66

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which an objection has given rise to a dispute between two or more States, the following procedures shall be followed:

(*a*) Any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(*b*) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present articles may set in motion the procedure specified in the annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which an objection has given rise to a dispute between an international organization and one or more States or between an international organization and one or more international organizations, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

ARTICLE 69 (Consequences of the invalidity of a treaty),

ARTICLE 70 (Consequences of the termination of a treaty),

ARTICLE 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law) *and*

ARTICLE 72 (Consequences of the suspension of the operation of a treaty)

46. Articles 69–72, which follow very closely the text of the corresponding articles of the Vienna Convention, have not elicited any comments or observations. It appears that the Commission can adopt them as they are in second reading.

[33] *Yearbook . . . 1980*, vol. II (Part Two), pp. 83–84, commentary to article 63.

[34] *Ibid.*, p. 85, para. (4) of the commentary to article 65.

PART VI. MISCELLANEOUS PROVISIONS

ARTICLE 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization),

ARTICLE 74 (Diplomatic and consular relations and the conclusion of treaties) *and*

ARTICLE 75 (Case of an aggressor State)

47. Articles 73–75 have long preoccupied the Commission in first reading. They have not, however, given rise to comments or objections at the governmental level. It appears that the Commission can adopt them in second reading without amendment.

PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

ARTICLE 76 (Depositaries of treaties),

ARTICLE 77 (Functions of depositaries),

ARTICLE 78 (Notifications and communications),

ARTICLE 79 (Correction of errors in texts or in certified copies of treaties) *and*

ARTICLE 80 (Registration and publication of treaties)

48. The same observations apply to draft articles 76–80.

Provisions already considered in second reading

49. As already indicated (para. 9 above), the articles concerned are article 5 (Treaties constituting international organizations and treaties adopted within an international organization) and article 20 (Acceptance of and objection to reservations). During the discussions in the Sixth Committee, some doubts were expressed about the usefulness of adopting an article 5, but in general the proposal met with approval. A number of representatives, however, referred to a point made by the Commission in its commentary to article 20.[35] The text of article 20 as adopted in second reading contains no provision parallel to article 20, paragraph 3, of the Vienna Convention, which states:

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

50. The idea behind this omission was that treaties which are the constituent instruments of an international organization are treaties between States and come within the scope of the Vienna Convention. It is, admittedly, conceivable that an international organization might be a member of another international organization and that its constituent instrument would therefore come within the scope of the draft articles automatically. In 1977, during its consideration of draft article 20 in first reading, the Commission had set aside that hypothesis as referring to an exceptional situation.[36] With the adoption of article 5, however, the hypothesis has been retained: it is therefore logical to add to draft article 20 a paragraph 3 reiterating word for word the terms of article 20, paragraph 3, of the Vienna Convention; the existing paragraphs of draft article 20, numbered 3 and 4, would become, respectively, paragraphs 4 and 5.

51. Another matter raised in the Commission in connection with articles 30 and 42 was whether it might not be appropriate to propose a new article on the following lines:

> The present articles are without prejudice to Article 103 of the Charter of the United Nations.

52. Such a provision would extend to the articles as a whole the provision mentioned only in article 30, paragraph 6, in the following form:

> The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

53. It would seem in fact that the reservation regarding Article 103 of the Charter should appear in other articles besides article 30, and particularly in article 42, in that, whatever theoretical views may be taken with regard to the effects of Article 103, it is difficult to suppress the notion that this Article is, at the very least, conducive to results which are tantamount to a suspension. At the same time, it would seem that to conclude that it would be useful to adopt a new article, generalizing the scope of article 30, paragraph 6, would be to follow a line of reasoning which would have been equally valid for the Vienna Convention. The Commission has, however, consistently sought to avoid adopting provisions which seem to indicate the existence of omissions or shortcomings in the Vienna Convention. For this reason, the Special Rapporteur is more inclined to leave article 30 as it is and to refrain from adopting a new article generalizing the Article 103 formula. A further reason for this reservation relates to all the difficulties which invariably arise when reference is made to conventional provisions whose meaning is disputed and which the Commission has no authority to interpret.

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[35] *Yearbook . . . 1981*, vol. II (Part Two), pp. 138–139, para. (3) of the commentary to article 20.

[36] *Yearbook . . . 1977*, vol. II (Part Two), p. 112, para. (3) of the commentary to article 20.