

Document:-
A/37/10

**Report of the International Law Commission on the work of its Thirty-fourth session, 3
May - 23 July 1982, Official Records of the General Assembly, Thirty-seventh session,
Supplement No. 10**

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1982, vol. II(2)

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

DOCUMENT A/37/10*

**Report of the International Law Commission on the work
of its thirty-fourth session (3 May-23 July 1982)**

CONTENTS

	<i>Page</i>
<i>Abbreviations</i>	6
Principal conventions cited in the present volume	6
Note concerning quotations	6
<i>Chapter</i>	<i>Paragraphs</i>
I. ORGANIZATION OF THE SESSION	1-11 7
A. Membership	3-4 7
B. Officers	5-6 7
C. Drafting Committee	7 8
D. Working Group on the draft Code of Offences against the Peace and Security of Mankind	8 8
E. Secretariat	9 8
F. Agenda	10-11 8
II. QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS	12-63 9
A. Introduction	12-55 9
1. Historical review of the work of the Commission	12-33 9
2. General remarks concerning the draft articles	34-55 12
(a) Form of the draft	34 12
(b) Relationship to the Vienna Convention	35-44 12
(c) Methodological approach	45-55 14
B. Recommendation of the Commission	56-61 16
C. Resolution adopted by the Commission	62 17
D. Draft articles on the law of treaties between States and international organizations or between international organizations	63 17
PART I. INTRODUCTION	17
Article 1. Scope of the present articles	17
Commentary	17
Article 2. Use of terms	17
Commentary	18
Article 3. International agreements not within the scope of the present articles	21
Commentary	22
Article 4. Non-retroactivity of the present articles	22
Commentary	23
Article 5. Treaties constituting international organizations and treaties adopted within an international organization	23
Commentary	23
PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES	23
Section 1. Conclusion of treaties	23
Article 6. Capacity of international organizations to conclude treaties	23
Commentary	23
Article 7. Full powers and powers	24
Commentary	25
Article 8. Subsequent confirmation of an act performed without authorization	27
Commentary	27
Article 9. Adoption of the text	27
Commentary	28

* Initially distributed as *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10.*

	Page
Article 10. Authentication of the text.....	28
Commentary.....	29
Article 11. Means of expressing consent to be bound by a treaty.....	29
Commentary.....	29
Article 12. Consent to be bound by a treaty expressed by signature.....	29
Commentary.....	30
Article 13. Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty.....	30
Commentary.....	30
Article 14. Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval.....	30
Commentary.....	30
Article 15. Consent to be bound by a treaty expressed by accession.....	31
Commentary.....	31
Article 16. Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession.....	31
Commentary.....	31
Article 17. Consent to be bound by part of a treaty and choice of differing provisions.....	31
Commentary.....	32
Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force.....	32
Commentary.....	32
Section 2. <i>Reservations</i>	32
General commentary to section 2.....	32
Article 19. Formulation of reservations.....	35
Commentary.....	35
Article 20. Acceptance of and objection to reservations.....	35
Commentary.....	35
Article 21. Legal effects of reservations and of objections to reservations.....	36
Article 22. Withdrawal of reservations and of objections to reservations.....	37
Article 23. Procedure regarding reservations.....	37
Commentary to articles 21, 22 and 23.....	37
Section 3. <i>Entry into force and provisional application of treaties</i>	37
Article 24. Entry into force.....	37
Article 25. Provisional application.....	37
Commentary to articles 24 and 25.....	38
PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES.....	38
Section 1. <i>Observance of treaties</i>	38
Article 26. <i>Pacta sunt servanda</i>	38
Commentary.....	38
Article 27. Internal law of States, rules of international organizations and observance of treaties.....	38
Commentary.....	38
Section 2. <i>Application of treaties</i>	40
Article 28. Non-retroactivity of treaties.....	40
Commentary.....	40
Article 29. Territorial scope of treaties.....	40
Commentary.....	40
Article 30. Application of successive treaties relating to the same subject-matter.....	40
Commentary.....	41
Section 3. <i>Interpretation of treaties</i>	41
General commentary to section 3.....	41
Article 31. General rule of interpretation.....	41
Article 32. Supplementary means of interpretation.....	41
Article 33. Interpretation of treaties authenticated in two or more languages.....	42
Section 4. <i>Treaties and third States or third organizations</i>	42
General commentary to section 4.....	42
Article 34. General rule regarding third States and third organizations.....	42
Commentary.....	42
Article 35. Treaties providing for obligations for third States or third organizations.....	42
Commentary.....	42
Article 36. Treaties providing for rights for third States or third organizations.....	42
Commentary.....	43
Article 36. <i>bis</i> . Obligations and rights arising for States members of an international organization from a treaty to which it is a party.....	43
Commentary.....	43
Article 37. Revocation or modification of obligations or rights of third States or third organizations.....	47
Commentary.....	47
Article 38. Rules in a treaty becoming binding on third States or third organizations through international custom.....	47

	Page
Commentary.....	47
PART IV. AMENDMENT AND MODIFICATION OF TREATIES	48
General commentary to Part IV.....	48
Article 39. General rule regarding the amendment of treaties	48
Commentary.....	48
Article 40. Amendment of multilateral treaties.....	48
Article 41. Agreement to modify multilateral treaties between certain of the parties only	49
PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES.....	49
Section 1. General provisions.....	49
Article 42. Validity and continuance in force of treaties.....	49
Article 43. Obligations imposed by international law independently of a treaty	49
Article 44. Separability of treaty provisions.....	49
Commentary to articles 42, 43 and 44	49
Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or sus- pending the operation of a treaty.....	50
Commentary.....	50
Section 2. Invalidity of treaties.....	51
Article 46. Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties	51
Commentary.....	51
Article 47. Specific restrictions on authority to express the consent of a State or an international organization	53
Commentary.....	53
Article 48. Error.....	53
Commentary.....	53
Article 49. Fraud.....	54
Commentary.....	54
Article 50. Corruption of a representative of a State or of an international organization.....	54
Commentary.....	54
Article 51. Coercion of a representative of a State or of an international organization.....	54
Commentary.....	54
Article 52. Coercion by the threat or use of force.....	55
Commentary.....	55
Article 53. Treaties conflicting with a peremptory norm of general international law (<i>jus cogens</i>)	56
Commentary.....	56
Section 3. Termination and suspension of the operation of treaties.....	56
Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties.....	57
Commentary.....	57
Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force	57
Commentary.....	57
Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termi- nation, denunciation or withdrawal	57
Commentary.....	57
Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties	57
Commentary.....	57
Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only	58
Commentary.....	58
Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty.....	58
Commentary.....	58
Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach	58
Commentary.....	58
Article 61. Supervening impossibility of performance.....	59
Commentary.....	59
Article 62. Fundamental change of circumstances.....	59
Commentary.....	59
Article 63. Severance of diplomatic or consular relations.....	62
Commentary.....	62
Article 64. Emergence of a new peremptory norm of general international law (<i>jus cogens</i>).....	62
Commentary.....	62
Section 4. Procedure.....	63
Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty	63
Commentary.....	63
Article 66. Procedures for arbitration and conciliation.....	64
Commentary.....	64

	<i>Page</i>	
Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty	65	
Commentary.....	65	
Article 68. Revocation of notifications and instruments provided for in articles 65 and 67.....	66	
Commentary.....	66	
<i>Section 5. Consequences of the invalidity, termination or suspension of the operation of a treaty.....</i>	<i>66</i>	
Article 69. Consequences of the invalidity of a treaty.....	66	
Commentary.....	66	
Article 70. Consequences of the termination of a treaty.....	67	
Commentary.....	67	
Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law.....	67	
Commentary.....	67	
Article 72. Consequences of the suspension of the operation of a treaty.....	67	
Commentary.....	67	
PART VI. MISCELLANEOUS PROVISIONS	67	
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.....	67	
Commentary.....	68	
Article 74. Diplomatic and consular relations and the conclusion of treaties	70	
Commentary.....	70	
Article 75. Case of an aggressor State	70	
Commentary.....	70	
PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION.....	71	
Article 76. Depositaries of treaties	71	
Commentary.....	71	
Article 77. Functions of depositaries	71	
Commentary.....	72	
Article 78. Notifications and communications	73	
Commentary.....	74	
Article 79. Correction of errors in texts or in certified copies of treaties	74	
Commentary.....	74	
Article 80. Registration and publication of treaties.....	74	
Commentary.....	74	
ANNEX. ARBITRATION AND CONCILIATION PROCEDURES ESTABLISHED IN APPLICATION OF ARTICLE 66.....	75	
I. Establishment of the Arbitral Tribunal or Conciliation Commission	75	
II. Functioning of the Arbitral Tribunal	75	
III. Functioning of the Conciliation Commission.....	75	
Commentary	75	
	<i>Paragraphs</i>	
III. STATE RESPONSIBILITY	64-103	78
A. Introduction	64-78	78
B. Consideration of the topic at the present session	79-103	80
IV. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW	104-156	83
A. Introduction	104-107	83
B. Consideration of the topic at the present session	108-156	83
<i>Schematic outline.....</i>	<i>109</i>	<i>83</i>
1. Salient features of the third report and schematic outline	110-128	85
(a) Scope	110-113	85
(b) Content.....	114-121	86
(c) Attribution and strict liability	122-128	86
2. The Commission's discussion	129-156	88
(a) The "make-or-break" questions	129-138	88
(b) Other matters	139-156	90
V. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY.....	157-198	93
A. Introduction	157-198	93
1. Historical review of the work of the Commission.....	157-170	93
2. Consideration of the topic at the present session.....	171-198	95
B. Draft articles on jurisdictional immunities of States and their property.....		99
PART I. INTRODUCTION		99
Article 1. Scope of the present articles		99
Commentary		99

	<i>Page</i>
Article 2. Use of terms	100
Commentary	100
PART II. GENERAL PRINCIPLES.....	100
Article 6. State immunity	100
Article 7. Modalities for giving effect to State immunity	100
Commentary	100
Article 8. Express consent to the exercise of jurisdiction.....	107
Commentary	107
Article 9. Effect of participation in a proceeding before a court	109
Commentary	109
	<i>Paragraphs</i>
VI. STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER	199-249 112
A. Introduction	199-205 112
B. Consideration of the topic at the present session.....	206-249 114
1. Part I of the draft articles: "General provisions".....	210-230 115
(a) Scope of the draft articles	211-219 115
(b) Use of terms	220-225 116
(c) General principles	226-230 117
2. Part II of the draft articles: "Status of the diplomatic courier, the diplomatic courier <i>ad hoc</i> and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag".....	231-247 118
(a) Proof of status	232 118
(b) Appointment of a diplomatic courier	233-236 118
(c) Nationality of the diplomatic courier	237 118
(d) Functions of the diplomatic courier	238-240 119
(e) Duration of the functions	241-247 119
VII. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION.....	250-289 121
A. The law of the non-navigational uses of international watercourses.....	250-251 121
B. Draft Code of Offences against the Peace and Security of Mankind	252-256 121
C. Programme and methods of work of the Commission	257-272 121
D. Co-operation with other bodies.....	273-279 124
1. Inter-American Juridical Committee	273-278 124
2. European Committee on Legal Co-operation.....	279 125
E. Date and place of the thirty-fifth session	280 125
F. Representation at the thirty-seventh session of the General Assembly	281 125
G. International Law Seminar	282-289 125

ANNEX

Comments and observations of Governments and principal international organizations on articles 61 to 80 and annex of the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the International Law Commission at its thirty-second session	127
---	-----

ABBREVIATIONS

CMEA	Council for Mutual Economic Assistance
ECE	Economic Commission for Europe
EEC	European Economic Community
EFTA	European Free Trade Association
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organisation
IMF	International Monetary Fund
INTERPOL	International Criminal Police Organization
ITU	International Telecommunication Union
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private Law
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WHO	World Health Organization
<i>I.C.J. Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>

PRINCIPAL CONVENTIONS

cited in the present volume

- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) (*United Nations, Treaty Series*, vol. 500, p. 95)
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) (*United Nations, Treaty Series*, vol. 596, p. 261)
- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (*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)
- Convention on Special Missions (New York, 8 December 1969) (General Assembly Resolution 2530 (XXIV), annex)
- Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) (*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207)
- Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978) (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185)

NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirty-fourth session at its permanent seat at the United Nations Office at Geneva from 3 May to 23 July 1982. The session was opened by the Chairman of the thirty-third session, Mr. Doudou Thiam.

2. The work of the Commission during this session is described in the present report. Chapter II of the report, on the question of treaties concluded between States and international organizations or between two or more international organizations contains a description of the Commission's work on that topic, together with 81 draft articles and annex constituting the whole draft on the law of treaties between States and international organizations or between international organizations and commentaries thereto, as finally approved by the Commission. Chapter III on State responsibility and chapter IV on international liability for injurious consequences arising out of acts not prohibited by international law contain a description of the work of the Commission at its present session on those respective topics. Chapter V on jurisdictional immunities of States and their property contains a description of the Commission's work on the topic, together with five articles and commentaries thereto, as provisionally adopted by the Commission at the thirty-fourth session. Chapter VI on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier contains a description of the work of the Commission at its present session on that topic. Finally, chapter VII deals with the law of the non-navigational uses of international water-courses, the draft Code of Offences against the Peace and Security of Mankind and the programme and methods of work of the Commission, as well as a number of administrative and other questions.

A. Membership

3. By its resolution 36/39 of 18 November 1981, the General Assembly decided, *inter alia*, to amend articles 2 and 9 of the Statute of the International Law Commission to provide for an increase in the number of members of the Commission from 25 to 34. At its 69th plenary meeting, on 23 November 1981, the General Assembly elected thirty-four members of the Commission for a five-year term of office commencing 1 January 1982. The Commission consists of the following members:

Chief Richard Osuolale A. AKINJIDE (Nigeria);
Mr. Riyadh Mahmoud Sami AL-QAYSI (Iraq);
Mr. Mikuin Leliel BALANDA (Zaire);
Mr. Julio BARBOZA (Argentina);
Mr. Boutros BOUTROS GHALI (Egypt);
Mr. Carlos CALERO RODRIGUES (Brazil);
Mr. Jorge CASTAÑEDA (Mexico);
Mr. Leonardo DÍAZ GONZÁLEZ (Venezuela);
Mr. Khalafalla EL RASHEED MOHAMED AHMED (Sudan);
Mr. Jens EVENSEN (Norway);
Mr. Constantin FLITAN (Romania);
Mr. Laurel B. FRANCIS (Jamaica);
Mr. Jorge E. ILLUECA (Panama);
Mr. Andreas J. JACOVIDES (Cyprus);
Mr. S. P. JAGOTA (India);
Mr. Abdul G. KOROMA (Sierra Leone);
Mr. José Manuel LACLETA MUÑOZ (Spain);
Mr. Ahmed MAHIOU (Algeria);
Mr. Chafic MALEK (Lebanon);
Mr. Stephen C. McCAFFREY (United States of America);
Mr. Zhengyu NI (China);
Mr. Frank X. NJENGA (Kenya);
Mr. Motoo OGISO (Japan);
Mr. Syed Sharifuddin PIRZADA (Pakistan);
Mr. Robert Q. QUENTIN-BAXTER (New Zealand);
Mr. Edilbert RAZAFINDRALAMBO (Madagascar);
Mr. Paul REUTER (France);
Mr. Willem RIPHAGEN (Netherlands);
Sir Ian SINCLAIR (United Kingdom of Great Britain and Northern Ireland);
Mr. Constantin A. STAVROPOULOS (Greece);
Mr. Sompong SUCHARITKUL (Thailand);
Mr. Doudou THIAM (Senegal);
Mr. Nikolai A. USHAKOV (Union of Soviet Socialist Republics);
Mr. Alexander YANKOV (Bulgaria).

4. Mr. Ahmed Mahiou (Algeria) was elected by the Commission at its 1701st meeting on 6 May 1982, to fill the casual vacancy caused by the resignation of Mr. Mohammed Bedjaoui upon his election to the International Court of Justice.

B. Officers

5. At its 1698th meeting, on 3 May 1982, the Commission elected the following officers:

Chairman: Mr. Paul Reuter;
First Vice-Chairman: Mr. Leonardo Díaz González;
Second Vice-Chairman: Mr. Constantin Flitan;

Chairman of the Drafting Committee: Mr. Sompong Sucharitkul;

Rapporteur: Mr. Frank X. Njenga.

6. At the present session of the Commission, its Enlarged Bureau was composed of the officers of the session, former Chairmen of the Commission and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission at the present session. On the recommendation of the Enlarged Bureau, the Commission, at its 1706th meeting, on 13 May 1982, set up for the present session a Planning Group to consider matters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Leonardo Díaz González (Chairman), Mr. Jorge Castañeda, Mr. Andreas J. Jacovides, Mr. S. P. Jagota, Mr. Abdul G. Koroma, Sir Ian Sinclair, Mr. Constantin A. Stavropoulos, Mr. Doudou Thiam and Mr. Nikolai A. Ushakov.

C. Drafting Committee

7. At its 1704th meeting, on 11 May 1982, the Commission appointed a Drafting Committee. It was composed of the following members: Mr. Sompong Sucharitkul (Chairman), Chief Richard Osuolale A. Akinjide, Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Julio Barboza, Mr. Carlos Calero Rodrigues, Mr. Khalafalla el Rasheed Mohamed Ahmed, Mr. Constantin Flitan, Mr. José Lacleta Muñoz, Mr. Stephen C. McCaffrey, Mr. Zhengyu Ni, Mr. Robert Q. Quentin-Baxter, Mr. Edilbert Razafindralambo and Mr. Nikolai A. Ushakov. Mr. Frank X. Njenga also took part in the Committee's work in his capacity as Rapporteur of the Commission. Members of the Commission not members of the Committee were invited to attend and a number of them participated in the meetings.

D. Working Group on the draft Code of Offences against the Peace and Security of Mankind

8. At its 1745th meeting, on 14 July 1981, the Commission decided to establish a Working Group on the topic "Draft Code of Offences against the Peace and Security of Mankind", chaired by the Special Rapporteur appointed for the topic, Mr. Doudou Thiam.¹ The Working Group was composed of the following members: Mr. Mikuin Leliel Balanda, Mr. Boutros Boutros Ghali, Mr. Jens Evensen, Mr. Laurel B. Francis, Mr. Jorge E. Illueca, Mr. Ahmed Mahiou, Mr. Chafic Malek, Mr. Frank X. Njenga, Mr. Motoo Ogiso, Mr. Syed Sharifuddin Pirzada, Mr. Willem Riphagen and Mr. Alexander Yankov.

¹ See below, chap. VII, sect. B.

E. Secretariat

9. Mr. Erik Suy, Under-Secretary-General, the Legal Counsel, represented the Secretary-General at the session and made a statement at the opening meeting of the session which, pursuant to a decision taken by the Commission at its 1700th meeting, was circulated as a document of the Commission (A/CN.4/L.340). Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Eduardo Valencia-Ospina, Senior Legal Officer, acted as Deputy Secretary to the Commission. Mr. Andronico O. Adede, Senior Legal Officer, Mr. Larry D. Johnson and Miss Mahnoush Arsanjani, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

10. At its 1698th meeting, on 3 May 1982, the Commission adopted an agenda for its thirty-fourth session, consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. Question of treaties concluded between States and international organizations or between two or more international organizations
3. State responsibility
4. International liability for injurious consequences arising out of acts not prohibited by international law
5. The law of the non-navigational uses of international water-courses
6. Jurisdictional immunities of States and their property
7. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier
8. Draft Code of Offences against the Peace and Security of Mankind (paras. 1 and 2 of General Assembly resolution 36/106 of 10 December 1981)
9. Relations between States and international organizations (second part of the topic)
10. Programme and methods of work, including the question of documentation of the Commission
11. Co-operation with other bodies
12. Date and place of the thirty-fifth session
13. Other business.

11. The Commission considered all the items on its agenda with the exception of item 9 (Relations between States and international organizations (second part of the topic)). In the course of the session, the Commission held fifty-five public meetings (1698th to 1752nd) and two private meetings. In addition, the Drafting Committee held twenty-three meetings, the Enlarged Bureau of the Commission four meetings, the Planning Group two meetings and the Working Group on the draft Code of Offences against the Peace and Security of Mankind one meeting.

Chapter II

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

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

12. During the preparation of the draft articles on the law of treaties from 1950 to 1966, the Commission considered on several occasions the question whether the draft articles should apply not only to treaties between States but also to treaties concluded by other entities, and in particular by international organizations.² The course finally adopted was to confine the study undertaken by the Commission to treaties between States. The Commission accordingly included in the final draft articles³ an article 1 which read: "The present articles relate to treaties concluded between States." The draft articles were subsequently transmitted⁴ as the basic proposal to the United Nations Conference on the Law of Treaties, which, having met at Vienna in 1968 and 1969, adopted on 23 May 1969, the Vienna Convention on the Law of Treaties.⁵ Article 1 of the Commission's draft became article 1 of the Convention, reading as follows: "The present Convention applies to treaties between States." However, in addition to the provision of article 1, the Conference adopted the following resolution:

Resolution relating to article 1 of the Vienna Convention on the Law of Treaties

The United Nations Conference on the Law of Treaties

Recalling that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,

Taking note that the Commission's draft articles deal only with treaties concluded between States,

Recognizing the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,

² See the first report of the Special Rapporteur (*Yearbook ... 1972*, vol. II, p. 171, document A/CN.4/258), and the historical survey in the working paper published by the Secretary-General at the Commission's twenty-third session (A/CN.4/L.161 and Add.1 and 2).

³ *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II

⁴ The draft articles were transmitted to the Conference by the Secretary-General under paragraph 7 of General Assembly resolution 2166 (XXI) of 5 December 1966.

⁵ Referred to hereafter as the "Vienna Convention". The Vienna Convention entered into force on 27 January 1980.

Cognizant of the varied practices of international organizations in this respect, and

Desirous of ensuring that the extensive experience of international organizations in this field be utilized to the best advantage,

Recommends to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations.⁶

13. The General Assembly, having discussed that resolution, dealt with it in paragraph 5 of its resolution 2501 (XXIV) of 12 November 1969, in which the Assembly

Recommends that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.

14. In 1970, at its twenty-second session, the Commission decided to include the question referred to in resolution 2501 (XXIV), paragraph 5, in its general programme of work, and it set up a Sub-Committee composed of thirteen members to make a preliminary study.⁷ The Sub-Committee submitted two reports, the first in the course of the Commission's twenty-second session⁸ and the second during its twenty-third session.⁹ In 1971, on the basis of the second report, the Commission appointed Mr. Paul Reuter Special Rapporteur for the question of treaties concluded between States and international organizations or between two or more international organizations.¹⁰ In addition, it confirmed a decision taken in 1970 requesting the Secretary-General to prepare a number of documents, including an account of the relevant practice of the United Nations and the principal international organizations, "it being understood that the Secretary-General will, in consultation with the Special Rapporteur, phase and select the studies required for the preparation of the documentation..."¹¹

⁶ *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.

⁷ See *Yearbook ... 1970*, vol. II, p. 310, document A/8010/Rev.1, chap.V, para. 89.

⁸ *Ibid.*

⁹ See *Yearbook ... 1971*, vol. II (Part One), pp. 348-349, document A/8410/Rev.1, chap. IV, annex.

¹⁰ *Ibid.*, p. 348, document A/8410/Rev.1, chap. IV, para. 118.

¹¹ *Ibid.*

15. To facilitate the task of carrying out that decision, the Special Rapporteur addressed a questionnaire to the principal international organizations, through the Secretary-General, with a view to obtaining information on their practice in the matter.¹² The Secretariat, in its turn, prepared the following documents between 1970 and 1974:

(a) A document containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations *Treaty Series*;¹³

(b) A selected bibliography on the question;¹⁴

(c) A study of the possibilities of participation by the United Nations in international agreements on behalf of a territory.¹⁵

16. Meanwhile the General Assembly, by its resolutions 2634 (XXV) of 12 November 1970 and 2780 (XXVI) of 3 December 1971, recommended that the Commission should continue its consideration of the question of treaties concluded between States and international organizations or between two or more international organizations. This recommendation was later renewed by the General Assembly in its resolutions 2926 (XXVII) of 28 November 1972 and 3071 (XXVIII) of 30 November 1973.

17. At the Commission's twenty-fourth session, in 1972, the Special Rapporteur submitted his first report on the topic referred to him.¹⁶ This report reviewed the discussions which the Commission, and after it the United Nations Conference on the Law of Treaties, while examining the law of treaties, had held on the question of the treaties of international organizations. In the light of that review, the report made a preliminary examination of several essential problems such as the form in which international organizations express their consent to be bound by a treaty, their capacity to conclude treaties, the question of representation, the effect of treaties concluded by international organizations and the precise meaning of the reservation concerning "any relevant rules of the organization" which appears in article 5 of the Vienna Convention.

18. In 1973 the Special Rapporteur submitted to the Commission for its twenty-fifth session a second report,¹⁷ supplementing the first in the light of, *inter alia*, the substantial information since communicated by international organizations in reply to the questionnaire which had been addressed to them.¹⁸

19. Mr. Reuter's first two reports were discussed by the Commission at its twenty-fifth session. The opinions

expressed by the members concerning those reports are reflected in the Commission's report on the work of that session.¹⁹

20. From 1974 to 1980, the Special Rapporteur presented his third to ninth reports containing proposed draft articles.²⁰ Those reports were considered by the Commission at its twenty-sixth, twenty-seventh and twenty-ninth to thirty-second sessions. On the basis of that consideration and on reports of the Drafting Committee, the Commission at its thirty-second session completed the adoption in first reading of a set of draft articles on treaties concluded between States and international organizations or between international organizations.²¹

21. During that period, the General Assembly recommended that the Commission should: proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations (resolutions 3315 (XXIX) of 14 December 1974 and 3495 (XXX) of 15 December 1975); proceed on a priority basis with that preparation (resolutions 31/97 of 15 December 1976 and 32/151 of 19 December 1977); proceed with that preparation with the aim of completing, as soon as possible, the first reading of these draft articles (resolution 33/139 of 19 December 1978); and proceed with that preparation with the aim of completing, at its thirty-second session, the first reading of these draft articles (resolution 34/141 of 17 December 1979).

22. At its thirty-first session, in 1979, the Commission reached the conclusion that the articles on the topic which had thus far been considered (arts 1 to 4, 6 to 19, 19 *bis*, 19 *ter*, 20, 20 *bis*, 21 to 23, 23 *bis*, 24, 24 *bis*, 25, 25 *bis*, 26 to 36, 36 *bis* and 37 to 60) should be submitted for observations and comments before the draft as a whole was adopted in first reading. That procedure was seen as making it possible for the Commission to undertake the second reading without too much delay. In accordance with articles 16 and 21 of its Statute, those draft articles were then transmitted to Governments for their comments and observations. Furthermore, since the General Assembly recommended, in paragraph 5 of resolution 2501 (XXIV) of 12 November 1969, that the Commission should study the present topic "in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice", the Commission also decided to transmit those draft articles to such organizations for their com-

¹² *Yearbook ... 1973*, vol. II, pp. 93-94, document A/CN.4/271, annex.

¹³ A/CN.4/L.161 and Add.1 and 2.

¹⁴ *Yearbook ... 1974*, vol. II (Part Two), pp. 3 *et seq.*, document A/CN.4/277.

¹⁵ *Ibid.*, pp. 8 *et seq.*, document A/CN.4/281.

¹⁶ *Yearbook ... 1972*, vol. II, p. 171, document A/CN.4/258.

¹⁷ *Yearbook ... 1973*, vol. II, p. 75, document A/CN.4/271.

¹⁸ *Ibid.*, pp. 93-94, document A/CN.4/271, annex.

¹⁹ *Ibid.*, p. 224, document A/9010/Rev.1, chap. V, paras. 127-133.

²⁰ *Yearbook ... 1974*, vol. II (Part One), p. 135, document A/CN.4/279 (third report); *Yearbook ... 1975*, vol. II, p. 25, document A/CN.4/285 (fourth report); *Yearbook ... 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1 (fifth report); *Yearbook ... 1977*, vol. II (Part One), p. 119, document A/CN.4/298 (sixth report); *Yearbook ... 1978*, vol. II (Part One), p. 247, document A/CN.4/312 (seventh report); *Yearbook ... 1979*, vol. II (Part One), p. 125, document A/CN.4/319 (eighth report); and *Yearbook ... 1980*, vol. II (Part One), p. 131, document A/CN.4/327 (ninth report).

²¹ For the text of these articles, see *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.*

ments and observations.²² It was indicated at that time that following completion of the first reading of the draft, the Commission would request comments and observations of Member States and of the said international organizations on the remaining draft articles adopted and, in so doing, would set a date by which comments and observations should be received.

23. In the light of the above, the Commission, at its thirty-second (1980) session, decided to request the Secretary-General again to invite Governments and the international organizations concerned to submit their comments and observations on the draft articles on treaties concluded between States and international organizations or between international organizations transmitted earlier and to request that such comments and observations be submitted to the Secretary-General by 1 February 1981.

24. Furthermore, and in accordance with articles 16 and 21 of its Statute, the Commission decided to transmit through the Secretary-General, to Governments and the international organizations concerned, articles 61 to 80 and the annex adopted by the Commission in first reading at that session for their comments and observations and to request that such comments and observations be submitted to the Secretary-General by 1 February 1982.

25. The procedure outlined above would, it was anticipated, allow Governments and organizations sufficient time for the preparation of their comments and observations on all the draft articles and would also allow the Commission to begin its second reading of the draft articles on the topic without too much delay, on the basis of reports to be prepared by the Special Rapporteur and in the light of comments and observations received from Governments and international organizations.

26. By its resolution 35/163 of 15 December 1980, the General Assembly recommended that, taking into account the relevant written comments received and views expressed in the debates in the General Assembly, the Commission should, at its thirty-third session, commence the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations.

27. Pursuant to that recommendation, the Commission at its thirty-third session in 1981 commenced its second reading of the draft articles in question on the basis of the tenth report²³ submitted by the Special Rapporteur. That report included general observations and a review of articles 1 to 41 of the draft articles as adopted in first reading, in the light of the written comments and observations received pursuant to the request noted on paragraphs 22 and 23 above, as well as of

²² In the light of Commission practice regarding its work on the topic, the organizations in question were the United Nations and the intergovernmental organizations invited to send observers to United Nations codification conferences.

²³ *Yearbook ... 1981*, vol. II (Part One), p. 43, document A/CN.4/341 and Add.1.

views expressed in the debates in the General Assembly.²⁴ The Commission in addition had before it the text of the written comments and observations submitted by Governments and principal international organizations.²⁵ Finally, the Commission had before it a Note submitted by a member listing some of the relevant provisions of the "Draft Convention on the Law of the Sea (Informal Text)"²⁶ and the Common Fund Agreement.²⁷

28. After consideration of the Special Rapporteur's tenth report and referring articles 1 to 41 to the Drafting Committee, at its thirty-third session the Commission adopted on second reading the texts of articles 1, 2 (para. 1, subparas. (a), (b), (b bis), (b ter), (c), (c bis), (d), (e), (f), (g), (i) and (j) and para. 2), and 3 to 26, on the basis of the Drafting Committee's report.²⁸

29. The text of articles 1 to 26 of the draft articles on treaties concluded between States and international organizations or between international organizations and commentaries thereto, as finally approved at the thirty-third session, were reproduced in the Commission's report on the work of that session²⁹ for the information of the General Assembly. The Commission at that time reserved the possibility, after the completion of the second reading of the entire set of draft articles, of making minor drafting adjustments to those articles if in the interests of clarity and consistency it was so required.

30. In order to facilitate the completion of the second reading of the draft articles in question at the earliest possible time, the Commission at that session decided to remind, through the Secretary-General, Governments and principal international organizations of its previous invitation (see para. 24 above) for the submission to the Secretary-General, by 1 February 1982, of their comments and observations on articles 61 to 80 and annex of the draft articles on treaties concluded between States

²⁴ See "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-fourth session of the General Assembly" (A/CN.4/L.311); and "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326); as well as the reports of the Sixth Committee to the General Assembly: 1974 — *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897; 1975—*ibid.*, *Thirtieth Session, Annexes*, agenda item 108, document A/10393; 1976—*ibid.*, *Thirty-first Session, Annexes*, agenda item 106, document A/31/370; 1977—*ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433; 1978—*ibid.*, *Thirty-third Session, Annexes*, agenda item 114, document A/33/419; 1979—*ibid.*, *Thirty-fourth Session, Annexes*, agenda item 108, document A/34/785.

²⁵ See *Yearbook ... 1981*, vol. II (Part Two), annex II.

²⁶ A/CONF.62/WP.10/Rev.3 and Corr.1 and 3.

²⁷ TD/IPC/CF/CONF/25 (United Nations publication, Sales No. E.81.II.D.8).

²⁸ Owing to lack of time, the Drafting Committee was unable to consider, *inter alia*, the other articles on this topic which had been referred to it during the thirty-third session of the Commission. See *Yearbook ... 1981*, vol. II (Part Two), p. 8, para. 12.

²⁹ *Ibid.*, pp. 120 *et seq.*

and international organizations or between international organizations, as adopted in first reading by the Commission in 1980.

31. The General Assembly, by resolution 36/114 of 10 December 1981, recommended that, taking into account the written comments of Governments as well as views expressed in debates in the General Assembly, 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 adopted at its twenty-sixth, twenty-seventh and twenty-ninth to thirty-second sessions, also taking into account the written comments of principal international organizations.

32. Accordingly, the Commission at its present session completed the second reading of the draft articles in question on the basis of the eleventh report (A/CN.4/353)³⁰ submitted by the Special Rapporteur. In his report, the Special Rapporteur re-submitted to the Commission articles 27 to 41, which it had examined at its thirty-third session on the basis of the Special Rapporteur's tenth report, but which the Drafting Committee had not been able to consider owing to lack of time.³¹ Furthermore, the report included a review of the remaining articles 42 to 80 and annex as adopted in first reading, in the light of the written comments and observations received pursuant to the requests noted in paragraphs 22, 23, 24 and 30 above, as well as of the views expressed in debates in the Sixth Committee of the General Assembly.³² The Commission also had before it the text of the written comments and observations submitted by Governments and principal international organizations pursuant to the requests noted in paragraphs 22, 23, 24 and 30 above.³³

33. The Commission considered the eleventh report of the Special Rapporteur at its 1699th to 1707th meetings, from 4 to 14 May 1982, and 1718th to 1728th meetings, from 2 to 16 June 1982, and referred to the Drafting Committee articles 27 to 80 as well as the annex. It also referred to the Drafting Committee subparagraph 1 (h) of article 2, article 5 and a new paragraph of article 20. At its 1740th and 1741st meetings, on 6 and 7 July 1982, the Commission considered the report of the Drafting Committee containing the text of the articles referred to it, as well as consequential changes to the text of article 2, subparagraph 1 (c *bis*) and article 7, paragraph 4, which had been previously approved by

³⁰ Reproduced in *Yearbook ... 1982*, vol. II (Part One).

³¹ It may be recalled that while in the report on the work of its thirty-third session the Commission indicated that the Drafting Committee remained seized of those articles and would consider them in the course of the present session, it was also stipulated that the Commission at the present session might decide otherwise. (*Yearbook ... 1981*, vol. II (Part Two), p. 8, para. 12)

³² See footnote 24 above and "Topical summary, prepared by the Secretariat, on the discussion on the report of the International Law Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339).

³³ *Yearbook ... 1981*, vol. II (Part Two), annex II, documents A/CN.4/350, Add.1-6 and Add.6/Corr.1, and Add.7-11, reproduced in annex to the present volume.

the Commission at its thirty-third session. On the basis of that report, the Commission, at its 1740th meeting, adopted the text of article 2, subparagraphs 1 (c *bis*) and 1 (h); article 5; article 7, paragraph 4; article 20, paragraph 3; articles 27 to 36, 36 *bis*, and 37 to 80 and of the annex. In addition, in accordance with its usual practice and as reflected in its report on its thirty-third session (see para. 29 above), the Commission approved minor drafting adjustments to certain articles which had been finally approved at its preceding session, in the interests of clarity and consistency. Finally, the Commission, on the recommendation of the Drafting Committee, approved the title to be given to the set of draft articles in question. At its 1750th meeting, on 21 July 1982 the Commission adopted the final text of its draft articles on the law of treaties between States and international organizations or between international organizations, as a whole. In accordance with its Statute, it submits that final text herewith to the General Assembly, together with a recommendation (see paras. 56 to 61 below).

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

(a) *Form of the draft*

34. As in the other work undertaken by the Commission in the past, the form adopted in preparing the present codification was that of a set of *draft articles* capable of constituting the substance of a convention at the appropriate time. A set of draft articles, because of the strict requirements it imposes upon the preparation and drafting of the text, was deemed to be the most suitable form in which to deal with questions concerning treaties between States and international organizations or between international organizations. At its present session, the Commission concluded that the draft articles on the law of treaties between States and international organizations or between international organizations should form the basis for the conclusion of a convention and adopted a recommendation to that effect in accordance with its Statute (see paras. 56 to 61 below).

(b) *Relationship to the Vienna Convention*

35. By comparison with others, the present codification possesses some distinctive characteristics owing to the extremely close relationship between the draft articles and the Vienna Convention.

36. Historically speaking, the provisions which constitute the draft articles now under consideration would have found a place in the Vienna Convention had the Conference not decided that it would confine its attention to the law of treaties between States. Consequently, the further stage in the codification of the law of treaties represented by the preparation of draft articles on the law of treaties between States and international organizations or between international organizations cannot be divorced from the basic text on the subject, namely the Vienna Convention.

37. That Convention has provided the general framework for the present draft articles. This means, firstly, that the draft articles deal with the same questions as formed the substance of the Vienna Convention. The Commission has had no better guide than to take the text of each of the articles of that Convention in turn and consider what changes of drafting or of substance are needed in formulating a similar article dealing with the same problem in the case of treaties between States and international organizations or between international organizations.

38. This task, as the Commission envisaged it, called for a very flexible approach. On considering what changes should be made in an article of the Vienna Convention in order to give it the form of an article applicable to treaties between States and international organizations, the Commission has been presented with the possibility of drafting a provision containing additions to or refinements of the Vienna Convention that might also be applicable to treaties between States, for example in connection with a definition of treaties concluded in written form or the consequences of the relationship between a treaty and other treaties or agreements. In such a case, the Commission has in principle refrained from pursuing it and from proceeding with any formulation which would give the draft articles, on certain points, a structure different from that of the Vienna Convention. The position is different where, because of the subject-matter under consideration, namely treaties between States and international organizations or between international organizations, new and original provisions are required to deal with problems or situations unknown to treaties between States.

39. Unfortunately these considerations do not dispose of all the difficulties raised by the relationship between the draft articles and the Vienna Convention. The preparation of a set of draft articles that it recommended to form the basis of a convention presents, as regards the future relationship between the articles and the Vienna Convention, certain additional questions or issues.

40. Treaties are based essentially on the equality of the contracting parties, and this premise leads naturally to the assimilation, wherever possible, of the treaty situation of international organizations to that of States. The Commission has largely followed this principle in deciding generally to follow as far as possible the articles of the Vienna Convention referring to treaties between States for treaties between States and international organizations, and for treaties between international organizations. The increasing number of treaties in which international organizations participate is evidence of the value of treaties to international organizations as well as to States.

41. However, even when limited to the field of the law of treaties, the comparison involved in the assimilation of international organizations to States is quickly seen to be far from exact. While all States are equal before

international law, international organizations are the result of an act of will on the part of States, an act which stamps their juridical features by conferring on each of them strongly marked individual characteristics which limit its resemblance to any other international organization. As a composite structure, an international organization remains bound by close ties to the States which are its members; admittedly, analysis will reveal its separate personality and show that it is "detached" from them, but it still remains closely tied to its component States. Being endowed with a competence more limited than that of a State and often somewhat ill-defined (especially in the matter of external relations), for an international organization to become party to a treaty occasionally required an adaptation of some of the rules laid down for treaties between States.

42. The source of many of the substantive problems encountered in dealing with this subject lies in the contradictions which may arise as between *consensuality* based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties. The rule stated in article 6 of the draft, which reflects this basic truth, clearly shows the difference between international organizations and States. Moreover, although the number and variety of international agreements to which one or more international organizations are parties have continued to increase, international practice concerning certain basic questions, such as the participation of international organizations in open multilateral treaties and the formulation of reservations by international organizations, is still limited.

43. This does not mean that a consistently negative position should be adopted on the status of international organizations under the law of treaties or that the problems involved should be overlooked. On the contrary, the Commission has sought to take a balanced view denying organizations some of the facilities granted to States by the Vienna Convention and applying to organizations certain rules whose flexibility had been considered appropriate for States alone. However, it has maintained for international organizations the benefit of the general rules of consensuality wherever that presented no difficulties and seemed to be consistent with certain trends emerging in the modern world.

44. The Commission has thus endeavoured from the start to establish a fair balance, in keeping with the facts, between, on the one hand, the equality between States and international organizations that must prevail in all the articles which are merely the expression of the

general principles of consensuality, and, on the other hand, the need for differentiation not only in the substance but also in the vocabulary of certain other articles.³⁴ Apart from yielding the drafting improvements that will be considered below, the second reading of the draft articles has made it possible to resolve the differences and dispel the doubts and reservations which arose out of the difficulty of giving their just weight to opposing yet legitimate considerations. Having resolved outstanding difficulties with respect to certain basic articles (particularly art. 7, para. 4, and arts. 36 *bis*, 45 and 65), the Commission is able to submit a set of draft articles which, with the exception of article 66 on the settlement of disputes, has the unanimous approval of its members.

(c) *Methodological approach*

45. As soon as the Commission resolved, as indicated above, to prepare a text which could become a convention it was confronted with a choice: it could prepare a draft which *in form* was entirely *independent* of the Vienna Convention, or a draft which was more or less closely linked to that Convention from the standpoint of form. The Commission opted for the former course, that is a draft that is formally independent of the Vienna Convention. The draft articles as they appear today in form entirely independent of the Vienna Convention, meaning that they are independent in two respects, which must be carefully distinguished.

46. First, the draft articles are independent of the Vienna Convention in the sense that the text as a whole represents a complete entity that can be given a form which would enable it to produce legal effects irrespective of the legal effects of the Vienna Convention. If, as recommended, the set of draft articles becomes a convention, the latter will bind parties other than those to the Vienna Convention and will have legal effects whatever befalls the Vienna Convention. The draft articles have been so formulated that, as worded at present, they are fated to remain completely independent of the Vienna Convention. If they became a convention, there would be States which would be parties to both conventions at once. That being so, there may be some problems to be solved, as the Commission indicated briefly in its report on the work of its twenty-sixth session:

The draft articles must be so worded and assembled as to form an entity independent of the Vienna Convention; if the text later becomes a convention in its turn, it may enter into force for parties which are not parties to the Vienna Convention possibly including, it must be remembered, all international organizations. Even so, the terminology and wording of the draft articles could conceivably have been brought into line with the Vienna Convention in advance, so as to form a homogeneous whole with that Convention. The Commission has not rejected that approach outright and has not ruled out the possibility of the draft articles as a whole being revised later with a view to providing for States which are parties both to the Vienna Convention and

to such convention as may emerge from the draft articles, a body of law as homogeneous as possible, particularly in terminology. ...³⁵

47. Second, the draft articles are independent in the sense that they state the rules they put forward in full, *without referring back to the articles of the Vienna Convention*, even when the rules are formulated in terms identical with those of the Vienna Convention.

48. It was suggested at one point that it would be a good idea to streamline as much as possible a set of draft articles which appeared to be a belated annex to the Vienna Convention and whose main point was to establish the very simple idea that the principles embodied in the Convention are equally valid for treaties to which international organizations are parties. A review of the methodological approach hitherto adopted was urged and it was suggested that the draft articles be combined with the relevant provisions of the Vienna Convention so as to simplify the proposed text, one method being to use "*renvois*" to the articles of the Vienna Convention. If the Commission had adopted that latter method, it would have been possible to apply it to a considerable number of draft articles which differ from the Vienna Convention only in their references to the international organizations which are parties to the treaties covered by the draft articles. Although such an approach would have simplified the drafting process, the Commission did not follow it for several reasons. To begin with, the preparation of a complete text with no "*renvois*" to the Vienna Convention would undoubtedly be advantageous from the standpoint of clarity and would make it possible to measure the extent of the parallelism with the Vienna Convention. Furthermore, the Commission has until now avoided all formulas involving "*renvois*"; one need only compare the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character³⁶ to realize that, although there was ample opportunity to refer from one text to another, there is not a single example of a "*renvoi*". Moreover, such a "*renvoi*" was likely to cause certain legal difficulties: since every convention may have a different circle of States parties, would States not parties to the convention to which the "*renvoi*" referred be bound by the interpretation given by States which were parties to the convention in question? Should a "*renvoi*" to a convention be understood to apply to the text as it stands at the time of the "*renvoi*" or to the text as it might conceivably be amended as well?

49. It was also deemed useful to consider another possible methodological approach which, while not having been suggested, merited attention. That approach was based on the desire to strengthen the formal links between the draft articles and the Vienna Conven-

³⁴ Thus, for legal acts having the same nature, the same effect and the same purpose, the Commission used a different vocabulary according to whether those acts were performed by States or international organizations: for example, "full powers" and "powers" (art. 7) or "ratification" and "act of formal confirmation" (art. 14).

³⁵ *Yearbook ... 1974*, vol. II (Part One), p. 293, document A/9610/Rev.1, chap. IV, para. 141.

³⁶ Hereinafter called "Convention on the Representation of States".

tion and entailed considering the draft articles as constituting, from the technical standpoint, a proposal to amend the Vienna Convention. Such a position could not be accepted by the Commission for a number of reasons. The simplest is that, since the Vienna Convention does not contain any specific provisions governing its amendment, the rules of article 40 of the Convention would apply and amendments would be decided upon both as to principle and substance by the contracting States alone. Of course, any contracting State can take the initiative to have the treaty amended on any ground it deems appropriate, but the Commission is foreign to such a procedure and could not direct its work to that end. Moreover, returning to the initial point, it must be borne in mind that the draft articles are structured in such a way as to accord with whatever solution the General Assembly may ultimately adopt. The Commission could not on its own authority adopt an approach which would foreclose all but one very specific option, namely, amendment of the Vienna Convention. It should be added, moreover, that incorporating the draft articles into the Vienna Convention by means of an amendment would create difficulties with regard to the role of international organizations in the preparation of the text and the procedure in accordance with which they would agree to be bound by the provisions relating to them. In addition, incorporating the substance of the draft articles into the Vienna Convention would entail a number of drafting problems on which there is no need to dwell here.

50. The Commission has prepared a comprehensive set of draft articles that will remain legally separate from the Vienna Convention. The draft articles will be given legal force by incorporation in a convention, as recommended, or in another instrument depending upon the decision of the General Assembly. However much the streamlining of the text of the draft articles might be desirable, it can be achieved, at least to some extent, by means other than the inclusion of references to the Vienna Convention.

51. As the Commission's work progressed, views were expressed to the effect that the wording of the draft articles as adopted in first reading was too cumbersome and too complex. Almost all such criticisms levelled against these draft articles stemmed from the dual position of principle that was responsible for the nature of some articles:

On the one hand, it was held that there are sufficient differences between States and international organizations to rule out in some cases the application of a single rule to both;

On the other hand, it was held that a distinction must be made between treaties between States and international organizations and treaties between international organizations and that different provisions should govern each.

There is no doubt that these two principles were responsible for the drafting complexities which were so apparent in the draft articles as adopted in first reading.

52. Throughout the second reading of the draft articles, both at the thirty-third session and at the present one, the Commission considered whether in concrete in-

stances it was possible to consolidate certain articles which dealt with the same subject-matter, as well as the text within individual articles, as had been suggested in some of the written comments received and as had been proposed by the Special Rapporteur in his tenth and eleventh reports. Whenever it was deemed justified by the characteristics of the types of treaty involved, the Commission decided to maintain the textual distinctions which had been made in the articles adopted in first reading, with a view to achieving clarity and precision and consequently to facilitate the application and interpretation of the rules contained in the articles concerned. On the other hand, when it was concluded that repetition or distinctions were not so justified, the Commission proceeded to simplify the text to the extent possible by combining two paragraphs into a single one applicable to all the treaties which are the subject-matter of the present draft (this was done in the case of articles 13, 15, 18, 34, 42 and 47). It also proved possible in some cases to merge within an article two paragraphs dealing with the same type of treaty into a single paragraph (arts. 35 and 36). Furthermore, it proceeded in certain cases to combine two articles into a more simplified single one (arts. 19 and 19 *bis*, 20 and 20 *bis*, 23 and 23 *bis*, 24 and 24 *bis* and 25 and 25 *bis*). In one case, article 19 *ter*, which had been adopted in first reading, was deleted from the draft upon review during second reading.

53. As a general matter, the Commission sought to pay close attention to the quality of the wording and to simplify it as far as possible without introducing any ambiguities or altering any substantive position which the Commission intended to confirm. In the course of the second reading, minor drafting adjustments were at times introduced in the texts of articles adopted in first reading in order to simplify or clarify the texts concerned, without loss of the necessary precision, as well as to achieve consistency in presentation and in the use of terminology.

54. In conformity with the general conception of the relationship which the draft articles should naturally bear to the Vienna Convention, it was decided to keep the order of that Convention so far as possible, so as to permit continuous comparison between the draft articles and the corresponding articles of that Convention. Accordingly the draft articles bear the same numbers as those of the Vienna Convention. Any provision of the present draft which does not correspond to a provision found in the Vienna Convention is numbered *bis* or *ter* in order to preserve the parallel between the Vienna Convention and the present draft articles.

55. Finally, the Commission wishes to indicate that it considers that its work on the law of treaties between States and international organizations or between international organizations 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. The articles it has formulated contain elements both of progressive development and of codification of the law and, as in the case of several

previous drafts, it is not practicable to determine into which category each provision falls.

B. Recommendation of the Commission

56. Article 23 of the Statute of the Commission provides that the Commission may submit to the General Assembly a recommendation concerning the follow-up to be given to the work undertaken and completed on a specific topic. No account may be taken in this recommendation of any other than the legal issues within the competence of the Commission. It is the exclusive responsibility of the general Assembly not only to make a definitive assessment of those issues, but also to take into consideration all other factors of help to it in reaching a final decision.

57. With this important reservation, the Commission decided, at its 1728th meeting, on the 16 June 1982, to recommend to the General Assembly the course capable of conferring the highest possible legal authority on the proposed articles, namely that provided for in article 23, subparagraph 1 (d), of the Statute of the Commission:

To convoke a conference to conclude a convention.

58. The main reason for this decision is the present situation of codification both as regards the law of treaties and as regards the law of international organizations. Pursuant to decisions of the General Assembly, the law of treaties has already been the subject of two Conventions, that of 23 May 1969 on the law of treaties and that of 23 August 1978 on succession of States in respect of treaties; it thus seems logical that a third convention should complete the United Nations overall design. This conclusion is all the more justified as the articles in question are basically intended to extend to the treaties to which one or more international organizations are parties to the rules contained in the Vienna Convention for treaties to which only States are parties. Should the proposed articles be taken not merely as falling generally within the "law of treaties", but as part of what might be termed "the law of international organizations", the same conclusion emerges, for the work done by the Commission in the latter sphere has already been embodied in a Convention, namely the Convention on the Representation of States of 14 March 1975.

59. It is therefore in keeping with the decisions already taken by the General Assembly to give the draft articles under consideration the form of a general convention.

60. The drafting and adoption of a convention on treaties to which international organizations are parties will only be meaningful if the rules in that convention can bind such organizations. The Commission has taken some aspects of this question into account from the start.³⁷ The conference might possibly decide to open the future convention to participation by international organizations on an equal footing with States. That is

not, however, the only solution, and there has already been recourse to other mechanisms in international practice; international organizations might be recognized as having a different status from that of States and the future convention, while not conferring on them the status of "parties to the Convention", might permit them to bind themselves with regard to its rules. This is the kind of solution employed in the Convention of 21 November 1947 on the Privileges and Immunities of the Specialized Agencies,³⁸ the Agreement of 22 April 1968 on the rescue of astronauts, the return of astronauts and the return of objects launched into outer-space,³⁹ and the Convention of 29 March 1972 on International Liability for Damage Caused by Space Objects⁴⁰—all treaties which allow international organizations to be given an opportunity of binding themselves by the rules of such an instrument without becoming parties to it. There are, then, technical means of solving the problem at issue and it will be for the General Assembly in the first instance, and then the conference, to choose a solution on the basis of the many considerations that may be weighed only by the representatives of the Governments concerned. In the light of the foregoing, it is hardly conceivable that international organizations will not be associated in some way with the drafting of the convention in question. The convening of a conference will therefore raise the question of the participation in it of international organizations; that will require a decision by the General Assembly.

61. Apart from the issue of participation in the future convention, a conference, other than examining the substantive rules in the draft articles, would only have to resolve the usual problems relating to the final clauses. In this regard, it only remains to stress that the reason why the Commission has dealt in the draft articles with the issue of the settlement of disputes—which it has not always discussed in other sets of draft articles⁴¹—is above all that, in the 1969 Vienna Convention, the question of the settlement of certain disputes (which the Commission had not discussed in its draft articles) was associated closely by the relevant Conference with questions of substance. The Commission was of the opinion that, since it had followed the solutions adopted in 1969 as closely as possible, it should endeavour to adapt the solutions reached for inter-State treaties to treaties to which one or more international organizations are parties.

³⁷ United Nations, *Treaty Series*, vol. 33, p. 261.

³⁸ *Ibid.*, vol. 672, p. 119.

³⁹ *United Nations, Juridical Yearbook, 1971* (Sales No. E.73.V.1), p. 111.

⁴¹ For example, for lack of time the Commission did not propose provisions relating to the settlement of disputes in the draft articles on succession of States in respect of treaties; it did, however, include such proposals in the draft on the representation of States in their relations with international organizations of a universal character. See *Yearbook ... 1974*, vol. II (Part One), p. 173, document A/9610/Rev.1, chap. II, paras. 79-81, and *Yearbook ... 1971*, vol. II (Part One), pp. 333-335, document A/8410/Rev.1, chap. II, sect. D, art. 82.

³⁷ *Yearbook ... 1972*, vol. II, pp. 192 *et seq.*, document A/CN.4/258, paras. 64 *et seq.*

C. Resolution adopted by the Commission

62. At its 1750th meeting on 21 July 1982, the Commission, after adopting the text of the articles on the law of treaties between States and international organizations or between international organizations, unanimously adopted the following resolution:

The International Law Commission,

Having adopted the draft articles on the law of treaties between States and international organizations or between international organizations,

Desires to express to the Special Rapporteur, Professor Paul Reuter, 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.

D. Draft articles on the law of treaties between States and international organizations or between international organizations

63. The text of, and the commentaries to, articles 1 to 80 and annex of the draft articles of the law of treaties between States and international organizations or between international organizations, as finally approved by the Commission at its thirty-third and thirty-fourth sessions, are reproduced below.

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to:

- (a) treaties between one or more States and one or more international organizations, and
- (b) treaties between international organizations.

Commentary

The title of the draft articles was modified in the course of the second reading to align it more closely to the title of the Vienna Convention, by specifying that what is being codified is the law of treaties to which international organizations are parties. The titles of part I and article 1 are in the same form as those in the Vienna Convention. The scope of the draft articles is described in the body of article 1 in more precise terms than in the title in order to avoid any ambiguity. Furthermore, the two categories of treaties concerned have been presented in two separate subparagraphs because this distinction will sometimes have to be made in the treaty regime to which the draft articles apply. The separation into two subparagraphs, (a) and (b), does not affect the fact that many of the draft articles are formulated in general terms, referring to "a treaty" as defined in article 2, subparagraph 1 (a), without distinguishing between the two types of treaties.

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

- (i) between one or more States and one or more international organizations; or
- (ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization 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 and designating a person or persons 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;

(c bis) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the organization 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 or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

- (i) a State, or
- (ii) an international organization,

which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

- (i) a State, or
- (ii) an international organization,

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" and "third organization" mean respectively:

(i) a State, or

(ii) an international organization,

not a party to the treaty;

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the 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 meaning which may be given to them in the internal law of any State or in the rules of any international organization.

Commentary

(1) *Subparagraph 1* (a), defining the term "treaty", follows the corresponding provision of the Vienna Convention but takes into account article 1 of the present draft. No further details have been added to the Vienna Convention text.

(2) The definition of the term "treaty" contains a fundamental element by specifying that what is involved is an agreement "governed by international law". It has been suggested that a further distinction should be introduced into the article according to whether or not a State linked by an agreement to an international organization is a member of that organization. The Commission fully recognizes that special problems arise, particularly as regards matters such as reservations or the effects of treaties on third States or third organizations, when an organization and some or all of its member States are parties to the same treaty, but the draft articles cannot be designed to cater exhaustively for all difficulties. Furthermore, while the distinction may be relevant in the case of regional organizations, it is less important in the case of universal organizations. For those reasons, the Commission has, not without regret, left it aside, except as regards the particularly important questions dealt with below in connection with article 36 *bis*.

(3) The suggestion noted above is also of interest in so far as it raises the possibility of investigating whether some agreements are of an "internal" nature as far as the international organization is concerned, that is, whether they are governed by rules peculiar to the organization in question. The Special Rapporteur addressed inquiries on this point to various international organizations without receiving any conclusive replies.⁴² However, the draft articles, in referring to agreements "governed by international law", have established a

simple and clear criterion. It is not the purpose of the draft articles to state whether agreements concluded between organizations, between States and international organizations, or even between organs of the same international organization may be governed by some system other than general international law, whether the law peculiar to an organization, the national law of a specific country, or even, in some cases, the general principles of law. Granting that, within certain limits, such a possibility exists in some cases, the draft articles do not purport to provide criteria for determining whether an agreement between international organizations or between States and international organizations is not governed by general international law. Indeed, that is a question which, within the limits of the competence of each State and each organization, depends essentially on the will of the parties and must be decided on a case-by-case basis.

(4) What is certain is that the number of agreements dealing with administrative and financial questions has increased substantially in relations between States and organizations or between organizations, that such agreements are often concluded in accordance with streamlined procedures and that the practice is sometimes uncertain as to which legal system governs such agreements. If an agreement is concluded by organizations with recognized capacity to enter into agreements under international law and if it is not by virtue of its purpose and terms of implementation placed under a specific legal system (that of a given State or organization), it may be assumed that the parties to the agreement intended it to be governed by general international law.⁴³ Such cases should be settled

⁴² Concerning the implementation of an agreement, see the commentary to article 27, below. Attention may also be drawn to agreements referred to as "interagency" agreements, about whose legal nature there may sometimes be doubt. What seems certain is that some important agreements concluded between international organizations are not subject either to the national law of any State or to the rules of one of the organizations that is a party to the agreement and hence fall within the purview of general public international law. A case in point is that of the United Nations Joint Staff Pension Fund, which was established by General Assembly resolution 248 (III) of 7 December 1948 (subsequently amended on several occasions). The principal organ of the Fund is the Joint Staff Pension Board (art. 5 of the Regulations (JSPB/G.4/Rev.10)). Article 13 of the Regulations provides that:

"The Board may, subject to the concurrence of the General Assembly, approve agreements with member Governments of a member organization and with intergovernmental organizations with a view to securing continuity of pension rights between such Governments or organizations and the Fund".

Agreements have been concluded in pursuance of that article with several States (Canada, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the USSR) and intergovernmental organizations (the European Communities, the European Space Agency, EFTA, IBRD, IMF, OECD and the European Centre for Medium-range Weather Forecasts). For the texts of these agreements, see *Official Records of the General Assembly, Supplement No. 9, Thirty-second Session* (A/32/9/Add.1); *ibid., Thirty-third Session* (A/33/9/Add.1); *ibid., Thirty-fourth Session* (A/34/9/Add.1); *ibid., Thirty-fifth Session* (A/35/9 and Add.1). An agreement has legal effect only when the General Assembly "concurs" (for an example see resolution 35/215 A, sect. IV, of 17 December 1980).

⁴³ See the second report of the Special Rapporteur, *Yearbook ... 1973*, vol. II, pp. 88-89, document A/CN.4/271, paras. 83-87.

in the light of practice; the draft articles are not intended to prescribe the solution.

(5) The texts of *subparagraphs 1 (b) and (b ter)* reproduce the same meanings attributed to the terms in question as are given in article 2, subparagraph 1 (b), of the Vienna Convention with regard to the establishment by a State of its consent to be bound by a treaty. Subparagraph (b ter) also applies the definition of the Vienna Convention concerning “acceptance”, “approval” and “accession” to the establishment by an international organization of its consent to be bound by a treaty.

(6) The use of the term “ratification” to designate a means of establishing the consent of an international organization to be bound by a treaty, however, gave rise to considerable discussion within the Commission in the context of the consideration of article 11 on means of expressing consent to be bound by a treaty.⁴⁴

(7) To put the elements of the problem in clearer perspective, it should be remembered that there is no question of the meaning which may be given to the terms in question in the internal law of a State or in the rules of an international organization (art. 2, para. 2). It is therefore irrelevant to ascertain whether an international organization employs the term “ratification” to designate a particular means of establishing its consent to be bound by a treaty. In point of fact, international organizations use the term only in exceptional cases, which appear to be anomalous.⁴⁵ It is obvious, however, that the draft articles do not set out to prohibit an international organization from using a particular vocabulary within its own legal order.

(8) At the same time, the draft articles, like the Vienna Convention, make use of a terminology accepted “on the international plane” (art. 2, subpara. 1 (b), of the Vienna Convention). The Commission considered in this connection that the term “ratification” should be reserved for States, since in accordance with a long historical tradition it always denotes an act emanating from the highest organs of the State, generally the Head of State, and there are no corresponding organs in international organizations.

(9) Looking not at the organs from which the ratification proceeds, however, but at the technical mechanism of ratification, we find that ratification amounts to the definitive confirmation of a willingness to be bound. Such a mechanism may sometimes be necessary in the case of international organizations, and there is no reason for denying it a place among the means of establishing their consent to be bound by a treaty. At present, however, there is no generally accepted international designation of such a mechanism in relation to an international organization. In the absence of an accepted term, the Commission has confined itself to describing this mechanism by the words “act of formal

confirmation”, as indicated in *subparagraph 1 (b bis)*. When necessary, international organizations, using a different terminology, can thus establish on an international plane their consent to be bound by a treaty by means of a procedure which is symmetrical with that which applies to States.

(10) In *subparagraph 1 (c)*, the term “full powers” is confined to documents produced by representatives of States, and in *subparagraph 1 (c bis)*, the term “powers” to those produced by representatives of international organizations. The Commission is aware of how much the terminology varies in practice (a situation exemplified by articles 12 and 44 of the Convention on the Representation of States), but it considers that the terminology which it proposes makes a necessary distinction. It seemed inappropriate to use the term “full powers” for an organization, for the capacity of such a body to bind itself internationally is never unlimited.

(11) The Commission, in first reading, believed that to apply the verb “express” in this context (“expressing the consent ... to be bound by ... a treaty”) to the representative of an international organization might give rise to some doubt; the term might be understood in some cases as giving the representative of an international organization the right to determine by himself, as representative, whether or not the organization should be bound by a treaty. As a means of avoiding that doubt in such cases, the verb “communicate” was used instead of the verb “express”. The Commission in second reading at first retained the expression “communicating the consent of the organization to be bound by a treaty”; later, however, it decided not to use the verb “to communicate”, but to replace it by the verb “to express”, as already used for the consent of States. The reasons for this change are given below in the commentary to article 7 (paras. (11) to (14)).

(12) Apart from the modifications made necessary by the incorporation of international organizations in the text,⁴⁶ *subparagraph 1 (d)*, dealing with the term “reservation”, follows the corresponding provision of the Vienna Convention and does not call for any special comment.

(13) It will be recalled that the definition of the term “reservation” which appeared in the text of *subparagraph 1 (d)* adopted in first reading was adopted by the Commission in 1974 prior to its examination of articles 11 and 19. The Commission, instead of waiting at that time, decided to adopt provisionally the wording found in the first-reading draft, which included the phrase “made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty”. In so doing, the Commission saw the advantage of a text simpler than the corresponding text of the Vienna Convention and of leaving in abeyance the question whether the terms “ratification”, “acceptance”, “approval” and “acces-

⁴⁴ See commentary to article 11 below.

⁴⁵ See *Yearbook ... 1975*, vol. II, p. 33, document A/CN.4/285, para. (4) of the commentary to article 11 and footnote 31.

⁴⁶ As well as consequential slight drafting changes in the French text only.

sion” could also be used in connection with acts whereby an organization expresses its consent to be bound by a treaty. Nevertheless, the Commission stressed that the wording so adopted was provisional and put the expression “by any agreed means” in brackets to indicate its intention to review the adequacy of such an expression at a later stage.⁴⁷

(14) Having adopted article 11 and article 2, subparagraph 1 (*b bis*), which establish an “act of formal confirmation” for international organizations as equivalent to ratification for States, the Commission could, in second reading, see no reason which would justify maintaining the first reading text rather than reverting to a text which could now more closely follow that of the corresponding definition in the Vienna Convention.

(15) *Subparagraph 1 (e)* defines the terms “negotiating State” and “negotiating organization”. It follows the corresponding provision of the Vienna Convention, but takes into account article 1 of the present draft. Since the term “treaty” refers here to a category of conventional acts different from that covered by the same term in the Vienna Convention, the wording need not allow for the fact that international organizations sometimes play a special role in the negotiation of treaties between States by participating through their organs in the preparation, and in some cases even the establishment, of the text of certain treaties.

(16) *Subparagraph 1 (f)*, also follows the corresponding provision of the Vienna Convention, taking into account article 1 of the present draft.

(17) Except for the addition of the words “or an international organization”, the definition given in *subparagraph 1 (g)* follows exactly the wording of the Vienna Convention. It therefore leaves aside certain problems peculiar to international organizations. But in this case the words “to be bound by the treaty” must be understood in their strictest sense—that is to say, as meaning to be bound *by the treaty itself* as a legal instrument and not merely “to be bound by the rules of the treaty”. For it can happen that an organization will be bound by legal rules contained in a treaty without being a party to the treaty, either because the rules have a customary character in relation to the organization, or because the organization has committed itself by way of a unilateral declaration (assuming that to be possible),⁴⁸ or because the organization has concluded with the parties to treaty X a collateral treaty whereby it undertakes to comply with the rules contained in treaty X without, however, becoming a party to that treaty. Furthermore, it should be understood that the relatively simple definition given above cannot be used in the case of international organizations which, at the time of the drawing-up of a treaty, lend their technical assistance in the

preparation of the text of the treaty, but are never intended to become parties to it.

(18) The definition given in *subparagraph 1 (h)* merely extends to third organizations the Vienna Convention’s definition of third States.

(19) *Subparagraph 1 (i)* gives the term “international organization” a definition identical with that in the Vienna Convention. This definition should be understood in the sense given to it in practice: that is to say, as meaning an organization composed mainly of States and, in exceptional cases, one or two international organizations⁴⁹ and having in some cases associate members which are not yet States or which may be other international organizations. Some special situations have been mentioned in this connection, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.⁵⁰

(20) It should, however, be emphasized that the adoption of the same definition of the term “international organization” as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.

(21) In the present draft, this very elastic definition is not meant to prejudice the regime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise, no attempt has been made to prejudice the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is that the main purpose of the present draft is to regulate, not the status of international organizations, but the regime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.

(22) Attention should be drawn to a further very important consequence of the definition proposed. The present draft articles are intended to apply to treaties to which international organizations are parties, whether the purpose of those organizations is relatively general or relatively specific, whether they are universal or regional in character, and whether admission to them is relatively open or restricted; the draft articles are intended to apply to the treaties of all international organizations.

⁴⁸ This line of analysis may be compared with that adopted in paragraph 2 of article 9 below, regarding the adoption of the text of a treaty at international conferences. See also the commentary to article 5 below.

⁵⁰ In connection with situations in which an organization is called upon to act specifically on behalf of a territory, see the secretariat study on “Possibilities of participation by the United Nations in international agreements on behalf of a territory”, *Yearbook ... 1974*, vol. II (Part Two), p. 8, document A/CN.4/281.

⁴⁷ *Yearbook ... 1974*, vol. II (Part One), p. 295, document A/9610/Rev.1, chap. IV, sect. B, para. (4) of the commentary to article 2.

⁴⁸ See the examples given on p. 16 above, para. 60.

(23) Yet the Commission has wondered whether the concept of international organization should not be defined by something other than the “intergovernmental” nature of the organization. In connection with the second reading of the article, several Governments also suggested that this should be the case.⁵¹ After having further discussed this question, the Commission has decided to keep its earlier definition, taken from the Vienna Convention, because it is adequate for the purposes of the draft articles; either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it.

(24) *Subparagraph 1 (j)* is a new provision by comparison with the Vienna Convention. In the light of a number of references which appear in the present draft articles to the rules of an international organization, it was thought useful to provide a definition for the term “rules of the organization”. Reference was made in particular to the definition that had recently been given in the Convention on the Representation of States. The Commission accordingly adopted the present subparagraph, which reproduces verbatim the definition given in that Convention.

(25) However, a question which occupied the Commission for some considerable time was that of the terms referring to the organization’s own law, or that body of law which is known as “the internal law” of a State and which the Commission has called “the rules” of an international organization. The Commission has, finally, left its definition unchanged. There would have been problems in referring to the “internal law” of an organization, for while it has an internal aspect, this law also has in other respects an international aspect. The definition itself would have been incomplete without a reference to “the constituent instruments ... of the organization”; it also had to mention the precepts established by the organization itself, but the terminology used to denote such precepts varies from organization to organization. Hence, while the precepts might have been designated by a general formula through the use of some abstract theoretical expression, the Commission, opting for a descriptive approach, has employed the words “decisions” and “resolutions”; the adverbial phrase “in particular” shows that the adoption of a “decision” or of a “resolution” is only one example of the kind of formal act that can give rise to “rules of the organization”. The effect of the adjective “relevant” is to underline the fact that it is not all “decisions” or “resolutions” which give rise to rules, but only those which are *of relevance* in that respect. Lastly, reference is made to *established practice*. This point once again evoked comment from Governments

and international organizations.⁵² It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules.⁵³ However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect. Similarly, by referring to “established” practice, the Commission seeks only to rule out uncertain or disputed practice; it is not its wish to freeze practice at a particular moment in an organization’s history. Organizations stressed this point at the United Nations Conference on the Law of Treaties (1969) and the United Nations Conference on the Representation of States in Their Relations with International Organizations (1975).⁵⁴

(26) *Article 2, paragraph 2*, extends to international organizations the provisions of article 2, paragraph 2, of the Vienna Convention, adjusted in the light of the adoption of the term “rules of the organization” as explained above.

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

The fact that the present articles do not apply:

- (i) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties; or
- (ii) to international agreements to which one or more international organizations and one or more subjects of international law other than States or organizations are parties; or
- (iii) to international agreements not in written form between one or more States and one or more international organizations, or between international organizations;

shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present articles to which they would be subject under international law independently of the present articles;
- (c) the application of the present articles to the relations between States and international organizations or to the relations of organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

⁵² See, for example, *Yearbook ... 1981*, vol. II (Part Two), p. 189, annex II, sect. A.10, subsect. IV.2.

⁵³ This was the view taken by the International Court of Justice with regard to the effect of abstentions by permanent members of the Security Council in voting in that body, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 22, para. 22.

⁵⁴ See *Yearbook ... 1972*, vol. II, pp. 106 and 107, document A/CN.4/258, para. 51.

⁵¹ See “Topical summary...” (A/CN.4/L.311), para. 171; and *Yearbook ... 1981*, vol. II (Part Two), pp. 188-189, annex II, sect. A.10, subsect. IV.1.

Commentary

(1) It is pretty well beyond dispute that the situation under international law of certain international agreements not within the scope of the present articles needs to be safeguarded by a provision on the lines of article 3 of the Vienna Convention. Suffice it to point out that it is not unusual for an international agreement to be concluded between an international organization and an entity other than a State or than an international organization. Reference might be made here (if the Vatican City were not recognized as possessing the characteristics of a State) to agreements concluded between the Holy See and international organizations. Similarly, there can be little doubt that agreements concluded between the International Committee of the Red Cross and an international organization (such as those concluded with EEC under the World Food Programme) are indeed governed by international law. The development of world humanitarian law and its extension for the benefit of entities which have not yet been constituted as States will provide further examples of this kind, and there will even be agreements between one or more international organizations, one or more States and one or more entities which are neither States nor international organizations.

(2) On the other hand, there is no need to belabour the frequency and importance of agreements not in written form between one or more States and one or more international organizations. There may indeed be some doubt as to whether agreements resulting from an offer made by a State and accepted by an international organization at a meeting of which only a summary record is to be kept are written agreements; it must also be borne in mind that many agreements between organizations are set down, for example, in the verbatim records of conferences or co-ordination committees. Lastly, the development of telecommunications necessarily leads to a proliferation of unwritten international agreements on a variety of matters ranging from peace-keeping to intervention on economic markets—so much so that voices have been raised against what has sometimes been considered the abuse of such agreements. However, even if such comment may in some cases be deemed justified, it does not affect the need for concluding such agreements. It is for each organization, under the rule laid down in article 6 of the draft, so to organize the regime of agreements not concluded in written form that no organ goes beyond the limits of the competence conferred on it by the relevant rules of the organization.

(3) It therefore seemed to the Commission that some agreements should have the benefit of provisions similar to those of article 3, subparagraphs (a), (b) and (c), of the Vienna Convention. The text of those subparagraphs of the Convention has been adopted for draft article 3, subject, in the case of subparagraph (c), to the changes obviously necessitated by the difference in scope between the Vienna Convention and the draft articles.

(4) On the other hand, a problem might arise in defining the agreements to which the rules laid down in subparagraphs (a), (b) and (c) apply. The Commission considered that, for the sake of clarity, it should enumerate those agreements and it discarded global formulae which, though simpler in form, were less precise; it has accordingly enumerated the agreements in question in separate categories in subparagraphs (i), (ii) and (iii) of draft article 3; categories (i) and (ii), as is implicit in the general meaning of the term “agreement”, include both agreements in written form and agreements not in written form.

(5) On considering the three categories referred to in subparagraphs (i), (ii) and (iii), it will be seen that the Commission has excluded agreements between States, whether or not in written form, and agreements between entities other than States or international organizations, whether or not in written form. It took the view that, after the Vienna Convention, there was no need to reiterate that agreements between States, whatever their form, were subject to international law. Agreements between entities other than States or than international organizations seem too heterogeneous a group to constitute a general category, and the relevant body of international practice is as yet too exiguous for the characteristics of such a general category to be inferred from it.

(6) The Commission in second reading, after having considered shorter versions of this article, decided that the present wording, although cumbersome, should be maintained for the sake of clarity. It decided to replace the expression “one or more entities other than States or international organizations” by the phrase “one or more subjects of international law other than States or organizations”. The term “subject of international law” is used in the Vienna Convention where it applies to international organizations in particular. The Commission avoided this term in first reading in order to preclude discussion of the question whether there are currently subjects of international law other than States and international organizations. It became apparent in second reading, however, that the term “entity” is too vague and could cover any subject of private law, including associations or societies, and that such an extension of the scope of the article could give rise to all kinds of problems. The reference to subjects of international law is, as things stand, far narrower in scope and the area of discussion which it opens up is very limited.

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the present articles, the present articles apply only to such treaties concluded after the entry into force of the present articles with regard to those States and those organizations.

Commentary

Except for the reference to the treaties which are the subject of the present draft articles, this text follows that of article 4 of the Vienna Convention. In referring to the "entry into force" of the present articles with regard to specific States and international organizations, the draft article implies that a treaty will be concluded to ensure the binding force of the articles. In its report, the Commission has submitted a corresponding recommendation to the General Assembly;⁵⁵ but, as it has stressed, it has no intention of prejudging the General Assembly's decision on the matter. If the General Assembly opts for a different course, it will suffice to alter the tenor of article 4. Furthermore, the Commission has already observed that, even if the General Assembly decides to entrust the draft articles to a conference with the task of drawing up a treaty, that will not necessarily mean that the international organizations will become "parties" to such a treaty, since the rules of that instrument can enter into force with regard to the organizations without the latter acquiring the status of parties.

Article 5. Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.

Commentary

(1) In its first reading of the draft articles, the Commission subscribed to the Special Rapporteur's view that there was no need for a provision paralleling article 5 of the Vienna Convention.

(2) On reviewing the question, the Commission came to the conclusion that even though its substance would relate to what are still rather exceptional circumstances, such a provision was perhaps not without value; it has therefore adopted a draft article 5 which follows exactly the text of article 5 of the Vienna Convention. The differences resulting from the attribution to the term "treaty" of a distinct meaning in each of those texts must now be spelt out and evaluated.

(3) First, draft article 5 evokes the possibility of the application of the draft articles to the constituent instrument of one organization to which another organization is also a party. While—with the exception of the special status which one organization may enjoy within another as an associate member thereof⁵⁶—such cases are at present rare, not to say unknown, there is no reason to consider that they may not occur in the future. There are already commodity agreements admitting as members certain organizations having special

characteristics.⁵⁷ However, the Commission did not feel it necessary to draw from this the consequence that the definition of the expression "international organization" should be amended to take account of such cases, for they will most probably never involve more than the admission by an essentially intergovernmental organization of one or two other international organizations as members.⁵⁸ The Commission did not consider the hypothesis that an international organization might have *nothing but* international organizations as members. One member of the Commission did, however, express the view that, for the moment, it would have been sufficient to deal in article 5 with the hypothesis discussed in paragraph (4) below.

(4) Second, draft article 5 extends the scope of the draft to treaties adopted within international organizations. Such a situation arises principally when a treaty is adopted within an international organization of which another such organization is a member. But it is also conceivable that an international organization all of whose members are States might adopt a treaty designed for conclusion by international organizations or by one or more international organizations and one or more States. In referring to "the adoption of a treaty", article 5 seems to mean the adoption of the text of a treaty, and it is, for example, conceivable that the text of a treaty might be adopted within the United Nations General Assembly, even though certain organizations might subsequently be invited to become parties to the instrument.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6. Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

Commentary

(1) When the question of an article dealing with the capacity of international organizations to conclude

⁵⁵ See *International Wheat Agreement, 1971* (United Nations, Treaty Series, vol. 800, p. 45); *International Cocoa Agreement, 1975* (United Nations Cocoa Conference, 1975 (United Nations publication, Sales No. E.76.II.D.9 and Corr.1)); *International Coffee Agreement, 1976* (publication of the International Coffee Organization, London, 1976); *International Sugar Agreement, 1977* (United Nations Sugar Conference, 1977 (United Nations publication, Sales No. E.78.II.D.17)); *International Rubber Agreement, 1979* (United Nations publication, Sales No. E.80.II.D.5 and Corr.); *International Olive Oil Agreement, 1979* (United Nations publication, Sales No. E.80.II.D.1); *Sixth International Tin Agreement [1981]* (United Nations publication, Sales No. E.82.II.D.16).

⁵⁸ The situation is comparable to that contemplated by article 9 with respect to "international conferences of States".

⁵⁵ See p. 16 above, paras. 56-61.

⁵⁶ See para. (19) of the commentary to article 2, above.

treaties was first discussed in the Commission, members were divided on the matter; varied and finely differentiated views were expressed on this subject. With some slight simplification, these may be reduced to two general points of view. According to the first, such an article would be of doubtful utility, or should at least be limited to stating that an organization's capacity to conclude treaties depends only on the organization's rules. According to the second point of view, the article should at least mention that international law lays down the principle of such capacity; from this it follows, at least in the opinion of some members of the Commission, that, in the matter of treaties, the capacity of international organizations is the ordinary law rule, which can be modified only by express restrictive provisions of constituent instruments.

(2) The wording eventually adopted by the Commission for article 6 is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations in international law; that question remains open, and the proposed wording is compatible both with the concept of general international law as the basis of international organizations' capacity and with the opposite concept. The purpose of article 6 is merely to lay down a rule relating to the law of treaties; the article indicates, for the sole purposes of the regime of treaties to which international organizations are parties, by what rules the capacity to conclude treaties should be assessed.

(3) Thus set in context, article 6 is nevertheless of great importance. It reflects the fact that every organization has its own distinctive legal image which is recognizable, in particular, in the individualized capacity of that organization to conclude international treaties. Article 6 thus applies the fundamental notion of "rules of any international organization" already laid down in article 2, paragraph 2, of the present draft. The addition in article 6 of the objective "relevant" to the expression "rules of that organization" is due simply to the fact that, while article 2, paragraph 2, relates to the "rules of any organization" *as a whole*, article 6 concerns only *some* of those rules, namely those which are relevant in settling the question of the organization's capacity.

(4) A question naturally arises as to the nature and characteristics of the "relevant rules" in the matter of an organization's capacity, and it might be tempting to answer this question in general terms, particularly with regard to the part played by *practice*. That would obviously be a mistake, and one which the text of draft article 6 seeks to avert by specifying that "the capacity of an international organization to conclude treaties is governed by the relevant rules of *that* organization".

(5) It should be clearly understood that the question how far practice can play a creative part, particularly in the matter of international organization's capacity to conclude treaties, cannot be answered uniformly for all international organizations. This question, too, depends

on the "rules of the organization"; indeed, it depends on the highest category of those rules—those which form, in some degree, the constitutional law of the organization and which govern in particular the *sources* of the organization's rules. It is theoretically conceivable that, by adopting a rigid legal framework, an organization might exclude practice as a source of its rules. Even without going as far as that, it must be admitted that international organizations differ greatly from one another as regards the part played by practice and the form which it takes, *inter alia* in the matter of their capacity to conclude international agreements. There is nothing surprising in this; the part which practice has played in this matter in an organization like the United Nations, faced in every field with problems fundamental to the future of all mankind, cannot be likened to the part played by practice in a technical organization engaged in humble operational activities in a circumscribed sector. For these reasons, practice as such was not specifically mentioned in article 6; practice finds its place in the development of each organization in and through the "rules of the organization", as defined in article 2, subparagraph 1 (*j*), and that place varies from one organization to another.

(6) These considerations should make it possible to clear up another point which has been of keen concern to international organizations in other contexts,⁵⁹ but which is open to no misunderstanding so far as the present draft articles are concerned. In matters such as the capacity to conclude treaties, which are governed by the rules of each organization, there can be no question of fixing those rules as they stand at the time when the codification undertaken becomes enforceable against each organization. In reserving the practice of each organization in so far as it is recognized by the organization itself, what is reserved is not the practice *established at the time of entry into force of the codification* but the very *faculty* of modifying or supplementing the organization's rules by practice to the extent permitted by those rules. Thus, without imposing on the organizations the constraint of a uniform rule which is ill-suited to them, article 6 recognizes the right of each of them to have its own legal image.

(7) Lastly, it would, strictly speaking, have been possible for article 6 to restate in an initial paragraph the rule laid down in article 6 of the Vienna Convention: "Every State possesses capacity to conclude treaties". But it was felt that such a reminder was unnecessary and that the whole weight of article 6 could be concentrated on the case of international organizations.

Article 7. Full powers and powers

1. 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 such a treaty if:

(a) he produces appropriate full powers; or

⁵⁹ See *Yearbook ... 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 51.

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce 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 of Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference of States in which international organizations participate, for the purpose of adopting the text of a treaty between States and international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty within that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between the accrediting States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of expressing the consent of that organization to be bound by a treaty if:

(a) he produces appropriate powers; or

(b) it appears from the practice of the competent organs of the organization or from other circumstances that that person is considered as representing the organization for such purpose without having to produce powers.

Commentary

(1) The first two paragraphs of this draft article deal with representatives of States and the last two paragraphs with representatives of international organizations. The former provisions implicitly concern only treaties between one or more States and one or more international organizations; the latter relate to treaties within the meaning of draft article 2, subparagraph 1 (a), namely both to treaties between one or more States and one or more international organiza-

tions and to treaties between international organizations.

(2) In the case of representatives of States, the draft broadly follows article 7 of the 1969 Vienna Convention: as a general rule, these representatives are required to produce "appropriate full powers" for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty. There are nevertheless exceptions to this rule. First of all, as in the Vienna Convention, practice or other circumstances might result in a person being considered as representing a State despite the fact that full powers are not produced.

(3) Secondly, as in the Vienna Convention, certain persons are considered as representing a State *in virtue of their functions*. The enumeration of these persons which is given in the Vienna Convention has had to be altered to some extent. In the case of Heads of State and Ministers for Foreign Affairs (subparagraph 2 (a)) there is no change, but some amendments have been made as regards other representatives. First, article 7, subparagraph 2 (b), of the Vienna Convention, which refers to "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", was not required, since it is inapplicable to the present draft article. In addition, account had to be taken not only of certain advances over the Vienna Convention represented by the Convention on the Representation of States but also of the limitations which affect certain representatives of States by virtue of their functions.

(4) Subparagraph 2 (b) of the present draft article is therefore symmetrical with article 7, subparagraph 2 (c), of the Vienna Convention in its treatment of international conferences, but it replaces the latter subparagraph's expression "representatives accredited by States to an international conference" by the more precise wording "heads of delegations of States to an international conference", which is based on article 44 of the Convention on the Representation of States. Drawing inspiration from article 9, further precision is introduced by describing that conference as one "of States in which international organizations participate".

(5) Subparagraph 2 (c) deals with the case of heads of delegations of States to an organ of an international organization and restricts their competence to adopt the text of a treaty without producing full powers to the single case of a treaty between one or more States and the organization to the organ of which they are delegated. This is because their functions do not extend beyond the framework of the organization in question.

(6) Lastly, with regard to missions to international organizations, the wording "representatives accredited by States ... to an international organization" used in the Vienna Convention has been dropped in favour of the term "head of mission" employed in the Conven-

tion on the Representation of States; *subparagraph 2 (d) and (e)* of the present draft article are based on paragraphs 1 and 2 of article 12 of the latter instrument, which contain the most recent rule drafted by representatives of States in the matter. Heads of permanent missions to an international organization are competent by the very fact of their functions to *adopt* the text of a treaty between accrediting States and that organization. They may also be competent, but only by virtue of practice or other circumstances, to *sign*, or to sign *ad referendum* the text of a treaty between accrediting States and the organization concerned.

(7) The matter of representatives of international organizations raises new questions and, first, one of principle. Should the rule be established that the representative of an organization is required, like the representative of a State, to prove by an appropriate document that he is competent to represent a particular organization for the purpose of performing certain acts relating to the conclusion of a treaty (the adoption and authentication of the text, consent to be bound by the treaty, etc.)? The Commission answered that question in the affirmative, since no reason exists for international organizations not to be subject to a rule which is already firmly and universally established with regard to treaties between States. It is perfectly true that, in the practice of international organizations, formal documents are not normally used for this purpose. The treaties at present being concluded by international organizations are in large measure bilateral treaties or are restricted to very few parties; they are preceded by exchanges of correspondence which generally determine beyond all doubt the identity of the individuals who will perform on behalf of the organization certain acts relating to the procedure for the conclusion (in the broadest sense) of the treaty. In other cases, the highest-ranking official of the organization ("the chief administrative officer of the Organization" within the meaning of article 85, paragraph 3, of the Convention on the Representation of States), with his immediate deputies, is usually considered in practice as representing the organization without further documentary evidence.

(8) These considerations should not, however, obscure the fact that, in the case of organizations with a more complex institutional structure, formal documents are necessary for the above purposes. Moreover, the present draft articles provide for the possibility, with the consent of the States concerned, of participation by international organizations in treaties drawn up at an international conference composed mainly of States (article 9), and it seems perfectly proper that in such cases organizations should be subject to the same rules as States. It is nevertheless necessary that the general obligation thus imposed on international organizations should be made as flexible as possible and that authority should exist for a practice which is accepted by all concerned, namely that of making whatever arrangements are desirable; these ends are achieved by subparagraphs 3 (b) and 4 (b), which apply the rule accepted for representatives of States to the case of representatives of

international organizations. The Commission did not, however, think it possible to draw up a list of cases in which a person would be absolved *by reason of his functions* in an international organization from the need to furnish documentary proof of his competence to represent an organization in the performance of an act relating to the conclusion (in the broadest sense) of a treaty. If impossible complications are to be avoided, the present draft articles, unlike the Convention on the Representation of States, must apply to *all organizations*; and international organizations, taken as a whole, exhibit structural differences which rule out the possibility of making them the subject of general rules.

(9) There are other considerations which support this view. As has been mentioned, no organization has the same treaty-making capacity as a State; the capacity of every organization is restricted, under the terms of *draft article 6*. These differences are asserted through appropriate terminology, and the limited competence of representatives of international organizations by comparison with what applies to States is spelt out. Thus, as indicated in the commentary to article 2 above, subparagraph 1 (c) of that article confines the term "full powers" to documents produced by representatives of States, and subparagraph 1 (c *bis*) confines the term "powers" to documents produced by representatives of international organizations.

(10) Moreover, in the case of representatives of international organizations, the Commission felt it necessary to distinguish between the adoption and authentication of the text of a treaty, on the one hand, and consent to be bound by a treaty, on the other; the two cases are dealt with in paragraphs 3 and 4 of the present draft article, respectively. With regard to the adoption or authentication of the text of a treaty, the formulation proposed corresponds to that of subparagraph 1 (a) relating to representatives of States. With regard to consent to be bound by a treaty, however, the Vienna Convention and paragraph 1 of the present draft article provide for a case in which "a person is considered as representing a State ... for the purpose of *expressing* the consent of the State to be bound by such a treaty". May the same provision be used in connection with the consent of international organizations to be bound by a treaty?

(11) It would seem that, generally speaking, the answer should be affirmative. As has, however, already been said, in practice the representatives of organizations rarely possess powers; the representative of an organization is often none other than the head of the secretariat of that organization and for him to confer powers on himself is inconceivable. Hence the exception laid down for the representatives of States to the rule of producing powers and the reference to practice or other circumstances leading to a person's being considered as representing a State without producing powers, becomes extremely important for organizations. The fear was expressed both within the Commission and outside it that the representatives of organizations, who are, more often than not, members of international

secretariats, might declare a consent that had never been formulated by the competent organs of the organization. In order to circumvent that difficulty, the Commission in first reading made a change by comparison with the terminology employed for States. While the representative of a State “expresses” the consent of a State to be bound by a treaty, the representative of an organization merely “communicates” that body’s consent (the use of the term “communicates” implying that the consent is given by an organ other than the one which declares it). The Commission retained this term in the text adopted on second reading at its thirty-third session.

(12) This solution had, however, serious disadvantages which had already been pointed out, particularly by international organizations. If the verb “to communicate” was *always* to be taken in the sense of “to transmit”, its use would not always reflect reality, since organizations’ consent is, in fact, often established at the level of their representative organs. If “to communicate” was to mean, depending on circumstances, either “to transmit” or “to establish”, employing it would not provide the desired assurances. Furthermore, ambiguous use of this term is very unusual and would make for inconsistency in the wording of the draft articles, for article 67 employs the term “communication” in the normal sense of “transmission”.

(13) Following the second reading of articles 27 *et seq.*, the Commission at its thirty-fourth session decided to use the same wording for representatives of organizations and of States and therefore replaced the verb “to communicate” by the verb “to express”, not only in article 7, paragraph 4, but also in article 2, subparagraph 1 (*c bis*) and in article 47; article 67 remains unchanged. In the text of the draft articles, the verb “to express” covers, as appropriate and without distinction, the case of a consent made public by the person that established it legally and the case of a consent made public by a person other than the person or entity (the competent organ, whatever that might be) that established it legally.

(14) The Commission has also made a small change in the text of paragraph 4 to take account, in a more satisfactory form than by employing the verb “to communicate”, of the concerns which first led to the use of that term. Instead of referring baldly to “practice”, the Commission has specified in the final text that what is meant is “the practice of the competent organs of the organization”. This has removed an ambiguity. It is a fact that the constituent treaties of many of the most important organizations contain no provision specifying which organ is competent to bind the organization. In fact, “practice” has filled the gap by means of subtle solutions denoting admission that, in many cases, the head of the secretariat of the organization (whatever his title) is competent to express the consent of that organization without reference to another organ. This solution emanates from the requirements of international life. With regard to the question of how this practice became established, however, it must be admitted

that, initially, such competence was not “established” and that it has not been “established” on the initiative solely of heads of secretariats, but just as much by the attitude adopted by all the other organs that might have been entitled to claim the competence and did not do so. Through their conduct, they allowed the practice in question to develop, take root and so become a “rule of the organization”. It is the acquiescence of these organs which constitutes the practice. Should it become useful for the competences of the head of the secretariat to be developed further at a later stage, it will not suffice for him actually to exercise such competence, since the other organs of the organization can question this solution and seek to condition and limit it; if they do not do so, it will be their acceptance—tacit though it may be—which will permit the practice in question to acquire legal standing.

(15) Although the suggestion that it should do so was made in some comments,⁶⁰ the Commission did not feel it possible to provide that the executive head of an organization should have a general right, such as Heads of States, Heads of Government and Ministers for Foreign Affairs have for States, to represent an organization for the purposes of concluding a treaty. It is quite true that one cannot confer “powers” on oneself and that there is in fact a person responsible in the organizations for providing others with “powers” without giving any to himself.⁶¹ But it is necessary to uphold firmly the principle that each organization has its own highly individualized structure, and that it decides, according to its own rules, on the capacity, status and title of the person responsible for representing it without powers and, when necessary, for conferring powers on others.

Article 8. Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization.

Commentary

This article reproduces the corresponding text of the Vienna Convention except for the changes necessitated by the subject-matter of the present draft articles.

Article 9. Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States and international organizations or, as the case may be, all the organizations participating in its drawing up except as provided in paragraph 2.

⁶⁰ *Yearbook ... 1981*, vol. II (Part Two), p. 183, annex II, sect. A.3, para. 7.

⁶¹ *Ibid.*, pp. 196-197, sect. B.1, subsect. II, para. 2.

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

Commentary

(1) The corresponding article of the Vienna Convention establishes a rule, namely that the adoption of the text of a treaty shall take place by the consent of all the States participating in its drawing up, together with an exception concerning the adoption of the text of the treaty at an "international conference", but it does not define an "international conference". The general view, however, has always been that this term relates to a relatively open and general conference in which States participate without the final consent of one or more of them to be bound by the treaty being regarded by the other States as a condition for the entry into force of the treaty.

(2) The present draft article exhibits a number of particular aspects which derive from the specific characteristics of international organizations. In the first place, article 9, paragraph 1, of the Vienna Convention refers, as regards a treaty, to "all the States participating in its drawing up"; no definition is given for this expression, the meaning of which is sufficiently clear when only States are involved. Where organizations are concerned, it is only possible to regard as "organizations" participating in the drawing up of the text those organizations which participate in the drawing up on the same footing as States, and that excludes the case of an organization which merely plays a preparatory or advisory role in the drawing up of the text.

(3) In examining the possible place of international organizations in the development of the international community, the Commission has had to decide whether a conference consisting only of international organizations is conceivable. The hypothesis, although exceptional, cannot be excluded; it is possible, for example, that international organizations might seek through an international conference to resolve certain problems or at least to bring uniformity into certain arrangements relating to the international civil service. It was felt, however, that even in an eventuality of that kind, each organization would possess such specific characteristics by comparison with the other organizations that there would be little point in bringing such a "conference" within the scope of the rule in article 9, *paragraph 2*. In the draft article proposed above, a "conference" consisting only of international organizations would fall under *paragraph 1* in regard to the adoption of the text of a treaty: the text would have to be adopted by all the participants, unless a rule other than unanimous consent were established.

(4) The only specific hypothesis calling for the application of a rule symmetrical with the rule in article 9,

paragraph 2, of the Vienna Convention would be that of a "conference" between States within the meaning of that Convention, in which one or more international organizations also participated with a view to the adoption of the text of a treaty between those States and the international organization or organizations concerned. In such a case, it would be proper that the rule of the two-thirds majority laid down in the text of the Vienna Convention should apply, with the two-thirds majority meaning two-thirds of all the participants, both States and international organizations. This is the aim of *paragraph 2* of the present draft article. In the absence of such a provision, if States participating in the conference decided to invite one or two international organizations to participate in the conference on the same footing as States themselves, the rule in article 9, *paragraph 2*, of the Vienna Convention would be inapplicable; that would leave no alternative but to follow a rule of unanimous consent, possibly for the adoption of the text of a treaty and in any case for the adoption of the rule according to which the text of a treaty is to be adopted. It was not the intention of the Commission, in proposing *paragraph 2* of draft article 9, to recommend the participation of one or more international organizations in the drawing up of a treaty at an international conference; this is a question which must be examined case by case and is a matter for States to decide. The Commission merely wished to make provision for that possibility. At least in some cases, customs and economic unions may be called on to participate as such in the drawing up of conventions at international conferences. Nor was it the intention of the Commission that the provisions of *paragraph 2* should be interpreted as impairing the autonomy of international conferences in the adoption of their own rules of procedure, which might prescribe a different rule for the adoption of the text of a treaty, or in filling any gaps in their rules of procedure on the subject.

(5) In second reading, the Commission modified the wording of article 9, while leaving all substantive provisions intact, in order to make it more explicit: it will be noted that *paragraph 1* speaks of "The adoption of the text of a treaty" (as does article 9 of the Vienna Convention). In addition, the capacity of the "participants" in the drawing up of the text of a treaty has been clarified by distinguishing between the two categories of treaty that are the subject of the draft articles:

The adoption of the text of a treaty takes place by the consent of all the States and international organizations or, as the case may be, all the organizations participating in its drawing up ...

Article 10. Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

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

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the represen-

tatives of those States and those organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

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

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those organizations of the text of a treaty or of the final act of a conference incorporating the text.

Commentary

This draft article reproduces the corresponding text (article 10) of the Vienna Convention, except for differences of presentation reflecting the two particular kinds of treaty with which it is concerned. The brief allusion at the end of paragraph 2 to a conference consisting only of international organizations should be regarded as providing for an exceptional case, as explained in connection with article 9.⁶²

Article 11. Means of expressing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Commentary

(1) Paragraph 1 of this draft article reproduces, in respect of the consent of States to be bound by a treaty which is implicitly between one or more States and one or more international organizations, the enumeration of the various means of expressing consent given in article 11 of the Vienna Convention as regards treaties between States.

(2) It is more difficult to enumerate the various means of establishing the consent of an international organization to be bound by a treaty to which it intends to become a party. There is no difficulty, as regards international organizations, in allowing signature, exchange of instruments constituting a treaty, acceptance, approval or accession. The Commission considers that the same principle could be accepted for international organizations as for States, namely, the addition to this list of the expression "any other means if so agreed". This formulation, adopted by the United Nations Conference on the Law of Treaties, is of considerable significance, since it introduces great flexibility in the

means of expressing consent to be bound by a treaty; the freedom thus given to States, which it is proposed to extend to international organizations, bears on the terminology as well, since the Vienna Convention enumerates, but does not define, the means of expressing consent to be bound by a treaty. Practice has shown, however, that the considerable expansion of treaty commitments makes this flexibility necessary, and there is no reason to deny the benefit of it to international organizations.

(3) Article 11 reflects the decision explained above, in the commentary to article 2, to reserve for States the expression "ratification" as a means of expressing consent to be bound by a treaty and to utilize a new term, "act of formal confirmation", as the analogous means for an international organization to express consent to be bound by a treaty.⁶³

(4) During the second reading of this article, at its thirty-third session, the Commission concluded that there were no convincing reasons to maintain the distinction which had been made in the text adopted in first reading between the consent of a State to be bound by a treaty being "expressed" and that of an international organization being "established". The terminology as adopted in second reading is now uniform in that regard. This change has also been reflected in the articles which follow.

Article 12. 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 the representative of that State when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that signature should have that effect; or

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

2. The consent of an international organization to be bound by a treaty is expressed by the signature of the representative of that organization when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the organization to give that effect to the signature appears from the powers of its representative or was expressed during the negotiation.

3. For the purposes of paragraphs 1 and 2:

(a) the initialling of a text constitutes a signature when it is established that the negotiating States and

⁶² See para. (3) of the commentary to article 9, above.

⁶³ See article 2, subparas. 1 (b) and (b bis), above.

negotiating organizations or, as the case may be, the negotiating organizations so agreed;

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

Commentary

(1) Article 12 corresponds to article 12 of the Vienna Convention and basically provides for the same regime for both States and international organizations. It was deemed advisable to maintain separate paragraphs for States and organizations because of the important distinction between “full powers” (subpara. 1 (c)) and “powers” (subpara. 2 (c)).

(2) The other distinction, which was made at the first reading stage, involved the denial to international organizations of the faculty accorded to States under subparagraph 1 (b). The Commission concluded that there was no sound reason why the consent of an international organization to be bound by a treaty could not be expressed by signature when, in the absence of a relevant provision in the treaty, it was established that the negotiating States and negotiating organizations or, as the case might be, the negotiating organizations were agreed that signature should have that effect. In that connection, it may be stressed that the use of the term “negotiating organization” must be read in the light of the fact that the consent of an organization to be bound by signature can only be given in conformity with the relevant rules of the organization.

(3) Finally, the Commission decided in second reading to replace the ambiguous expression “participants in the negotiation” by a more precise formula inspired by the text of the corresponding article of the Vienna Convention: “the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations”.

Article 13. Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States and international organizations or, as the case may be, of organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those States and those organizations or, as the case may be, those organizations were agreed that the exchange of instruments should have that effect.

Commentary

(1) This draft article reproduces article 13 of the Vienna Convention, except for the changes necessitated by the subject-matter of the draft articles. The wording of this draft article reflects the fact, although cases of the kind are now rare, that a treaty may also be con-

stituted by an exchange of instruments when there are more than two contracting parties.

(2) The text adopted in first reading consisted of two paragraphs, one dealing with treaties between one or more States and one or more international organizations and the other dealing with treaties between international organizations. In second reading, it was decided to simplify the article by merging the two paragraphs into a single one applicable to both kinds of treaties.

Article 14. Consent to be bound by a treaty expressed by ratification, act of formal confirmation, 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 and negotiating organizations were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State 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 an international organization to be bound by a treaty is expressed by an act of formal confirmation when:

(a) the treaty provides for such consent to be expressed by means of an act of formal confirmation;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was expressed during the negotiation.

3. The consent of a State or of an international organization to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification or, as the case may be, to an act of formal confirmation.

Commentary

(1) This draft article deals separately with, in paragraph 1, the consent of the State in the case of treaties implicitly between one or more States and one or more international organizations and, in paragraph 2, the consent of an international organization in the case of a treaty as defined in article 2, subparagraph 1 (a)—that is to say, a treaty between one or more States and one or more international organizations or a treaty between a number of international

organizations. It does not call for any comment as regards the question of the use, for the case of international organizations, of the term “act of formal confirmation”, which has already been discussed.⁶⁴ It will merely be noted that the wording of the title of this article makes it clear that the expression used there (“act of formal confirmation”) is a verbal expression describing an operation which has not so far had any generally accepted term bestowed on it in international practice.

(2) At its thirty-third session, the Commission basically maintained the text as adopted in first reading, except for a few drafting adjustments already explained⁶⁵ in connection with other articles.

Article 15. Consent to be bound by a treaty expressed by accession

The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State or that organization by means of accession;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that such consent may be expressed by that State or that organization by means of accession; or

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

Commentary

Draft article 15 corresponds to the provisions of article 15 of the Vienna Convention and, in its present form, is the result of an attempt to simplify the text adopted in first reading by the merger into one paragraph of the earlier text’s two paragraphs dealing with the two types of treaties covered by the present draft articles. As a result, there is no description of the two types of treaty involved, since the same rule applies to both. One member of the Commission abstained in the adoption of the consolidated text since, in his view, it was not possible to contemplate, in the case of a treaty concluded solely between international organizations, later accession to that treaty by States. It was also felt that such a situation should not be dealt with in the present draft, since the corresponding situation of treaties concluded solely between States being acceded to by international organizations had not been covered by the Vienna Convention. The text of article 15 as adopted in second reading shows changes similar to those previously made in other articles.⁶⁶

⁶⁴ See paras. (8) and (9) of the commentary to article 2, above.

⁶⁵ See para. (4) of the commentary to article 11 and para. (3) of the commentary to article 12, above.

⁶⁶ *Ibid.*

Article 16. Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession

1. Unless the treaty otherwise provides, instruments of ratification, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting organizations or to the depositary, if so agreed.

Commentary

The draft article follows the provisions of article 16 of the Vienna Convention, but has two paragraphs dealing separately with the two different kinds of treaties which are the subject of this set of draft articles. In the case of acts of formal confirmation, the description of the instruments establishing their existence had been rendered in the first and second reading texts as “instruments of act of formal confirmation”. At the present session, to avoid grammatical awkwardness, it was altered to read “instruments relating to an act of formal confirmation”. The use of this term is in harmony with the expression “act of formal confirmation” in draft article 2, subparagraph 1 (*b bis*), and in draft articles 11 and 14, since these terms help to avoid any confusion with the confirmation referred to in draft article 8 and, as has already been explained,⁶⁷ they do not denominate, but rather describe the operation referred to.

Article 17. Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and the contracting organizations or, as the case may be, the other contracting organizations and the contracting States so agree.

⁶⁷ See para. (9) of the commentary to article 2, above.

2. Without prejudice to articles 19 to 23, the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Commentary

This draft article deals with the two separate questions which are the subject of article 17 of the Vienna Convention. It deals with these questions in four paragraphs, giving separate consideration to the two kinds of treaties which are the subject of the present set of draft articles.

Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization 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

The draft article follows the principle set forth in article 18 of the Vienna Convention. Again, as in articles 13 and 15 and for similar reasons of simplification, the text of article 18 as it has emerged from second reading at the thirty-third session is the result of the merger into one paragraph of what was originally two. Consequently, the reference is to "a treaty" as defined in article 2, subparagraph 1 (a), but without distinguishing between the two types of treaties involved.

SECTION 2. RESERVATIONS

General commentary to section 2

(1) Even in the case of treaties between States, the question of reservations has always been a thorny and

controversial issue, and even the provisions of the Vienna Convention may not have eliminated all these difficulties.⁶⁸ Difficulties attended the Commission's discussions in first reading with regard to treaties to which international organizations are parties;⁶⁹ the compromise text finally adopted did not receive unanimous support within the Commission.⁷⁰ In the Sixth Committee, the question was discussed extensively, and widely diverging points of view emerged in 1977;⁷¹ the question was also touched upon in 1978 and 1979.⁷² It is brought out in the written observations submitted by a number of Governments and international organizations.⁷³

(2) Before examining the considerations which led to the conclusions reached by the Commission in second reading, it should be considered whether it would not in fact be possible to find some information concerning practice, despite the prevailing view that practice is lacking in this regard. In fact, this view is not entirely justified; there are a certain number of cases in which such questions have arisen. Admittedly the value of these cases is open to question: do the examples to be adduced involve genuine reservations, genuine objections or even genuine international organizations? It would seem difficult to claim that the problem of reservations has never arisen in practice, although the issue is a debatable one.

(3) An interesting legal opinion has been given in the form of an aide-mémoire addressed to the Permanent Representative of a Member State from the Secretary-General of the United Nations concerning the "Juridical standing of the specialized agencies with regard to reservations to the Convention on the Privileges and Immunities of the Specialized Agencies",⁷⁴ which was adopted by the General Assembly of the United Nations on 21 November

⁶⁸ See P.H. Imbert, *Les réserves aux traités multilatéraux: Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951* (Paris, Pedone, 1979); see also the same author's "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire français de droit international*, 1978 (Paris), vol. XXIV, p. 29.

⁶⁹ *Yearbook ... 1975*, vol. I, pp. 237-249, 1348th to 1350th meetings; and *Yearbook ... 1977*, vol. I, pp. 70-103, 1429th to 1435th meetings.

⁷⁰ One member of the Commission did not associate himself with the compromise solution adopted and proposed another text (A/CN.4/L.253), see *Yearbook ... 1977*, vol. II (Part Two), pp. 109-110, footnote 464, and p. 113, footnote 478).

⁷¹ See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 169-177. While some representatives supported the compromise submitted by the Commission (*ibid.*, para. 170), some sought a stricter system on the lines envisaged in the previous note (*ibid.*, para. 171), while others asked for a more liberal system (*ibid.*, para. 172).

⁷² *Ibid.*, *Thirty-third Session, Annexes*, agenda item 114, document A/33/419, para. 228; and "Topical summary ..." (A/CN.4/L.311), paras. 175-176.

⁷³ See *Yearbook ... 1981*, vol. II (Part Two), annex II.

⁷⁴ United Nations, *Juridical Yearbook 1964* (Sales No.: 66.V.4), pp. 266 *et seq.*

1947.⁷⁵ In becoming parties to this Convention, States have sometimes entered reservations, and several specialized agencies have "objected to the reservation"; after various representations, four States which had formulated reservations withdrew them. It is at the level of objections to reservations that such precedents can be invoked. According to the Secretary-General's legal opinion:

... Practice ... has established ... the right ... to require that a reservation conflicting with the purposes of the Convention and which can result in unilaterally modifying that agency's own privileges and immunities, be not made effective unless and until it consents thereto.⁷⁶

As an example of an objection by an international organization to a reservation formulated by a State, the 1947 Convention is open to dispute, in that the specialized agencies are not usually considered as "parties" to that Convention.⁷⁷ However, even if they are denied this status, there is obviously a link under the terms of the Convention between each specialized agency and each State party to the Convention, and it is on the basis of this link that the objection is made.⁷⁸

(4) A second case which arose a little later involved reservations not only to the 1947 Convention but also to the Convention on the Privileges and Immunities of the United Nations, which was approved by the General Assembly on 13 February 1946.⁷⁹ In a letter addressed to the Permanent Representative of a Member State,⁸⁰ the Secretary-General of the United Nations referred still more specifically to the position of a State which has indicated its intention of acceding to the Convention with certain reservations. Without using the term "objection", the Secretary-General indicated that certain reservations were incompatible with the Charter of the United Nations and strongly urged that the reservation should be withdrawn, emphasizing that he would be obliged to bring the matter to the attention of the General Assembly if, despite his objection, the reservation was retained, and that a supplementary agreement might have to be drawn up "adjusting" the provisions of the Convention in conformity with section 36 of the Convention. This precedent is of additional interest in that the Convention contains no provision concerning reservations and objections to reservations and also in

that the States parties have made a considerable number of reservations.⁸¹

(5) A number of precedents concern the European Economic Community, and at least one of them is of particular interest. The Community is a party to several multilateral conventions, usually on clearly specified conditions. Some of these conventions prohibit reservations or give a restrictive definition of the reservations authorized; in other cases there are no indications.⁸² The Community has already entered reservations authorized under such conventions.⁸³ One case which merits some attention is the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) concluded at Geneva on 14 November 1975.⁸⁴ This Convention has provided that customs or economic unions may become parties to the Convention, either at the same time as all the member States do so or subsequently; the only article to which reservations are authorized is the article relating to the compulsory settlement of disputes. Both Bulgaria and the German Democratic Republic have made *declarations* to the effect that:

... the possibility envisaged in article 52, paragraph 3, for customs or economic unions to become Contracting Parties to the Convention, does not bind Bulgaria [the German Democratic Republic] with any obligations whatsoever with respect to these unions.⁸⁵

The nine (at that time) member States of the Community and the European Economic Community jointly formulated an objection in the following terms:

... The statement made by Bulgaria [the German Democratic Republic] concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention.

The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void.⁸⁶

⁸¹ See United Nations, *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc.*, as at 31 December 1979 (Sales No. E.80.V.10), pp. 35 *et seq.*

⁸² Examples of prohibition have already been cited in the report of the Commission on the work of its twenty-ninth session (*Yearbook ... 1977*, vol. II (Part Two), pp. 108-109, footnotes 458-462). Mention can also be made of the Convention on the Conservation of Migratory Species of Wild Animals signed at Bonn on 23 June 1979, which, in article 1, subpara. 1 (k), recognizes "any regional economic integration organization" as a party; article XIV restricts the right to enter reservations, but states that the reservations permitted are open to "any State or any regional economic integration organization" (*International Protection of the Environment, Treaties and Related Documents*, B. Rüster, B. Simma and M. Bock, eds. (Dobbs Ferry, N.Y., Oceana, 1981), vol. XXIII, pp. 14 and 24). One State (the USSR) objected to the mention of such organizations and has not become a party to the Convention.

⁸³ The International Convention on the Simplification and Harmonization of Customs Procedures, concluded at Kyoto on 18 May 1973, authorizes certain reservations; EEC which is a party to the Convention, has on several occasions accepted "annexes" while availing itself of the power to formulate reservations. (*Official Journal of the European Communities, Legislation*, vol. 18 (1975), No. L 100, p. 1; *ibid.*, vol. 21 (1978), No. L 160, p. 13; *ibid.*, vol. 23 (1980), No. L 100, p. 27.)

⁸⁴ ECE/TRANS/17.

⁸⁵ United Nations, *Multilateral Treaties ...*, p. 335.

⁸⁶ *Ibid.*

⁷⁵ General Assembly resolution 179 (II). For the text of the Convention, see United Nations, *Treaties Series*, vol. 33, p. 261.

⁷⁶ United Nations, *Juridical Yearbook 1964 ...*, p. 267, para. 6.

⁷⁷ The legal opinion states that:

"Each specialized agency enjoys the same degree of legal interest in the terms and operation of the Convention as does a State party thereto, irrespective of the question whether or not each agency may be described as a 'party' to the Convention in the strict legal sense". (*Ibid.*, para. 5.)

See also the report of the Secretary-General entitled "Depositary practice in relation to reservations" (*Yearbook ... 1965*, vol. II, p. 102, document A/5687, paras. 23-25).

⁷⁸ See the view expressed by the Special Rapporteur in his first report: *Yearbook ... 1972*, vol. II, p. 194, document A/CN.4/258, footnote 181.

⁷⁹ General Assembly resolution 22 (I). For the text of the Convention, see United Nations, *Treaty Series*, vol. 1, p. 15.

⁸⁰ United Nations, *Juridical Yearbook 1965* (Sales No. E.67.V.3), pp. 234 *et seq.*

There is no need to discuss or even to consider the legal problems created by this precedent. It merely indicates that international organizations (or at least organizations sharing certain common features with international organizations) may be called upon to take cognizance of questions relating to reservations at a time when it would not perhaps be universally recognized, even in the context of inter-State relations, that the rules of the Vienna Convention have become customary rules of international law. All that can be said is that these precedents, especially that of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies and the 1946 Convention on the Privileges and Immunities of the United Nations, show that it is not unknown in current practice for international organizations to formulate what may be considered reservations or objections.

(6) At its thirty-third session, the Commission made a general review of the articles on reservations which it had adopted in first reading. It was encouraged to pay particular attention to this issue by the difficulty of the subject, on the one hand, and by the differences of opinion that had become apparent among its members in first reading and the oral and written comments of Governments, on the other.

(7) Apart from tackling the difficult drafting problems involved, the Commission devoted a long discussion to the substantive problem of the *formulation* of reservations (art. 19 of the Vienna Convention). It was left in no doubt that this was the question that gave rise to the greatest difficulties, and that its solution required both a statement of principle and the admission of exceptions to that principle.

(8) With regard to the principle, the options are either to extend to organizations the freedom to formulate reservations conferred upon States by article 19 of the Vienna Convention or, on the contrary, to state by way of a general rule that organizations are prohibited from making reservations. In either case, the consequences of the choice can be alleviated by appropriate exceptions.

(9) In first reading, the Commission tried to establish a compromise between two approaches that became apparent during its discussions, the one favouring the principle of freedom and the other the principle of prohibition. As a result, it provided that the principle of freedom would apply with respect to treaties between international organizations and to reservations formulated by States, but that the possibility of reservations by international organizations to a treaty between States and international organizations would depend on the circumstances of the case.

(10) Not all members of the Commission subscribed to this choice, and one of them proposed a consistent series of articles based on the principle of prohibition.⁸⁷

(11) Numerous comments were made concerning the articles adopted in first reading. In particular, it was

said that the distinctions made by the Commission lacked logical justification and employed imprecise criteria. Furthermore, as an extension of the compromise solution that it had adopted concerning the formulation of reservations in articles 19 and 19 *bis*, the Commission had devoted an article 19 *ter*, having no equivalent in the Vienna Convention, to the formulation of objections to reservations, and it was claimed that the rules laid down in that article were pointless, complicated and ambiguous.

(12) Finally, the Commission had proposed in articles 19, 19 *bis* and 19 *ter* a description of the treaties in question which implied that the articles and, in consequence, the formulation of reservations applied only to multilateral treaties. While it is certain that reservations take on their full significance only in relation to multilateral treaties, it was pointed out that there had been examples in practice of reservations to bilateral treaties, that the question was the subject of dispute, and that the Vienna Convention was cautiously worded and took no stand on the matter.

(13) After a thorough review of the problem, a consensus was reached within the Commission, which, choosing a simpler solution than the one it had adopted in first reading, assimilated international organizations to States for the purposes of the formulation of reservations.

(14) Hence, the rules laid down in article 19 of the Vienna Convention now extend, in the cases of treaties between States and international organizations and treaties between international organizations, both to reservations formulated by States and to reservations formulated by international organizations. The principle of the freedom to formulate reservations that had been established for States is also valid for international organizations; this is in accordance with the wishes of such organizations and, it would seem, with a number of pointers from the realm of practice. The limits to that freedom which subparagraphs (a), (b) and (c) of article 19 of the Vienna Convention lay down for States have been applied without change to international organizations.

(15) This substantive change from the solutions chosen by the Commission in first reading makes for far simpler drafting. There is no longer any need to make a fundamental distinction between treaties between States and international organizations and treaties between international organizations; in some instances, it is even possible to forego distinguishing between the case of States and that of international organizations. Articles 19 and 19 *bis* as adopted in first reading have been reduced to a single provision, the new article 19; article 19 *ter* as adopted in first reading, which varied the régime for the formulation of objections to reservations according to whether the objection came from an organization or a State and whether the treaty was between international organizations or between one or more States and one or more international organizations, has been deleted as having lost its *raison d'être*.

⁸⁷ A/CN.4/L.253 (see footnote 70 above).

The Commission has also been able, either as a direct consequence of the change in the rules it proposes concerning the formulation of reservations, or merely by the use of simpler wording, substantially to refine the text of the other articles concerning reservations and, in particular, to reduce each of the combinations of articles 20 and 20 *bis* and 23 and 23 *bis* to a single article.

Article 19. Formulation of reservations

1. 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 or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that the reservation is prohibited;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Commentary

Article 19 replaces articles 19 and 19 *bis* as adopted in first reading. It is only for the sake of clarity that the article retains separate paragraphs for States and international organizations; the rules it lays down are substantially the same in each case. Paragraph 1, concerning States, differs from article 19 of the Vienna Convention only in that it mentions both “negotiating States and negotiating organizations”; paragraph 2, concerning international organizations, speaks of “formally confirming” rather than “ratifying” and distinguishes, in subparagraph (a) between the case of treaties between States and international organizations and that of treaties between international organizations.

Article 20. Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the con-

tracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

2. When it appears from the object and the purpose of a 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 and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the author of the reservation and for the State or organization which has accepted it;

(b) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or one contracting organization or, as the case may be, one other contracting organization or one contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, 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

(1) As stated above, article 20 results from the merger of articles 20 and 20 *bis* as adopted in first reading. Like the corresponding provision in the Vienna Convention, the article moves directly to the problem of acceptance of and objection to reservations without the question of the “formulation” of objections having been tackled in any way in the earlier articles; this was not the case with the articles adopted in first reading, since they included article 19 *ter* (now eliminated), which was devoted to that question.

(2) Comparison of the present article 20 and article 20 of the Vienna Convention reveals two substantive

points⁸⁸ which merit comment and a number of drafting changes which it is sufficient simply to point out. The latter concern subparagraphs 4 (a) and (b), where mention of an international organization appears alongside that of a State, and paragraph 1 and subparagraph 4 (c), where a distinction is made between the case of treaties between States and international organizations and that of treaties between international organizations.

(3) Until the second reading of the draft articles the Commission had not adopted any text symmetrical with article 5 of the Vienna Convention, and article 20 consequently contained no provision symmetrical with article 20, paragraph 3, of the Vienna Convention. The adoption of an article 5 brings within the scope of the present articles the constituent instruments of the international organizations of which at least one member is another international organization; it thus becomes necessary to insert a paragraph 3 which reproduces word for word the corresponding provision of the Vienna Convention. It is, of course, understood that the meaning of the term "treaty" is not the same in the draft articles as in the Vienna Convention.

(4) The second comment on the substance concerns article 20, paragraph 5, which deals with the effects of silence during a specified period (twelve months) with regard to a reservation formulated by a contracting State. The text of this provision as proposed in second reading is identical to that of article 20, paragraph 5, of the Vienna Convention; it provides 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 on which it expressed its consent to be bound by the treaty, whichever is later.

The rule therefore applies to reservations whether they are formulated by international organizations or by States; however, this new paragraph 5 does not state any rule concerning the acceptance of a reservation by an international organization in the event that the organization does not react to the reservation within a specified period. In this respect, the paragraph as adopted in first reading assimilated the situation of international organizations to that of States.

⁸⁸ There is a further substantive difference which was approved in first reading and to which the Commission considered it unnecessary to revert, namely the omission from paragraph 2 of the present text of all reference to the "limited number of negotiating States". Such a reference could hardly be transposed either to the field of treaties between organizations or to that of treaties between States and international organizations. The object of article 20, paragraph 2, of the Vienna Convention is to place treaties under a special regime in cases where "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". That text gives two criteria for the nature of such consent: the limited number of negotiating States, and the object and purpose of the treaty. The second criterion is perfectly valid for treaties between international organizations or between States and international organizations, but the first is not and has therefore been discarded. The limited degree of participation in a negotiation cannot, indeed, be measured in the same way for treaties between States as for treaties between international organizations or between States and international organizations, since the membership of international organizations already represents a multiplicity of States.

(5) The majority of the members of the Commission accepted this change only after protracted discussion. Several protests had been raised, in oral and written comments, against the assimilation of international organizations to States in this respect. It had been asserted that the paragraph in effect established "tacit acceptance" of reservations and that:

... any actions by an international organization relating to a treaty to which it is a party must be clearly and unequivocally reflected in the actions of its competent body.⁸⁹

It was also remarked that twelve months was too short a period to serve as the basis for a rule of tacit acceptance, since, in the case of some international organizations, the bodies competent to accept reservations did not hold annual sessions. It was suggested in that connection that the twelve months' time-limit might have been extended in the case of international organizations. In contrast to this, it was said that the expiry of the twelve months' time-limit had less the effect of tacit acceptance than of the prescription of a right and that organizations could not be given the privilege of prolonging uncertainty concerning the substance of treaty obligations. It was further stated that constitutional considerations specific to an organization could not in any case be taken into consideration when that organization expressed its consent to be bound by a treaty *after* the formulation of a reservation by one of its partners. That was because the competent organs of the organization would have been aware of the reservation when they took the decision to bind the organization and their silence would therefore have been voluntary.

(6) Finally, the Commission, without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct,⁹⁰ has refrained from saying anything in paragraph 5 of article 20 concerning the problems raised by the protracted absence of any objection by an international organization to a reservation formulated by one of its partners. It was the Commission's view in this respect that practice would have no great difficulty in producing remedies for the prolongation of a situation whose drawbacks should not be exaggerated.⁹¹

Article 21. Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

⁸⁹ *Yearbook ... 1981*, vol. II (Part Two), p. 190, annex II, sect. A.13, para. 2.

⁹⁰ This question was studied again in connection with draft article 45.

⁹¹ Prolongation of uncertainties concerning the acceptance of a reservation has drawbacks principally in the case referred to in article 20, paragraph 2, since it then delays the entry into force of the treaty.

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

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

3. When a State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization to the extent of the reservation.

Article 22. Withdrawal of reservations and of objections to reservations

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

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State or a contracting organization or, as the case may be, another contracting organization or a contracting State only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23. 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 contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

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

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Commentary to articles 21, 22 and 23

By comparison with the texts adopted in first reading, these three articles exhibit only drafting changes, all of

which have been made in order to lighten the text: article 22 now has only three paragraphs instead of four, and the new version of article 23 is a product of the merger of articles 23 and 23 *bis* as adopted in first reading. The result is that the new texts are very close to the corresponding provisions of the Vienna Convention, from which they differ only by their mention of international organizations in addition to States (art. 21, subparas. 1(a) and (b), and para. 3; art. 22, para. 1 and subpara. 3 (b); art. 23, paras. 1 and 2) or by the fact that they distinguish between treaties between States and international organizations and treaties between international organizations (art. 22, subpara. 3 (a)).

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24. 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 and negotiating organizations or, as the case may be, the negotiating organizations 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 and negotiating organizations or, as the case may be, all the negotiating organizations.

3. When the consent of a State or of an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or that organization notifies the other States and the organizations or, as the case may be, the other organizations and the States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Commentary to articles 24 and 25

No substantive changes were made to these two articles after their second reading. Their wording is, however, considerably lighter than that of the corresponding provisions as adopted in first reading, articles 24 and 24 *bis* and articles 25 and 25 *bis* respectively having been merged to form single articles. Articles 24 and 25 as now drafted differ from the corresponding articles of the Vienna Convention only in so far as is necessary to cater for the distinction between treaties between States and international organizations and treaties between international organizations (art. 24, paras. 1, 2 and 3; art. 25, subpara. 1 (b) and para. 2).

PART III

OBSERVANCE, APPLICATION AND
INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26. Pacta sunt servanda

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

Commentary

This text reproduces the corresponding provision of the Vienna Convention. It calls for no comment other than that it may be said to constitute a definition of the very essence of treaties, thus recognizing that international organizations are genuine parties to legal instruments which are genuine treaties, even if some differences exist between their participation and that of States.

Article 27. Internal law of States, rules of international organizations and observance of treaties

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

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

Commentary

(1) From the purely drafting point of view, the preparation of a draft article adapting article 27 of the Vienna Convention to the treaties covered by the present draft quickly led to a proposal containing three paragraphs, dealing respectively with the case of States, the case of international organizations and the reservation of article 46, which is common to both those cases.

(2) It soon appeared, however, that the case of international organizations raised major difficulties for

some members of the Commission. They considered that the "rules of the organization", as newly defined in article 2, subparagraph 1 (j), could not be assimilated to the internal law of a State since those rules themselves constituted rules of international law; treaties concluded by an international organization to implement those rules, far from being exempt from compliance with them, must be subject to them so that, at least in one member's opinion, the international organization should have the right to modify the treaties in question whenever that was necessary for the legitimate and harmonious exercise of its functions. Various examples were given. For instance, resolutions of the Security Council concerning the dispatch of peace-keeping forces could result in treaties being concluded between certain States and the United Nations, but no such treaty could prevent the Council from amending the resolutions it had adopted. Again, an organization might undertake by treaty to supply certain assistance to a State, but the treaty could not prevent the organization from suspending or terminating that assistance if it decided that the State in question had failed in its obligations concerning, for example, respect for human rights. Another member of the Commission did not accept the foregoing line of argument, but maintained that international organizations are no less bound by their treaties than are States and that, consequently, international organizations are not free to amend their resolutions or to take other measures which absolve them from their international obligations without engaging their responsibility under international law.

(3) A broad exchange of views thus took place in the Commission. While there was agreement among its members on questions of principle, the Commission expressed doubts as to the advisability of drafting for organizations a paragraph 2 drawing attention to an aspect of the question which was of particular importance for international organizations, and as to the terms of such a paragraph. In first reading, it adopted the following text, subject to review of its terms in second reading:

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

Since the Commission considered the wording used unsatisfactory and had doubts about the need to provide for such a broad exception, it adopted in second reading paragraph 2 as set forth above. The paragraph lays down a rule for organizations which is identical to that laid down for States in paragraph 1, the term "rules of the organization" simply being substituted for the term "internal law" which is used in the case of States. The various stages along the path taken by the Commission are discussed below.

(4) One point is certain: article 27 of the Vienna Convention pertains more to the regime of international responsibility than to the law of treaties. It can thus be seen as an incomplete reference to problems which the

Convention did not purport to deal with (art. 73),⁹² even though some of its articles are not unconnected with questions of responsibility (for example, arts. 18, 48, 49, 50, 60). Hence it cannot be claimed that article 27 provides an answer to all the questions arising from the rules of international responsibility, nor can the article be transposed to the case of international organizations in the expectation of finding such an answer. According to the principles of international responsibility, a State may invoke a wrongful act of another State in order to deny it the benefit of performance of a treaty. An international organization may deny a contracting State the benefit of performance of a treaty if that State has committed a wrongful act against the organization, no matter whether that wrongful act consists in a breach of the treaty or of a general rule of international law, or in a breach of the rules of the organization if the State is also a member of the organization. Here then is a very clear case in which an international organization may invoke the rules of the organization, or rather a breach of the rules of the organization, as a ground for its own non-performance of a treaty. However, this involves the operation of the rules of responsibility, a process which must be fully reserved in accordance with article 73 of the Vienna Convention.

(5) Another equally certain point is that article 27 contemplates only valid treaties which have been properly concluded. Where that is not the case, invalidity and not international responsibility is involved.⁹³ The problem thus becomes much more specific. Each organization has certain limits to the treaties it may conclude concerning the exercise of its functions and powers. If those limits are overstepped, the question of the validity of the treaties will arise; if they are respected, the treaties will be valid.⁹⁴ It must therefore be acknowledged that, to an extent to be determined for each organization, the possibility exists for an organization to bind itself by treaty in regard to the exercise of its functions and powers. Not to recognize this would simply be to deny the organization the right to bind itself otherwise than under purely discretionary conditions. It must be

recognized, however, that it may be a delicate matter to determine the margin within which each organization can commit itself.

(6) For although the organization has some margin of freedom, constitutionally, to bind itself by treaty in regard to the exercise of its functions, the treaty which the organization concludes must still make it clear that such is its object and purpose, and this depends essentially on the will of the parties to the treaty, i.e. on their intention. In this connection, there are two conceivable hypotheses. The first is that the organization freely and unilaterally takes a decision, by means of a resolution of one of its organs, which it reserves the right to revoke or alter unilaterally, and the sole purpose of the treaty which it concludes is to provide for the implementation of that resolution, if it is subject to that resolution, on which it is entirely dependent and whose fate it automatically follows.⁹⁵ The second hypothesis is that the organization concludes a treaty which, without being conditional on prior resolutions of the organization and without being subject to the retention or non-alteration of such resolutions, binds it in an *autonomous* manner.

(7) In the case of a treaty concluded by the organization, the question whether the first or second of the hypotheses considered above applies is, subject to article 46,⁹⁶ a question of interpretation of the treaty and has to be solved in accordance with articles 31 *et seq.*, on interpretation of treaties. This was a decisive factor in second reading; the Commission considered that it was not possible to refer here to other elements that could be taken as guides in interpreting the treaty; it also considered that it was unnecessary to add further references—to articles 6 and 31, for example—to that of article 46.

(8) If these problems are considered from a more general standpoint, the following observations can also be made. The Vienna Convention accords only a few brief references in paragraph 2 of article 30 to the question of the subordination of one treaty to another or, to put the problem in still broader terms, to the question of groups of treaties.⁹⁷ *A fortiori* it has ignored the question of the subordination of a treaty to a unilateral act of an organization; but the latter question must be set in

⁹² Article 27 is the result of an amendment (A/CONF.39/C.1/L.181), which was discussed at the United Nations Conference on the Law of Treaties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 151-158, 28th meeting of the Committee of the Whole, para. 58, and 29th meeting, para. 76). The amendment was adopted, but not before the Expert Consultant had expressed his doubts about the acceptance of a text which related mainly to international responsibility (*ibid.*, p. 158, 29th meeting, Committee of the Whole, para. 73). After consideration by the Drafting Committee, the text was approved as a separate article from article 23 (which became article 26) because it could not be placed on the same footing as the *pacta sunt servanda* rule (*ibid.*, pp. 427-428, 72nd meeting of the Committee of the Whole, paras. 29-48).

⁹³ The reservation in article 27 concerning article 46 of the Vienna Convention, which was inserted in the circumstances described in the preceding note, is of considerable importance in the case of treaties concluded by an organization *with one of its member States*, since the latter may find that breaches of the rules of the organization are invoked against it.

⁹⁴ See the commentary to article 46, below.

⁹⁵ This hypothesis would also be conceivable in the case of a treaty between States. The following are two examples. The constitution of a State grants its nationals the right to vote even if they are resident abroad; to implement this provision, the State concluded a treaty with another State. Or again, a national law grants certain benefits to aliens who are resident in the country and who satisfy certain conditions; the State concludes treaties which determine the regime of administrative evidence and certification required from the country of origin to enable these aliens actually to secure without difficulty the benefits provided for by the national law. The treaties concluded for this purpose do not affect any international consolidation of the national law.

⁹⁶ If the interpretation does not lead to a choice between two constructions that are equally possible as regards the constitutionality of the commitment, but offers a choice between one construction in favour of an unconstitutional commitment and another in favour of a legally valid commitment, the latter construction should be preferred, even if it reduces the scope of the commitment.

⁹⁷ See the commentary to article 36 *bis*, below.

the wider context of the regime of treaties concluded by an organization *with a member State*, which will be taken up later in the commentary to article 46. The subordination of a treaty to a unilateral act of the organization can only arise in practice for States whose status as members of an organization renders them substantially subject to the "rules of the organization".

SECTION 2. APPLICATION OF TREATIES

Article 28. 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

Neither the machinery nor the regime of the treaties covered by the present draft articles offer any reasons for departing from the text of the Vienna Convention.

Article 29. Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

Commentary

(1) Article 29 of the Vienna Convention, which stems from the International Law Commission's draft and an amendment adopted by the United Nations Conference on the Law of Treaties, expresses a fundamental principle: that with regard to its international commitments, a State is bound indivisibly in respect of all its parts.

(2) This principle can be extended without difficulty, by modifications of wording, to the obligations of States under treaties between one or more States and one or more international organizations, but is it possible to imagine a parallel provision concerning the obligations of international organizations? Despite the somewhat loose references which are occasionally made to the "territory" of an international organization,⁹⁸ we cannot speak in this case of "territory" in the strict sense of the word. However, since this is so and since account must nevertheless be taken of the variety of situations which the multiple functions of international organizations may involve, it seemed preferable to avoid a formula which was too rigid or too narrow. If the draft articles said that, in the case of an international organization which is a party to a treaty, the

scope of application of the treaty extended to the entire territory of the States members of that organization, the draft would diverge from article 29 of the Vienna Convention by raising the question of the scope of application of a treaty, which is not expressly covered by that Convention.

(3) A problem comparable to that affecting States, and one which might in fact arise for international organizations in different and yet parallel terms, is the question of the extension of treaties concluded by an international organization to all the entities, subsidiary organs, connected organs and related bodies which come within the orbit of that international organization and are incorporated in it to a greater or lesser extent. It would be useful to make it clear that, unless there is a properly established indication to the contrary, when an international organization binds itself by treaty, it also binds all these other bodies. Conversely, a treaty concluded on behalf of a subsidiary organ should bind the entire organization as well. However, as pointed out elsewhere,⁹⁹ this is an area in which notions, vocabulary and the practice of international organizations are not settled, and it seemed wisest to leave aside a subject which it is too early to codify.

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations 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 incompatible 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 59, 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 two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;

(b) as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State or an

⁹⁸ "Postal territory" (Constitution of UPU, art. 1 (United Nations, *Treaty Series*, vol. 611, p. 64)); "territory of the Community" (Court of Justice of the European Communities, *Reports of Cases before the Court, 1974-78* (Luxembourg), vol. XX, p. 1421); and other examples relating, for instance, to the territory of a customs union.

⁹⁹ *Yearbook ... 1973*, vol. II, pp. 85-86, document A/CN.4/271, paras. 65-68.

organization or, as the case may be, towards another organization or a State not party to that treaty, under another treaty.

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

Commentary

(1) The adoption, in regard to the treaties which form the subject-matter of the present draft articles of a text similar to article 30 of the Vienna Convention raised only one question of substance, which the Commission discussed but failed to settle, and which its proposed draft article 30 does not solve. Article 30 of the Vienna Convention begins with a reservation: "Subject to Article 103 of the Charter of the United Nations ...". Could this provision, about which there can be no question so far as States are concerned, be extended to international organizations as well? Article 103 provides that:

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.

Two arguments were advanced in the Commission. The first was that the provision extends to international organizations as well as to States because the membership of the United Nations is quasi-universal, because international organizations constitute instruments for collective action by States and because it is inconceivable that, in regard to collective action, States should rid themselves of limitations to which they are subject individually. The second argument was that Article 103 does not mention international organizations, which can therefore conclude any agreement whatsoever without having to take account of the Charter, to which they are not and cannot be parties. Besides the fact that these two arguments are diametrically opposed, some members considered that it was not the Commission's function to interpret the Charter and that the Commission should state the proviso regarding Article 103 of the Charter in such a way that both interpretations would be possible. To that end, the reservation of Article 103 has been separated from paragraph 1 of the draft article and placed at the end of the article as paragraph 6, in terms which are deliberately ambiguous. The Commission also considered, in second reading of article 30, whether it would be advisable to propose that paragraph 6 should be stated in the form of a general article applicable to the draft articles as a whole. It decided against doing so on the grounds that such an article would add nothing to the obligations set forth in the draft articles.

(2) The various paragraphs of article 30 reproduce almost literally the corresponding paragraphs of the Vienna Convention, except for paragraph 6 which has been taken from paragraph 1 of the Vienna Convention for the reasons stated above. In second reading, the Commission simplified the wording of paragraph 4 considerably and made paragraph 5 more explicit.

SECTION 3. INTERPRETATION OF TREATIES

General commentary to section 3

(1) Draft articles 31, 32 and 33 below reproduce unchanged articles 31, 32 and 33 of the Vienna Convention. This is rendered possible by the fact that, in substance, these articles of the Convention are based on the fundamental characteristics of a consensus of wills, whoever the parties to the consensus may be, and that, in form, none of these articles defines the nature of the parties, for instance by using the term "State".

(2) This by no means implies that the practical application of the rules stated in these articles will not differ according to the parties to the treaty, its object or some other characteristic of the treaty. This is true of treaties between States, and no less true of treaties between international organizations or between one or more States and one or more international organizations. For example, it has been pointed out that "preparatory work" may have specific aspects, particularly for international organizations. The international engagement of an international organization generally entails intervention by a number of bodies and work and discussion in public of a kind likely to confer on the preparatory work various features whose importance should not be underestimated.

Article 31. 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 connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection 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 or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement 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 32. 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 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated 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 a treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES
OR THIRD ORGANIZATIONS

General commentary to section 4

The articles which make up section 4 of the Vienna Convention have been transposed to treaties that are the subject of the present draft articles without causing any substantive problems, save for one point concerning article 36. A general regime has thus been established which corresponds to articles 34, 35, 36, 37 and 38 whereby the situation of international organizations is assimilated, with the exception of article 36, to that of States. Article 36 *bis* deals with a special situation, which calls for special rules, namely, that of treaties to which organizations are parties and which are designed to create rights and obligations for the member States of those organizations.

Article 34. General rule regarding third States and third organizations

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.

Commentary

The principle which the Vienna Convention lays down is only the expression of one of the fundamental consequences of consensuality. It has been adapted

without difficulty to treaties to which one or more international organizations are parties; in second reading, the Commission combined in a single paragraph the two paragraphs of the draft adopted in first reading,¹⁰⁰ thus emphasizing the parallel with the Vienna Convention.

Article 35. Treaties providing for obligations for third States or third organizations

1. **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 organization 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 organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the relevant rules of that organization.**

Commentary

The provisions of this article are the rules of the Vienna Convention extended to treaties to which international organizations are parties. In first reading, the Commission provided for a further condition, namely, that the obligation established for the organization should be "in the sphere of its activities". However, acceptance by the organization is governed by the relevant rules of the organization, and as article 35 refers to that rule, it was considered unnecessary to add that further condition, since the competence of the organization is always restricted to a particular sphere of activity. In second reading, the restriction was deleted and the draft article reduced to two paragraphs.

Article 36. Treaties providing for rights for third States or third organizations

1. **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 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 international organiza-**

¹⁰⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 123. Examples will also be found in the commentary of treaties between two international organizations which offer to create rights and obligations for a third State. As already stated, a treaty *between States* which has as its object the creation of rights and obligations for a third organization does not fall within the scope (so far as acceptance by the organization is concerned) of either the present articles or the Vienna Convention. Such treaties are common where an existing organization is to be entrusted with new functions and powers. For another example, see article 34 of the draft articles on succession of States in respect of State property, archives and debts (*Yearbook ... 1981*, vol. II (Part Two), pp. 80-81).

tions to which it belongs, or to all organizations, and the third organization assents thereto. Its assent shall be governed by the relevant rules of the organization.

3. 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.

Commentary

(1) The text of article 36 distinguishes between the case where a right arises for a State and the case where it arises for an international organization. The solution embodied in article 36 of the Vienna Convention is proposed in the former circumstance (paragraph 1), but a somewhat stricter regime in the latter (paragraph 2).

(2) The presumption of consent provided for in article 36, paragraph 1, of the Vienna Convention and in paragraph 1 of the present article in respect of States has thus been eliminated in regard to the expression of the consent of an organization to accept a right accorded it by a treaty to which it is not a party. This stricter regime is justified by the fact that the international organization has not been given unlimited capacity and that, consequently, it is not possible to stipulate that its consent shall be presumed in respect of a right.¹⁰¹ The consent of the organization is therefore never presumed, but paragraph 2 of the article lays down no special conditions as to the means whereby such consent is to be expressed.

(3) Paragraph 2, like paragraph 2 of article 35, also carries a reminder, that consent continues to be governed by the relevant rules of the organization. This reminder is particularly necessary since the Vienna Convention does not define the legal theory that justifies the effects of consent. In regard to obligations, the Commission's commentary to its draft article which formed the basis for article 35 of the Vienna Convention referred to the mechanism of a "collateral agreement",¹⁰² that is, of a treaty that would come within the scope of the present articles. But, in the case of rights, other legal mechanisms, including that of *stipulation pour autrui*, have been mentioned.¹⁰³

(4) Paragraph 3 states a rule identical to that in the Vienna Convention (art. 36, para. 2), but adapts it to treaties to which international organizations are parties.

Article 36 bis. Obligations and rights arising for States members of an international organization from a treaty to which it is a party

Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:

(a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and

(b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations.

Commentary

(1) Article 36 *bis* is unquestionably the one that has aroused most comment, controversy and difficulty, both in and outside the Commission. Since the first proposal submitted by the Special Rapporteur in 1977,¹⁰⁴ its form and content have undergone many changes that have modified, not only its wording, but also its scope. The evolution of the Commission's thinking on the question must first be summarized (paras. (2) to (10) below), following which the text as finally adopted by the Commission will be discussed in the commentary.

(2) There can be no question as to the development of a *de facto* situation which the Vienna Convention did not contemplate—and indeed did not have to—¹⁰⁵ namely a situation where several treaties, each involving in a distinctive manner an international organization and its member States, lead to a single result which creates certain relationships between those separate commitments.¹⁰⁶ For example, a customs union, in the

¹⁰⁴ *Yearbook ... 1977*, vol. II (Part One), pp. 128-129, document A/CN.4/298; for the different versions of article 36 *bis*, see also *Yearbook ... 1978*, vol. II (Part Two) p. 134; tenth report of the Special Rapporteur (A/CN.4/341 and Add.1), para. 104, reproduced in *Yearbook ... 1981*, vol. II (Part One); and eleventh report of the Special Rapporteur (A/CN.4/353), para. 26, reproduced in *Yearbook ... 1982*, vol. II (Part One).

¹⁰⁵ It was pointed out, however, that the Vienna Convention applies to treaties between States which create an international organization and that such an organization, while not a party to its constituent instrument, is not a third party vis-à-vis that instrument. The effects of a treaty between States as regards a third international organization are governed neither by the Vienna Convention nor by the present draft articles.

¹⁰⁶ So far as the regime of a "group" of treaties is concerned, it is merely pointed out that article 30, para. 2, of the Vienna Convention refers to the case when "a treaty specifies that it is subject to ... an earlier ... treaty". However, as is noted further on, article 37 does not even mention the concept of a "collateral treaty". The Commission encountered a similar problem in connection with article 27, namely, the subordination of a treaty to a resolution of an organ of an international organization, the implementation of which must be provided for by that treaty. Another case concerns the effects of a most-favoured-nation clause which establishes a relationship between the effects of a treaty and the conclusion of other treaties; but special draft articles on most-favoured-nation clauses have been prepared by the Commission (*Yearbook ... 1978*, vol. II (Part Two), pp. 8 *et seq.*).

¹⁰¹ It is possible to go even further and to argue that the very idea of a right, in the sense of a "subjective right", of an organization seldom corresponds to all the facts. The "rights" of an organization correspond to "functions", which the organization is not at liberty to modify. In other words, the exercise by an organization of certain "rights" is generally also a matter of performing an "obligation", at least in regard to its members, and for that reason the situation of an organization cannot be fully equated with that of a State.

¹⁰² *Yearbook ... 1966*, vol. II, p. 227, document A/6309/Rev.1, part. II, chap. II, commentary to article 31.

¹⁰³ *Ibid.*, pp. 228-229, commentary to article 32.

case where it takes the form of an international organization, normally concludes tariff agreements to which its members are not parties. Such tariff agreements would be pointless unless they were to be immediately binding on member States; this is what is provided for under the constituent treaty of the customs union¹⁰⁷ and in this way certain relationships are established between two or more treaties. But other, more modest, examples may also be given. For instance, an international organization, before concluding a headquarters agreement with a State, may wish its member States to agree among themselves, and with the organization itself, *beforehand* so as to establish, at least in part, some of the provisions of the headquarters agreement. Another possible case is where a regional organization has reason to conclude a treaty with one or more States, which are to provide substantial financial support, for the execution of a regional development project. In such cases it will often happen that State or States concerned make their assistance subject to certain financial or other undertakings on the part of the States members of the organization. The organization will then have to make sure of those commitments before the final stage of the negotiation of the assistance treaty. Consequently, in present circumstances, it is certainly possible to envisage many instances where a treaty to which an organization is party is concerned with the obligations of member States.

(3) The question which then immediately arises is whether such cases call for special rules or whether they do fall, quite simply, within the scope of articles 34 to 37 the Vienna Convention. To start with, it should be noted that neither the Commission in its work on the law of treaties, nor the United Nations Conference on the Law of Treaties, ever referred to these or similar cases. It was always very conventional situations that were contemplated, and although theories such as *stipulation pour autrui* were sometimes mooted within the Commission, the Convention remained extremely reticent as regards the legal mechanism whereby rights and obligations could arise for third States. Only in the commentaries of the Commission and its Special Rapporteur is reference made to a "collateral agreement" to the basic treaty. By establishing two different regimes—one for rights and one for obligations—concerning the consent given by the third State, the Vienna Convention also raised difficulties in the most frequent case, where rights and obligations are created simultaneously.

(4) The advantage of including special provisions in the draft articles stems mainly from the following reasons.

(5) In the first place, the creation of obligations for a third State is made subject, both in the Vienna Convention and under the general regime established by article 35 of the draft articles, to express consent given in writing by the third State and normally subsequent to the conclusion of the treaty; the same applies to the creation of obligations for third organizations. The Commission's intention is to lay down the rule to the effect that the creation of an obligation for a third party requires, in addition to the consent of all the parties to the basic treaty, the consent of the States on whom the obligation is to be imposed, and that such consent must be express. The Commission therefore rejected a number of proposals by the Special Rapporteur which failed to underline sufficiently the need for such consent, or even provided for the possibility of presumed or implicit consent. However, in the case provided for under article 36 *bis* the requirement of express consent in writing, instituted as a general rule by article 35, needs to be made more flexible, or at least clarified, in certain respects. This is because in practice, it is apparent that in some cases, as the examples given make clear, the consent of States members of the organization is given *prior* to the conclusion of the treaty by the organization, whereas article 35 seems rather to refer to *subsequent* consent. Then the requirement of consent *in writing* also seems to refer to consent given in an instrument within the meaning of the law of treaties, and this is why the idea of a *collateral treaty* to which the third State is party is suggested by article 35. However, while the Commission readily agrees with the finding that *proof* of the requisite consent will in point of fact be derived only from written documents, it considers that it must be made clear that the actual *idea of a collateral treaty must not be imposed or discarded in any general way* in the case contemplated by article 36 *bis*. This again is an important point which came up in the Commission only at the end of its discussions and which relates to the regime, that is, to the actual effects of the requisite consent.

(6) This is a second, and even more fundamental, reason for providing for a solution, for the case covered by article 36 *bis*, which departs from the ordinary law regime established both in the Vienna Convention and in the draft articles for article 37.

(7) Article 37 adopts different solutions as regards the extent of the consents given and the relationship between the treaty and the effects of the consents given, depending on whether rights or obligations are involved. Paragraph 1 of article 37 stipulates that an obligation may be modified only "with the consent of the parties to the treaty and of the third State": the parties to the treaty are therefore bound by the consent of the third State. That solution might seem a little surprising: why require the consent of the third State when the aim is to relieve it of a burden? The only explanation is that it is no more than the logical consequence of the requirement of consent laid down for the establishment of the obligation. In other words, even though the Vienna Convention does not make any formal reference to such

¹⁰⁷ This is the well-known case of EEC. In the earlier versions of article 36 *bis*, as well as in some commentaries, it may perhaps have appeared that the article had been drafted solely in the light of the case of the Community, which would have raised *inter alia* an objection of principle, namely, that the draft articles were not meant to govern specific situations. The wording finally adopted indicates that article 36 *bis* is entirely general in scope.

an explanation, everything happens as though a treaty relationship had arisen between the parties to the treaty and third parties. This is the case of a *collateral agreement* referred to in the *travaux préparatoires* of the Special Rapporteur and the Commission. For a right, the solution is a different one, since it may be revoked by the parties to the treaty unless it is established that it "was intended not to be revocable or subject to modification without the consent of the third State". The text of the Vienna Convention¹⁰⁸ gives rise to problems of interpretation, in particular because of the combination of two separate rules when rights and obligations are established simultaneously for the benefit of a third party. But above all, it should be noted that the Convention leaves unanswered many questions concerning the links that exist between two sets of rights and obligations, the first of which binds the parties to the treaty to one another and the second which unites those same parties and a State not party to that treaty.

(8) Nonetheless, in the particular case where States are members of an international organization party to a treaty which is designed to create obligations and rights for them and to which they are not parties, the rules laid down by article 37 seem to be inappropriate. Even though they may be of only a residual character, and the parties concerned may adopt other provisions, they nonetheless lay down rules of principle which are not valid for this particular case. Actually, the case cannot be the subject of any general rule, so broad is the possible diversity of specific situations. This can be easily illustrated by referring to some of the examples given above, such as the case of an organization that has been given its form by a customs union and concludes tariff agreements with States. It will be readily agreed that the States members of such an organization are bound to respect those tariff agreements, and it is conceivable that the States which have concluded those tariff agreements with the organization have acquired the right to insist directly on their observance by the member States of the organization. However, short of paralysing the customs union, the member States do not have the right to make their consent subject to the modification and repeal of agreements concluded by the organization. Nevertheless, in other circumstances, other organizations may postulate a contrary solution. For instance, an organization whose object is to pursue a policy of very close and very active economic co-operation among its members may conclude with a State an economic co-operation treaty that will establish a general framework for agreements which each of the States members of the organization will conclude with that same State. But, once concluded, such agreements will be completely independent of the treaty concluded by the organization, and they can continue in force even if the treaty concluded by the organization

disappears.¹⁰⁹ In the case cited above, in which the States members of an organization undertake in advance to contribute up to a given sum to the implementation of a development programme, and to grant a certain status to technicians placed at the disposal of the organization by a State granting technical and financial aid to enable the programme to be implemented, the treaty which the organization concludes with the State granting the aid for the implementation of the programme will be in general linked with those commitments on the part of member States. Treaties concluded in this way will be mutually interdependent in that any infringement of one will have repercussions on the others.

(9) In view of the wide variety of situations, it is not possible to lay down a general rule, even on a residual basis. It is for the parties concerned to adjust their treaty relationships. Many problems could arise whenever a new factor happens to affect the conclusion or life of a treaty (nullity, extinction, withdrawal and suspension of implementation). It is incumbent upon the parties concerned to provide for such problems in their undertakings or, at any rate, to lay down the principles that will enable them to be solved. And it is precisely here that the need becomes apparent to give all the contracting parties, the partners of an international organization in a treaty, all the information relating to the rights and obligations that are going to arise among themselves and among the members of that organization. This obligation of information relates not only to the *substance* of those rights and obligations, but also to their *status*, that is, to the conditions and effects, to the *regime* of those rights and obligations. This may result in the inclusion of fairly lengthy, and sometimes even complicated, provisions being introduced into treaties.¹¹⁰ If the parties concerned want to make several treaties interdependent, it is necessary, in the interests of all and for the security of legal relationships,¹¹¹ that the regime of rights and obligations thus created should be

¹⁰⁹ This is so in the case of treaties concluded by the CMEA. The member States, without becoming parties to those treaties, participated in their negotiation and approved them so as to enable them to enter into force. Thus, the Agreement on Co-operation between CMEA and Finland signed on 16 May 1973, provides in article 9 for the full autonomy of treaties concluded between the member States of CMEA and Finland (*International Affairs* (Moscow, October 1973), p. 123).

¹¹⁰ In order to make provision, in the Convention on the Law of the Sea, concluded on 30 April 1982 (A/CONF.62/122 and corrigenda), for organizations to which their member States had transferred the exclusive exercise of certain powers, a set of fairly complex rules was laid down in a lengthy annex IX.

¹¹¹ The States which conclude treaties with EEC have several times pointed out that serious doubts exist as to the effects of the relationships formed in this way, whether it is the implementation of responsibility, the exercise of diplomatic protection or any other matter that is involved. The Court of Justice of the European Communities has so far proved extremely cautious in its decisions, particularly as regards the question that arose concerning the regulation of fishing in Community waters; see case 812/79, judgment of 14 October 1980 (Court of Justice of the European Communities, *Reports of Cases before the Court, 1980-7* (Luxembourg), pp. 2789 *et seq.*), and cases 181/80 and 180/80 and 266/80, judgments of 8 December 1981 (*ibid.*, 1981-9, pp. 2964 *et seq.* and 2999 *et seq.* respectively).

¹⁰⁸ The rule is expressed in article 37 in the following way:

"2. When a right has arisen for a third State in conformity with article 36, 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."

established as clearly as possible and case-by-case, since it is not possible to lay down a general rule, even on a residual basis.

(10) This is how the ideas central to article 36 *bis*, as finally put before the General Assembly, gradually took shape during the work of the International Law Commission: need for express consent of all the parties concerned in order to establish rights and obligations between, on the one hand, the States members of an international organization and, on the other, the partners of that organization in a treaty; impossibility of formulating a general rule concerning the regime of rights and obligations thus established and the correlative need to regulate by treaty, case-by-case, the solutions adopted and to inform the co-contracting parties of the organization concerned of the conditions and effects of the relations established. On the negative side, the Commission did not accept certain suggestions which were made to it and which either weakened the requirement of express consent or seemed to refer in too exclusive a manner to a case as special as that of the European Communities. Lastly, article 36 *bis* serves as a reminder—so far as situations which are highly individual but which might well multiply are concerned—of certain needs for legal security; although the initial intent that prevailed when it was first formulated has remained unchanged, namely, to take into consideration the situation of States members of an international organization which, although third parties vis-à-vis treaties concluded by the organization, *can in certain cases* find themselves in a very special situation, the actual content of article 36 *bis* has undergone profound change as a result of all the observations submitted by Governments and of the very lengthy debates in the Commission. But, after having given rise to many doubts and to some strong opposition, article 36 *bis* has been given a more specific, more precise and more modest direction than in its initial substance and, in the form in which it is now submitted at the end of that lengthy endeavour, it was possible for the members of the Commission to adopt it unanimously.

(11) The new text submitted by the Commission first calls for a preliminary remark. It refers only to the case of an international organization formed exclusively of States. By virtue of the text of article 5, adopted in second reading, the Commission has recognized, as one possibility that could materialize and of which certain indications are to be seen in practice,¹¹² the case of an organization which could include, in addition to States, one or more international organizations. These, however, are exceptional cases which would suffice neither to cause the international organization in question to lose their “intergovernmental” character, nor to modify the provisions of the draft articles as a whole. However, it will be noted that article 36 *bis* is so worded

as to relate only to organizations all of whose members are States. The reason for this restriction lies in the equally exceptional character of the situations covered by article 36 *bis*. It seemed to the Commission that it would be sufficient to take account of the simplest case which, for the time being, is virtually the only one known in practice.

(12) Article 36 *bis* in its final version relates both to the *obligations* and to the *rights* which could arise for the States members of an international organization out of the treaties concluded by the organization. At one stage of its work, the Commission thought that it could confine itself to *obligations*, but it ultimately transpired that this distinction was, in the event, very arbitrary, since the rights of some are the obligations of others and it was therefore necessary to consider them simultaneously.

(13) In order for the obligations and rights to be created for the member States of the organization, three conditions are necessary, two of which relate to the consent of the parties concerned and one to the information of future parties to the treaty concluded by the organization.

(14) An initial consent is necessary, that of the States and organizations parties to the treaty concluded by the organization. This consent must be *expressed*. The will to create such obligations and rights must be real. A mere intention, with little thought having been given to the full import of such a step in all its aspects, is here not enough; consent given in the abstract to the actual principle that such rights and obligations should be created is not enough; such consent must define the *conditions* and the *effects* of the obligations and rights thus created. Normally, the parties to the treaty will define the regime for these obligations and rights in the treaty itself, but they may come to some other arrangement, in a separate agreement.

(15) The second consent necessary is that of the States members of the organization. This consent must relate to those provisions of the treaty which will create obligations and rights for them. Such consent must be forthcoming from all members of the organization, for it is by virtue of their status as “members” that the effects in question will arise. Provided that it is established, this consent can be given in any manner. Article 36 *bis*, paragraph (a), starts by giving an important but exceptional example, where consent is given *in advance* in the treaty creating the organization. It is conceivable—to revert to the example of an organization given its form by a customs union—that the States have conferred upon the organization the right to conclude not only treaties which lay down rules that the member States must respect, but also treaties that give rise to obligations and rights for member States vis-à-vis third parties. However, this case remains the exception by reason of its extent, since the treaty which will create the organization will generally provide for these effects in respect of a whole category of treaties (tariff agreements, for example). Member States may,

¹¹² The references quoted above in the commentary to article 5 may be added to the references quoted by the Special Rapporteur in his first report, *Yearbook ... 1972*, vol. II, p. 193, document A/CN.4/258, paras. 69 and 73 and footnote 173 (see footnote 57 above).

however, consent ‘‘otherwise’’, that is, by a separate agreement that a particular treaty to be concluded by the organization gives rise to such effects.

(16) Lastly, under the terms of paragraph (b) of article 36 *bis*, the consent of member States must have been brought to the knowledge of States and organizations that participated in the negotiation of the treaty. This condition, laid down at the end of paragraph (b), shows clearly that what the Commission had mainly in mind when drafting the article were situations where the consent of member States to the creation of obligations and rights was prior to, or at least concomitant with, the negotiations concerning the treaty. It is the interdependence that *may* exist in some cases between an organization and its members that results in the binding of the latter vis-à-vis the treaty partners of the organization. But these partners must be fully informed of the obligations and rights that are going to arise for them vis-à-vis the members of the organization. As this situation may alter their intentions on their position during negotiations, they must receive this information before the closure of the negotiations, since the elements communicated in this way are a vital factor. Article 36 *bis* does not specify *who* must furnish this information; depending on the circumstances, it will be the organization or the member States, or perhaps both, if the partners of the organizations so request.

(17) Lastly, it will be noted that article 36 *bis*, like articles 34, 35 and 36 of the Vienna Convention and of the present draft, does not specify the kind of legal machinery involved. As explained above, it is less necessary to do so in the case of article 36 *bis* than in the case of other articles, since the main point of article 36 *bis* is to afford the parties concerned the widest possibilities and choice, on the sole condition that they keep one another informed, that they make known exactly what they wish to do and each bring it to the attention of the others.

Article 37. Revocation or modification of obligations or rights of third States or third organizations

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, 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.

4. When a right has arisen for a third organization in conformity with paragraph 2 of article 36, 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 organization.

5. The consent of an international organization party to the treaty or of a third organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

Commentary

The effect of the text of article 36 *bis* as adopted in second reading, is to provide for flexible solutions. In so doing, it departs from paragraphs 5 and 6 of article 37 as agreed in first reading;¹¹³ it was therefore decided that the latter should be deleted. The amended text of article 37 thus establishes as a regime of ordinary law a regime identical to that of the Vienna Convention.

Article 38. Rules in a treaty becoming binding on third States or third organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such.

Commentary

(1) Article 38 differs from the corresponding article in the Vienna Convention only in that it refers to both third States and third organizations. Its adoption by the Commission gave rise, in regard to international organizations, to difficulties similar to those encountered in regard to States at the United Nations Conference on the Law of Treaties.

(2) In its final report on the draft articles on the law of treaties, the Commission explained the significance of article 34 in the following terms:¹¹⁴

... It [the Commission] 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 33,¹¹⁵ 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.

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. ...¹¹⁶

(3) Doubts were nevertheless expressed at the Conference on the Law of Treaties, and Sir Humphrey

¹¹³ See the commentary to article 36 *bis* above.

¹¹⁴ Renumbered to become article 38 in the Vienna Convention.

¹¹⁵ Renumbered to become articles 34 to 37 in the Vienna Convention.

¹¹⁶ *Yearbook ... 1966*, vol. II, p. 231, document A/6309/Rev.1, part II, chap. II, paras. (2) and (3) of the commentary to art. 34.

Waldock (Expert Consultant) again pointed out, at the end of one of his statements, that:

Article 34 was simply a reservation designed to obviate any misunderstanding about articles 30 to 33. It in no way affected the ordinary process of the formulation of customary law. The apprehensions under which certain delegations seemed to be labouring originated in a misunderstanding of the purpose and meaning of the article.¹¹⁷

(4) Following other statements,¹¹⁸ the Conference adopted article 34 (which subsequently became article 38) by a very large majority.¹¹⁹

(5) The present draft articles does not prejudice in one way or the other the possibility that the effects of the process of the formulation of customary law might extend to international organizations, and it was with that consideration in mind that the article was approved after consideration in first reading and finally adopted by the Commission in second reading.

PART IV AMENDMENT AND MODIFICATION OF TREATIES

General commentary to part IV

Of the three articles of part IV, only article 39 calls for comment; the other two articles show no changes, or only minor ones, from the corresponding texts of the Vienna Convention.

Article 39. General rule regarding the amendment of treaties

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.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

Commentary

The purpose of article 39 of the Vienna Convention is to establish a simple principle: what the parties have decided to do, they may also undo. Since the Convention does not lay down any particular rule as to the form of conclusion of treaties, it excludes the “*acte*

¹¹⁷ *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole...*, p. 201, 36th meeting of the Committee of the Whole, para. 43.

¹¹⁸ Sir Francis Vallat, for example, said that:

“...article 34 was essentially a saving clause intended to prevent the preceding articles from being construed possibly as excluding the application of the ordinary rules of international law. Article 34 had never been intended as a vehicle for describing the origins, authority or sources of international law...” (*ibid.*, *Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 63, 14th plenary meeting, para. 38.).

¹¹⁹ *Ibid.*, p. 71, 15th plenary meeting, para. 58.

contraire” principle, under which an agreement amending a treaty must take the same form as the treaty itself. The rule laid down in article 39 of the Vienna Convention is also valid for treaties between international organizations and treaties between one or more States and one or more international organizations. In first reading, the Commission had considered that such permissiveness extended only to form and that the wording of the Vienna Convention should be amended slightly so that its scope would be clearer. It had therefore replaced the expression “by agreement” by the more explicit wording “by the conclusion of an agreement”, thus clarifying, but not altering, the rule of the Vienna Convention, which provides that the rules laid down in part II apply to such agreements. In second reading, the Commission preferred to revert to the text of the Vienna Convention. In first reading, the Commission had also omitted the proviso “except in so far as the treaty may otherwise provide”, considering that it served no purpose since all the rules in part II are merely residual and respect the freedom of will of the parties. In second reading, however, the Commission reverted to the text of the Vienna Convention, which the new wording follows more closely. The Commission also considered that reference should be made in paragraph 2, as in many other articles, to the need for compliance in respect of such an agreement with the relevant rules of the organization.

Article 40. 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 all the contracting States and contracting organizations or, as the case may be, to all the contracting organizations, 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 or international organization 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 party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such a party.

5. Any State or international organization 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 or organization:

(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 41. Agreement 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 is not prohibited by the treaty and:

(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.

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.

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 be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

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

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

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

PART V

INVALIDITY, TERMINATION
AND SUSPENSION
OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties

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.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Article 43. Obligations imposed by international law independently of a treaty

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 provisions of the treaty shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only

Commentary to articles 42, 43 and 44

(1) These articles, which are merely a transposition of the corresponding provisions of the Vienna Convention, raised no substantive problems either in first or in second reading and were not the subject of any comments by Governments or international organizations. The wording of article 42, which was made even less cumbersome in second reading, did not give rise to any particular difficulties.

(2) It is article 42, paragraph 2, which, as the Commission recalled following the first reading,¹²⁰ required more thorough consideration since it is open to question whether the draft articles really do cover all the grounds for terminating, denouncing, withdrawing from or suspending the operation of a treaty. In this connection, the expansion of the provisions of article 73 provides all the necessary safeguards with regard to the problems of "succession" that may arise between an international organization and a State. Since the provisions of the Vienna Convention and those of the draft articles are, moreover, only of a residual nature, the parties may, by agreement, decide to provide for specific cases of termination (for example, through the operation of a resolutive condition) or of suspension. Comments on Article 103 of the Charter of the United Nations, which some persons interpret as providing for a special case of the suspension of treaties, have already been presented in connection with article 30 above.

¹²⁰ *Yearbook ... 1979*, vol. II (Part Two), p. 149, commentary to art. 42.

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

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

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

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

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

(b) it must by reason of the conduct of the competent organ be considered as having renounced the right to invoke that ground.

Commentary

(1) Article 45 of the Vienna Convention deals with the problem of the loss by a State of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. By implication, but quite clearly, it excludes the possibility of disappearance of a right to invoke coercion of a representative or coercion by the threat or use of force (arts. 51 and 52) or violation of a peremptory norm (art. 53) as grounds for invalidating a treaty. The article recognizes that a State may renounce its right to invoke any ground for invalidating a treaty other than those three and any ground for terminating, withdrawing from or suspending the operation of a treaty. With regard to the means whereby the right may be renounced, article 45 mentions express agreement (subpara. (a)) and acquiescence by reason of conduct (subpara. (b)). The former has never caused any difficulty, but at the United Nations Conference on the Law of Treaties, the latter provoked discussion and some opposition,¹²¹ based on the fear that the principle it established might be used to legitimize situations secured under cover of political domination. The Conference, following the view of the Commission, adopted subparagraph (b) as a statement of a general principle based on good faith and well founded in jurisprudence.¹²² Furthermore, the articles submitted to the Conference did not provide for

¹²¹ *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole...*, pp. 390-402, 66th meeting of the Committee of the Whole, paras. 46 *et seq.*, and 67th meeting.

¹²² *Yearbook ... 1966*, vol. II, pp. 239-240, document A/6309/Rev.1, part. II, chap. II, commentary to article 42.

prescription and a number of proposals to introduce it were rejected by the Conference; this justified still further the maintenance of a certain flexibility in the means whereby States can manifest their renunciation.

(2) The Commission has retained, in draft article 45, paragraph 1, the rule laid down at the Conference for the consent of States. The Commission discussed at length the case of the consent of international organizations and, in first reading, dealt with it in two paragraphs. In second reading, it made very minor drafting changes in paragraph 1 to bring it into line with the corresponding provision of the Vienna Convention; and it amended and combined paragraphs 2 and 3 in a single paragraph, thus arriving at a text which was adopted without reservation by all members of the Commission.

(3) The question to be decided came down to whether the same regime should be applicable to international organizations as to States. Some members of the Commission thought that it should, on the ground that inequalities between States and international organizations should not be created in treaty relations.

(4) Other members inclined to the view that the far-reaching structural differences between States and organizations made it necessary to provide special rules for the latter. The unity of the State, it was said, meant that the State could be regarded as bound by its agents, who possessed a general competence in international relations. If one of them (a Head of State, a Minister for Foreign Affairs, or in certain cases an ambassador) became aware of the facts contemplated in article 45, it was the State which became aware of them; if one of them engaged in certain conduct, it was the State which engaged in that conduct. International organizations, on the other hand, had organs of a completely different kind; and unlike a State, an organization could not be held to be duly informed of a situation because any organ or agent was aware of it, or to be bound by conduct simply because any organ or agent had engaged in it. It was therefore considered that the Commission should retain only the case provided for in subparagraph (a) of paragraph 2, which no one disputed, and avoid any provision referring to the conduct of the organization. The same members were also of the opinion that the situation dealt with in article 46, paragraphs 3 and 4, namely, invalidity of the consent of an international organization to be bound by a treaty on the grounds of the violation of a rule of the organization regarding competence to conclude treaties, ought not to be subject to paragraph 2 in the case of international organizations; conduct governed by the relevant rules of the organization could not amount to renunciation of the right to invoke a manifest violation of a rule regarding competence to conclude treaties. Several Governments had supported that point of view.

(5) Other members of the Commission took the view that it was even more necessary for an organization than for a State that the organs able to bind it should be aware of the situation and that the "conduct" amount-

ing to renunciation should be the conduct of those same organs; but they believed that for the security of the organization's treaty partners, and even out of respect for the principle of good faith, the rule laid down for States should be extended to international organizations, with the stipulation that the conduct of an organization duly aware of the facts might amount to the renunciation of certain rights. That solution, it was pointed out, would better protect the organization's interests; for without sacrificing any principles, it would be able to renounce a particular right in the simplest manner possible, usually by continuing to apply the treaty after becoming aware of the relevant facts. With regard to the reference, in the case of international organizations, to article 46 as one to which the rule of paragraph 2 applies, most members of the Commission had considered that organizations differed widely and that, although the relevant rules of some organizations might be very strict and rule out any possibility, even in accordance with established practice, of supplementing or amending the constitutional rules regarding competence to conclude treaties, that was not generally the case.

(6) Since the first reading, viewpoints have converged considerably, but do not completely coincide. The draft article as adopted then contained a paragraph 2 relating to international organizations, subparagraph (b) of which retained for organizations the effects of their conduct. Two provisions took account of the problems of international organizations. First of all, the term "acquiesced" used for States in paragraph 1 and in article 45 of the Vienna Convention was eliminated in paragraph 2 as having connotations of passivity and facility which the Commission wished to avoid. By slightly amending the wording of subparagraph (b), the Commission referred to "renunciation of the right to invoke" the ground in question. In order to extend the scope of that amendment, a paragraph 3 was added as a reminder that both express agreement and conduct are subject to the relevant rules of the organization. For some members, that was a concession because they considered paragraph 3 unnecessary since it merely restated a principle clearly established elsewhere. Other members, however, welcomed the reminder. With regard to the reference to article 46 in paragraph 2, some members still had doubts and reservations.

(7) In second reading, any remaining doubts in the way of a unanimous solution to that problem were dispelled by means of the solution which had been adopted in article 7, paragraph 4, above and which could easily be applied to article 45. It consisted in referring not simply to "its conduct" in subparagraph (b), but, rather, to the "conduct of the competent organ". As stated in paragraph (14) of the above commentary to article 7, this new formula guarantees that renunciation of the right to invoke a ground for invalidity will *never* be used against the will or even without the participation of the competent organ. It is not the conduct of just any organs that will alone determine whether there has been a renunciation, but, rather, the conduct of the competent organ, whose competence

may have been overlooked. To take a theoretical example, it may be said that a treaty giving rise to a financial debt for an organization must, according to the relevant rules of that organization, be authorized by an assembly of Government representatives. Such a treaty concluded by the head of the secretariat *without* such prior authorization is irregularly concluded. However, if the assembly adopts measures to implement the agreement (for example, by approving funds or an agreement concerning the immunities of the members of a mission sent to implement that treaty), it will normally be considered that the organization has, by its conduct, renounced its right to invoke the invalidity of that agreement. This explicit reference to the competence of the organ whose conduct amounts to renunciation made it unnecessary to refer in paragraph 3, as adopted in first reading, to the relevant rules of the organization and paragraph 3 was therefore eliminated.

SECTION 2 INVALIDITY OF TREATIES

Article 46. Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. 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 was manifest and concerned a rule of its internal law of fundamental importance.

2. In the case of paragraph 1, a violation is manifest if it would be objectively evident to any State or any international organization referring in good faith to normal practice of States in the matter.

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

4. In the case of paragraph 3, a violation is manifest if it is or ought to be within the knowledge of any contracting State or any contracting organization.

Commentary

(1) Article 46 of the Vienna Convention is one to which the Commission and the Conference on the Law of Treaties devoted a great deal of time and attention. With regard to an issue which was the subject of much theoretical discussion (question of "unconstitutional treaties" and "imperfect ratifications"), the Commission proposed and the Conference adopted a solution making reasonable provision for the security of legal relations. The Vienna Convention recognizes the invalidity of a treaty concluded in violation of the internal law of a State, but on two conditions: the rule violated must be one of fundamental importance and the violation must have been manifest, that is to say, "objec-

tively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”.

(2) The Commission discussed at length the question whether a provision similar to article 46 of the Vienna Convention should apply to the treaties governed by the draft articles. Although it generally agreed that the reply to that question should be affirmative, it decided to make special provision for the consent of international organizations and even slightly to amend the text of the Vienna Convention relating to the consent of States. Draft article 46 contains four paragraphs, the first two relating to the consent of States and the last two to the consent of international organizations. The title of the article, which was amended in second reading to bring it into line with that of the article 46 of the Vienna Convention, refers to provisions of internal law of a State and rules of an international organization.

(3) Paragraph 1 does not give rise to any difficulties; it reproduces the text of the Vienna Convention. The same basic solution was adopted in paragraph 3 dealing with the consent of international organizations, but the Commission hesitated to stipulate, with regard to the invalidity of the consent of international organizations, that the violation of the rules of the organization regarding competence to conclude treaties must concern “a rule of fundamental importance”. It had deleted those words in first reading, considering that organizations required full protection against a violation regardless of the importance of the rule violated. In second reading, the Commission decided that there was no reason to establish different regimes for organizations and for States. Some members also pointed out that the second condition provided for in article 46, namely, that the violation must have been *manifest*, did not overlap with the first condition.

4) It was mainly” the “manifest” character of a violation that occupied the Commission’s attention both with regard to the consent of States and to that of organizations.

(5) With regard to the consent of States, the Commission had confined itself in first reading to proposing a text of paragraph 2 that was identical with that of paragraph 2 of the Vienna Convention. In second reading, the suggestion that a reference to international organizations should be added to the definition of the manifest character of a violation would have led to the following text :

A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with normal practice and in good faith.

In discussing the merits of the addition of those words, the Commission found that the text of the Vienna Convention was ambiguous and that, if account was taken of the presence of one or more organizations in treaty relations, different wording from that of the Vienna Convention would have to be adopted and it would, in particular, have to be made clear that it is the normal practice of *states* which serves as the basis to which the other parties to the treaty are entitled to refer. If a viola-

tion of the internal law of a State is not apparent to one of the partners, whether a State or an international organization, which compares the conduct of the State whose internal law has been violated with the normal conduct of States in the matter, the violation is not manifest. If, however, that partner learned of the violation by other means, the violation could be invoked against it since it would not have the benefit of good faith, the need for which, in this connection and in others, is recalled in paragraph 2.

(6) With regard to the “manifest” character of the violation of the relevant rules of an organization regarding competence to conclude treaties, the problem is a different one. In the case of States, reference can rightly be made to the practice of States because such practice is, broadly speaking, the same for all States and it invests with exceptional importance the expression by certain high-level agents of the State (Heads of State or Government and Ministers for Foreign Affairs, under article 7 of the Vienna Convention) of the will of a State to be bound by a treaty. But no such agents exist in the case of international organizations. The titles, competence and terms of reference of the agents responsible for the external relations of an international organization differ from one organization to another. It can therefore not be said that there is a “normal practice of organizations”; there are thus no general guidelines or standards by which the basis for the conduct of the treaty partners of an organization may be defined.

(7) Other criteria may, however, be used to define the “manifest” character of a violation by reference to those partners. In the first place, if they are aware of the violation, the organization will be able to invoke it against them as a ground for the invalidity of its consent in accordance with the principle of good faith, which applies both to States and to organizations. There is, however, another criterion: invalidity can be invoked when the partners *ought to* have been aware of the violation, but in fact were not. Either through indifference or through lack of information, they violate an obligation incumbent on them and therefore cannot claim that by invoking invalidity, an international organization is refusing them the security to which they are entitled. Cases in which the partners of the organization should be aware of a violation may arise in a number of situations, but one in particular warrants attention: that in which an organization concludes a treaty with its own members.

(8) In such a case, the partners of the organization must be aware of the rules regarding the conclusion of treaties. In the first place, it is with them that the information originates; and, in the second, the partners (which, in this case are, for practical purposes, States) take part, through their representatives in the organs of the organization, in the adoption of the most important decisions and, indirectly, but most certainly, assume a share of the responsibility for the conclusion of irregular treaties. When a violation of the relevant rules of the organization is established, it is established in respect of the members of that organization, which can

thus invoke it against them. In view of the many important treaties concluded by organizations of a universal character, the practical significance of a case of this kind need not be stressed.

(9) These comments call for an observation which goes beyond the framework of article 46. Several Governments drew the Commission's attention to the importance of making special provision for treaties concluded between an organization and its own members. There are two reasons why the Commission did not, generally speaking, adopt special rules for this category of treaties: first, when it conducted its inquiry among international organizations,¹²³ this problem elicited no comments, even in the case of the very specialized organizations whose rules constitute a valuable and well-ordered legal system.¹²⁴ Doubts were, however, expressed regarding the legal nature of agreements which are concluded not between an organization and its member States, but between organs and related bodies within an organization and which usually concern administrative matters.

(10) Secondly, the member States of an organization are third parties in respect of the treaties concluded by the organization; this principle is not open to dispute and derives from the legal personality of the organization. The member States of an organization are, however, not exactly third States like the rest; the problems to which some treaties concluded by the organization give rise in respect of its member States have already been discussed at length in the commentary to article 36 *bis*; problems of the same kind underlay article 27; and still others, which have been mentioned, arise in connection with article 46. The Commission therefore points out that it is these articles, more than any others, that it discussed. Although it may have been premature to try to deal systematically with such situations, the Commission did take them into consideration.

Article 47. Specific restrictions on authority to express the consent of a State or an international organization

If the authority of a representative to express the consent of a State or of an international organization 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 the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations or, as the case may be, to the other negotiating organizations and negotiating States prior to his expressing such consent.

¹²³ See p. 10, para. 15, above.

¹²⁴ Should such treaties, however, comply with the rules of the organization not only with regard to competence to conclude treaties, but also with regard to the substantive rules of the organization? This question, as stated above in the commentary to article 27, is of real practical interest.

Commentary

(1) Article 47 of the Vienna Convention concerns the case in which the representative of a State has received every formal authority, including full powers if necessary, to express the consent of the State to be bound by a treaty, but in addition has had his powers restricted by *instructions* to express that consent only in certain circumstances, on certain conditions or with certain reservations. Although the representative is bound by these instructions, if they remain secret and he does not comply with them, his failure to do so cannot be invoked against the other negotiating States, and the State is bound. For the situation to be different, the other States must have been notified of the restrictions *before* the consent was expressed.

(2) This rule was maintained in article 47 for States and extended to cover international organizations. As a result of the use in the draft articles adopted in second reading of the words "to express" instead of the words "to communicate" for the consent of an organization (see art. 7, para. 4, above), the wording of the draft article has been greatly simplified and article 47 has been reduced from two paragraphs to one.

Article 48. Error

1. A state or an international organization 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 or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or that organization 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 79 then applies.

Commentary

(1) With article 48 and the case of error, the Vienna Convention tackles what have sometimes been called cases of "vitiation of consent". It seemed to the Commission that this aspect of the general theory of treaties was also applicable to consent given by international organizations to be bound by a treaty. It therefore adopted draft article 48, which, apart from minor drafting changes in paragraphs 1 and 2, is identical with article 48 of the Vienna Convention.

(2) This does not mean, however, that the practical conditions in which it is possible to establish certain facts which bring the error regime of article 48 into operation will be exactly the same for organizations as for States. The Commission therefore considered the possible "conduct" of an organization and the conditions in which it should be "put... on notice of a poss-

ible error". Paragraph 2, in which these terms occur, is certainly based on the fundamental idea that an organization, like a State, is responsible for its conduct and hence for its negligence. In the case of an international organization, however, proof of negligence will have to take different and often more rigorous forms than in that of State because—to revert once more to the same point—international organizations do not have an organ equivalent to the Head of State or Government or Minister for Foreign Affairs which can fully represent them in all their treaty commitments and determine the organization's "conduct" by its acts alone, thus constituting in itself a seat of decision to be "put on notice" of everything concerning the organization. On the contrary: in determining the negligence of an organization, it will be necessary to consider each organization in the light of its particular structure, to reconstitute all the circumstances that gave rise to the error and to decide, case-by-case, whether there has been error or negligent conduct on the part of the organization, not merely on the part of one of its agents or even of an organ. But after all, international jurisprudence on error by a State shows that the situation is not simple for States either, and that, as in all questions of responsibility, factual circumstances play a decisive role for States as they do for organizations.

Article 49. Fraud

A State or an international organization induced to conclude a treaty by the fraudulent conduct of a negotiating State or a negotiating organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Commentary

(1) By making fraud (defined as fraudulent conduct by another negotiating State to induce a State to conclude a treaty) an element invalidating consent, article 49 of the Vienna Convention provides an even more severe sanction for a delictual act of the State than for error. Although international practice provides only rare examples of fraud, there is no difficulty with the principle, and the Commission recognized that an international organization could be both defrauded and defrauding. Draft article 49 departs from the Vienna Convention only in terms of its wording, which was amended and shortened in second reading.

(2) In itself, the idea of fraudulent conduct by an international organization undoubtedly calls for the same comments as were made on the subject of error. In the first place, there will probably be even fewer cases of fraudulent conduct by organizations than by States. It is perhaps in regard to economic and financial commitments that fraud is least difficult to imagine; for example, an organization aware of certain monetary decisions already taken but not made public, might by various manoeuvres misrepresent the world monetary situation to a State in urgent need of a loan, in order to secure its agreement to particularly disadvantageous financial commitments. But it must be added that the

treaty instruments of organizations are usually decided upon and concluded at the level of collective organs, and it is difficult to commit a fraud by collective deliberation. Thus cases of fraud attributable to an organization will be rare, but it does not seem possible to exclude them in principle.

Article 50. Corruption of a representative of a State or of an international organization

A State or an international organization the expression of whose consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by a negotiating State or a negotiating organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Commentary

(1) Corruption of the representative of a State by another negotiating State as an element vitiating consent to be bound by a treaty seemed to the Commission, early in its work, a necessary, if extraordinary, case to mention. Unfortunately, corruption has since proved less exceptional than was then believed. Draft article 50 therefore provides for the case where the organization is either the victim of corruption or guilty of it, making the necessary drafting changes to the text and title of article 50 of the Vienna Convention. The text was further refined and shortened in second reading.

(2) Here again, as in the case of articles 48 and 49, it must be recognized that active or passive corruption is not so easy for a collective organ as it is for an individual organ, and this should make the practice of corruption in international organizations more difficult. It must not be forgotten, however, that corruption within the scope of article 50 of the Vienna Convention (and draft article 50) can take many forms. A collective organ can never in fact negotiate; in technical matters, negotiation is always based on expertise or appraisals by specialists, whose opinions are sometimes decisive and may be influenced by corruption. Although States and organizations are unlikely to possess funds that do not have to be accounted for, they have other equally valued and effective assets, in particular, the power of nomination to high posts and missions. Although it is to be hoped that cases of corruption will prove extremely rare, there is no technical reason for excluding them, even where international organizations are concerned.

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Commentary

It can hardly be contested that coercion of an individual in his personal capacity may be employed

against the representative of an organization as well as against the representative of a State; it should merely be pointed out that in general the representative of a State has wider powers than the representative of an organization, so that the use of coercion against him may have more extensive consequences. Drafting changes similar to those made in previous articles have been made to the text and title of article 51 of the Vienna Convention.

Article 52. Coercion 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 international law embodied in the Charter of the United Nations.

Commentary

(1) The text of article 52 of the Vienna Convention has been used without change for draft article 52. The title adopted in first reading, which was based on that of the Vienna Convention, referred to coercion “of a State or of an international organization”; in second reading, the title was shortened; it no longer refers to the entities coerced.

(2) The extension of article 52 to treaties to which one or more organizations are parties was nevertheless discussed at length by the Commission, which sought to assess the practical effect of such extension. Is it really conceivable that all, or at least many, international organizations may suffer, or even employ, the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations?

(3) In trying to answer that question, the Commission inevitably faced the question whether article 52 of the Vienna Convention covers only the threat or use of *armed* force or whether it covers coercion of every kind. This is a long-standing problem; it was formerly discussed by the Commission, which at that time confined itself to a cautious reference to the principles of the Charter. The question was taken up again at the United Nations Conference on the Law of Treaties, which considered amendments explicitly referring to political and economic pressure¹²⁵ and ultimately adopted a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties as an annex to the Final Act. The Declaration solemnly condemns:

the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.¹²⁶

The General Assembly had discussed the question before the Conference took place (see resolution 2131

(XX) of 21 December 1965)¹²⁷ and has reverted to it on a number of occasions since 1969. In particular texts, it has prohibited the use of armed force and has condemned aggression (notably in resolution 3314 (XXIX) of 14 December 1974 entitled “Definition of Aggression”), but it has repeatedly pointed out that this prohibition does not cover all forms of the illegal use of force, e.g. in the preamble to resolution 3314 (XXIX), in the preamble and the text of the annex to resolution 2625 (XXV) of 24 October 1970;¹²⁸ in resolution 2936 (XXVII) of 29 November 1972;¹²⁹ in resolution 3281 (XXX) of 12 December 1974;¹³⁰ in resolutions 31/91 of 14 December 1976¹³¹ and 32/153 of 19 December 1977,¹³² etc.

(4) In the light of these numerous statements of position, the view can certainly be supported that the prohibition of coercion established by the principles of international law embodied in the Charter goes beyond armed force; and this view has been expressed in the Commission. Nevertheless, the Commission did not find it necessary to change the formulation of article 52, which is sufficiently general to cover all developments in international law. Moreover, even taking armed force alone, enough examples can be imagined to warrant extending the rule in article 52 of the Vienna Convention to international organizations.

(5) Any organization may be compelled to conclude a treaty under the pressure of armed force exerted against it in violation of the principles of international law. To mention only one example, the headquarters of an international organization might find itself in an environment of threats and armed violence, either during a civil war or in international hostilities; in those circumstances, it might be induced to consent by treaty to give up some of its rights, privileges and immunities, in

¹²⁷ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, para. 2 of which reads:

“No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind ...”.

¹²⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. See, in particular, the third principle:

“The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter:

“... armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

“No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. ...

“...”

¹²⁹ Non-use of force in international relations and permanent prohibition of the use of nuclear weapons.

¹³⁰ Charter of Economic Rights and Duties of States—in particular, arts. 1 and 32.

¹³¹ Non-interference in the internal affairs of States.

¹³² *Idem*.

¹²⁵ *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. 172, document A/CONF.39/14, para. 449.

¹²⁶ *Ibid.*, p. 285, document A/CONF.39/26, annex.

order to avoid the worst. If the coercion was unlawful, for example in a case of aggression, the treaty would be void. Armed force can also be directed against the agents or representatives of any organization outside its headquarters, in which case an agreement concluded by the organization to free such persons from the effects of unlawful armed force would be void under draft article 52.

(6) It is obvious that the unlawful use of armed force by an organization is possible only if the organization has the necessary means at its disposal; hence only a few organizations are concerned. The problem is, nevertheless, sufficiently important to have been considered by the General Assembly on several occasions. In certain resolutions concerning the unlawful use of armed force it has avoided the term "international organization", preferring the even broader expression "group of States".¹³³ In 1970, in resolution 2625 (XXV), it set out the consequences of the "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter" in the following terms: "No State or group of States has the right to intervene ..." etc. Later, in resolution 3314 (XXIX) ("Definition of Aggression"), it reverted to this question in the explanatory note to article 1, as follows:

In this Definition the term 'State' ...

...

(b) Includes the concept of a 'group of States' where appropriate.

However the expression "group of States" is defined, it covers an international organization, so it can be concluded that the General Assembly provides sufficient authority for recognizing that an international organization may in theory be regarded as making unlawful use of armed force.

(7) It was also pointed out that the United Nations Charter itself, in acknowledging the action of regional agencies for the maintenance of peace and in requiring their activities to be in conformity with the Charter, had recognized that those activities could in fact violate the principles of international law embodied in the Charter.

(8) In the light of all these considerations, the Commission proposes a draft article 52 which extends to international organizations the rule laid down for States in the Vienna Convention. Certain members of the Commission, however, were of the view that the extension of the rule to international organizations was based on highly theoretical considerations which they felt need not be stressed.

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm ac-

cepted and recognized by the international community of States as a whole as a norm 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) Draft article 53 involves only a provisional and unimportant difference with respect to article 53 of the Vienna Convention, namely, a reference to "the present articles" instead of to "the present Convention".

(2) It is apparent from the draft articles that peremptory norms of international law apply to international organizations as well as to States, and this is not surprising. International organizations are created by treaties concluded between States, which are subject to the Vienna Convention by virtue of article 5 thereof; despite a personality which is in some respects different from that of the States parties to such treaties, they are none the less the creation of those States. And it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization. Moreover, the most reliable known example of a peremptory norm, the prohibition of the use of armed force in violation of the principles of international law embodied in the Charter, also applies to international organizations, as we have just seen in connection with draft article 52.

(3) The Commission considered the question whether draft article 53 should retain the expression "international community of States" used in article 53 of the Vienna Convention. That expression could conceivably have been supplemented by a reference to international organizations, which would result in the phrase "international community of States and international organizations". But in law, this wording adds nothing to the formula used in the Vienna Convention, since organizations necessarily consist of States, and it has, perhaps, the drawback of needlessly placing organizations on the same footing as States. Another possibility would have been to use the shorter phrase "international community as a whole". On reflection, and because the most important rules of international law are involved, the Commission thought it worthwhile to point out that, in the present state of international law, it is States that are called upon to establish or recognize peremptory norms. It is in the light of these considerations that the formula employed in the Vienna Convention has been retained.

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

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

¹³³ In the Charter of Economic Rights and Duties of States (resolution 3281 (XXIX)), in article 12, the General Assembly used the term "groupings" of States.

(b) at any time by consent of all the parties, after consultation with the other contracting States and the other contracting organizations or, as the case may be, with the other contracting organizations.

Commentary

Consultation with contracting States that are not parties to a treaty was provided for in article 54 of the Vienna Convention for the following reasons explained at the Conference on the Law of Treaties by the Chairman of the Drafting Committee:

... that question had been raised in the Drafting Committee, where it had been pointed out that there were a few cases in which a treaty already in force was not in force in respect of certain contracting States, which had expressed their consent to be bound by the treaty but had postponed its entry into force pending the completion of certain procedures. In those rare cases, the States concerned could not participate in the decision on termination, but had the right to be consulted; nevertheless, those States were contracting States, not parties to the treaty, for the limited period in question.¹³⁴

In order to extend this provision to international organizations, the last part of paragraph (b) of the article has been amended to provide for the two cases: treaties between States and international organizations and treaties between international organizations. The wording was revised on second reading.

Article 55. 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 necessary for its entry into force.

Commentary

This draft article reproduces the text of article 55 of the Vienna Convention without change, but it should be recognized that, for the time being, it can concern only very few cases. Its application is limited to multilateral treaties open to wide participation, and so far as treaties between international organizations are concerned, this case will be exceptional. As regard treaties between States and international organizations, there will be treaties between States which are open to wide participation by States and also to some international organizations on certain conditions. This practice is gaining ground in the economic sphere, particularly as regards commodity agreements. This possibility had been provided for in other articles of the draft, for example in article 9, paragraph 2.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denun-

¹³⁴ *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole...*, p. 476, 81st meeting of the Committee of the Whole, para. 6.

ciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

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

Commentary

The text of article 56 of the Vienna Convention has been adopted without change for this draft article. It will be remembered that in the final draft articles on the law of treaties between States the Commission did not adopt the provision now in subparagraph 1 (b);¹³⁵ it was added at the Conference on the Law of Treaties.¹³⁶ This was the provision that gave rise to the greatest difficulties of application for treaties between States, and will probably do so for the treaties which are the subject of the present draft articles. Which treaties are in fact by their *nature* denounceable or subject to withdrawal? In the case of treaties between international organizations, should treaties relating to the exchange of information and documents be included in this category? Treaties between one or more States and one or more international organizations include a class of treaties which, although having no denunciation clause, seem to be denounceable: the headquarters agreements concluded between a State and an organization. For an international organization, the choice of its headquarters represents a right whose exercise is not normally immobilized; moreover, the smooth operation headquarters agreement pre-supposes relations of a special kind between the organization and the host State, which cannot be maintained by the will of one party only. These considerations, which were discussed in the Commission's 1979 report in connection with this article,¹³⁷ were referred to by the International Court of Justice in its advisory opinion of 20 December 1980 on the *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*.¹³⁸ Other examples of treaties which might by their nature be the subject of withdrawal or denunciation are more questionable, except of course that of the denunciation by an international organization of an agreement whose sole purpose is to implement a decision of the organization which it has reserved the right to modify.¹³⁹

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties

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

¹³⁵ *Yearbook ... 1966*, vol. II, pp. 250-251, document A/6309/Rev.1, part II, chap. II, art. 53 and commentary thereto.

¹³⁶ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference...*, p. 177, document A/CONF.39/14, paras. 485 *et seq.*

¹³⁷ *Yearbook ... 1979*, vol. II (Part Two), pp. 156-157.

¹³⁸ *I.C.J. Reports 1980*, p. 96, para. 49.

¹³⁹ See the commentary to article 27, above.

(a) in conformity with the provisions of the treaty; or
 (b) at any time by consent of all the parties, after consultation with the other contracting States and the other contracting organizations or, as the case may be, with the other contracting organizations.

Commentary

The same drafting changes made in the text of article 54 in first and second readings were made in the text of article 57 of the Vienna Convention.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

- (a) the possibility of such a suspension is provided for by the treaty; or
- (b) the suspension in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) is not incompatible with the object and purpose of 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 those provisions of the treaty the operation of which they intend to suspend.

Commentary

(1) No change has been made to the text of article 58 of the Vienna Convention, not even to make the title of the article correspond more precisely to the wording of the text, which provides for suspension of the operation of "provisions of the treaty", not of "the treaty" as a whole. But it follows from article 59 of the Convention that the Convention does not exclude the case of suspension of all the provisions of a treaty.

(2) There is no reason for not extending the provisions of article 58 of the Vienna Convention to treaties to which international organizations are parties.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

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

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that 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 later treaty or is otherwise established that such was the intention of the parties.

Commentary

There is no departure from the text or title of article 59 of the Vienna Convention. Article 59, like article 58, lays down rules which derive from a straightforward consensuality approach and may therefore be extended without difficulty to the treaties which are the subject of the present draft articles.

Article 60. 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 in whole or in part or to terminate it either:
 - (i) in the relations between themselves and the defaulting State or international organization, 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 or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part 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 this 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.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Commentary

Article 60 of the Vienna Convention governs the effects of the breach of a treaty on the provisions of that

treaty, and lays down principles in this matter which there is no reason not to extend to treaties to which international organizations are parties. Hence only minor drafting changes were needed in the text of article 60.

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from 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.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Commentary

(1) The text of draft article 61 does not differ from that of article 61 of the Vienna Convention, which was adopted at the Conference on the Law of Treaties without having given rise to particular difficulties. The principle set forth in article 61 of the Vienna Convention is so general and so well established that it can be extended without hesitation to the treaties which are the subject of the present draft articles. The title of the article is perhaps a little ambiguous because of its possible implication that the text of the article embraces all cases in which a treaty cannot be performed. But the substance of the article shows that it refers exclusively to the case of permanent or temporary impossibility of performance which results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. It is therefore evident that this provision of the Vienna Convention does not seek to deal with the general case of *force majeure*, which is a matter of international responsibility and, in regard to international responsibility among States, was the subject of draft article 31 adopted in first reading by the Commission at its thirty-first session.¹⁴⁰ Furthermore, article 73 of the Vienna Convention like article 73 of the present draft reserves all questions relating to international responsibility.

(2) Although it is not for the Commission to give a general interpretation of the provisions of the Vienna Convention, it feels it necessary to point out that the only situations contemplated in article 61 are those in which an object is affected, and not those in which the subject is in question. Article 73, to which the draft article 73 mentioned above corresponds, also reserves all questions that concern succession of States and certain situations concerning international organizations.

(3) As regards the nature of the object in question, article 61 of the Vienna Convention operates in the first

place like draft article 61, where a physical object disappears; an example given was the disappearance of an island whose status is the subject of a treaty between two States. Article 61, however, like draft article 61, also envisages the disappearance of a legal situation governing the application of a treaty; for instance, a treaty between two States concerning aid to be given to a trust territory will cease to exist if the aid procedures show that the aid was linked to a trusteeship regime applicable to that territory and that the regime has ended. The same will apply if the treaty in question is concluded between two international organizations and the administering State.

(4) Whether treaties between States, treaties between international organizations, or treaties between one or more States and one or more organizations are concerned, the application of article 61 may cause some problems. There are cases in which it may be asked whether the article involved is article 61 or in fact article 62. Particular cases mentioned were those in which financial resources are an object indispensable for the execution of a treaty and cease to exist or cannot be realized. Problems of this kind may in practice occur more often for international organizations than for States, because the former are less independent than the latter. It must be borne in mind in this connection that under draft article 27, although an organization may not withdraw from a validly concluded treaty by a unilateral measure not provided for in the treaty itself or in the present draft articles, it is not excluded that it may, where a treaty has been concluded for the sole purpose of implementing a decision taken by the organization, terminate all or part of the treaty if it amends the decision. In applying the article, account must be taken as regards international organizations not only of the other rules set forth in the present draft but also of the reservations established in article 73; these concern a number of important matters which the Commission felt it was not at present in a position to examine.

Article 62. 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 extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations, if the treaty establishes a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing

¹⁴⁰ See *Yearbook ... 1979* vol. II (Part Two), p. 122.

from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Commentary

(1) Article 62 of the Vienna Convention is one of its fundamental articles, because of the delicate balance it achieves between respect for the binding force of treaties and the need to terminate or withdraw from treaties which have become inapplicable as a result of a radical change in the circumstances which existed when they were concluded and which determined the States' consent. Article 62 therefore engaged the attention of the Commission and the United Nations Conference on the Law of Treaties for a long while; it was adopted almost unanimously by the Commission itself and by a large majority at the Conference.¹⁴¹ The Commission had no hesitation in deciding that provisions analogous to those of article 62 of the Vienna Convention should appear in the draft articles relating to treaties to which international organizations are parties. It nevertheless gave its attention to two questions, both of which concern the exceptions in paragraph 2 of the article of the Vienna Convention.

(2) To begin with the exception in subparagraph 2 (b) of article 62 of the Vienna Convention, concerning the invoking of a fundamental change of circumstances which is the result of a breach, by the party invoking it, of an international obligation, the question is whether the exception arises in such simple terms for an organization as it does for a State. The change of circumstances which a State invoking it faces through a breach of an international obligation is always, in regard to that State, the result of a wrongful act imputable to itself alone, and a State certainly cannot claim legal rights under such a wrongful act which is imputable to it. The question might arise in somewhat different terms for an organization, bearing in mind the hypotheses mentioned above in connection with article 61. For a number of fundamental changes can result from acts which take place inside and not outside the organization; these acts are not necessarily imputable to the organization as such (although in some cases they are), but to the States members of the organization. The following examples can be given. An organization has assumed substantial financial commitments; if the organs possessing budgetary authority refuse to adopt a resolution voting the necessary appropriations to meet those commitments, there is quite

simply a breach of the treaty and the refusal cannot constitute a change of circumstances. But if several member States which are major contributors to the organization leave it and the organization subsequently finds its resources reduced when its commitments fall due, the question arises whether there is a change of circumstances producing the effects provided for in article 62. Other situations of this kind could be mentioned. Article 62, like article 61, therefore requires that account be taken of the stipulations or reservations made in other articles of the draft, including article 27 and especially article 73. The extent to which the organization's responsibility can be dissociated totally from that of its member States is a difficult subject and basically a matter of the responsibility of international organizations; article 62 reserves not only that question, but also certain issues involved in changes which, in the life of organizations, alter the relationship between the organization and its member States (termination of organizations, changes in membership of the organization).

(3) The first exception, that in article 62, subparagraph 2 (a), on treaties establishing boundaries, nevertheless took up more of the Commission's time both in first and second readings. It involves two basic questions: the first must be considered initially in the light of the Vienna Convention and relates to the notion of a treaty which "establishes a boundary"; the second concerns the capacity of international organizations to be parties to a treaty establishing a boundary. Since the answer to the first question will have some bearing on the answer to the second, the two issues must be looked at in turn.

(4) The Vienna Convention has now entered into force and the practice of the States bound by it will govern the meaning of the expression "treaties establishing a boundary". Subject to that proviso, a number of important observations can be made. First of all, the expression certainly means more than treaties of mere delimitation of land territory and includes treaties of cession, or in more general terms, treaties establishing or modifying the territory of States; this broad meaning emerges from the preparatory work, since the Commission altered its original wording to reflect the broader meaning in response to comments from Governments.¹⁴²

(5) The main problem, however, is to determine the meaning of the word "boundary". The scope of the question must be defined first of all. The term "boundary" customarily denotes the limit of the land territory of a State, but it could conceivably be taken more broadly to designate the various lines which fix the spatial limits of the exercise of different powers. Customs lines, the limits of the territorial sea, continental shelf and exclusive economic zone and also certain armistice lines could be considered as boundaries in this

¹⁴¹ *Yearbook ... 1966*, vol. I (Part One), p. 130, 842nd meeting, para. 53; *Official Records of the United Nations Conference on the Law of Treaties, Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole ...*, p. 121, 22nd plenary meeting, para. 47.

¹⁴² See *Yearbook ... 1966*, vol. II, p. 259, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, para. (11) of the commentary to article 59.

sense. But it is important to be quite clear about the effects attaching to the classification of a particular line as a "boundary"; some of the lines may be "boundaries" for one purpose (opposability to other States, for example) and not for others (totality of jurisdiction). In regard to article 62, the effect of the quality of "boundary" is a stabilizing one. To say that a line is a "boundary" within the meaning of article 62 means that it escapes the disabling effects of that article.

(6) In this connection, many questions were raised in the Commission concerning certain lines intended to effect maritime delimitations, particularly as a result of the work of the Third United Nations Conference on the Law of the Sea and of the Convention on the Law of the Sea.¹⁴³ It was noted that the outer limit of the territorial sea is a true limit of the territory of the State, which is not the case with other lines.¹⁴⁴ A distinction must, however, be made between the two questions at issue. First of all, it is, of course, possible to try to determine whether in general, a line delimiting a maritime area constitutes a boundary. Even if this first question is answered affirmatively, however, consideration must also be given to a question relating to the interpretation of article 62 of the Vienna Convention: is such a boundary covered by that article? Lines of maritime delimitation (not to mention the delimitation of air space) may in fact have special features and it is possible that the stabilizing effect of article 62 does not extend to certain lines of maritime delimitation, even if, to all intents and purposes, they constitute true boundaries. In any event, the Commission is not equipped to interpret either the Vienna Convention or the Convention on the Law of the Sea. That position was stated again in the Commission in second reading and, as will be seen in paragraph (12) below, it was reflected in still closer adherence to the wording of the Vienna Convention.

(7) The second question concerns the capacity of organizations to be parties to treaties establishing boundaries. An important preliminary remark is that international organizations do not have "territory" in the proper sense; it is simply analogical and incorrect to say that the Universal Postal Union set up a "postal territory" or that a particular customs union had a "customs territory". Since an international organization has no territory, it has no "boundaries" in the traditional meaning of the word and cannot therefore "establish a boundary" for itself.

(8) But can an international organization be said to "establish a boundary" for a State by concluding a

treaty? The question must be understood correctly. An international organization, by a treaty between States, can quite definitely be given power to settle the future of a territory or decide on a boundary line by a unilateral decision; one example of this is the decision on the future of the Italian colonies taken by the United Nations General Assembly under the 1947 Treaty of Peace. But the point at issue at present is not whether the organization can dispose of a territory where it is especially accorded that authority, but whether by negotiation and treaty it can dispose of a territory which *ex hypothesi* is not its own. Although this situation is conceivable theoretically, not a single example of it can yet be given.

(9) Indications that such a situation might occur were nevertheless mentioned. It could do so if an international organization administered a territory internationally, under international trusteeship, for example, or in some other way. Although the practice examined on behalf of the Commission¹⁴⁵ is not at present conclusive, the possibility remains that the United Nations might have to assume responsibility for the international administration of a territory in such broad terms that it was empowered to conclude treaties establishing a boundary on behalf of that territory.

(10) During the discussions in first reading, it had also been pointed out that the new law of the sea could demonstrate that an international organization (the International Sea-Bed Authority) might have to conclude agreements establishing lines, some of which might be treated as "boundaries".

(11) The Commission recognized the interest which might attach to the hypotheses of this kind, but felt that its task for the time being was simply to adapt article 62 of the Vienna Convention to provide for the treaties which are the subject of the present articles; the article has been worded from the traditional standpoint that only States possess territory and that only delimitations of territories of States constitute boundaries. The only treaties (in the meaning of the present articles) to which the rule in article 62, paragraph 2 (a), of the Vienna Convention will therefore have to apply are those establishing a boundary between at least two States to which one or more international organizations are parties. The organizations may be parties to such a treaty because the treaty contains provisions concerning functions which they have to perform; one instance of this is where an organization is required to guarantee a boundary or perform certain functions in boundary areas.

(12) In the circumstances, the Commission followed the Vienna Convention as closely as possible; in second reading, it even adopted drafting changes which brought the text of the draft article more into line with that of article 62 of the Vienna Convention.

¹⁴³ Convention adopted on 30 April 1982 (A/CONF.62/122 and corrigenda).

¹⁴⁴ Mention might be made in this connection of the distinction drawn by the parties in regard to the competence of the arbitral tribunal constituted by the United Kingdom and France to make delimitations in the English Channel and the Mer d'Iroise, in respect of the delimitation of the continental shelf and the delimitation of the territorial sea (*Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, decision of 30 June 1977* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 130 et seq.)).

¹⁴⁵ See the Secretariat study "Possibilities of participation by the United Nations in international agreements on behalf of a territory", *Yearbook ... 1974*, vol. II (Part Two), p. 8, document A/CN.4/281.

(13) Of the three paragraphs of the Vienna Convention, the first and the third refer to the principle and effects of the rule enunciated, while the second states the exceptions of the application of the rule. Paragraphs 1 and 4 of draft article 62 are identical with paragraphs 1 and 3 of article 62 of the Vienna Convention. Article 62, paragraph 2, was divided into two separate paragraphs—paragraphs 2 and 3—in the draft article. Paragraph 3 of the draft article reproduces word for word the introductory sentence and subparagraph (b) of article 62, paragraph 2 of the Vienna Convention. Lastly, the only differences appear in paragraph 2 of the draft article. It was necessary to specify that reference was being made not to any treaty, but rather, solely to a “treaty between two or more States and one or more international organizations”; the first sentence and subparagraph (a) of article 62, paragraph 2, of the Vienna Convention were run together without change; two minor drafting changes were thus made in the text adopted in first reading.

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Commentary

(1) The severance of diplomatic or consular relations does not as such affect either existing treaties between the States concerned or the ability of those States to conclude treaties. Evident as they are, the rules to this effect have not always been fully appreciated or gone unchallenged in the past, and the Vienna Convention therefore embodied them in two articles, article 63 and article 74; the latter will be considered later. The only exception to the first rule, and one as evident as the rule itself, is that of treaties whose application calls for the existence of such relations. For instance, the effects of a treaty on immunities granted to consuls are suspended for as long as consular relations are interrupted. As diplomatic and consular relations exist between States alone, the general rule in article 63 of the Vienna Convention is solely applicable, as far as the treaties dealt with in the present articles are concerned, to treaties between two or more States and one or more international organizations. Draft article 63 therefore been limited to this specific case.

(2) The Commission observed that, in today's world, relations between international organizations and States have, like international organizations themselves, developed a great deal, particularly, but not exclusively, between organizations and their member States. Permanent missions to the most important international organizations have been established—delegations whose status is in many aspects akin to that of diplomatic

agents, as shown by the Convention on the Representation of States. It is beyond question that the severance of relations between a State and an international organization does not affect the obligations incumbent on the State and on the organization. To take the simplest example, if the permanent delegation of a State to an international organization is recalled or if the representatives of a State do not participate in the organs of the organization as they should under its constituent instrument, the substance of the obligations established by that instrument remains unaffected.

(3) That situation, which was discussed in the Commission and in the comments of several Governments, was reconsidered in second reading. The Commission took the view that it was not necessary to burden the text of article 63 with a provision concerning that case. Even if that question is considered to be of great importance, the legal source of the relations between an organization and its member States is, in the vast majority of cases, the constituent instrument of the organization, that is to say, a treaty between States governed by the Vienna Convention, and it is therefore in that Convention that such a provision should have been included. The draft articles would cover only the case in which one of the members of an organization was another international organization or specific cases in which a treaty between an organization and a State, whether or not a member of that organization, established such specific organic relations as the local appointment of delegations, commissions and other bodies of a permanent kind. If these permanent organic relations were severed, the principle of article 63, which is merely an application of the general principles of the law of treaties, would obviously apply.

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Commentary

(1) The notion of peremptory norms of general international law, embodied in article 53 of the Vienna Convention, had been recognized in public international law before the Convention existed, but that instrument gave it both a precision and a substance which made the notion one of its essential provisions. The Commission therefore had no hesitation in adopting draft article 53, which extends article 53 of the Vienna Convention to treaties to which one or more international organizations are parties.

(2) As stated above in the commentary to article 53, what makes a rule of *jus cogens* peremptory is that it is “accepted and recognized by the international community of States as a whole” as having that effect.

(3) These remarks apply equally to article 64 of the Vienna Convention and to the identical draft article 64. The emergence of a norm which is peremptory as

regards treaties cannot consist in anything other than recognition by the international community of States as a whole that the norm in question has that character. The precise effects of this occurrence are the subject of draft article 71, considered below.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, 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 reasons 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 67 the measure which it has proposed.

3. When an objection is 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. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. 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.

6. Without prejudice to article 45, the fact that a State or an international organization 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) Both the Commission and the United Nations Conference on the Law of Treaties were keenly aware of the fact that the first three sections of part V of the Vienna Convention (like the corresponding articles of the draft), in giving a methodical and complete account of all the possible cases in which a treaty ceased to be applicable, might give rise to many disputes, and in the long run seriously weaken the *pacta sunt servanda* rule. There could be no question, however, of disregarding altogether the rule which enables States to make their own judgements of the legal situations which concern them. In its draft articles on the law of treaties the Commission, in what is now article 65 of the Convention, established certain safeguards concerning the procedure

by which States should conduct their unilateral actions. The Conference on the Law of Treaties decided to supplement these safeguards by providing, in the case of persistent disputes, for recourse to third parties, that is to say the International Court of Justice, arbitration or a conciliation commission.

(2) The system established in article 65 was adopted without opposition at the Conference, and the Commission considers that, with certain slight drafting changes, it can easily be extended to the present draft articles. The purpose of the mechanism established under article 65 is to ensure a fair procedure for the States in dispute, based on notification, explanation, a moratorium, and the possibility of recourse to the means for settlement of disputes specified in Article 33 of the Charter. The significance of the various components of the mechanism is illuminated by the procedural details given in article 67.

(3) In addition to minor drafting changes, two amendments to article 65 of the Vienna Convention were made in draft article 65; the first, to which the Commission devoted a considerable amount of time and attention in both readings, resulted in the amendment of the text adopted in first reading. The first point concerns the three-month moratorium and the question whether it might not be too short to enable an organization to decide whether to raise an objection to another party's claim since some of the organs competent to take such a decision meet only infrequently. Some members of the Commission considered that the time-limit should either be extended or determined by flexible wording such as "within a reasonable period". In first reading, the Commission had retained the three-month time-limit, noting that the permanent organs of the organization could always raise an objection and then subsequently withdraw it. Particular account also had to be taken of the fact that, during the prescribed period, the notifying party had to continue to apply the treaty and of the fact that it would be unreasonable to sacrifice its interests.

(4) The discussion in second reading took a new turn on the basis of a problem relating to the interpretation of the Vienna Convention. Does article 65, paragraph 2, of the Vienna Convention deprive the notifying party's treaty partners of the right to raise an objection after the expiry of the three-month period—in other words, does it establish an extinctive prescription of the right to object to the notification? It is pointed out that a party which makes a notification without receiving communication of an objection can *lawfully* take the measure contemplated and that, since its good faith is established, its conduct in no way engages its responsibility. It can be maintained that it is necessary to go further and say that its claim is validly and finally established, particularly in view of the wording of paragraph 3, which clearly links recourse to the means indicated in Article 33 of the Charter—and hence the very possibility of the existence of a dispute—to the mechanism of the paragraph: "If, *however*, objection *has been* raised by any other party ...". The contrary can also be maintained by pointing out that the question

of *prescription* of grounds for invalidity was discussed at length at the Conference on the Law of Treaties,¹⁴⁶ but that no prescription was established; the Conference merely referred in article 45 to the effects of acquiescence resulting from the conduct of the State concerned. That would moreover, explain the reference to article 45 in the last paragraph of article 65. Whatever the interpretation of the Vienna Convention, which the Commission is not entitled to make, it was considered that, in the case of the treaties which are the subject of the draft articles, it would be advisable not to provide for loss of the right to raise an objection to a notification designed to suspend the operation of a treaty. Accordingly and whatever interpretation was given to the Vienna Convention, the Commission had to draft paragraph 3 in such a way as to make that choice clear. It therefore replaced the words "If, however, objection has been raised by any other party ..." in paragraph 3 by the words "When an objection is raised by any other party". This new wording indicates that an objection may be raised at *any* time.

(5) A second substantive amendment was made in article 65. Invoking a ground for withdrawing from conventional obligations and making an objection to another party's claim are sufficiently important acts for the Commission to have considered it necessary, as in the case of other draft articles (art. 35, para. 2; art. 36, para. 2; art. 37, para. 5; art. 39, para. 2) to specify that, when these acts emanate from an international organization, they are governed by the relevant rules of the organization. The rules in question are, of course, the relevant rules regarding the competence of the organization and its organs. This provision forms a new paragraph 4. The paragraphs of the draft article corresponding to article 65, paragraphs 4 and 5, of the Vienna Convention have been renumbered as paragraphs 5 and 6, the sole addition being that of the words "international organization" in paragraph 6.

Article 66. Procedures for arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or article 64 may, by written notification to the other party or parties to the dispute, submit it to arbitration in accordance with the provisions of the Annex to the present articles, unless the parties by common consent agree to submit the dispute to another arbitration procedure;

(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 conciliation procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations, unless the parties by common consent agree to submit the dispute to another conciliation procedure.

Commentary

(1) Article 66 and the Annex to the Vienna Convention were not drafted by the Commission, but by the United Nations Conference on the Law of Treaties itself. Many Governments considered that the provisions of article 65 failed to provide adequate safeguards for the application of part V of the Vienna Convention, and they feared that a detailed statement of all the rules that could lead to the non-application of a treaty might encourage unilateral action and thus be a threat to the binding force of treaties; other Governments did not share those fears and considered that article 65 already provided certain safeguards. The opposing arguments were only settled by a compromise, part of which consisted of article 66 of the Vienna Convention.¹⁴⁷

(2) This brief reminder will explain two peculiarities of article 66. The first is that an article which, as its title indicates, is devoted to settlement of disputes does not appear among the final clauses but in the body of the treaty; the second is that this article does not claim to cover *all* disputes relating to the interpretation or application of the Convention, but only those concerning part V. It will also be noted that, in regard to the latter disputes, it distinguishes between articles 53 and 64 on the one hand and any of the remaining articles in part V on the other; disputes in the former case may be submitted to the International Court of Justice by written application, while the remainder entail a conciliation procedure. This difference is justified purely by the fact that the notion of peremptory norms appeared to certain States to call for specially effective procedural safeguards owing to the radical nature of its consequences, the relative scarcity of fully conclusive precedents and the developments that article 64 appeared to foreshadow.

(3) The Commission decided to propose a draft article 66, even though the considerations which had led it fifteen years ago not to propose provisions for the settlement of disputes in the draft articles on treaties between States had lost none of their weight. The Commission took this decision for two reasons. Firstly, by inserting article 66 in the body of the Vienna Convention, immediately after article 65, the Conference on the Law of Treaties had taken the position that substantive questions and procedural questions were linked as far as part V was concerned, and the Commission considered that it should abide by the positions taken by the Con-

¹⁴⁶ See the amendments proposed by Guyana and the United States of America (A/CONF.39/C.1/L.267 and Add.1) and Australia (A/CONF.39/C.1/L.354), *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference...*, p. 164, para. 382, and the discussions at the 66th meeting of the Committee of the Whole, *ibid.*, *First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole...*, p. 390, paras. 44 *et seq.*

¹⁴⁷ The article was finally adopted by 61 votes to 20, with 26 abstentions (*ibid.*, *Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole...*, p. 193, 34th plenary meeting, para. 72).

ference. Secondly, the Commission did not wish to shy away from an effort which might help the States concerned to decide which position they should adopt. In so doing, the Commission remains fully alive to the continuing differences among States on this question today. The solution which it adopted in second reading was rejected by some members; it establishes compulsory arbitration for disputes concerning the application or the interpretation of articles 53 or 64 and compulsory conciliation for disputes concerning the other articles in part V. Another solution providing only for compulsory conciliation for disputes concerning the interpretation and application of all the articles of part V was proposed by one of the members.¹⁴⁸ Before commenting on the text of article 66 adopted in second reading, it is necessary to recall the solution adopted in first reading and the reasons why it was subsequently rejected.

(4) The transposition of the solutions adopted at the Conference in 1969 concerning disputes to which international organizations are parties involves a major procedural difficulty: international organizations cannot be parties in cases before the International Court of Justice. Consequently, in the case of disputes concerning *jus cogens* to which an international organization is a party, recourse cannot be had to judicial proceedings before the Court. In 1980, the Commission studied various means of remedying the situation, including the establishment of the right of some organizations to request an advisory opinion from the Court.¹⁴⁹ In view of all the imperfections and uncertainties of such a procedure, however, the Commission decided not to include it in the text of article 66. It finally adopted a rather simple solution, while taking into account the difference between States and international organizations stemming from the Statute of the International Court of Justice: disputes concerning the interpretation or the application of articles 53 and 64 to which only States were parties would be submitted to the Court, while the conciliation procedure would be compulsory for all other disputes whatever the articles in part V concerned.

(5) In addition to providing for a difference in the treatment of States and international organizations, this solution might raise procedural difficulties by blurring the distinction between judicial settlement and conciliation. Such disputes, especially as they concern *jus cogens*, may involve more than two parties, and a shift from judicial settlement to conciliation might easily take

place as a result of a decision of an international organization making common cause with one of the States parties to the dispute. It was perhaps impossible to resolve all the problems raised by disputes involving more than two parties; although the Vienna Convention related only to disputes between States, it did not deal with the problems arising in connection with disputes involving more than two parties. It was, however, difficult to overlook the practical difficulties which might result from the solution adopted by the majority of the members of the Commission in first reading.

(6) In these circumstances, the Commission drew on the solutions adopted in the Convention on the Law of the Sea¹⁵⁰ and proposed a draft article 66 whose general design is simple: judicial settlement is no longer explicitly provided for as the means of settling disputes concerning articles 53 and 64; it is replaced by arbitration, by means of machinery which guarantees that the Arbitral Tribunal may always be established and, for disputes concerning other articles in part V, the system of compulsory recourse to conciliation instituted by the Vienna Convention is retained. In any event, article 66 does not create any essential discrimination between States and organizations.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. 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 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State 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. If the instrument emanates from an international organization, the representative of the organization communicating it may be called upon to produce powers.

Commentary

(1) In the commentary to draft article 65, it was shown how article 67 supplemented article 65 of the Vienna Convention. It must thus be extended to the treaties which are the subject of the present draft articles, and calls for adjustment only as far as the powers to be produced by the representative of an organization are concerned.

(2) The meaning of article 67 of the Vienna Convention needs to be clarified. In relation to acts leading a State to be bound by a treaty, article 7 of the Convention provides, firstly, that certain agents represent States in virtue of their functions, in such a way that they are dispensed from having to produce full powers

¹⁴⁸ In this case, the wording of article 66 would be as follows:

"If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedure shall be followed:

"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 set in motion the conciliation procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations, unless the parties by common consent agree to submit the dispute to another conciliation procedure."

¹⁴⁹ *Yearbook... 1980*, vol. II (Part Two), p. 87, para. (9) of the commentary to article 66.

¹⁵⁰ Annexes V and VII of the Convention (A/CONF.62/122 and corrigenda).

(art. 7, para. 2); other agents can bind the State only if they produce appropriate powers or if "it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers. (subpara. 1 (b)". If these rules are compared with those established by article 67 of the Vienna Convention for the act whereby a State divests itself of its obligation, it can be seen that the Convention is stricter in the latter case; unless the instrument is signed by the Head of State, Head of Government or Minister for Foreign Affairs, "the representative of the State ... may be called upon to produce full powers". This greater stringency, and particularly the elimination of dispensation from the production of full powers by virtue of practice or the presumption drawn from the circumstances, is readily understandable considering that one of the guarantees afforded by the procedure laid down in articles 65 and 67 is the use of an instrument characterized by a degree of formality. It was sought to avoid any ambiguity in a procedure designed to dissolve or suspend a treaty, and to set a definite time-limit for that procedure; no account can therefore be taken either of practice or of circumstances, which are invariably ambiguous factors taking firm shape only with the passage of time.

(3) It is necessary in draft article 67 to complete the text of the Convention by providing for the case of international organizations; as far as their consent is concerned, a distinction similar to that for States needs to be made between the procedure for the conclusion of a treaty and the procedure for its dissolution or suspension. As regards the expression of consent to be bound by a treaty, draft article 7 (para. 4) provides for only two cases: the production of appropriate powers and the tacit authorization resulting from the practice of the competent organs of the organization or from other circumstances. If the rules applying to the dissolution of a treaty are to be stricter than those applying to the expression of consent to be bound by a treaty, there are two possible solutions: either to require appropriate powers in all cases, without provision for the case of tacit authorization resulting from practice or other circumstances, or to provide, as in the case of States, that the representative of the organization may be called upon to produce powers. After adopting the first solution on first reading, the Commission adopted the second in second reading, finding that it was difficult to justify requiring production of powers where the agent making the communication was at the same time the agent authorized to issue powers.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

Commentary

(1) Article 68 of the Vienna Convention is designed to help safeguard the security of treaties and did not raise

any difficulties either in the Commission or at the United Nations Conference on the Law of Treaties. The essential effect of the instruments revocable under this provision is, in varying degrees, the non-application of the treaty. As long as these instruments have not taken effect, they can be revoked. There is no reason why such a natural provision should not be extended to the treaties which are the subject of the present draft articles; draft article 68 contains no departure from the corresponding text of the Vienna Convention.

(2) The Vienna Convention does not specify what form the "revocation" of the notifications and instruments provided for in article 67 (or for that matter the "objection") should take. The question is not important in the case of the "notification", which can only be made in writing, but it is important in the case of the "instrument". While recognizing that there is no general rule in international law establishing the "*acte contraire*" principle, the Commission considers that, in order to safeguard treaty relations, it would be logical for the "revocation" of an instrument to take the same form as the instrument itself, particularly as regards the communication of the "full powers" and "powers" provided for in article 67.

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

*Article 69. Consequences of the invalidity
of a treaty*

1. A treaty the invalidity of which is established under the present articles is void. 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 invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

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

Commentary

(1) The text which became article 69 of the Vienna Convention met with no opposition either in the Commission or at the United Nations Conference on the Law of Treaties, since its object is to set out in a logical man-

ner the consequences of the invalidity of a treaty. Its extension to the treaties which are the subject of the present articles is necessary, and merely entailed the inclusion of a reference to international organizations alongside the reference to States (para. 4).

(2) It may simply be pointed out that article 69, paragraph 3, of the Convention, like draft article 69, clearly establishes that, notwithstanding the general reservation made by article (and draft article) 73 on questions involving international responsibility, fraud, acts of corruption or coercion constitute wrongful acts in themselves. They are therefore not, or not solely, elements invalidating consent; that is why the Vienna Convention and, following it, the draft articles, establish rules for these cases which in themselves serve to penalize a wrongful act, particularly in regard to the separability of treaty provisions (art. 44 and draft art. 44, paras. 4 and 5).

Article 70. 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 or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Commentary

Article 70 of the Vienna Convention sets forth the logical consequences of the termination of a treaty in language which leaves no room for doubt. This is why the Commission extended the rules of article 70 to the treaties which are the subject of the present articles, adding only a reference to an international organization alongside the reference to a State.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed 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 64, 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

Three articles of the Vienna Convention (arts. 53, 64 and 71) deal with peremptory norms. The Commission considered it inappropriate to make any changes to the text of article 71, not only because of the need to be as faithful as possible to the wording of the Vienna Convention, but because the subject is so complicated that departures from a text which, even if not fully satisfactory, was carefully prepared may well raise more problems than they solve.

Article 72. 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) releases 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 obstruct the resumption of the operation of the treaty.

Commentary

Like all the articles in section 5 of part V of the Vienna Convention, article 72 gave rise to no objection, so necessary are the rules which it lays down. The rules in question have therefore been extended without change to the treaties which are the subject of the present articles.

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

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a

treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

Commentary

(1) When the Commission prepared the draft articles which were to become the Vienna Convention, it found it necessary to insert a reservation relating to two topics included in its general plan of codification which were to form the subject of separate sets of draft articles and which it had recently begun to study, namely State succession and the international responsibility of States. This first consideration was not only interpreted fairly flexibly but also coupled with a further justification for a reservation relating to responsibility, namely that, as pointed out earlier,¹⁵¹ some of the articles on the law of treaties necessarily raised questions of responsibility. The Commission went slightly further in asking itself whether it should not also include a reservation relating to a subject hotly debated in "traditional" international law, namely the effect of "war" upon treaties; that was not covered by its general plan of codification, and a reservation relating to it in the draft articles would therefore have the effect of drawing the attention of Governments to the importance of a matter which the Commission had deliberately left aside. Although the Commission decided after consideration to make no reference to it, the United Nations Conference on the Law of Treaties reopened the question and added a reservation thereon to the two already in article 73.¹⁵²

(2) This brief summary of the background to article 73 of the Vienna Convention clearly shows that the purpose of that article was not to provide an exhaustive list of the matters which treaties between States can involve and on which the Convention took no position. In the view of the Commission, article 73 is intended to draw the reader's attention to certain particularly important questions, without thereby ruling out others.

(3) In the light of this view of the scope of article 73 of the Vienna Convention, an examination of the situation with regard to the treaties which form the subject of the

present articles illustrates the need for an article which is symmetrical to article 73 of the Vienna Convention and which contains reservations at least as broad as those in article 73. The twofold problem of substance and of drafting considered by the Commission in this connection was whether the reservations provided for in draft article 73 should be broadened to take account of the particular characteristics of international organizations.

(4) The easiest problem to solve relates to international responsibility. There is no doubt that cases exist in which the responsibility of an international organization can be engaged, as is shown by practice, and, in particular, treaty practice. In its work on the international responsibility of States, the Commission has had occasion to deal with this matter and has deliberately limited the draft articles in course of preparation to the responsibility of States.¹⁵³ It is logical and necessary, however, for draft article 73 to contain both a reservation relating to the international responsibility of international organizations and a reservation relating to the international responsibility of States.

(5) The question of the reservation relating to hostilities between States was less simple because it could be asked whether international organizations might not also be involved in hostilities; if so, draft article 73 would have to refer only to "hostilities" and avoid the more restrictive words "hostilities between States". Many members of the Commission considered that, as international practice now stood, international organizations could be involved in "hostilities"; others had doubts on the matter. In the end the Commission decided to retain the words "hostilities between States", for a reason unconnected with the question of principle whether international organizations could be involved in "hostilities". Article 73 deals only with the effect of "hostilities" on treaties and not with all the problems raised by involvement in hostilities, whereas "traditional" international law dealt with the effect of "war" on treaties, an effect which, in the practice of States and the case-law of national courts has, in the past hundred years, undergone considerable changes. In introducing this reservation in article 73, the Vienna Conference took no position on the problems as a whole which arise as a result of involvement in "hostilities"; it merely made a reservation, without taking any position, on the problems which might at present continue to exist during armed conflict between States as a result of rules applied in the past on the effect of war upon treaties. Since the reservation in article 73 of the Vienna Convention is of such limited scope, it was only appropriate for the Commission to include in draft article 73 a reservation having the same purpose as that provided for in the Convention.

(6) The main difficulties are encountered in regard to widening the reservation relating to State succession. Reference might conceivably have been made to "suc-

¹⁵¹ See para. (2) of the commentary to article 69, above.

¹⁵² In connection with the question of responsibility, see also draft articles 48 to 52 above, and commentaries thereto. In connection with the question of outbreak of hostilities, see *Yearbook ... 1966*, vol. II, pp. 267-268, document A/6309/Rev.1, part II, chap. II, para. (2) of the commentary to art. 69; and *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole...*, pp. 451-453, 76th meeting of the Committee of the Whole, paras. 9-33.

¹⁵³ *Yearbook ... 1975*, vol. II, p. 54, document A/10010/Rev.1, chap. II, sect. A.2., para. 32, and *ibid.*, pp. 87-91, chap. II, sect. B.2, commentary to art. 13. See also *Yearbook ... 1971*, vol. II (Part One), pp. 272-273, document A/CN.4/246 and Add.1-3, paras. 209-213.

cession of international organizations", if necessary by defining that term, which is sometimes found in learned studies. The Special Rapporteur had been prepared to follow that course, but members of the Commission pointed out not only that the term was vague but also that the word "succession" itself, which had been carefully defined in the Commission's work and in the Vienna Convention on Succession of States in Respect of Treaties (1978),¹⁵⁴ should not be used to describe situations which appeared radically different.

(7) Closer examination of the cases that may come to mind when the term "succession of international organizations" is used shows that they are quite far removed from cases of State succession. It is true that certain organizations have ceased to exist and that others have taken over some of their obligations and property, as the United Nations did after the dissolution of the League of Nations. In all such cases, however, the scope and modalities of the transfers were determined by conventions between States. It was pointed out that such transfers were entirely artificial and arbitrary, unlike the case of a succession of States, in which it is the change in sovereignty over a territory that, in some cases, constitutes the actual basis for a transfer of obligations and property. Thus, strictly speaking, there can never be a "succession" of organizations.

(8) What can happen, though, is that the member States, when they establish an international organization, transfer to it certain powers to deal with specific matters. The problem is then to determine whether the organization thus established is bound by the treaties concluded on the same subject by the member States before the establishment of the organization. This situation usually involves treaties between States, but it may also concern treaties to which other international organizations are already parties. One example is that of a multilateral treaty, the parties to which are not only many States but also an international organization representing a customs union. If three States parties to such a treaty also set up a customs union administered by an international organization, it may be necessary to determine what the relationship is between that new organization and the treaty. It might be asked whether, in such a case, "succession" takes place between the States and the international organization.

(9) Questions might also be asked about the effects of the dissolution of an international organization. Must it be considered that the States members of that organization "succeed" to its property and obligations? Are they, for example, bound by the treaties concluded by the organization? Bearing in mind the existence of organizations having operational functions and constituted by only a few States, such a case might be of considerable practical importance.

(10) Many other more or less hypothetical cases were referred to in the Commission. It was asked how the treaties concluded by an organization might be affected

by an amendment to its constituent instrument that deprived it of legal capacity to honour obligations under an existing treaty which it had concluded properly. Since changes in the membership of an organization do not, formally at least, affect the identity of the organization, which continues to be bound by the treaties concluded before the changes took place, no problem of "succession" of international organizations arises in such a case; at most it might be asked, as the Commission has done in connection with other articles,¹⁵⁵ whether in some cases such changes in membership do not give rise to certain legal consequences. On the other hand, the fact that a member State which has concluded a treaty with the organization ceases to be a member of the organization might in some cases give rise to difficulties; these could be bound up with the fact that the conclusion or performance of such a treaty might depend on membership in the organization. Conversely, forfeiture of membership, if imposed as a sanction, might not release a State from treaty obligations which it had contracted under a specific treaty concluded with the organization. These are delicate issues which require detailed study and on which the Commission has taken no position. Such questions are not theoretical ones, but they lie outside the scope of a topic which might, even in the broadest sense, be characterized as "succession of international organizations".

(11) In view of all these considerations, the Commission decided not to use the term "succession of international organizations" nor to attempt to give an exhaustive list of cases that are subject to reservation, but simply to mention two examples, namely, termination of the existence of international organizations and termination of participation by a State in the membership of an international organization.

(12) Once the Commission had taken a position on the substance, it still has to solve a drafting problem. The easiest solution would have been to enumerate in a single paragraph all the different subjects governed by the reservation made in article 73 "in regard to a treaty". This approach was criticized because it would have required an enumeration of subjects to which the reservation would have been applicable only for certain treaties. The international responsibility of States, a succession of States and the outbreak of hostilities between States are extraneous to treaties concluded solely between international organizations. For the sake of accuracy, therefore, the Commission drafted two paragraphs, even though this makes the text more unwieldy.

(13) It included in paragraph 1, in regard to a treaty between one or more States and one or more international organizations, a reservation relating to a succession of States and to the international responsibility of a State; it added to those two a reservation relating to the outbreak of hostilities between States parties to such a

¹⁵⁴ Art. 2, subpara. 1 (b), of the Convention.

¹⁵⁵ See article 61 above, para. (2) of the commentary, and article 62, para. (2) of the commentary.

treaty. It is observed that the text refers not only to the responsibility of a State towards another State but also to the responsibility of a State towards an international organization.

(14) The reservation in paragraph 2 relates to the responsibility of an international organization, either towards another organization or towards a State, and to the two cases selected from among many others, namely, the termination of the existence of an organization and the termination of participation by a State in the membership of an international organization.

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Commentary

(1) There is no legal nexus as such between treaty relations and diplomatic and consular relations. The first consequence drawn from that fact in article 63 of the Vienna Convention and draft article 63 is that the severance of diplomatic and consular relations is not in itself of legal consequence for treaty relations, unless the application of the treaty *actually* requires the existence of such relations. Article 74 and draft article 74 express two further consequences of the independence of treaty relations and diplomatic or consular relations, namely, that the severance of diplomatic or consular relations does not prevent the conclusion of a treaty and that the conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

(2) The rules which article 74 of the Vienna Convention embodies cannot be extended to all the treaties which come within the scope of the present articles. For diplomatic and consular relations exist between States alone, and therefore draft article 74 can only apply to those treaties whose parties include at least two States between which diplomatic or consular relations are at issue. Draft article 74 was therefore worded so as to limit its effects to treaties concluded between two or more States and one or more international organizations. With regard to the current relevance of such matters in terms no longer of diplomatic or consular relations, but of the relations which international organizations need in some cases to maintain with States, reference should be made to what has been said on that point in connection with article 63 above.

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations 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) Article 75 of the Vienna Convention was adopted to take account of a situation created by the Second World War. States concluded certain treaties which imposed obligations on States considered as aggressors, but those obligations had not been accepted by treaty by all the latter States at the time the Vienna Convention was concluded. Article 75 prevents any provision whatsoever of the Vienna Convention from being invoked as a bar to the effects of those treaties. It nevertheless provides for the future in general terms.

(2) In these circumstances, the Commission discussed several awkward questions connected with the adaptation of the rule in article 75 to the case of the treaties forming the subject of the present draft articles. One such question was whether draft article 75 should not contemplate the case in which the aggressor was an international organization. It soon became clear that this matter had to be left aside, for several reasons. First, it was not at all certain that the term "aggressor State" might not apply to an international organization; it was noted that a text such as the Definition of Aggression adopted on 14 December 1974 by the General Assembly¹⁵⁶ provides that "the term 'State' ... Includes the concept of a 'group of States' where appropriate". Such a definition indicates that, in relation to an armed attack, it is difficult to distinguish between States acting collectively and the organization which they may in certain cases constitute. Whatever position is taken on this question, which is a matter solely for the States parties to the Vienna Convention to settle, there is a second, more compelling reason for not dealing with it: if good reasons could be shown to place an aggressor organization on the same footing as a State, that should seemingly have been done by the Vienna Convention itself, because the problem is far more important for treaties between States than for treaties to which one or more international organizations are parties. In formulating the present draft articles, however, the Commission has consistently refused to adopt proposals which would draw attention to gaps or shortcomings in the Vienna Convention. It therefore decided that draft article 75 should simply speak of an "aggressor State" as article 75 of the Vienna Convention does.

(3) The second problem involves the transposition to draft article 75 of the expression "in relation to a treaty". Its inclusion in the draft article unchanged would mean that the treaty in question could either be a treaty between one or more States and one or more international organizations or a treaty between international organizations, in accordance with the definition in draft article 2, subparagraph 1 (a). Now, of all the possibilities that come to mind, one very unlikely to occur in international relations as they now stand is that of

¹⁵⁶ General Assembly resolution 3314 (XXIX), annex.

a number of international organizations, under a treaty concluded between them alone, taking measures that would give rise to obligations for an aggressor State. A less unlikely possibility is that of a treaty between a number of States and one or more international organizations. The Commission hesitated between a simple solution which would cover unlikely cases and a more restrictive one which would cover only the least unlikely case. In the end it decided to make no reference to the case in which such a treaty would be concluded solely between international organizations. It thus described the treaties to which the draft article may apply as treaties "between one or more States and one or more international organizations", in order to refer only to the least unlikely cases.

PART VII
DEPOSITARIES, NOTIFICATIONS,
CORRECTIONS AND REGISTRATION

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Commentary

(1) Like the other articles of part VII of the Vienna Convention, article 76 is one containing technical provisions on which agreement was reached without difficulty both in the Commission and at the United Nations Conference on the Law of Treaties. These articles must be transposed to the present draft articles with the necessary changes.

(2) The only question with regard to article 76 which might have given rise to a problem is that of multiple depositaries. It will be recalled that in 1963, in order to overcome certain particularly sensitive political problems, international practice devised the solution, at least for treaties whose universality was highly desirable, of designating a number of States as the depositaries of the same treaty (multiple depositaries). Article 76 provides for the use of multiple depositaries, despite various criticisms to which that institution had given rise, but it does so only for States, and not for international organizations or the chief administrative officers of organizations.

(3) The Commission considered whether the provision should not be extended to cover organizations; in other words, whether the draft should not say that the depositary of a treaty could be "one or more organizations". In the end, the Commission decided not to make that change and to word draft article 76 in the same way as article 76 of the Vienna Convention. It wishes to point out that, while it has no objection in principle to the designation of a number of international organizations as the depositary of a treaty, it found that, in the period of over ten years that has elapsed since the signing of the Vienna Convention, no example of a depositary constituted by more than one international organization has occurred to testify to a practical need for that arrangement; indeed, it is difficult to see what need it might meet. Moreover—and this is a decisive point, already made a number of times, in particular in connection with article 75—if the possibility of designating more than one international organization as the depositary of a treaty had been of any interest it would have been so mainly for treaties between States, and should therefore have been embodied in the Vienna Convention itself. Save in exceptional cases, the Commission has always tried to avoid, even indirectly, improving on a situation if the improvement could already have been embodied in the Vienna Convention.

(4) The only change eventually made in draft article 76, by comparison with article 76 of the Vienna Convention, is in paragraph 1, and arises from the need to mention negotiating States and negotiating organizations as well as negotiating organizations and to cater for the two types of treaties governed by the present articles, namely, treaties between one or more States and one or more international organizations and treaties between international organizations.

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(e) informing the parties and the States and international organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, instruments relating to an act of formal confirmation, or instruments of acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the organization concerned.

Commentary

(1) The lengthy article 77 of the Vienna Convention needs to be transposed to the present draft articles, but with certain amendments, some of them minor ones. The changes will be considered in paragraph and subparagraph order.

(2) Subparagraph 1 (a) must provide that the depositary should also assume custody of powers, an expression which, according to draft article 2, subparagraph 1 (c *bis*), means a document emanating from the competent organ of an international organization and having the same purpose as the full powers emanating from States.

(3) In certain cases (subpara. 1 (d) and para. 2) it was sufficient to mention the international organization as well as the State. In other cases (the introductory part of para. 1 and subparas. 1 (b), (e) and (f)), it appeared necessary, despite the resultant unwieldiness of the text, to cater for the distinction between treaties between one or more States and one or more international organizations and treaties between international organizations.

(4) In subparagraph 1 (f), the list of instruments enumerated in article 77 of the Convention has been extended to include "instruments relating to an act of formal confirmation" in order to take account of the fact that the Commission replaced the term "ratification" by "act of formal confirmation", defined in draft article 2, subparagraph 1 (b *bis*), as "an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty".

(5) Subparagraph 1 (g) of article 77 was a source of some difficulty for the Commission both in first and second readings. The difficulty already existed in the Vienna Convention itself; it has become more acute now that this provision has had to be adapted to the treaties with which the present draft articles are concerned. Consideration will be given first to the difficulties inherent in the Vienna Convention as such and then to those arising out of the adaptation of the provision.

(6) The main problem concerns the meaning to be given to the term "registration", and it is complicated by the relationship between article 77 and article 80. The Commission had proposed in 1966 a draft article (art. 72) on the functions of the depositary, which contained no provision on the registration of treaties. Its draft article 75 (eventually article 80), on the other hand, laid down the obligation to register treaties with the Secretary-General but did not stipulate whose the obligation was; registration and publication were to be governed by the regulations adopted by the General Assembly and the term "registration" was to be taken in its broadest sense.¹⁵⁷ At the Conference on the Law of Treaties, a proposal submitted by the Byelorussian Soviet Socialist Republic in the Committee of the Whole amended the text of that article 75 to give it the present form of paragraph 1 of article 80, so that filing and recording were mentioned as well as registration.¹⁵⁸ However, an amendment by the United States of America to article 72 (the future article 77) making the depositary responsible for "registering the treaty with the Secretariat of the United Nations"¹⁵⁹ had been adopted a few days earlier, without detailed comment.

(7) What is the meaning of the word "register" in this text? In article 77, is this function merely stated—that is to say, should it be understood as a possibility which the Convention allows if the parties agree to it? Or does article 77 actually constitute the agreement? There are divergent indications on this point in the preparatory work.¹⁶⁰ What is certain, though, is that the Expert

¹⁵⁷ The commentary to the article which became article 80 shows that the Commission used the term "registration" in its general sense to cover both "registration" and "filing and recording" (see *Yearbook ... 1966*, vol. II, pp. 273-274, document A/6309/Rev.1, part II, chap. II, para. (2) of the commentary to art. 75). The Commission added:

"... 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." (*Ibid.*, para. (3)).

¹⁵⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference ...*, p. 206, document A/CONF.39/14, para. 684 (b).

¹⁵⁹ *Ibid.*, p. 201-202, para. 657, sect. (iv), para. (6).

¹⁶⁰ In connection with the Commission's draft article 71 (now art. 76), which was discussed together with draft article 72 (now art. 77), the United Kingdom delegation drew attention to the purely expository character of the wording on functions of depositaries (*ibid.*, *First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole ...*, p. 462, 77th meeting of the Committee of the Whole, para. 53). Sir Humphrey Waldock, Expert Consultant to the Conference, confirmed this view (*ibid.*, p. 467, 78th meeting of the Committee of the Whole, para. 51). The United

Consultant to the Conference made the following important statement:

It had been asked whether the registration of treaties should not be part of a depositary's functions. The International Law Commission had studied that problem, but had come to the conclusion that the function of registration might cause difficulties, in view of the rules applied by the General Assembly where the depositary was an international organization. There were very strict rules on the subject. The Commission had come to the conclusion that it would be unwise to mention registration as one of the functions of a depositary without making a more thorough study of the relationship between the provision and the rules on the registration of treaties applied by the United Nations.¹⁶¹

(8) In conclusion, doubts may be expressed as to both the scope and the usefulness of subparagraph (g) of paragraph 1; although using different terminology, it seems to duplicate article 80. Turning now to the question of its adaptation to the treaties to which the present draft articles relate, it may first be asked whether the subparagraph can be applied to all "treaties" as understood in the present draft. The reply to this question depends on the meaning of the term "registration"; since it has a narrow sense in article 80, it might be thought appropriate to give it a narrow meaning here as well. If so, subparagraph (g) could not apply to all treaties, since there are some treaties to which "registration" under the rules formulated by the United Nations does not apply. The Commission therefore considered inserting the proviso "where appropriate" in subparagraph (g). Another solution, since the subject is governed by the terminology, rules and practices of the United Nations, would have been to mention Article 102 of the Charter of the United Nations in subparagraph (g) in order to emphasize that the subparagraph was confined to stating what could or should be done according to the interpretation of the Charter given by the United Nations. The Commission finally adopted subparagraph (g) of the Vienna Convention unchanged. Subparagraph (g) is thus of a purely expository nature. The registration of treaties is *conditional* if it depends on rules applied by the United Nations. At present, registration does not, under the relevant rules of the United Nations, apply to treaties between international organizations.

(9) Article 77, paragraph 2, unfortunately gives rise to further difficulties. In its report, the Commission gave no details or explanation about the concluding phrase of paragraph 2 of the corresponding article of its draft on the law of treaties.¹⁶² What is the organization "concerned"? What is the meaning here of the conjunction "or"? If the organization concerned is the depositary organization (which would be the logical explanation

under the Vienna Convention), a formula by which the depositary brings the question to the attention of the competent organ of the depositary might be wondered at. It is true that at the time the text was drafted considerable difficulties had arisen in the United Nations with regard to the precise role of the Secretary-General when the United Nations was the depositary and reservations were made; in the end, the Secretary-General was relieved of all responsibility in the matter,¹⁶³ and the concluding phrase of paragraph 2 simply reflects his concern to ensure that any difference arising on grounds which he considers do not engage his responsibility should be settled by a political body.¹⁶⁴ If this is so, the conjunction "or" definitely establishes an alternative: if there is an organization "concerned" and if it has an organ competent to settle disputes between the depositary and a signatory State or contracting party, the dispute should be brought to the attention of that organ of the organization. Some members of the Commission nevertheless considered that the conjunction "or" was unsatisfactory and should either be replaced by the conjunction "and" or simply be deleted.

(10) Finally, although not entirely satisfied, the Commission decided to retain the text of paragraph 2 of the Vienna Convention. It included a reference to international organizations in addition to the reference to States and, for the sake of clarity, divided the paragraph into two subparagraphs.

Article 78. Notifications and communications

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

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organizations in question only upon its receipt by the State or the organization 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 or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

States representative, however, in explaining his delegation's amendment, stated: "the United Nations Secretariat had informally indicated its preference that registration of a treaty be effected by the depositary" (*ibid.*, p. 459, 77th meeting of the Committee of the Whole, para. 20).

¹⁶¹ *Ibid.*, pp. 467-468, 78th meeting of the Committee of the Whole, para. 59.

¹⁶² *Yearbook ... 1966*, vol. II, pp. 269-270, document A/6309/Rev.1, part II, chap. II, art. 72 and commentary.

¹⁶³ See article 20, para. 3, of the Vienna Convention, which requires reservations to a constituent instrument of an international organization to be accepted by the competent organ of that organization, and the Commission's commentary to the corresponding draft article of 1966 (*ibid.*, p. 207, para. (20) of the commentary to art. 17).

¹⁶⁴ See "Summary of the practice of the Secretary-General as depositary of multilateral agreements" (ST/LEG/7), para. 80. This is certainly the explanation given by the Special Rapporteur himself concerning para. 2 of article 29 (later art. 72, now art. 77):

"Reference to a competent organ of an international organization was needed in article 29, paragraph 2, because of the functions it might have to fulfil as a depositary." (*Yearbook ... 1966*, vol. I (Part II), p. 295, 887th meeting, para. 95.)

Commentary

Article 78 of the Vienna Convention, which is of a technical nature, gave rise to no difficulty either in the Commission or at the United Nations Conference on the Law of Treaties. Its adaptation to the treaties which are the subject of the present draft articles simply requires a reference to international organizations in the introductory wording and in subparagraphs (b) and (c), and a reference in subparagraph (a) to "the States and organizations or, as the case may be, to the organizations for which it is intended", in order to distinguish the case of treaties between one or more States and one or more international organizations from that of treaties between international organizations.

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations decide upon some other means of correction, 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 an 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 shall notify the signatory States and international organizations and the contracting States and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary 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 parties and to the States and organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations.

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 signatory States and international organizations and the contracting States and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. 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 of it to the signatory States and international organizations and to the contracting States and contracting organizations.

Commentary

The comments made on article 78 also apply to draft article 79, whose wording was made less cumbersome in second reading and which differs from article 79 of the Vienna Convention only in that it refers both to international organizations and to States.

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

Commentary

(1) Article 80 of the Vienna Convention has already been commented on in connection with draft article 77. It will be observed that the text (particularly in its English version) establishes an obligation for the parties to the Vienna Convention, whereas it has been said that article 77 is purely expository. Article 80 can be applied to the treaties which are the subject of the present draft articles without altering the text at all, and would establish an obligation for those international organizations which might by one means or another become bound by the rules in the draft articles.

(2) This obligation can, however, only have conditional effects. Its fulfilment depends entirely on the rules in force in the United Nations. The United Nations is bound by Article 102 of the Charter, but how it applies Article 102 (as to form, terminology and method of publication) is exclusively a matter for the competent organs of that Organization. Thus the General Assembly has seen fit to amend the regulations on the application of Article 102¹⁶⁵ and in particular to restrict the extent of publication of treaties between States.¹⁶⁶ While the purpose of draft article 80 may be said to be that Article 102 of the Charter should be applied to new categories of treaty, it will be for the United Nations itself to amend the existing regulations if necessary, especially if draft article 80 becomes applicable to the Organization. One member of the Commission stated that, although he had no objection to the text of the

¹⁶⁵ See *Yearbook ... 1963*, vol. II, pp. 28-32, document A/CN.4/154, paras. 125-143.

¹⁶⁶ See General Assembly resolution 33/141 of 19 December 1978.

draft article, he thought that it would have been appropriate to divide paragraph 1 into two paragraphs. The first, which would retain the substance of the present paragraph, would relate only to treaties to which one or more States were parties, while the second, which would deal with treaties between international organizations, would merely provide for the *possibility* of transmission to the Secretariat and thus take account of the fact that, at present, the existing rules usually do not apply to such treaties.

ANNEX

Arbitration and conciliation procedures established in application of article 66

I. ESTABLISHMENT OF THE ARBITRAL TRIBUNAL OR CONCILIATION COMMISSION

1. A list consisting of qualified jurists, from which the parties to a dispute may choose the persons who are to constitute an arbitral tribunal or, as the case may be, a conciliation commission, shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a State party to the present articles and any international organization to which the present articles have become applicable shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list, a copy of which shall be transmitted to the President of the International Court of Justice. The term of a person on the list, including that of any person nominated to fill a casual vacancy, shall be five years and may be renewed. A person whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraphs.

2. When notification has been made under article 66, paragraph (a), the dispute shall be brought before an arbitral tribunal. When a request has been made to the Secretary-General under article 66, paragraph (b), the Secretary-General shall bring the dispute before a conciliation commission. Both the arbitral tribunal and the conciliation commission shall be constituted as follows:

The States and international organizations which constitute one of the parties to the dispute shall appoint by common consent:

- (a) one arbitrator or, as the case may be, one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and
- (b) one arbitrator or, as the case may be, one conciliator, who shall be chosen from among those included in the list and shall not be of the nationality of any of the States or nominated by any of the organizations which constitute that party to the dispute.

The States and international organizations which constitute the other party to the dispute shall appoint two arbitrators or, as the case may be, two conciliators, in the same way. The four persons chosen by the parties shall be appointed within 60 days following the date on which the other party to the dispute receives notification under article 66, paragraph (a), or on which the Secretary-General receives the request for conciliation.

The four persons so chosen shall, within 60 days following the date of the last of their own appointments, appoint from the list a fifth arbitrator or, as the case may be, conciliator, who shall be chairman.

If the appointment of the chairman, or of any of the arbitrators or, as the case may be, conciliators, has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General of the United Nations within 60 days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

The appointment of arbitrators or conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

II. FUNCTIONING OF THE ARBITRAL TRIBUNAL

3. Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall decide its own procedure, assuring to each party to the dispute a full opportunity to be heard and to present its case.

4. The Arbitral Tribunal, with the consent of the parties to the dispute, may invite any interested State or international organization to submit to it its views orally or in writing.

5. Decisions of the Arbitral Tribunal shall be adopted by a majority vote of the members. In the event of an equality of votes, the Chairman shall have a casting vote.

6. When one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. Before making its award, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

7. The award of the Arbitral Tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based. Any member of the Tribunal may attach a separate or dissenting opinion to the award.

8. The award shall be final and without appeal. It shall be complied with by all parties to the dispute.

9. The Secretary-General shall provide the Tribunal with such assistance and facilities as it may require. The expenses of the Tribunal shall be borne by the United Nations.

III. FUNCTIONING OF THE CONCILIATION COMMISSION

10. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

11. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

12. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

13. The Commission shall report within 12 months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

14. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

Commentary

(1) The commentary to draft article 66 explains why the Commission decided to propose the inclusion in the draft articles of provisions on the settlement of disputes. It also explains the Commission's reasons for proposing a simple solution consisting of an arbitration procedure for the settlement of disputes concerning articles 53 and 64 a conciliation procedure for disputes concerning other articles in part V. The Commission considered that this was the best way of preserving as much parallelism as possible with the Vienna Convention.

(2) It was on the basis of that idea that the Commission also adopted the annex, which establishes the settlement procedures provided for in article 66 and is also modelled as closely as possible on the annex to the Vienna Convention, although certain changes and, above all, additions were necessary in view of the need for two settlement procedures, one relating to arbitration and the other to conciliation. The annex to the 1969 Vienna Convention refers to the conciliation procedure only, since recourse to the judicial settlement procedure does not call for any special provisions and that contained in article 66 of the Convention is sufficient, providing as it does that 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". In the present annex, however, it is necessary to introduce a specific rule to ensure the achievement of the desired objective, that is to say, the establishment of a compulsory arbitration procedure which can, when necessary, be set in motion by any one of the parties to the dispute.

(3) However, on this point as well, the Commission has drawn as much as possible on the annex to the Vienna Convention and proposes a text in which section I relates both to arbitration and to conciliation procedures and is followed by two other sections dealing respectively with the functioning of the Arbitral Tribunal (section II) and the functioning of the Conciliation Commission (section III). The only innovation vis-à-vis the text of the Convention is section II, while section I merely makes the provisions drawn up in the Convention for the establishment of a conciliation commission applicable equally to the establishment of an arbitral tribunal. Section III reproduces without change the rules of the Convention on the functioning of the Conciliation Commission.

(4) The decision to include in a single text provisions on the drawing up of a list of persons from which both arbitrators and conciliators may be chosen and the decision to place international organizations on an absolutely equal footing with States obviously made it necessary to introduce some changes in the text of the Convention and these decisions call for some explanation. The Commission discussed both questions and, in particular, the first at length, and several members were of the opinion that the qualifications required of a conciliator are not necessarily the same as those required of an arbitrator. Consequently, it might be advisable to prepare separate lists from which one or the other could be chosen. Although they did not deny the fact that such a course of action might be justified, other members pointed out that, in this particular case, disputes in which both arbitrators and conciliators would be called upon to intervene would be of an essentially legal nature and that it would therefore also be desirable for conciliators to be qualified jurists. In particular, it was pointed out that, although the annex to the Vienna Convention deals with conciliation only, its paragraph 1 also requires the list of conciliators to consist of "qualified jurists"; it was asked whether this meant that higher qualifications should be required of persons in-

cluded in the list of arbitrators. The Commission finally decided to maintain the single-list system and a single criterion for the nomination of all the persons included in the list.

(5) In view of the comments made by one of its members, the Commission considered the question of the equality of States and international organizations, not only in respect of their rights and obligations as parties to a dispute, but also in respect of the nomination of persons for inclusion in the list of arbitrators and conciliators and the appointment of persons to act as such in a particular dispute. The Commission took account of the view that only States should be entitled to nominate persons for inclusion in the list, but, in the end, the majority of its members decided that the text should reflect the consequences of the international legal personality of international organizations without any discrimination whatever vis-à-vis States. Of course, since international organizations have no population and, consequently, no nationals, a person cannot, for the purposes of section 1, subparagraph 2 (b), be linked with an international organization through nationality. The Commission therefore used the criterion of "nomination" in that case.

(6) The Commission realizes that agreement on the appointment of arbitrators or conciliators, as the case may be, by the States and organizations which are parties to a dispute and which are required to nominate two persons, one of their own choice and the other from among the names included in the list, may be difficult to achieve, but it should not be more difficult than in the case where States alone are parties to a dispute. Moreover, the proposed text makes it quite clear that, if agreement is not reached and those persons cannot be appointed within the prescribed 60-day period, such appointment will be made by the Secretary-General of the United Nations or by the President of the International Court of Justice if the United Nations is a party to the dispute. As a result of that provision, the Commission believes that the proposed text guarantees not only the establishment of the Arbitral Tribunal or the Conciliation Commission in any circumstances, an indispensable prerequisite for any compulsory procedure for the settlement of disputes, but also maximum impartiality in appointments not made by the parties.

(7) The Commission draws attention to the fact that most of the proposed provisions of section II of the annex relating to the functioning of the Arbitral Tribunal are taken from annex VII to the Convention on the Law of the Sea,¹⁶⁷ which has been somewhat simplified and to which the provision contained in paragraph 4 and based on paragraph 3 of the annex to the Vienna Convention has been added. The Commission considers that this provision will be useful to the arbitration procedure because it provides for the possibility that, with the consent of the parties to the dispute, other interested parties—States or international organizations, in this

¹⁶⁷ A/CONF.62/122 and corrigenda.

case—may be invited to submit their views to the Tribunal. Since arbitration cases involve the interpretation and the application of rules of *jus cogens*, the Commission has, moreover, drafted that text in such a way as to ensure that such a possibility is open not only to the parties to the treaty to which the particular dispute relates, but also to any interested State or international organization.

(8) Annex VII to the Convention on the Law of the Sea was chosen by the Commission as a model for the provisions relating to the functioning of the Arbitral Tribunal for a variety of reasons. Above all, it is a very modern text and one which has been adopted by a large number of States. Secondly, it concerns an entirely analogous situation, that is to say, the functioning of an arbitral tribunal which is competent to act even if one of the parties to the dispute refuses to participate either in the appointment of arbitrators or in the actual proceedings before the Tribunal. Lastly, it affords the parties the greatest possible freedom in drawing up, by mutual agreement, the procedural provisions of their choice.

(9) The Commission will merely point out in this commentary that, apart from a few simplifications, paragraphs 3, 5, 6, 7 and 8 of the proposed annex correspond to articles 5, 8, 9, 10 and 11 of the above-mentioned annex VII, respectively. The origin of paragraph 4 has already been explained. To complete this commentary it should, however, be mentioned that paragraph 9 corresponds to paragraph 7 of the annex to the Vienna Convention. The Commission considers that, if a conciliation commission established in connection with a dispute is able to rely on the assistance of the Secretary-General of the United Nations and if its expenses are to be borne by the United Nations, there is no reason why such provisions should not apply in the case of a dispute which concerns rules of *jus cogens* and for which an arbitral tribunal is established.

(10) There does not seem to be any need to comment in detail on section III, paragraphs 10 to 14, of the annex, concerning the functioning of the Conciliation Commission, which are identical with the provisions of paragraphs 3 to 7 of the annex to the Vienna Convention (paras. 3-7).

Chapter III

STATE RESPONSIBILITY

A. Introduction

64. At its thirty-second session in 1980, the Commission completed its first reading of part 1 of the draft articles on the topic of State responsibility,¹⁶⁸ as recommended by the General Assembly in its resolution 34/141 of 17 December 1979.

65. The general structure of the draft was described at length in the Commission's report on its twenty-seventh session.¹⁶⁹ Under the general plan adopted by the Commission, the origin of international responsibility forms the subject of part 1 of the draft. The 35 draft articles constituting part 1, as provisionally adopted in first reading by the Commission,¹⁷⁰ are concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility.

66. The 35 articles of part 1 of the draft are contained in five chapters. Comments and observations on the provisions of all the chapters have been requested from the Governments of the Member States. The earlier comments on chapters I, II and III were the subject of comments and observations submitted to the Commission at its thirty-second session¹⁷¹ and its thirty-third session.¹⁷² Recent comments on part 1 of the draft, including those on chapters IV and V, were submitted at the present session (A/CN.4/351 and Add.1 and 2 and Add.2/Corr.1 and Add.3 and Add.3/Corr.1).¹⁷³ It is hoped that more comments will be received from the Governments of Member States before the Commission may embark on the second reading of part 1 of the draft articles.

67. Part 2 of the draft articles deals with the content, forms and degrees of international responsibility, that is to say, with determining the consequences which an internationally wrongful act of a State may have under international law in different cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction

may take). Once these two essential tasks are completed, the Commission may perhaps decide to add a part 3 concerning the "implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes.

68. The Commission commenced its consideration of part 2 of the draft at its thirty-second session in 1980, on the basis of a preliminary report¹⁷⁴ submitted by the Special Rapporteur, Mr. Willem Riphagen.

69. The preliminary report analysed in a general way the various possible new legal relationships (i.e. new rights and corresponding obligations) arising from an internationally wrongful act of a State as determined by part 1 of the draft articles. In the preliminary report, the Special Rapporteur set out three parameters for the possible new legal relationship arising from an internationally wrongful act of a State. The first parameter was the new obligations of the State whose act is internationally wrongful. The second parameter was the new right of the "injured" State, while the third parameter was the position of the "third" State in respect of the situation created by an internationally wrongful act.¹⁷⁵

70. At its thirty-third session, the Commission had before it the second report¹⁷⁶ submitted by the Special Rapporteur. In part II of that report, the Special Rapporteur proposed five draft articles on the content, forms and degrees of international responsibility. The draft articles were divided into two chapters as set out below:

CHAPTER I GENERAL PRINCIPLES

Article 1

A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.

Article 2

A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

¹⁶⁸ *Yearbook ... 1980*, vol. II (Part Two), p. 26.

¹⁶⁹ *Yearbook ... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, chap. II, paras. 38-51.

¹⁷⁰ For the texts, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

¹⁷¹ A/CN.4/328 and Add.1-4, reproduced in *Yearbook ... 1980*, vol. II (Part One), p. 87.

¹⁷² A/CN.4/342 and Add.1-4, reproduced in *Yearbook ... 1981*, vol. II (Part One).

¹⁷³ Reproduced in *Yearbook ... 1982* (Part One).

¹⁷⁴ *Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330.

¹⁷⁵ For the views expressed by the Commission, see *Yearbook ... 1980*, vol. I, pp. 73-98, 1597th to 1601st meetings.

¹⁷⁶ *Yearbook ... 1981*, vol. II (Part One), p. 79, document A/CN.4/344.

Article 3

A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.

CHAPTER II

OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 4

Without prejudice to the provisions of article 5,

1. A State which has committed an internationally wrongful act shall:

(a) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

(b) subject to article 22 of part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and

(c) re-establish the situation as it existed before the breach.

2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of approximate guarantees against repetition of the breach.

Article 5

1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State [within its jurisdiction] to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation mentioned in article 4, paragraph 1, under (c), or to act in accordance with article 4, paragraph 2.

2. However, if, in the case mentioned in paragraph 1 of the present article,

(a) the wrongful act was committed with the intent to cause direct damage to the injured State, or

(b) the remedies, referred to in article 4, paragraph 1, under (b), are not in conformity with an international obligation of the State to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2, paragraph 3 of that article shall apply.

71. The above articles were discussed by the Commission at its thirty-third session, during which several suggestions were made for possible improvements of the text.¹⁷⁷

72. It was suggested, and found generally acceptable, to start part 2 of the draft articles with an article providing for a link between the draft articles in part 1 and those to be drafted in part 2, in the form of a statement that "an internationally wrongful act of a State gives rise to obligations of that State and to rights of other States in accordance with the following articles".

73. There was considerable discussion and divergence of opinions within the Commission, on the advisability of including articles 1 to 3 in an introductory chapter of part 2. While most members felt that the ideas underlying articles 1 to 3 should be expressed at the outset as a frame for the provisions in the other chapters of part 2,

other members expressed doubts as regards the advisability of including articles of this kind in a first chapter.

74. It was suggested that articles 1 and 3 ought to be combined in one article dealing with both the obligations and the rights of the author State, the injured State and other States, and providing that those rights and obligations could be affected by a breach *only* to the extent stipulated in the other articles of part 2. In this way one could also avoid the impression, created by the wording of articles 1 and 3 as proposed, that those articles tended towards protection of the wrongdoing State.

75. As regards article 2, it was generally recognized that a specific rule or set of rules of international law establishing an international obligation could at the same time deal with the legal consequences of a breach of that obligation in a way at variance with the general rules to be embodied in the draft articles of part 2. The question was put, however, whether this should be stated at the outset or rather at some other place in the draft articles.

76. During the discussion on articles 4 and 5, several members expressed a preference for dealing with the new *obligations* of the author State arising from its internationally wrongful act, rather in terms of new *rights* of the injured State, and possibly other States, to *demand* a certain conduct of the author State after the breach occurred. While in part 1, relating to the origin of international responsibility, it was generally irrelevant towards which State or States the primary obligation existed, this question was essential in dealing with the legal consequences of a breach of such primary obligation. Obviously, such an approach would still make it necessary to spell out *which* conduct of the author State could be demanded by the injured State and, possibly, other States. Furthermore, such an approach could leave open the question whether or not the injured State (or, as the case may be, other States) should *first* demand the specified conduct of the author State before taking any other measure in response to the breach. In this respect one member expressed the opinion that any legitimate countermeasure could always be taken *in advance* of any request for *restitutio in integrum* or for reparation.

77. Doubts were also expressed in respect of article 5 as proposed. While some members did not consider that the breach of an obligation concerning the treatment to be accorded by a State to aliens entailed, within the framework of the first parameter, other legal consequences than a breach of any other international obligation, other members wondered whether the special regime of article 5 should not also apply in cases of breach of other international obligations than those mentioned in paragraph 1 of that article. The view was also expressed that article 4, subparagraph 1 (b) and article 5, subparagraph 2 (b) created the impression that the state of the *internal* law of a State influenced the extent of its obligations under international law. In this connection it was recalled that article 22 of part 1 of the

¹⁷⁷ For an account of the discussion in the Commission, see *Yearbook ... 1981*, vol. II (Part Two), pp. 143-145, paras. 145-161.

draft articles (Exhaustion of local remedies) dealt with the (non-)existence of a breach of an international obligation of result and only where that result or an equivalent result may be achieved by subsequent conduct of the State.

78. At the conclusion of the debate, the Commission decided to send articles 1 to 5 to the Drafting Committee, which did not, however, have the time to consider them during the session.

B. Consideration of the topic at the present session

79. At the present session, the Commission had before it the third report (A/CN.4/354 and Corr.1 and Add.1 and 2)¹⁷⁸ submitted by the Special Rapporteur. In the report, the Special Rapporteur recalled that the Commission had already in 1976 recognized that contemporary international law contains a multitude of different regimes of State responsibility.

80. The report noted the link between "primary" rules imposing obligations, "secondary" rules dealing with the determination of the existence of an internationally wrongful act and of its legal consequences, and the rules concerning the implementation of State responsibility; the three parts of rules together form a "sub-system" of international law for each particular field of relationship between States.

81. The report also indicated that the source (general customary law, multilateral treaties, bilateral treaties, decisions of international organizations, judgements of international tribunals, etc.), the content, and the object and purpose of an obligation cannot but influence the legal consequences entailed by its breach ("qualitative proportionality").

82. Furthermore, the report recalled that within each field of relationship between States, the circumstances of each individual case in which an internationally wrongful act had been committed must be relevant for the response which it should find ("quantitative proportionality"). In this connection, reference is made to "aggravating" and "extenuating" circumstances and, more generally, to the requirement of a degree of equivalence between the actual effect of the internationally wrongful act and the actual effects of the legal consequences thereof.

83. The necessity was stressed to provide, in the total set of draft articles on State responsibility, for a general clause on a procedure of settlement of disputes relating to the *interpretation* of those articles.

84. After a revision of the draft articles presented in the second report, the third report analysed various "sub-systems" of international law and their interrelationship. On the basis of this analysis a catalogue of legal consequences was discussed. A distinction was made between "self-enforcement by the author State", "enforcement by the injured State" and "international enforcement" (the three parameters). In this connection, the notion of "injured" State was analysed, as

well as the "scale of gravity" of the various legal consequences within each parameter.

85. As to the link between an internationally wrongful act and its legal consequences, it was noted that in the process of international law, from the formation of its rules to their enforcement, "State responsibility" is only one phase and has to take into account the earlier and later phases of this process. In view of the great variety of situations, it was suggested that part 2 cannot contain an exhaustive set of rules, but should concentrate on a number of cases in which one or more legal consequences mentioned in the catalogue are temporarily or definitely excluded, and cases in which the failure of a "sub-system", as a whole, may entail a shift to another "sub-system".

86. The third report, taking into account the views expressed on the second report (see paras. 72-77 above), presented six draft articles for inclusion in part 2, as follows:

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

Article 6

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

- (a) not to recognize as legal the situation created by such act; and
- (b) not to render aid or assistance to the author State in maintaining the situation created by such act; and
- (c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b).

2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

¹⁷⁸ Reproduced in *Yearbook ... 1982*, vol. II (Part One).

3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

87. Article 1 merely serves to lay a formal link between the draft articles in part 1 and those to be drafted in part 2. Article 2 enunciates the requirement of "quantitative proportionality". Article 3 relates to the residual character of the rules of part 2 other than articles 4, 5 and 6 ("the peremptory sub-systems"). Article 4 deals with *jus cogens*, article 5 with the United Nations system and article 6 with international crimes.

88. During the discussion of the third report, from the 1731st to the 1734th meetings, from 21 to 24 June 1982, and the 1736th to 1738th meetings, from 29 June to 1 July 1982, most members of the Commission also referred to articles 1 to 3 as proposed in the second report.

89. It appeared from the discussions that there was general support for the idea that a number of framework-articles would be useful; that a catalogue of the legal consequences of an internationally wrongful act should be drawn up; that consideration should be given to circumstances in which some legal consequences might be precluded and that a part 3 on implementation should be included in the draft articles.

90. As to the framework-articles proposed in the *second* report (arts. 1 to 3) and in the *third* report (arts. 1 to 6), diverging opinions were expressed.

91. The question was raised whether or not "self-defence" could be considered to fall within the scope of the legal consequences of an internationally wrongful act and, if so, whether the Commission should try to define in more detail under what circumstances "self-defence" could be invoked, and try to indicate the limitations international law set to measures taken in self-defence.

92. While some members were in favour of such a course, some other members emphasized that it was *not* the task of the Commission to interpret the provisions of the United Nations Charter in this field and that, at any rate, "self defence" fell outside the scope of the topic of State responsibility, being a primary right. Still other members felt that it was the Commission's task to emphasize the peaceful settlement of disputes rather than to elaborate on the case where such methods fail to bring about a solution of the conflict.

93. Article 1 as proposed in the third report received considerable criticism. Though recognizing that the article, as now proposed, resulted from an initiative of the Commission itself during its previous session and was meant merely to indicate the transition from part 1 to part 2 of the draft articles, some members felt that, *as such*, it could be dispensed with. Other members, favouring the retention of an article 1, thought that it should rather express a *rule* and, as such, should be drafted in an exhaustive manner. In this connection it was remarked that an internationally wrongful act could

also entail *obligations* of States other than the author State and that a general reference to "other rules of international law" would be appropriate in this context.

94. On the other hand, several members expressed the view that the idea underlying articles 1 and 3 as proposed in the *second* report should be retained in some form or another. They considered it useful to underline at the outset both the persistence of the obligation, notwithstanding its breach, and the consideration that an internationally wrongful act committed by a State did not deprive that State of *all* its rights under international law. One member, however, felt that article 1 as proposed in the second report was contrary to logic itself, since the breach of an obligation was, in essence, an irreversible act.

95. Most members felt that article 3 as proposed in the third report should immediately follow article 1. There was general agreement that the residual character of the rules to be embodied in part 2 should be stated at the outset. Some members expressed the view that article 3 should not weaken the importance of those rules by giving the impression that every "other rule of international law" could be considered to deviate therefrom. On the other hand, some other members advocated a greater flexibility in article 3 by using less stringent terms than "to the extent that" and "are prescribed".

96. Article 2 as proposed in the third report, relating to the notion of "proportionality", raised several doubts though the validity of the principle as such was not questioned. It was remarked that to define and ensure "proportionality" was primarily a task for the legislator. The fear was expressed that in the absence of a competent international court or tribunal, States would unilaterally judge the issue of "proportionality", thereby possibly undermining the effect of any rule of international law which determined the legal consequences to be attached to specific internationally wrongful acts. It was also remarked that the principle of "proportionality" should not exclude *effective* measures to counter internationally wrongful acts.

97. Several members, on the other hand, considered the principle of "proportionality" a key principle and advocated a stronger language in the drafting of article 3. In particular, one member wished that article to avoid giving the impression that some extent of disproportionality was justified.

98. With regard to article 4, it was remarked that this article, as well as article 5, was more in the nature of a safeguard clause and as such should find its place rather at the end of part 2.

99. Though the tenor of article 5 was generally accepted, some members raised the question whether the relationship between the provisions and procedures embodied in the United Nations Charter, on the one hand, and the rights entailed for the injured State by an internationally wrongful act, on the other, should not be further elaborated in the draft articles.

100. With respect to article 6, the view was expressed that the legal consequences of an international crime could better be treated in a separate chapter which could then *exhaustively* deal with *all* the legal consequences of such a crime, instead of mentioning only the one, however important, aspect of the obligation of *every* other State.

101. Some members felt that, even if article 6, as referring to the *obligations* of every other State than the author State, could only mention the *minimum* response, more positive obligations should be provided for. Other members reserved their positions as regards the content of the obligations provided for in paragraph 1 of article 6.

102. Some members expressed doubts as to the efficacy of the obligations provided for in article 6 in countering international crimes, in particular in view of the weakness of the institutional framework referred to in paragraph 2 of the article.

103. At the end of the debate the Commission decided to refer articles 1 to 6, as proposed in the third report, and to confirm the referral of articles 1 to 3, as proposed in the second report (see para. 78 above), to the Drafting Committee, on the understanding that the latter would prepare framework provisions and consider whether an article along the lines of the new article 6 should have a place in those provisions.

Chapter IV

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

104. The topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" was included in the current programme of work of the Commission at its thirtieth session in 1978. At that session, the Commission established a Working Group to consider the future work of the topic; it also appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.¹⁷⁹ The General Assembly at its thirty-fourth session requested the Commission, by paragraph 5 of resolution 34/141 of 17 December 1979, to continue its work on the remaining topics of its current programme of work, among them being the present topic.

105. At its thirty-second session, in 1980, the Commission examined the preliminary report¹⁸⁰ which the Special Rapporteur had submitted on the subject. A summary of that debate was set out in the relevant section of its report on that session.¹⁸¹

106. The second report of the Special Rapporteur,¹⁸² submitted to the Commission at its thirty-third session in 1981, was the subject of a debate which was summarized in the report on the work of that session.¹⁸³

107. The General Assembly, by paragraph 3 (b) of resolution 36/114 of 10 December 1981, recommended that, taking into account views expressed in the debate in the Assembly, the Commission should continue its work aimed at the preparation of draft articles.

B. Consideration of the topic at the present session

108. The Commission at its present session had before it the third report submitted by the Special Rapporteur (A/CN.4/360)¹⁸⁴ containing two chapters, the second of which introduced and set out a schematic outline of the

topic. The first chapter traced the relationship between the schematic outline and principles that had been identified, and had gained majority support, in earlier debates both in the Commission and in the Sixth Committee of the General Assembly. As the Commission had agreed at its previous session,¹⁸⁵ the main focus of attention would now be upon the inner content of the topic, rather than upon the question of its scope and relationship with the topic of State responsibility for wrongful acts.

109. The third report was considered by the Commission at its 1735th and 1739th meetings, on 28 June and 5 July 1982, and its 1741st to 1744th meetings, from 7 to 12 July 1982. The discussion concentrated upon the schematic outline presented by the Special Rapporteur and upon the future of the topic. The text of the schematic outline was as follows:

SCHEMATIC OUTLINE

SECTION 1

I. Scope

Activities within the territory or control of a State which give rise or may give rise to loss or injury to persons or things within the territory or control of another State.

[Notes: (1) It is a matter for later review whether this provision needs to be supplemented or adapted, when the operative provisions have been drafted and considered in relation to matters other than losses or injuries arising out of the physical use of the environment.

(2) Compare this provision, in particular, with the provision contained in section 4, article 1.]

2. Definitions

(a) "Acting State" and "affected State" have meanings corresponding to the terms of the provision describing the scope.

(b) "Activity" includes any human activity.

[Note: Should 'activity' also include a lack of activity to remove a natural danger which gives rise or may give rise to loss or injury to another State?]

(c) "Loss or injury" means any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State.

(d) "Territory or control" includes, in relation to places not within the territory of the acting State,

(i) any activity which takes place within the substantial control of that State; and

(ii) any activity conducted on ships or aircraft of the acting State, or by nationals of the acting State, and not within the territory

¹⁷⁹ For the historical review of the work of the Commission on the topic up to 1981, see *Yearbook ... 1978*, vol. II (Part Two), pp. 149-152, paras. 170-178; *Yearbook ... 1980*, vol. II (Part Two), pp. 158-161, paras. 123-144; *Yearbook ... 1981*, vol. II (Part Two), pp. 146 *et seq.*, paras. 162-194.

¹⁸⁰ *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2.

¹⁸¹ *Yearbook ... 1980*, vol. II (Part Two), pp. 158-161, paras. 131-144.

¹⁸² *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2.

¹⁸³ *Yearbook ... 1981*, vol. II (Part Two), pp. 146-152, paras. 165-199.

¹⁸⁴ Reproduced in *Yearbook ... 1982*, vol. II (Part One).

¹⁸⁵ *Yearbook ... 1981*, vol. II (Part Two), p. 151, para. 195.

or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or an aircraft in authorized overflight.

3. Saving

Nothing contained in these articles shall affect any right or obligation arising independently of these articles.

SECTION 2

1. When an activity taking place within its territory or control gives or may give rise to loss or injury to persons or things within the territory or control of another State, the acting State has a duty to provide the affected State with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable and the remedial measures it proposes.

2. When a State has reason to believe that persons or things within its territory or control are being or may be subjected to loss or injury by an activity taking place within the territory or control of another State, the affected State may so inform the acting State, giving as far as its means of knowledge will permit, a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable; and the acting State has thereupon a duty to provide all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable; and the acting State has thereupon a duty to provide all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.

3. If, for reasons of national or industrial security, the acting State considers it necessary to withhold any relevant information that would otherwise be available, it must inform the affected State that information is being withheld. In any case, reasons of national or industrial security cannot justify a failure to give an affected State a clear indication of the kinds and degrees of loss or injury to which persons and things within the territory or control of that affected State are being or may be subjected; and the affected State is not obliged to rely upon assurances which it has no sufficient means of knowledge to verify.

4. If not satisfied that the measures being taken in relation to the loss or injury foreseen are sufficient to safeguard persons and things within its territory or control, the affected State may propose to the acting State that fact-finding be undertaken.

5. The acting State may itself propose that fact-finding be undertaken; and when such a proposal is made by the affected State, the acting State has a duty to co-operate in good faith to reach agreement with the affected State upon the arrangements for and terms of reference of the inquiry, and upon the establishment of the fact-finding machinery. Both States shall furnish the inquiry with all relevant and available information.

6. Unless the States concerned otherwise agree,

(a) there should be joint fact-finding machinery, with reliance upon experts, to gather relevant information, assess its implications and, to the extent possible, recommend solutions;

(b) the report should be advisory, not binding the States concerned.

7. The acting State and the affected State shall contribute to the costs of the fact-finding machinery on an equitable basis.

8. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.

SECTION 3

1. If (a) it does not prove possible within a reasonable time either to agree upon the establishment and terms of reference of fact-finding machinery or for the fact-finding machinery to complete its terms of

reference; or (b) any State concerned is not satisfied with the findings, or believes that other matters should be taken into consideration; or (c) the report of the fact-finding machinery so recommends, the States concerned have a duty to enter into negotiations at the request of any one of them with a view to determining whether a regime is necessary and what form it should take.

2. Unless the States concerned otherwise agree, the negotiations shall apply the principles set out in section 5; shall also take into account, as far as applicable, any relevant factor including those set out in section 6; and may be guided by reference to any of the matters set out in section 7.

3. Any agreement concluded pursuant to the negotiations shall, in accordance with its terms, satisfy the rights and obligations of the States parties under the present articles; it may also stipulate the extent to which these rights and obligations replace any other rights and obligations of the parties.

4. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take or continue whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.

SECTION 4

1. If any activity does give rise to loss or injury, and the rights and obligations of the acting and affected States under the present articles in respect of any such loss or injury have not been specified in an agreement between those States, those rights and obligations shall be determined in accordance with the provisions of this section. The States concerned shall negotiate in good faith to achieve this purpose.

2. Reparation shall be made by the acting State to the affected State in respect of any such loss or injury, unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States.

3. The reparation due to the affected State under the preceding article shall be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5; and account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchanges or negotiations between them and to the remedial measures taken by the acting State to safeguard the interests of the affected State. Account may also be taken of any relevant factors including those set out in section 6, and guidance may be obtained by reference to any of the matters set out in section 7.

4. In the two preceding articles, "shared expectations" include shared expectations which:

(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community.

SECTION 5

1. The aim and purpose of the present articles is to ensure to acting States as much freedom of choice, in relation to activities within their territory or control, as is compatible with adequate protection for the interests of affected States.

2. Adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation; but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability.

3. In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity, and standards of protection

should take into account the means at the disposal of the acting State and the standards applied in the affected State and in regional and international practice.

4. To the extent that an acting State has not made available to an affected State information that is more accessible to the acting State concerning the nature and effects of an activity, and the means of verifying and assessing that information, the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury.

SECTION 6

Factors which may be relevant to a balancing of interests include:

1. The degree of probability of loss or injury (i.e. how likely is it to happen?);
2. The seriousness of loss or injury (i.e. an assessment of quantum and degree of severity in terms of the consequences);
3. The probable cumulative effect of losses or injuries of the kind in question—in terms of conditions of life and security of the affected State, and more generally—if reliance is placed upon measures to ensure the provision of reparation rather than prevention (i.e. the acceptable mix between prevention and reparation);
4. The existence of means to prevent loss or injury, having regard to the highest known state of the art of carrying on the activity;
5. The feasibility of carrying on the activity by alternative means or in alternative places;
6. The importance of the activity to the acting State (i.e. how necessary is it to continue or undertake the activity, taking account of economic, social, security or other interests?);
7. The economic viability of the activity considered in relation to the cost of possible means of protection;
8. The availability of alternative activities;
9. The physical and technical capacities of the acting States (considered, for example, in relation to its ability to take measures of prevention or make reparation or to undertake alternative activities);
10. The way in which existing standards of protection compare with:
 - (a) the standards applied by the affected State; and
 - (b) the standards applied in regional and international practice;
11. The extent to which the acting State:
 - (a) has effective control over the activity; and
 - (b) obtains a real benefit from the activity;
12. The extent to which the affected State shares in the benefits of the activity;
13. The extent to which the adverse effects arise from or affect the use of a shared resource;
14. The extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury, or of maximizing its benefits from the activity;
15. The extent to which the interests of:
 - (a) the affected State, and
 - (b) the acting State
 are compatible with the interests of the general community;
16. The extent to which assistance to the acting State is available from third States or from international organizations;
17. The applicability of relevant principles and rules of international law.

SECTION 7

Matters which may be relevant in negotiations concerning prevention and reparation include:

1. *Fact-finding and prevention*

1. The identification of adverse effects and of material and non-material loss or injury to which they may give rise;

2. The establishment of procedural means for managing the activity and monitoring its effects;

3. The establishment of requirements concerning the structure and operation of the activity;

4. The taking of measures to assist the affected State in minimizing loss or injury.

II. *Compensation as a means of reparation*

1. A decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others;

2. A decision as to whether liability should be unlimited or limited;

3. The choice of a forum in which to determine the existence of liability and the amounts of compensation payable;

4. The establishment of procedures for the presentation of claims;

5. The identification of compensable loss or injury;

6. The test of the measure of compensation for loss or injury;

7. The establishment of forms and modalities for the payment of compensation awarded;

8. Consideration of the circumstances which might increase or diminish liability or provide an exoneration from it.

III. *Authorities competent to make decisions concerning fact-finding, prevention and compensation*

At different phases of the negotiations the States concerned may find it helpful to place in the hands of their national authorities or courts, international organizations or specially constituted commissions, the responsibility for making recommendations or taking decisions as to the matters referred to in I and II above.

SECTION 8

Settlement of disputes (taking due account of recently concluded multilateral treaties that provide such measures).

1. SALIENT FEATURES OF THE THIRD REPORT AND SCHEMATIC OUTLINE

(a) *Scope*

110. The Special Rapporteur noted that, in presenting a schematic outline, he had responded to suggestions made during the General Assembly's thirty-sixth session in the course of the Sixth Committee's discussion of the Commission's previous report on the present topic. He emphasized that the outline was not a substitute for proof of any of the propositions it contained: each element must later be tested by reference to materials on State practice, which the Codification Division of the Office of Legal Affairs had already made good progress in assembling. These would be sufficiently complete to be utilized and annotated in future reports; and even now they had greatly helped the Special Rapporteur to settle the headings in sections 6 and 7 of the schematic outline. Although no firm conclusions could be drawn before the evidence of State practice had been addressed, discussion of the schematic outline could influence the final result of the Commission's work by setting a pattern of inquiry. It was especially important that the elements of the scheme should be evaluated, not in isolation, but in relation to each other as parts of a balanced whole.

111. The Special Rapporteur also recalled that a great deal of the past discussion of the topic had been concerned with questions of scope, and that he had himself twice suggested ways in which the scope of the topic could be provisionally limited.¹⁸⁶ On each occasion, the predominant view in the Commission and also in the Sixth Committee had been opposed to such a limitation, upon the ground that neither scope nor content should be predetermined until both had been explored. It had, however, been recognized that at present the evidence of State practice would almost all be found in areas that directly concern the use made of the physical environment—a description by no means confined to ecological questions. Accordingly, the Special Rapporteur was under directions to develop principles of unlimited generality, while drawing his materials from the areas in which they were available.

112. Thus, in section 1 of the schematic outline—as in all previous discussions of the topic—scope extends to any activity within the territory or control of one State which may give rise to loss or injury to persons or things within the territory or control of another State. This description is not limited to situations in which there is an element of shared management—a feature that may, for example, be present in some regimes concerned with pollution, but is certainly not present in such situations as damage caused by a space object outside the territory of the launching State. The one substantial limitation—and this has never been disputed—is contained in the “transboundary” concept: the loss or injury, and the activity that gives rise to it, must not occur within the territory or control of the same State. It is suggested that ships in innocent passage and aircraft in authorized overflight be treated as “transboundary” situations.

113. On the other hand, there is an important new element in the scope clause of section 1, and the accompanying definition of “territory or control”. It is envisaged that, exceptionally, an activity taking place within the territory of one State may remain within the substantial control of another State. This might, for example, be the case where one country agrees to assume responsibility for the safe operation of a ship as a condition of the ship’s entry into a foreign port. In earlier discussions, both in the Commission and in the Sixth Committee, it has been stressed that developing States may lack the technology and scientific skills adequately to regulate industries of foreign origin, which often operate for the benefit of foreign owners. The concept of “substantial control” has been introduced to meet such special situations; but it has not yet been fully developed. It is hoped that, with the co-operation of Governments, the Codification Division may be able to collect materials relevant to these situations, including agreements made with foreign corporations whether by Governments or by subordinate territorial authorities.

¹⁸⁶ See *Yearbook ... 1980*, vol. II (Part Two), p. 160, and *Yearbook ... 1981*, vol. II (Part Two), p. 150, paras. 189 *et seq.*

(b) Content

114. In outlining the content of the topic, reliance had been placed upon three propositions which had been tested and endorsed in earlier discussions, both in the Commission and in the Sixth Committee. The first was that the present topic did not in any way modify the rules of State responsibility for wrongfulness. It concerned the elaboration of “primary” rules of great generality to form an “umbrella” or framework treaty—an instrument which would encourage the conclusion of more limited agreements to regulate particular dangers, as well as to provide residual rules to govern reparation for a loss or injury not fully covered by any existing regime.¹⁸⁷

115. The second of the three established propositions has already been foreshadowed in the preceding sentence. In elaborating draft articles, pride of place would be given to the duty to avoid or minimize injury, rather than to the substituted duty to provide reparation for injury caused.¹⁸⁸ There could therefore be no implication that rules developed pursuant to this topic would set a tariff for conduct that caused transnational losses or injuries. On the contrary, the manner of conducting an activity that gave rise to such a loss or injury might well affect the extent of the duty of reparation for the loss or injury that actually occurred.

116. Thirdly, the present topic owed its existence to the fact that, in modern conditions, it was neither possible to prohibit useful activities that might give rise to transboundary loss or injury, nor to allow such activities to proceed without regard to their effect upon conditions of life in other countries. The balance of interest test¹⁸⁹ reflected in principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration) was an expression of that situation.¹⁹⁰ It could not be applied mechanically, yielding an automatic measure of reparation for loss or injury sustained; it could be articulated only in terms of a distribution of costs and benefits, as an aid to interested States in pursuance of their duty to negotiate in good faith, either to establish a regime to minimize and regulate dangers, or to arrive at just reparation for a loss or injury attributable to an activity that had not been regulated.

117. From these simple ingredients, the schematic outline had been constructed. Sections 2, 3 and 4 represented successive stages in the regulation of a danger—section 2 entailing minimal commitment by the interested States as they sought to determine the ex-

¹⁸⁷ See *Yearbook ... 1980* vol. II (Part Two), pp. 159-160, paras. 133 and 138; and *Yearbook ... 1981*, vol. II (Part Two), p. 147, paras. 170-171.

¹⁸⁸ See *Yearbook ... 1980*, vol. II (Part Two), p. 160, para. 137; and *Yearbook ... 1981*, vol. II (Part Two), p. 147, paras. 172-173.

¹⁸⁹ See *Yearbook ... 1980*, vol. II (Part Two), pp. 159-160, paras. 135-136; and *Yearbook ... 1981*, vol. II (Part Two), p. 148, paras. 175 *et seq.*

¹⁹⁰ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part. I, chap. I.

istence and degree of a risk of transboundary loss or injury; section 3 encompassing the duty of direct negotiation, with a view to minimizing the danger and making advance provision for any case in which loss or injury nevertheless ensues; section 4 concerning the negotiation to determine reparation, when loss or injury has actually occurred and there is no established regime by which the duty of reparation could be measured. Only when loss or injury had occurred, and the obligation to make appropriate reparation had been neglected, would State responsibility for wrongfulness be engaged.

118. Section 5 set out the principles which would govern both the duty to avoid or minimize loss or injury, and the ultimate obligation to provide appropriate reparation if loss or injury occurred and there were no applicable regime. Section 6 drew upon the richness of the treaty practice of States to suggest factors that the parties might select in their effort to achieve an equilibrium of costs and benefits. Similarly section 7 drew attention to a wide variety of tests and procedures that States had found useful, and might find useful again, as catalysts in the resolution of differences. Section 8 envisaged an obligation to settle disputes arising from a failure to agree upon appropriate reparation if an activity had given rise to a transboundary loss or injury.

119. Only a few other features of the content of the schematic outline might call for initial comment. One was the test of "shared expectations" in paragraph 4 of section 4. The Special Rapporteur explained that in sections 2 and 3 no such test was envisaged: interested States were entirely free to construct their own regimes, both to provide safeguards against loss or injury and to provide a scheme of reparation if loss or injury were nevertheless to occur. If, however, the parties had not succeeded in establishing such a regime, section 4 would in effect require a reconstruction of their respective positions to determine the question of entitlement to reparation for a loss or injury that had actually occurred. So, for example, the parties to the ECE Convention on Long-range Transboundary Air Pollution¹⁹¹ were under no restriction in negotiating the regime established by that treaty; but, if any question of reparation for loss or injury should arise between parties to that treaty, they would be bound by the shared expectation expressed in a footnote to that treaty, stipulating that the treaty did not affect any question of liability.¹⁹² Accordingly, no claim could be based on the provisions of the treaty.

120. In short, a key to an understanding of the schematic outline lay in recognizing that all of its provisions were mutually supporting and that none of these provisions was free-standing. The duty to provide safeguards against loss or injury, and a scheme of reparation for any loss or injury that was not avoided, could not be expressed absolutely: it was a duty to which the States concerned would give effect in their discre-

tion, bearing in mind the duty to provide appropriate reparation if any loss or injury did ensue. Conversely, if no regime of reparation had been provided for a loss or injury that actually occurred, the negotiation to determine the content of an obligation to provide reparation would take into account the whole of the preceding circumstances. Subject to any agreement among the States concerned, the State within whose territory or control an activity took place would always have a duty to justify its own conduct by taking whatever remedial measures it considered necessary and feasible to safeguard the interests of other States and their citizens.

121. Finally, the rules foreshadowed in the schematic outline were without prejudice to any other rights or obligations binding upon the parties. If any loss or injury was attributable to the wrongful act of a State, the responsibility of that State could of course be invoked. Moreover, rules articulated in pursuance of the present topic would achieve their purpose if, in any given context, they caused the interested States to resolve the issue of balancing their respective interests by establishing a precise regime crystallizing their rights and obligations. Yet, if that had not been done, and if the question of wrongfulness were in dispute, rules made in pursuance of the present topic might offer the only escape from deadlock. Under these rules there would be no prior question of wrongfulness or non-wrongfulness. The duty to seek a principled solution to the question of reparation would arise from the fact that a loss or injury which actually occurred had a transboundary origin. It was submitted that such rules would closely reflect the actual practice of friendly States which disagreed about the incidence or existence of a rule determining the wrongfulness of an action.¹⁹³

(c) *Attribution and strict liability*

122. In his previous report, the Special Rapporteur had emphasized a duty of care on the part of a State within whose territory or control an activity gave rise to a risk of transboundary loss or injury.¹⁹⁴ This description had evoked strong support, both in the Commission¹⁹⁵ and in the Sixth Committee, because it showed that the present topic was founded in the classical conception of the ambit of State responsibility for wrongful acts. The description had, however, also caused misunderstanding because, in the context of the present topic, the duty of care did not imply an obligation to prohibit any conduct that might give rise to loss or injury to other States or their citizens: it implied only the duties, reviewed in the preceding paragraphs of this report, to take due account of the interests of other States.

123. In the present report the Special Rapporteur had tried to avoid this source of confusion, by stressing in-

¹⁹³ See *Yearbook ... 1981*, vol. II (Part Two), pp. 146-147, paras. 167-168.

¹⁹⁴ *Ibid.*, pp. 147-148, paras. 172-174.

¹⁹⁵ One member of the Commission was of the opinion that the "duty of care" did not exist in contemporary international law.

¹⁹¹ Convention signed at Geneva on 13 November 1979 within the framework of the ECE (ECE/HLM.1/2, annex 1).

¹⁹² Footnote pertaining to art. 8, subpara. (f), of the Convention.

stead the test of foreseeability. The message was the same. By far the larger part of the obligations with which the present topic would deal fell squarely within the classical concept of a responsibility of the State commensurate with means of knowledge. Whenever there were communications between Governments about a possible danger, and whenever there was an activity that required regulation under the normal procedures of the territorial State, that State was put upon notice and had a duty to assess the risks entailed.

124. Moreover, it was well-accepted in State practice, especially in relation to activities known to be hazardous, that the obligation to avoid, minimize and provide reparation for loss or injury could not be evaded merely because the occurrence of a particular accident would always be unpredictable. That element of unpredictability might in some circumstances preclude State responsibility for wrongfulness, even though the State itself was the actor; but within the context of the present topic, it was sufficient that a risk of accident was foreseeable. Within these parameters there was no need to call upon any exceptional principle to establish the obligations of the State. Even a regime of strict liability, when the States concerned chose to employ such a regime, was no more than a substitute for a requisite safeguard—and, more often than not, a regime of strict liability was also a regime of limited liability.

125. Yet, as all the writers on this topic have agreed, there is a final point at which the ordinary principles of State responsibility for wrongful acts cannot explain a duty to make good a loss. In his second report, the Special Rapporteur suggested that this limiting situation—the true case of an accident or hidden damage that was neither specifically nor generically predictable—might for the moment be set aside, so that nothing would obscure the doctrinal orthodoxy of rules made pursuant to the present topic. In the Sixth Committee, however, a number of representatives thought that this approach was unnecessarily conservative. Their position was summed up in the statement that the duty of care should be developed and extended, but that some recourse to the principle of causality was necessary and acceptable. Upon reflection, the Special Rapporteur had acted upon that advice, abandoning the specially reserved category of losses or injuries that no one could foresee.

126. Even so, the very small element of pure causality that supplements the duty to minimize and repair foreseeable loss or injury goes only to the question of the existence of an obligation of reparation. The quantum of that obligation is not fixed upon any scale of strict liability: it is determined always, subject to any relevant shared expectations, by reference to foreseeability—if applicable—and to the distribution of costs and benefits. In the final analysis, therefore, the only automatic commitment of States in relation to the rules proposed is to admit in principle an obligation to give due weight to the interests and representations of other States in regard to activities that may injure those States or their citizens, and an obligation to make good

any loss or injury suffered, subject to the equities of the distribution of costs and benefits.

127. In the submission of the Special Rapporteur, the strength of the proposed rules lay in their persuasiveness, not in their compulsiveness. There was a steady emphasis upon the need to co-operate—setting aside, if necessary, a dispute about the lawfulness or unlawfulness of one State's conduct in permitting an activity that injured another State. In the residual cases in which the rules relating to reparation were engaged, the expectation of a just solution would depend on the reason of the thing—a danger that proved to have been underestimated, a precaution that failed, a freak accident the cost of which could more fairly be borne by the activity than by the victim; in these and other situations one might hope for prompt acceptance that reparation should be substantial.

128. It was, however, even more important to inculcate the habit of joint action, according to reasonably well-defined but flexible procedures, to forestall danger—or at the least to reinsure against it. Existing treaty regimes show that when States assume in this way an obligation to account internationally for the conduct of enterprises within their territory or control, they pass on the substance of the obligation to the enterprise concerned. More often than not, they also employ municipal courts and agencies to determine the validity of claims and to provide the reparation due. If the guarantees of objectivity are acceptable to the States concerned, there is everything to be said for procedures that avoid excessive dependence upon the diplomatic channel.

2. THE COMMISSION'S DISCUSSION

(a) *The "make-or-break" questions*

129. Without prejudice to their views on substance, the Commission members welcomed the opportunity to consider the schematic outline presented by the Special Rapporteur. Almost all members present at any stage of the Commission's discussion of the topic intervened in the debate. There were many searching criticisms and constructive suggestions about specific aspects of the schematic outline; these are mentioned under the subheading (b) below. In addition, a number of speakers considered what the future of the topic might be, and what final form the Commission's work on the topic might take. It is with these "make-or-break" questions that the present account can best begin.

130. As in other years, most of the Commission members who spoke were in favour of proceeding with the topic on the lines developed in the Special Rapporteur's three reports; there was a general willingness to regard the schematic outline as a basis for that development. Indeed, as one member remarked, there was a certain danger of the Commission doing its work twice, and reaching premature decisions on the basis of the schematic outline before the evidence of State practice had begun to be evaluated. There was particularly

strong support from many members for the retention and strengthening of the provisions dealing with prevention—using that term, not as a synonym for prohibition, but as a reference to the duty to avoid or minimize the risk of loss or injury. There was also a majority in favour of establishing an ultimate obligation to provide reparation, while a few members expressed an opposite view. Several members did, however, raise questions about how far activities carried out by private persons and having injurious transboundary consequences could be attributed to the acting State.

131. As in other years, there were also some Commission members who were wholly opposed to the course of development that was contemplated. In the view of one member, the topic was entirely artificial, lacking any foundation in general international law. Another member, declaring that States had a right to do anything which was not prohibited by international law, suggested that the time had come to call a halt to the consideration of this topic. A third member took the quite different view that the only proper subject-matter of the present topic was the duty of reparation, that this duty followed from the occurrence of loss or injury, and that it should be articulated in the context of the topic of State responsibility for wrongful acts. A fourth member inclined to the same view, believing that the proper scope of the present topic was more or less limited to cases in which rules of wrongfulness could not be invoked.

132. A less emphasized, but more broadly based, divergence of objectives ran through the whole of the debate. A number of members were anxious that the open structure of the schematic outline, with its emphasis upon freedom to negotiate and suspension of all judgmental factors until a final failure to provide reparation for loss or injury, was no sufficient guarantee of redress. Some would have liked to see a larger element of causality—reparation as the automatic consequence of loss or injury—at least in the areas of high technological hazard. At the other end of the spectrum, some members were concerned with reducing such elements of firm obligation as the schematic outline might contain. One member considered that there was not enough State practice to warrant the elaboration of anything more definite than guidelines. Another member wondered how far one could build on emerging norms without specific agreement. Some members endorsed the concept of a framework or guideline treaty—a treaty that would encourage the conclusion of other treaties, each dealing definitively with a specific hazard. Several members noted that this was exactly the concept embodied in the schematic outline; but several others were disposed to think that the Commission's final product should itself be in the form of guidelines.

133. Behind these wide divergences of standpoint lay the unsettled question of scope (see paras. 110-113 above). A number of speakers noted that, because the materials for the present topic had been found in areas relating to the use of the physical environment, the fac-

tors listed in section 6 of the schematic outline and the other matters relevant to negotiation listed in section 7 could not readily be applied outside the areas from which they were drawn. Some members went further, observing that the principles in section 5 and the procedural provisions of sections 2, 3 and 4 would give little guidance in negotiations about matters which did not concern the physical use of the environment. There was no disagreement with that point of view, and it was not suggested that the schematic outline could be enlarged to cater for different classes of case.

134. On the other hand, it had been agreed that ideas of scope and of content must be developed in relation to each other.¹⁹⁶ Now that there was an outline of content, attention returned to the question of scope, and many of the issues raised in earlier debates were raised again. The Special Rapporteur was asked, for example, whether losses caused by a State's devaluation of its currency could be brought within the definition of scope. Reflecting similar concerns, some Commission members thought it necessary to limit the scope of the item to damages arising out of the physical use of the environment, as had originally been proposed; several variants upon that definition were suggested.

135. The Special Rapporteur recalled the discussion during the Commission's thirty-third session.¹⁹⁷ In his view, the present topic, being of an auxiliary and largely procedural nature, could only operate in areas in which there were identifiable norms. States entered into regimes to regulate activities capable of giving rise to transboundary loss or injury because they recognized that a total disregard for harm caused to other States by such uses of the physical environment would be wrongful. The present topic was of interest to those concerned with the development of international economic law because norms that might emerge in that area were likely to embody a balance of interest test. It was no doubt true that rules based upon State practice in the field of the physical environment would not be freely transferable to the very different field of economic law, though such rules might have precedential value.

136. A question was also raised whether rules of the kind foreshadowed in the schematic outline might actually retard the maturation of nascent norms of wrongfulness. The Special Rapporteur, again referring to last year's debate in the Commission, recalled that rules relating to acts not prohibited never precluded an appeal to existing rules of wrongfulness. Indeed, rules of wrongfulness embodying a balance of interest test could hardly be articulated without recourse to auxiliary rules of the kind dealt with in the present topic. There was wide agreement that there would always be activities which, though dangerous, were too important to the international community to be outlawed. If rules made under the present topic could achieve their primary purpose of assisting the establishment of treaty regimes to regulate such activities, they would

¹⁹⁶ *Yearbook ... 1981*, vol. II (Part Two), pp. 149-150, para. 184.

¹⁹⁷ *Ibid.*, pp. 150-151, paras. 189-194.

automatically give way to the rules of wrongfulness contained in those regimes.

137. A rather similar question arose in another way. A number of Commission members considered that, when activities of an ultra-hazardous nature gave rise to transboundary loss or injury, the principle of causality—or strict liability—should provide automatic reparation. Some were inclined to assimilate that kind of obligation to obligations arising from wrongfulness; but the question of characterization is not ultimately important. It was noted that, if the States concerned have the will to make such a rule, whether in a wide or narrow context, it can be done—as was done in the case of the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972.¹⁹⁸ Meanwhile, as one Commission member pointed out, the schematic outline did envisage a rule of automatic answerability. Several members noted that this rule needed the support of a clearly stated principle that protection should be commensurate with the nature of the activity or the risk.

138. The need for an element of flexibility was also underlined by Commission members who spoke of the difficulties that face developing countries, both in obtaining the skills needed to evaluate complex technological issues and in assuming responsibility for the activities in their territory of multinational and other foreign corporations. Earlier in this report (para. 113), it was explained that the concept of “control” could be refined to take into account situations in which control of an activity was shared between a sending and a receiving State. Care must also be taken to state rules and principles in ways that have regard to the factual circumstances of countries in different stages of development. The developing countries would derive great benefit from the body of references, information and options which might be available to them and which they would find in the work of the Commission.

(b) *Other matters*

139. The major questions relating to section 1 of the schematic outline, dealing with scope, have been described in paragraphs 110 to 113 and 133 to 135 above; but other points should be mentioned. Uncertainty about the eventual scope and content of the topic has to some extent influenced requests for added descriptive elements in the definitions of “activity” and “loss or injury”. Moreover, suggestions that ships and aircraft should be excluded from the scope provisions appear to reflect an expectation that these mobile forms of property, sometimes tenuously linked with their flag State, could not be regulated as the draft articles may require. On the other hand, it has been pointed out by several Commission members that various maritime activities should certainly be covered by any draft provisions.

140. If it were decided radically to alter other elements in the schematic outline—for example, by including a stipulation for automatic reparation for some losses or injuries—there would no doubt be a need to make many compensating adjustments. Nevertheless, it was recognized that the Commission would embark on a slippery path if it began to make piecemeal exclusions from the field of application. Subject to the further determination of scope, the intention reflected in the schematic outline was that rules developed in pursuance of this topic should apply in respect of any “activity” that gave rise to transboundary “loss or injury”. One Commission member considered that the term “activity” should extend to any situation in which human intervention was needed to avert a transboundary disaster; but another was reluctant to contemplate any extension of the present definition. There were also suggestions that the definition of “loss or injury” should be confined to material, or physical, loss or injury.

141. One Commission member pointed out that “loss or injury” could apply only to an ascertained loss or injury, suffered by an identified person; and several members raised the important question of duties owed to the international community. It was felt that the term “loss or injury” was less extensive than “harm”—the expression used in earlier reports; and it was suggested that the latter term might be more appropriate in sections 2 and 3, relating to regime-building.

142. It was recognized by the Special Rapporteur that the definition of “territory or control” had not been fully worked out in relation to the definition of “affected State”. One Commission member noted with approval that the use of the phrase “give rise to” in the scope clause, in paragraph 1 of section 1 of the schematic outline, established a broad connecting link between activities within the territory or control of a State and the loss or injury suffered outside that State’s territory and control. Several members referred to the question of remoteness of consequences, and the need for further attention to this point was noted. A number of Commission members were interested in the question of the extent of the affected State’s duty to minimize loss or damage and to take an initiative when it had more opportunity than the acting State to be aware of the existence of a danger. One member wondered why the schematic outline should provide, in paragraph 7 of section 2, for the affected State to make an equitable contribution to the costs of fact-finding.

143. In responding to these and other comments, the Special Rapporteur stressed the fact that the schematic outline made no assumptions about the relative responsibilities of the acting and affected States: they would vary enormously from one case to another. The first point on which the outline insisted was that the acting State—and he quite agreed with the suggestion of a Commission member that “source State”, or perhaps “State of origin”, would be a better term than “acting State”—should answer for activities within its territory or control. In some cases, as the award of the *Lake*

¹⁹⁸ United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), pp. 111.

Lanoux tribunal¹⁹⁹ had recognized, it would not be reasonable to expect the acting State to shoulder the whole financial burden for measures needed to produce the result that would best suit the interests of the affected State; but at least the acting State must be prepared to co-operate upon equitable terms.

144. The second point on which the schematic outline would insist—and the Special Rapporteur accepted that this obligation must be given a prominent place among the principles in section 5—was that reparation is in principle owed in respect of any loss or injury, though the quantum of reparation could vary greatly, depending on the circumstances. The conduct of the affected State was always relevant to that calculation, as was the effort made by the acting State in relation to sources of danger within its knowledge. Neglect of a known source of danger by the acting State could enlarge its obligation to make reparation; similar neglect by the affected State could amount to estoppel. Foreseeability and the distribution of costs and benefits were among the prime considerations in assessing reparation. The factors listed in section 6 of the schematic outline should also be an aid in assessing reparation.

145. The Special Rapporteur noted that the concept of “shared expectations”—contained in paragraph 4 of section 4 of the schematic outline and described in paragraph 119 above—had had a rather mixed reception in the Commission. Some saw it as a valuable concept, others as adding little to the schematic outline. It would certainly be necessary to describe and illustrate the concept more carefully; but its function could be made clearer by comparison with other factors mentioned in the preceding paragraph. If only the affected State knew about a source of danger and it failed to bring that source of danger to the attention of the acting State, it might be estopped from obtaining reparation; but if both States knew of a source of danger, and chose to regard it as a tolerable hazard, their shared expectations might lead to a similar result. The concept worked negatively, to exclude from the scale of reckoning categories of loss or injury which both parties had not considered compensable.

146. Some Commission members—and especially those who would have preferred a degree of automatism in the rule of reparation in respect of loss or injury—found the procedures described in sections 2, 3 and 4, of the schematic outline to be over-elaborate, and to depend too much on the goodwill of the States concerned. Some other members felt that one of the main advantages of rules made in pursuance of this topic would be to encourage habits of co-operation among States, by prescribing the standards of conduct expected. Certain Commission members felt that the Special Rapporteur might have made more use of analogies from municipal law—especially, perhaps, from common law concepts of negligence, nuisance and strict liability. One member noted that there was also ample authority in international law for the concepts that underlie the procedural

framework—the duties to inform, to consider representations and to negotiate in good faith.

147. A number of members referred to the uses that could be made of domestic agencies as an approved means of carrying out some or all of the procedural requirements. For example, the United States Clean Air Act Amendments²⁰⁰ and some other United States enactments gave potentially affected foreign States access to United States licensing proceedings. Several members felt that the list of principles should include those of non-discrimination and equal access to domestic tribunals. In response to a question, the Special Rapporteur confirmed that, because of the transboundary element in the present topic, the rule of exhaustion of local remedies would not be applicable unless interested States made it applicable in the regimes they constructed to regulate activities that might give rise to a transboundary risk. That, however, was an attractive option of which States were likely to make full use.

148. No member of the Commission questioned the need to recognize the plea of security as a ground for withholding information; but, equally, no member challenged the view that this plea could not excuse a failure to give warning about actual or potential dangers. Several members were concerned that the security reservation, described in paragraph 3 of section 2 of the schematic outline, would provide a pretext for non-co-operation and that the staged procedures of fact-finding and negotiation gave too large an opportunity for obstructive delays. Some doubted the value of procedures which could be neglected without engaging the responsibility of the State for wrongfulness; but a larger number fully supported the concept that the conduct of the acting State in earlier stages of negotiation should directly affect the degree of liability it would incur in case of loss or injury.

149. Several Commission members took the view that the evidentiary rule stated in paragraph 4 of section 5 of the schematic outline was not a principle and could be taken for granted. It is however, necessary to bear in mind that section 4, like sections 2 and 3, is not concerned with dispute settlement procedures. The policy of the schematic outline is to postpone the occurrence of a dispute until every possibility of a negotiated settlement has been exhausted; and it may be of some value to state the evidentiary rule as a guide to negotiators. More important, however, was the strength of feeling within the Commission that failure of co-operation and engagement in ultra-hazardous activities which have not been regulated are circumstances that raise the duty of reparation almost to the level of an automatic obligation to repair fully the loss or injury sustained.

150. Several members emphasized that reparation should not always be equated with compensation: sometimes the acting State should be prepared to

¹⁹⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 285.

²⁰⁰ Public Law 95-95 of 7 August 1977 (*United States Statutes at Large 1977* (Washington, D.C., U.S. Government Printing Office, 1980), vol. 91).

reinstate the pre-existing situation or to provide an equivalent. One member commented that sometimes—and this did happen in the case of the *Trail Smelter*²⁰¹—the same proceeding that deals with reparation for a loss or injury should establish the regime designed to prevent a recurrence of such loss or injury. Several members, while agreeing that disputes should not be precipitated while any hope of a negotiated settlement remained, felt that the commitment to eventual disputes settlement procedures in section 8 was a vital element in the schema. Several members stressed that conciliation procedures should be mandatory.

151. Most members attached great importance to the requirement—in the last paragraphs of sections 2 and 3 of the schematic outline—that the acting State keep under continuing review any activity that does or may give rise to transboundary loss or injury, and take whatever measures it considers necessary and feasible to safeguard the interests of the affected State. There was equal emphasis upon the principle, stated in paragraph 3 of section 5 of the schematic outline, that the victim of a loss or injury should not by mere default be left without redress. The Special Rapporteur readily agreed that the phrase “innocent victim” was a slogan, rather than an apt legal description—though in a past debate some emphasis had been placed on the proviso that a victim must be “genuinely innocent”.

152. Apart from the evidentiary rule in paragraph 4, most members were in general agreement with the principles stated in section 5 and felt that they should be supplemented by drawing judiciously upon rules stated in other sections. The duty to provide reparation, now rather lost in the procedural mass of section 4, was one candidate for certain elevation; the rules discussed in paragraph 151 above were others. As to paragraphs 1 and 2 of section 4, there was some anxiety to ensure the economic interests should not be preferred to those of protection, when the two goals were not fully reconcilable. One Commission member issued a warning that interests that were easily quantifiable should not be given preference over other interests.

153. The same member also stressed that while economic viability might be a dominant factor in relation to matters in which there was a shared interest, it should not be given so great a weighting in a negotiation concerning the risks created by an activity that would benefit only one party to the negotiation. Similar considerations were in the minds of several other members, who wondered how well the principle of distribution of costs and benefits could work when there was no shared interest to temper the clash of opposed interests. One member even felt that the topic should be confined to cases in which States were prepared to recognize an ele-

ment of shared management. In general, however, Commission members did not support so radical a departure from the establishment of a principle of reparation for loss or injury. It is that principle which has to stand undiminished, when there is no accommodation of opposing interests.

154. In the time at the Commission’s disposal, there was little opportunity for Commission members to dwell upon the factors listed in section 6, and the procedures in section 7, of the schematic outline—though one member said that this was the area in which the present topic had the largest contribution to make. It was noted that among the factors might be found the elements of some additional principles. Several members also believed that the articles developed pursuant to this topic should draw upon the procedures in section 7 to establish more definitively the contents, forms and degrees of liability for injurious consequences arising out of acts not prohibited by international law. In the view of one member, part II of section 7 of the schematic outline, dealing with compensation as a means of reparation, was, together with section 8 on the settlement of disputes, the heart of the whole matter.

155. One member, dwelling upon the difficulties with which developing countries might be faced, said that in some circumstances there would be a need for a collective guarantee. At other points in the Commission’s debate, there were occasional references to the part that might be played by international organizations both in establishing and verifying standards and in promoting solutions not within the reach of the countries immediately affected. It is the more important to stress these comments because—as the Special Rapporteur acknowledged when introducing his report—the schematic outline necessarily concentrates upon the simple case of two States with unreconciled interests. The reality can often be far more complex. Work done on the present topic would not serve its highest purpose if it failed to provide a useful point of reference both for States and for international organizations with responsibility for ameliorating the human environment.

156. The substantial efforts which the Codification Division of the office of Legal Affairs has been making to collect and classify conventions relevant to the present topic are now coming to fruition. Upon the suggestion of the Special Rapporteur, the Commission requested the Codification Division to continue its research on: (a) the analytical examination of bilateral agreements relevant to the topic; (b) the analytical examination of relevant judicial decisions; and (c) the collection and analytical study of agreements relevant to prevention measures and liability to which entities other than States are also parties (see also paras. 110 and 113 above).

²⁰¹ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

Chapter V

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

157. The topic entitled "Jurisdictional immunities of States and their property" was included in the current programme of work of the Commission by the decision of the Commission at its thirtieth session, in 1978,²⁰² on the recommendation of the Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

158. At its thirty-first session, in 1979, the Commission had before it a preliminary report on the topic²⁰³ submitted by the Special Rapporteur, Mr. Sompong Sucharitkul.

159. During the discussion of the preliminary report, it was pointed out that relevant materials on State practice, including the practice of the socialist countries and developing countries, should be consulted as widely as possible. It was also emphasized that another potential source of materials could be found in the treaty practice of States, which indicated consent to some limitations on jurisdictional immunity in specific circumstances.

160. In that connection, the Commission, at its thirty-first session, decided to seek further information from Governments of Member States of the United Nations in the form of replies to a questionnaire. It was noted that States know best their own practice, wants and needs as to immunities in respect of their activities and that the views and comments of Governments could provide appropriate indication of the direction in which the codification and progressive development of the international law of State immunity should proceed.

161. Pursuant to that decision, the Legal Counsel of the United Nations addressed a circular letter dated 2 October 1979 to the Governments of Member States,

²⁰² The topic was one of fourteen included on a provisional list of topics selected for codification by the Commission in 1949 (see *Yearbook ... 1949*, p. 281, document A/925, para. 16). For a review of the subject, see *Yearbook ... 1973*, vol. II, pp. 230-231, document A/9010/Rev.1, paras. 173-174; *Yearbook ... 1977*, vol. II (Part Two), p. 130, para. 110; *Yearbook ... 1978*, vol. II (Part Two), pp. 152-155, paras. 179-190 and especially para. 188 (recommendations of the Work Group); *Yearbook ... 1979*, vol. II (Part Two), pp. 185-186, paras. 166-183.

²⁰³ *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

inviting them to submit replies, if possible by 16 April 1980, to a questionnaire on the topic formulated by the Special Rapporteur.²⁰⁴

162. At its thirty-second session, in 1980, the Commission had before it the second report on the topic submitted by the Special Rapporteur²⁰⁵ containing the text of the following six proposed draft articles: "Scope of the present articles" (art. 1); "Use of terms" (art. 2); "Interpretative provisions" (art. 3); "Jurisdictional immunities not within the scope of the present articles" (art. 4); "Non-retroactivity of the present articles" (art. 5); and "The principle of State immunity" (art. 6). The first five articles constituted part I, entitled "Introduction", while the sixth article was placed in part II, entitled "General principles".

163. During the discussion of the second report,²⁰⁶ the Special Rapporteur indicated that the provisional adoption by the Commission of draft articles 1 and 6 could provide a useful working basis for the continuation of the work on the topic. He suggested that the Commission might, therefore, wish to concentrate on the proposed draft articles 1 and 6, since draft articles 2, 3, 4 and 5²⁰⁷ had been submitted for the preliminary reaction of members of the Commission and their consideration could be deferred. Thus only draft articles 1 and 6 were referred to the Drafting Committee by the Commission.

164. As explained in the report on its thirty-second session,²⁰⁸ the Commission, after a considerable debate on the basis of the second report submitted by the Special Rapporteur, provisionally adopted article 1, en-

²⁰⁴ The materials received were originally organized by the Secretariat in a systematic order (and published in English, French, Russian and Spanish) as follows: part I consisted of Government replies to the questionnaire (A/CN.4/343 and Add.3 and 4). Part II contained materials that Governments had submitted together with their replies to the questionnaire (A/CN.4/343/Add.1). Part III contained materials submitted by the Governments which had not replied to the questionnaire (A/CN.4/343/Add.2). The materials now appear in a volume of the United Nations Legislative Series (hence in either English or French), *Materials on jurisdictional immunities of States and their property* (Sales No. E/F.81.V.10), hereinafter referred to as *Materials on jurisdictional immunities ...*

²⁰⁵ *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1.

²⁰⁶ *Yearbook ... 1980*, vol. I, pp. 195-205 and 214-220, 1622nd to 1626th meetings; and *Yearbook ... 1980*, vol. II (Part Two), pp. 138-141, paras. 112-122.

²⁰⁷ See notes 224 to 227 below.

²⁰⁸ *Yearbook ... 1980*, vol. II (Part Two), p. 138, para. 112.

titled "Scope of the present articles"²⁰⁹ and article 6, entitled "State immunity".²¹⁰

165. At its thirty-third session, in 1981, the Commission had before it the third report on the topic submitted by the Special Rapporteur²¹¹ containing the text of five proposed draft articles: "Rules of competence and jurisdictional immunity" (art. 7); "Consent of State" (art. 8); "Voluntary submission" (art. 9); "Counter-claims" (art. 10); and "Waiver" (art. 11).²¹² Together with the text of draft article 6 on "State immunity" adopted provisionally by the Commission at its thirty-second session, the five articles contained in the third report were placed in part II, entitled "General principles". The Commission had also before it documents containing replies and relevant materials submitted by Governments pursuant to the questionnaire mentioned above (para. 161).

166. In introducing the report, the Special Rapporteur explained that the five new draft articles mentioned above flowed from the position set out in draft article 6, which established the rule on State immunity. Thus, article 7 on the rules of competence and jurisdictional immunity was, in fact, a corollary to the right to State immunity laid down in article 6. This was so because article 7 imposed a duty on the part of one State to refrain from exercising jurisdiction over another State or in proceedings involving the interests of another State, regardless of its competence.

167. The Special Rapporteur further explained that the existence of consent could be viewed as an exception to the principle of State immunity and that it had been so viewed in certain national legislation and regional conventions. But, for the purposes of the draft articles, he preferred to consider consent as a constituent element of State immunity: immunity came into play when there was no consent, subject, of course, to other limitations and exceptions (which remained to be set forth in part III). Accordingly, draft articles 8, 9, 10 and 11 all constituted different ways in which consent could be expressed, and could thus be viewed as qualifications of the principle of State immunity. He left open the possibility of combining the ideas expressed in these four articles into three articles only. Thus "Consent of State" (art. 8) would remain a separate article, "Voluntary submission" (art. 9) and "Waiver" (art. 11) could be combined in one article on the various means of expressing consent, while "Counter-claims" (art. 10) would also remain a separate article.

²⁰⁹ *Ibid.*, p. 141. That article read as follows:

"Article 1. Scope of the present articles"

"The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State."

²¹⁰ See footnote 239 below.

²¹¹ *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1.

²¹² *Yearbook ... 1981*, vol. II (Part Two), pp. 155-156, footnotes 661-665.

168. After a considerable discussion in the Commission,²¹³ the Special Rapporteur prepared and submitted for the consideration of the Drafting Committee a revised version²¹⁴ of his original five draft articles, which the Commission had referred to the Drafting Committee and which he reduced to four, as follows: "Obligation to give effect to State immunity" (art. 7);²¹⁵ "Consent of State" (art. 8);²¹⁶ "Expression of consent" (art. 9);²¹⁷ and "Counter-claims" (art. 10).²¹⁸

²¹³ *Yearbook ... 1981*, vol. I, pp. 55-80, 1653rd to 1657th meetings, and pp. 110-124, 1663rd to 1665th meetings, and *Yearbook ... 1981*, vol. II (Part Two), pp. 154-157, paras. 208-225.

²¹⁴ A/CN.4/L.337. See notes 215 to 218, below.

²¹⁵ Draft article 7 as revised read:

"Article 7. Obligation to give effect to State immunity"

"Paragraph 1—Alternative A"

"1. A State shall give effect to State immunity under [as stipulated in] article 6 by refraining from subjecting another State

ministrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another State.

"Paragraph 1—Alternative B"

"1. A State shall give effect to State immunity under article 6 by refraining from subjecting another State to its jurisdiction [and] or from allowing legal proceedings to be conducted against another State, notwithstanding the existing competence of the authority before which the proceedings are pending.

"2. For the purpose of paragraph 1, a legal proceeding is considered [deemed] to be one against another State, whether or not named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, interests, properties or activities of the State.

"3. In particular, a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority; or against one of its representatives in respect of acts performed by them as State representatives, or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control.

"NOTE: Paragraph 3 would constitute an alternative to the text of draft article 3, subparagraph 1 (a)".

²¹⁶ Draft article 8 as revised read:

"Article 8. Consent of State"

"1. [Subject to Part III of the draft articles] Unless otherwise provided in the present articles, a State shall not exercise jurisdiction in any legal proceeding against another State [as defined in article 7] without the consent of that other State.

"2. Jurisdiction may be exercised in a legal proceeding against a State which consents to its exercise."

²¹⁷ Draft article 9 as revised read:

"Article 9. Expression of consent"

"1. A State may give its consent to the exercise of jurisdiction by the court of another State under article 8, paragraph 2, either expressly or by necessary implication from its own conduct in relation to the proceeding in progress.

"2. Such consent may be given in advance by an express provision in a treaty or an international agreement or a written contract, expressly undertaking to submit to the jurisdiction or to waive State immunity in respect of one or more types of activities.

"3. Such consent may also be given after a dispute has arisen by actual submission to the jurisdiction of the court or by an express waiver of immunity, [in writing, or otherwise] for a specific case before the court.

169. Owing to the time needed at the thirty-third session to complete the second reading of the draft articles on succession of States in respect of State property, archives and debts, and to commence the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations, the Drafting Committee was unable to consider, *inter alia*, the draft articles on this topic which had been referred to it and the revised versions thereof proposed by the Special Rapporteur. Those draft articles thus remained for consideration by the Drafting Committee at the thirty-fourth session of the Commission.

170. By paragraph 3 (b), of its resolution 36/114 of 10 December 1981, the General Assembly recommended that the International Law Commission should, *inter alia*, "Continue its work aimed at the preparation of draft articles on ... jurisdictional immunities of States and their property ...".

2. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

171. At the present session, the Commission had before it the fourth report on the topic submitted by the

"4. A State is deemed to have given consent to the exercise of jurisdiction by the court of another State by voluntary submission if it has instituted a legal proceeding or taken part or a step in the proceeding relating to the merit, without raising a plea of immunity.

"5. A State is not deemed to have given such consent by voluntary submission or waiver if it appears before the court of another State in order specifically to assert immunity or its rights to property and the circumstances are such that the State would have been entitled to immunity, had the proceeding been brought against it.

"6. Failure on the part of a State to enter appearance in a proceeding before the court of another State does not imply consent to the exercise of jurisdiction by that court. Nor is waiver of State immunity to be implied from such non-appearance or any conduct other than an express indication of consent as provided in paragraphs 2 and 3.

"7. A State may claim or waive immunity at any time before or during any stage of the proceedings. However, a State cannot claim immunity from the jurisdiction of the court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim of immunity can be based, in which event it can claim immunity based on those facts if it does so at the earliest possible moment."

²¹⁸ Draft article 10 as revised read:

"Article 10. Counter-claims

"1. In any legal proceedings instituted by a State, or in which a State has taken part or a step relating to the merit, in a court of another State, jurisdiction may be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court.

"2. A State making a counter-claim in proceedings before a court of another State is deemed to have given consent to the exercise of jurisdiction by that court with respect not only to the counter-claim but also to the principal claim, arising out of the same legal relationship or facts [as the counter-claim]."

Special Rapporteur (A/CN.4/357 and Corr.1).²¹⁹ The report dealt with part III of the draft articles concerning exceptions to State immunity and contained two articles: "The scope of the present part" (art. 11)²²⁰ and "Trading or commercial activity" (art. 12).²²¹

172. The fourth report by the Special Rapporteur was considered during the present session of the Commission at its 1708th to 1718th meetings, from 17 May to 2 June 1982, and 1728th to 1730th meetings, from 16 to 18 June 1982.

173. In presenting his fourth report, the Special Rapporteur gave a brief survey on the work so far done by the Commission on the topic, indicating the approach adopted by the Commission in elaborating the draft articles and the source materials to be consulted for that purpose.

174. In the presentation, the Special Rapporteur explained the status of the series of draft articles which he had proposed. He observed that article 1, entitled "Scope of the present articles",²²² and article 6, entitled "State immunity",²²³ had been provisionally adopted by the Commission in first reading. He then noted that article 2 on "Use of terms",²²⁴ article 3 on "Inter-

²¹⁹ Reproduced in *Yearbook ... 1982*, vol. II (Part One).

²²⁰ Draft article 11 read as follows:

"Article 11. Scope of the present part

"Except as provided in the following articles of the present part, effect shall be given to the general principles of State immunity as contained in part II of the present articles."

²²¹ Draft article 12 read as follows:

"Article 12. Trading or commercial activity

"1. In the absence of agreement to the contrary, a State is not immune from the jurisdiction of another State in respect of proceedings relating to any trading or commercial activity conducted by it, partly or wholly in the territory of that other State, being an activity in which private persons or entities may there engage.

"2. Paragraph 1 does not apply to transactions concluded between States, nor to contracts concluded on a government-to-government basis."

²²² See footnote 209 above.

²²³ See footnote 239 below.

²²⁴ Draft article 2 read as follows:

"Article 2. Use of terms

"1. For the purposes of the present articles:

"(a) 'immunity' means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

"(b) 'jurisdictional immunities' means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

"(c) 'territorial State' means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

"(d) 'foreign State' means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

"(e) 'State property' means property, rights and interests which are owned by a State according to its internal law;

"(f) 'trading or commercial activity' means:

"(i) a regular course of commercial conduct, or

"(ii) a particular commercial transaction or act;

pretative provisions",²²⁵ article 4 on "Jurisdictional immunities not within the scope of the present articles",²²⁶

"(g) 'jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

"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 meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization."

²²⁵ Draft article 3 read as follows:

"Article 3. Interpretative provisions

"1. In the context of the present articles, unless otherwise provided,

"(a) the expression 'foreign State', as defined in article 2, subparagraph 1 (d) above, includes:

"(i) the sovereign or head of State,

"(ii) the central government and its various organs or departments,

"(iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and

"(iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government.

"(b) the expression 'jurisdiction', as defined in article 2, subparagraph 1 (g) above, includes:

"(i) the power to adjudicate,

"(ii) the power to determine questions of law and of fact,

"(iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and

"(iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

"2. In determining the commercial character of a trading or commercial activity as defined in article 2, subparagraph 1 (f) above, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose."

²²⁶ Draft article 4 read as follows:

"Article 4. Jurisdictional immunities not within the scope of the present articles

"The fact that the present articles do not apply to jurisdictional immunities accorded or extended to:

"(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,

"(ii) consular missions under the Vienna Convention on Consular Relations of 1963,

"(iii) special missions under the Convention on Special Missions of 1969,

"(iv) the representation of States under the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975,

"(v) permanent missions or delegations of States to international organizations in general,

shall not affect:

"(a) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

"(b) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

"(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles."

and article 5 on "Non-retroactivity of the present articles"²²⁷ had been presented not for immediate consideration, but simply as a framework indicating the elements to be considered. Articles 1 to 5, thus constituted part I of the draft articles, entitled "Introduction".

175. The Special Rapporteur then outlined the articles comprising part II of the draft articles, entitled "General principles", in which five articles were already before the Commission: Article 6 as provisionally adopted by the Commission and articles 7 to 10 as revised by the Special Rapporteur and submitted to the Drafting Committee during the thirty-third session of the Commission (see paras. 168 and 169 above).

176. In further explanation of the draft articles constituting part II, the Special Rapporteur emphasized that, on the basis of an examination of judicial practice of States, national legislation and governmental practice, he had drawn the conclusion that there was a well-established rule of international law in support of the general principle of the jurisdictional immunity of States. He pointed out that the concept had, however, developed differently in different legal systems. Thus, in the common-law system, it had evolved from an extension of the doctrine of the immunity of the local sovereign to cover foreign sovereigns. In civil-law systems, on the other hand, the question of jurisdictional immunity had been primarily one of the competence or jurisdiction of the courts.

177. The Special Rapporteur then turned to part III of the draft articles, dealing with exceptions to the principle of State immunity. The first exception was trading or commercial activities, expressed in draft article 12²²⁸ submitted in his fourth report. In that report, the Special Rapporteur indicated other possible exceptions that would form the basis of draft articles for the whole of part III.

178. The tentative list of exceptions contained in that report (A/CN.4/357 and Corr.1, para. 10) included:

(a) trading or commercial activity;

(b) contracts of employment;

(c) personal injuries and damage to property;

(d) ownership, possession and use of property;

(e) patents, trade marks and other intellectual properties;

(f) fiscal liabilities and customs duties;

(g) share-holdings and membership of bodies corporate;

²²⁷ Draft article 5 read as follows:

"Article 5. Non-retroactivity of the present articles

"Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby."

²²⁸ See footnote 221 above.

- (h) ships employed in commercial services; and
- (i) arbitration.

179. In presenting the material and the draft articles of part III, the Special Rapporteur emphasized that the main feature of the topic of State immunity was its flexibility. He observed that many national procedures showed that the granting of jurisdictional immunity could be made dependent on reciprocity. Thus, even when not required by law to do so, a State could grant immunity without offending any principle of law. In spite of the many distinctions to be drawn between private and public international law, on the one hand, and between different internal laws and international law, on the other, it appeared that common practice was emerging in clearly defined areas. In the less clearly defined areas, it was the Special Rapporteur's view that the Commission would be able to find solutions which were acceptable to all States.

180. In order to give the new and enlarged Commission the opportunity to become more familiar with the issues involved, it was agreed that the consideration of the topic, following its introduction by the Special Rapporteur, should begin with a general exchange of views on all the draft articles which had been presented to the Commission. These included articles 1 and 6 as provisionally adopted,²²⁹ articles 7 to 10²³⁰ in their revised form, and the two new articles 11 and 12²³¹ contained in the fourth report, under discussion.

181. Apart from several drafting suggestions made with respect to a number of the above articles, the exchange of views did confirm the usefulness of certain basic ideas that had guided the Commission in its work on the topic, namely, the inductive approach for the elaboration of the draft articles, emphasis upon the development of general principles first, followed by articles on exceptions, and efforts towards wide use of source materials from various legal systems.

182. During the consideration of each of the draft articles 6 to 12, following the general exchange of views, several observations were made by members of the Commission calling for possible improvement of the draft as further reflected in the commentaries to the articles.

183. With respect to article 6, which is the first article in part II of the draft articles, it was noted that use of the phrase "in accordance with the provisions of the present articles" had given rise to controversy. Some members of the Commission maintained the view that the phrase in question made article 6 dependent upon other provisions of the draft articles and thus disqualified the article from being an independent legal proposition or a statement of a basic rule on State immunity. There was a suggestion that the phrase be deleted from paragraph 1 but retained in paragraph 2 of the article. But there was also the view that the deletion

of the phrase from the article would make the article lean towards stating the theory of absolute immunity and would thus prejudice any future consideration of the exceptions to immunity envisaged in the draft articles.

184. There was also support for the suggestion that the article as provisionally adopted did state a basic rule on State immunity, but that it might be later improved. According to this approach, paragraph 1 of the article would be retained as it is, but would incorporate an immediate reference to the exceptions and begin as follows:

A State is immune from the jurisdiction of another State except as provided in articles ... and

Some members of the Commission, however, preferred the approach reflected in article 15 of the 1972 European Convention on State Immunity²³² which establishes the rule on State immunity, subject to the exceptions enumerated in articles 1 to 14 of the Convention.

185. In articles 7 to 10, the Special Rapporteur sought to elaborate other relevant general principles constituting part II of the draft articles. He pointed out that it had become increasingly clear that, regardless of its development, the concept of jurisdictional immunity was based on the principle of *par in parem imperium non habet*. The evidence provided by State practice was still far from sufficient, however, to warrant amplifying the draft articles to cover State immunity from all aspects of State jurisdiction. Rather, the articles should be limited to areas of judicial jurisdiction, including immunity from the exercise of certain administrative powers by national authorities in respect of legal actions or proceedings. In this connection, article 7 set forth the principle of obligation to give effect to State immunity by refraining from subjecting another State to the jurisdiction of national authorities, particularly the courts and administrative authorities exercising adjudicatory and related functions.

186. While alternative A of paragraph 1 of article 7 was generally preferred, doubts were expressed as to the precise meaning of the phrase "subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities". The same doubts had been expressed with respect to the phrase "notwithstanding the existing competence of the authority before which the proceedings are pending" used in alternative B of paragraph 1 of the article. There was, accordingly, the need to re-examine the scope of the term "jurisdiction", which had been defined in paragraph 1 (g) of article 2 on the use of terms suggested by the Special Rapporteur in his second report.²³³

187. Since article 7 was presented as a natural consequence and a necessary corollary of article 6, those who

²²⁹ See footnote 209 above and footnote 239 below.

²³⁰ See footnotes 215 to 218 above.

²³¹ See footnotes 220 and 221 above.

²³² Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

²³³ See footnote 224 above.

maintained that article 6 itself stated no independent principle of State immunity did not find article 7 acceptable either. Others, however, pointed out that several provisions of article 7, especially paragraph 3 containing terms such as State “instrumentalities”, “organs”, “agencies” and “representatives”, needed further clarification, having regard to the scope of the draft articles as suggested in article 4.²³⁴ Members of the Commission who accepted the approach reflected in article 6, however, found article 7 generally acceptable and made a number of suggestions for improving its text, linking it with article 6.

188. Article 8 dealt with another important general principle, namely, consent of a State to the exercise of jurisdiction by the courts of another State. As explained by the Special Rapporteur, the relevance of the principle of consent to the theory of State immunity had been demonstrated in *The Schooner “Exchange” v. McFaddon and others* case (1812).²³⁵ The principle, he noted, is pertinent both to States granting jurisdictional immunity and to States requesting a waiver of the exercise of jurisdiction. Thus the consent of a State to the exercise of jurisdiction by the courts of another State meant that the consenting State could no longer claim immunity. As such the giving of consent was approximately equivalent to a waiver of immunity.

189. There was a general acceptance of the inclusion of the words in square brackets in the draft text of article 8. However, several suggestions were made as to how the article should be reformulated so as to be linked properly to articles 7 and 9. The view was also expressed that in reformulating the article, it should be made clear that the effect of consent to jurisdiction did not apply to interim seizure, attachment or post-judgement executions.

190. In article 9, the Special Rapporteur attempted to synthesize the various methods by which consent could be expressed. He pointed out that the terms of paragraph 6 of the article, under which failure by a State to appear in a proceeding did not imply consent to the exercise of jurisdiction by the court concerned, were based on the national legislation of a number of countries. While the article was generally acceptable, several suggestions were made for improving its text.

191. Questions were raised as to the meaning of the clause “or taken part or a step in the proceeding relating to the merit” used in paragraphs 4 and 7. A suggestion was also made that the concept of “explicit” consent should be separated from that of “implicit” consent and treated in a different paragraph rather than being combined, as they were, in paragraph 1 of the article. It was also noted that paragraph 5 of the article could be improved by relating the terms used therein to the other relevant paragraphs. Thus the paragraph would, for example, refer to “voluntary submission under

paragraph 4” and “waiver under paragraph 3”. Another suggestion was that paragraphs 4 and 7 could be combined, since they both relate to the merits. An observation was also made that the term “jurisdiction of the court” used throughout the article should be brought in line with the comparable expression “judicial and administrative authorities” used in article 7. Paragraphs 3 and 6 also needed improvement by restricting reference therein to consent only, instead of referring to both consent and waiver. Lastly, there was a suggestion that a new paragraph be added to article 9 making clear that waiver of immunity from jurisdiction in civil or administrative proceedings did not imply waiver of immunity in respect of execution of judgement.

192. Article 10, the last one in part II on “General principles”, dealt with counter-claims. It was observed that the two paragraphs of the article appeared to deal with two different situations: firstly, the situation in which the foreign State was the plaintiff and counter-claims were brought against it by the defendant in the action; and, secondly, the situation in which the foreign State was the defendant. Several suggestions were made for possible improvements to the text. There was the view that the phrase “has taken part or a step relating to the merit” appearing in paragraph 1 should be changed or replaced by the phrase “or in which a State has intervened”. A suggestion was also made that the last three lines of paragraph 1 could be redrafted to make it clear that they referred to action by a private party that was covered by one of the exceptions provided for in part III of the draft articles. Thus, the phrase “or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court” could be replaced by “or in respect of any counter-claims as to which a foreign State would not be entitled to immunity under the provisions of part III of the present articles, had such a claim been brought in a separate proceeding against the State”. This same wording was suggested for inclusion in paragraph 2 of the article to make it plain that private parties could bring an action against a foreign State in respect of any question falling within one of the exceptions in part III. But there was the view that given that meaning, the suggested phrase or the one it was meant to replace was unnecessary, since in the situations contemplated under paragraph 1 the court would have jurisdiction in any event.

193. Article 11, entitled “Scope of the present part”, was the first one in part III of the draft articles. There was a general view that the article seemed superfluous, since the basic principle with which it was concerned was already embodied in draft article 6. Whether or not article 11 indeed duplicated article 6, it was generally agreed that its retention as the first article in part III depended upon the solution adopted for article 6. As thus presented, it merely served as a necessary link between part II and part III.

194. Article 12, entitled “Trading or commercial activity”, dealt with the exception to the rule on State im-

²³⁴ See footnote 226 above.

²³⁵ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, 3rd. ed. (New York, Banks Law Publishing, 1911), vol. VII, p. 116.

munity that was, as explained by the Special Rapporteur, least open to dispute. He observed that recent trends in State practice in connection with trading or commercial activity had emerged and had no direct bearing on the distinction between acts performed *jure imperii* and acts performed *jure gestionis*. He further noted that from some thirty years' experience, there existed an abundance of evidence in support of the exception contained in article 12.

195. A view was expressed, however, that the conclusions reached by the Special Rapporteur with respect to the article were not satisfactory. The member of the Commission expressing this view emphasized that the article concerned the question of exceptions to the principle of jurisdictional immunity of States—a principle which stemmed from the sovereign equality of States and was a fundamental principle of international law. Thus, any exceptions to that principle must also be embodied in accepted rules of general international law. According to him, further study of State practice was still necessary before a determination was made as to whether there existed an identifiable rule exempting commercial activities from jurisdictional immunities. His basic position was that the accepted rule was State immunity and that exception to that rule could only be by express consent.

196. Other members of the Commission were of the opinion, none the less, that current State practice corroborated the substance of article 12, but that the text required further clarification. There was the view that the phrase "being an activity in which private persons or entities may there engage" created difficulties as to its application in various political and economic systems. Its deletion was accordingly suggested. It was observed that the basic problem raised by the article was the definition of what constituted trading or commercial activity. In this connection, it was noted that article 3, paragraph 2,²³⁶ on interpretative provisions placed emphasis on "the nature of the course of conduct or particular transaction or act, rather than ... its purpose". Several members were of the opinion that reference to the "nature" of the act was acceptable but that, in certain cases, it would be necessary also to refer to the "purpose" of the act, especially in regard to purchase of food supplies or other necessities of life to relieve famine or to maintain the livelihood of inhabitants of developing countries or to further their much-needed economic development. In his assessment of the problems raised by article 12, one member of the Commission expressed the view that, conceptually, it may be recognized that trading or commercial activities were not and had never been an exception to the doctrine of sovereign immunity since the doctrine had simply never extended so far as to cover immunity for States in respect of commercial activities. He pointed out that the practice of States, following the demise of *laissez-faire* doctrine and increasing intervention of States in the private sphere, would support the suggested conceptual view.

²³⁶ See footnote 225 above.

197. On the whole, it appeared from the discussion that more efforts should be made towards determining the meaning and scope of trading or commercial activities for the purposes of the article, which would include commercial, financial and industrial activities. Some members thought that the exception contained in article 12 could also conveniently cover other economic activities such as investment, fishing and hunting.

198. Following the extensive debate on these articles as presented in the Special Rapporteur's fourth report, the Commission confirmed its referral to the Drafting Committee of articles 7 to 10. It also referred to the Drafting Committee articles 11 and 12.²³⁷ The Commission also decided that article 6, already provisionally adopted, should be re-examined by the Drafting Committee in the light of the discussions of the rest of the articles constituting art II of the draft articles, and further decided that the Drafting Committee should also examine the provisions of articles 2 and 3 relevant to the problem of definition of "jurisdiction" and "trading or commercial activities". At its 1749th and 1750th meetings, on 20 and 21 July 1982, the Commission, on the basis of the report of the Drafting Committee (A/CN.4/L.342), adopted provisionally the text of articles 1 and 2, sub-para. 1 (a), and articles 7, 8 and 9.

B. Draft articles on jurisdictional immunities of States and their property

PART I INTRODUCTION

Article 1. Scope of the present articles²³⁸

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Commentary

(1) The above text incorporates changes made as a result of the re-examination of the earlier text by the

²³⁷ For the consideration of the Drafting Committee, the Special Rapporteur prepared the following revised version (A/CN.4/L.351) of articles 11 and 12:

"Article 11. Scope of the present part

"The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned.

"Article 12. Trading or commercial activity

"1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to any trading or commercial activity conducted, partly or wholly, in the territory of that other State, by the State itself or by one of its organs or agencies whether or not organized as a separate legal entity.

"2. Paragraph 1 does not apply to transactions or contracts concluded between States or on a government-to-government basis."

²³⁸ An earlier text of this article (see footnote 209 above) was provisionally adopted by the Commission in first reading at its thirty-second session. For the commentary thereto, see *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142.

Commission, at its thirty-fourth session, in the light of additional draft articles submitted by the Special Rapporteur on the topic.

(2) The addition of the phrase "of the courts" in the present text is designed to confirm the understanding that the scope of the current topic is confined primarily to immunity from the jurisdiction "of the courts" of States. A definition of the term "court" has thus been necessary under article 2 below. This limitation on the scope of the draft articles is only provisional and may have to be altered and further clarified when the Commission comes to consider part IV of the draft articles, dealing with immunity of State property from measures of attachment and execution.

(3) In consequence, the phrase "questions relating to" which appeared in the text as provisionally adopted has now been dropped. This phrase was necessary at a time when the precise scope of the draft articles remained uncertain and the Commission had not yet determined whether the draft articles should extend beyond immunity from the jurisdiction of the courts of another State to cover other related matters.

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

...

Commentary

(1) In the course of the discussion of article 7 on the modalities for giving effect to State immunity, it was decided that the scope of that article should be established by referring only to the exercise of jurisdiction by a State in proceedings before its courts against another State. In order to clarify the scope of the article it became necessary to define the term "court".

(2) Although the definition was originally intended to apply to article 7, it has now become a general one, affecting article 1 and other draft articles where the term "court" is used. This explains its present position in article 2 dealing with the "Use of terms".

PART II GENERAL PRINCIPLES

*Article 6. State immunity*²³⁹

²³⁹ Article 6, as adopted provisionally by the Commission at the thirty-second session, read as follows:

"Article 6. State immunity

"1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

"2. Effect shall be given to State immunity in accordance with the provisions of the present articles."

(*Yearbook ... 1980*, vol. II (Part Two), p.142).

Article 6 was further discussed by the Commission at the present session and, as noted in paragraphs 180, 183 and 184 above, still gave

Article 7. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Commentary

(1) In draft article 7, an attempt is made in paragraph 1 to identify the content of the obligation to give effect to State immunity and the modalities for giving effect to that obligation. The rule of State immunity may be viewed from the standpoint of the State giving or granting jurisdictional immunity, in which case a new point of departure is warranted. Emphasis is placed not so much on the sovereignty of the State claiming immunity, but more precisely on the independence and sovereignty of the State which is required by international law to recognize and accord jurisdictional immunity to another State. Of course, the obligation to give effect to State immunity stated in article 7 applies only to those situations in which the State claiming immunity is entitled thereto under these articles. Since immunity, under draft article 6, is expressly *from* the "jurisdiction of another State", there is a clear and unmistakable presupposition of the existence of "jurisdiction" of that other State over the matter under consideration; otherwise, it would be totally unnecessary to invoke the rule of State immunity in the absence of jurisdiction. There is as such an indispensable and inseparable link between State immunity and the existence of jurisdiction of another State with regard to the matter in question.

(2) The same initial proposition could well be formulated in reverse, taking the jurisdiction of a State as a starting-point; after having established the firm ex-

rise to divergent views. The Drafting Committee also re-examined draft article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee at the current session, the Commission agreed to re-examine draft article 6 at its next session.

istence of jurisdiction, the new formulation could stipulate an obligation to refrain from exercising such jurisdiction in so far as it involves, concerns or otherwise affects another State that is entitled to immunity and is unwilling to submit to the jurisdiction of the former. This restraint on the exercise of jurisdiction is prescribed as a proposition of international law and should be observed in accordance with detailed rules to be examined and clarified in subsequent draft articles.²⁴⁰ From the point of view of the absolute sovereignty of the State exercising its jurisdiction in accordance with its own internal law, any restraint or suspension of that exercise based on a requirement of international law could be viewed as a limitation. The first prerequisite to any question involving jurisdictional immunity is therefore the existence of a valid "jurisdiction", primarily under internal law rules of a State, and, in the ultimate analysis, the assumption and exercise of such jurisdiction not conflicting with any basic norms of public international law. It is then and only then that the applicability of State immunity may come into play.²⁴¹ There appears to be a close relationship between the existence of valid jurisdiction on the matter under consideration by the court and the consequential possibility of a claim of jurisdictional immunity. Without evidence of valid jurisdiction, there is no necessity to proceed to initiate, let alone substantiate, any claim of State immunity.²⁴² It should, however, be emphasized that the Commission is not concerned in the consideration of this topic with the compatibility with general international law of a State's internal law on the extent of jurisdiction.

(3) Paragraph 2 deals with the notion of proceedings before the courts of one State against another State, while paragraph 3 deals with the various entities which could be classified as beneficiaries of State immunity.

(4) Proceedings before the courts of one State are considered as having been instituted against another State if an attempt is made to compel that other State against its will to submit to the jurisdiction of the former. There are various ways in which a State can be impleaded or implicated in a litigation or a legal proceeding before the court of another State.

²⁴⁰ While this obligation to refrain from exercising jurisdiction against a foreign State may be regarded as a general rule, it is not unqualified. It should be applied in accordance with "the provisions of the present articles".

²⁴¹ It is suggested that in normal circumstances the court should be satisfied that it is competent before proceeding to examine the plea of jurisdictional immunity. In actual practice, there is no established order of priority for the court in its examination of jurisdictional questions raised by parties. There is often no rule requiring the court to exhaust its consideration of other pleas or objections to jurisdiction before deciding the question of jurisdictional immunity.

²⁴² Questions of the existence of valid jurisdiction are governed by internal law, although in practice the court is generally competent to determine the extent and limits of its own jurisdiction. It is easy to overlook the question concerning jurisdiction and to proceed to decide the issue of immunity without ascertaining first the existence of jurisdiction if contested on other grounds.

(a) *Institution of proceedings against another State*

(5) A State is indubitably implicated in litigation before the courts of another State if a legal proceeding is instituted against it in its own name. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. It does not arise if the State agrees to become a party to the proceeding.

(6) Although, in the practice of States, jurisdictional immunity has been granted more frequently in cases where a State as such has not been named as party to the proceeding, in reality there is a surprising collection of instances of direct implication in proceedings in which States are actually named as defendants.²⁴³ For the purpose of State immunity, a definition of "State" may be needed. Whatever the definition, it is clear from the practice of States that the expression "State" for the purposes of the present articles includes, in the first place, fully sovereign and independent foreign States, but by extension also entities that are sometimes not completely foreign and at other times not fully independent or only partially sovereign.²⁴⁴ Certainly the cloak of State immunity covers all foreign States regardless of

²⁴³ See, for example, *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923) (*Annual Digest of Public International Law Cases, 1923-1924* (London), vol. 2 (1933), case No. 69, p. 133); *United States of America v. Republic of China* (1950) (*International Law Reports, 1950* (London), vol. 17 (1956), case No. 43, p. 168); *The "Hai Hsuan"—United States of America v. Yong Soon Fe and another* (1950) (*ibid.*, case No. 44, p. 170); *Stato de Grecia, v. Di Capone* (1926) (*Rivista de diritto internazionale* (Rome), series III, vol. VI (1927), p. 102); *Pauer v. Hungarian People's Republic* (1956) (*International Law Reports, 1957* (London), vol. 24, (1961), p. 211); *Alfred Dunhill of London, Inc. v. Republic of Cuba* (1976) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 4 (July 1976), p. 735).

²⁴⁴ The practice of some States appears to support the view that semi-sovereign States and even colonial dependencies are treated, although they may fall within the same constitutional grouping as the State itself, as foreign sovereign States. British courts, for instance, consistently declined jurisdiction in actions against States members of the British Commonwealth and semi-sovereign States dependent on the United Kingdom. Thus, the Maharaja of Baroda was regarded as "a sovereign prince over whom British courts have no jurisdiction" *Gaekwar of Baroda State Railways v. Hafiz Habid-ul-Haq* (1938) (*Annual Digest ... 1938-1940* (London), vol. 9 (1942), case No. 78, p. 233). United States courts have adopted the same view with regard to their own dependencies: *Kawananakoa v. Polyblank* (1907) (*United States Reports*, vol. 205 (1921), pp. 349 and 353), wherein the territory of Hawaii was granted sovereign immunity; and also, by virtue of the federal Constitution, with respect to member States of the Union: *Principality of Monaco v. Mississippi* (1934) (*Annual Digest ... 1933-1934* (London), vol. 7 (1940), case No. 61, p. 166; cf. G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1941), vol. II, p. 402). French courts have similarly upheld immunity in cases concerning semi-sovereign States and member States within the French Union: *Bey of Tunis et consorts v. Ahmed-ben-Aïad* (1893) (Dalloz, *Recueil périodique et critique de jurisprudence, 1894* (Paris), part 2, p. 421); see also cases concerning the "Gouvernement chérifien", for instance, *Laurans v. Gouvernement impérial chérifien et Société marseillaise de crédit* (1934) (*Revue critique de droit international* (Darras) (Paris), vol. 30, No. 4 (October-December 1935), p. 795, and a note by Mme S. Basdevant-Bastid, pp. 796 *et seq.*). See also *Duff Development Company Ltd. v. Government of Kelantan and another* (1924) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1924*, p. 797).

their form of government, whether a kingdom, empire or republic, a federal union, a confederation of States or otherwise.²⁴⁵

(b) *Proceedings against the central Government or head of State of another State*

(7) A State need not be expressly named as party to a litigation to be directly implicated. For instance, an action against the Government of a State clearly implicates the State itself as, for all practical purposes, the central Government is identified or identifiable with it. A State is generally represented by the Government in most, if not all of its international relations and transactions. The central Government is therefore the State itself and a proceeding against the Government *eo nomine* is not distinguishable from a direct action against the State.²⁴⁶ State practice has long recognized the practical effect of a suit against a foreign Government as identical with a proceeding against the State.²⁴⁷

(8) A foreign sovereign or a head of State of a foreign State, often considered as a principal organ of a State, is also entitled to immunity to the same extent as the State itself on the ground that the crown, the reigning monarch, the sovereign head of State or indeed a head of State may be assimilated to the central Government. In point of fact, it is not inaccurate to state that in some countries the practice of allowing immunities in favour of foreign sovereigns or foreign potentates developed well before that in respect of a foreign State or Govern-

²⁴⁵ See, for instance, *Dralle v. Republic of Czechoslovakia* (1950) (*International Law Reports*, 1950 (London), vol. 17 (1956), case No. 41, p. 155); *Etat espagnol v. Canal* (1951) *Journal du droit international* (Clunet) (Paris), 79th year, No. 1 (January-March 1952), p. 220); *Patterson-MacDonald Shipbuilding Co., McLean v. Commonwealth of Australia* (1923) (United States of America, *The Federal Reporter*, vol. 293 (1924), p. 192); *De Froe v. The Russian State, now styled "The Union of Soviet Socialist Republics"* (1932) (*Annual Digest ... 1931-1932* (London), vol. 6 (1938), case No. 87, p. 170); *Irish Free State, v. Guaranty Safe Deposit Company* (1927) (*Annual Digest ... 1925-1926* (London), vol. 3(1929), case No. 77, p. 100); *Kingdom of Norway v. Federal Sugar Refining Co.* (1923) (United States of America, *The Federal Reporter*, vol. 286 (1923), p. 188); *Iptrade International S.A. v. Federal Republic of Nigeria* (1978) (*id.*, *Federal Supplement*, vol. 465 (1979), p. 824); *40 D 6262 Realty Corporation and 40 E 6262 Realty Corporation v. United Arab Emirates Government* (1978) (*ibid.*, vol. 447 (1978), p. 710); *Kahan v. Pakistan Federation* (1951) (United Kingdom, *The Law Reports, King's Bench Division*, 1951, vol. II, p. 1003); *Venne v. Democratic Republic of the Congo* (1968) (Canada, *The Dominion Law Reports, Third series*, vol. 5, p. 128).

²⁴⁶ See, for example, *Lakhowsky v. Swiss Federal Government and Colonel de Reynier* (1921) (*Annual Digest ... 1919-1922* (London), vol. 1, case No. 83, p. 122); *U. Kyaw Din v. His Britannic Majesty's Government of the United Kingdom and the Union of Burma* (1948) (*Annual Digest ... 1948* (London), vol. 15 (1953), case No. 42, p. 137); *Etienne v. Government of the Netherlands* (1947) (*Annual Digest ... 1947* (London), vol. 14, case No. 30, p. 83).

²⁴⁷ Sovereign immunity has sometimes been accorded to colonial dependencies of foreign States on the ground that the actions in effect implicated the foreign Governments, States being identifiable with their Governments. See, for instance, *The "Martin Behrman"*, *Isbrandtsen Co. v. Netherlands East Indies Government* (1947) (*Annual Digest ... 1947* (London), vol. 14 (1951), case No. 26, p. 75); *Van Heyningen v. Netherlands Indies Government* (1948) (*Annual Digest ... 1948* (London), vol. 15 (1953), case No. 43, p. 138).

ment.²⁴⁸ State immunity, as it is understood today, may be said in some jurisdictions to have been an extension of sovereign immunity. States have come to be identified with their reigning sovereigns who were in their own right entitled to immunity; or to put it in reverse, the sovereign heads of State have been identified with the States they represent.²⁴⁹

(c) *Proceedings against political subdivisions of another State*

(i) *Absence of uniform State practice*

(9) It is important to note that there is neither uniformity nor consistency in the practice of States on the precise legal status of political subdivisions of a foreign State before national authority. On the whole, State practice seems to suggest a trend in favour of local jurisdiction. Political subdivisions of a foreign State such as member States of a federal union, and part-sovereign States, such as protected States which lack full external sovereignty, are apparently in danger of not being clothed with State immunity, being neither sovereign States nor one of the recognized agencies of the central Government. An action against a political subdivision of a foreign State is therefore not automatically regarded as an action against the State itself. Such action is not necessarily considered as instituted against the foreign State of which the political subdivision forms a part. Such autonomous entities, lacking international personality and external sovereignty, and not being identified with the federal union or the federation, may be proceeded against in their own name without implicating the foreign State concerned.

(ii) *Proceedings considered not to be against another State*

(10) A judgement handed down in France in 1933 by the Cour de cassation, in a case concerning the State of Ceará of the Republic of Brazil, is illustrative of the general attitude of municipal courts in regard to autonomous entities such as political subdivisions of a

²⁴⁸ See, for instance, Lord Campbell in *Wadsworth v. Queen of Spain and De Haber v. Queen of Portugal* (1851) (United Kingdom, *Queen's Bench Reports*, vol. XVII (1855), p. 171, p. 206; cf. *Hullett v. King of Spain* (1828) (R. Bligh, *New Reports of Cases Heard in the House of Lords, 1828* (London), vol. II (1830), p. 31); and *Duke of Brunswick v. King of Hanover* (1844) (C. Clark and W. Finnely, *House of Lords Cases*, vol. II (1848-1850) (London), p. 1); *Mighell v. Sultan of Johore* (1893) (United Kingdom, *The Law Reports, Queen's Bench Division, 1894*, vol. I, p. 149).

²⁴⁹ Common law judges are inclined to refer to foreign States as foreign sovereigns for purposes of State immunities. See, for instance, Lord Justice Jenkins in *Kahan v. Pakistan Federation* (1951) (see footnote 245 above); Lord Denning in *Rahimtoola v. Nizam of Hyderabad* (1957) (*International Law Reports*, 1957 (London), vol. 24 (1961), p. 175). See also article 1, para. (a) of part I of the Harvard Draft Convention Prepared for the Codification of International Law under the Auspices of the Harvard Law School, in *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 475.

foreign State.²⁵⁰ The practice of American, French, Italian and Belgian courts generally supports the view that such political subdivisions are subject to local jurisdiction for lack of external sovereignty and international personality, being distinguishable from the central Government.²⁵¹ It should be observed, on the other hand, that on not infrequent occasions political subdivisions of a State or even colonial dependencies are treated, as a mark of courtesy, with a privileged status within the same federal union by fictitiously assimilating the position of the domestic entities to that of a foreign sovereign State.²⁵²

²⁵⁰ *Etat de Ceará v. Dorr et autres* (1932) (Daloz, *Recueil périodique et critique de jurisprudence*, 1933 (Paris, (part 1, p. 196). The Court said:

“Whereas this rule [of incompetence] is to be applied only when it is invoked by an entity which shows itself to have a personality of its own in its relations with other countries, considered from the point of view of public international law; whereas such is not the case of the State of Ceará, which, according to the provisions of the Brazilian Constitution legitimately relied upon by the lower courts, and whatever its internal status in the sovereign confederation of the United States of Brazil of which it is a part, being deprived of diplomatic representation abroad, does not enjoy from the point of view of international political relations a personality of its own ...” (*ibid.*, p. 197).

²⁵¹ For the practice of the United States of America, see, for instance, *Molina v. Comisión Regularadora del Mercado de Henequén* (1918) (Hackworth, *op. cit.*, vol. II, pp. 402-403), where Yucatán, a member State of the United States of Mexico, was held amenable to the jurisdiction of the United States courts; *Schneider v. City of Rome* (1948) (*Annual Digest ... 1948* (London), vol. 15 (1953), case No. 40, p. 131) where jurisdiction was assumed against the defendant, a political subdivision of the Italian Government exercising substantial governmental powers. See however, *Sullivan v. State of São Paulo* (1941) (*Annual Digest ... 1941-1942* (London), vol. 10 (1945), case No. 50, p. 178), where the State Department had recognized the claim of immunity.

For France, see, for instance *Ville de Genève v. Consorts de Civry* (1894), (Sirey, *Recueil général des lois et des arrêts*, 1896 (Paris), part 1, p. 225); *Crédit foncier d'Algérie et de Tunisie v. Restrepo et département d'Antioquia* (1922), (Clunet), *Journal du droit international*, 50th year (January-February 1923), p. 857); *Dumont v. State of Amazonas* (1948) (*Annual Digest ... 1948* (London), vol. 15, case No. 44, p. 140).

For Italy, see, for instance, *Somigli v. Etat de São Paulo du Brésil* (1910) (*Revue de droit international privé et de droit pénal international* (Darras) (Paris), vol. VI (1910), p. 527), where São Paulo was held amenable to Italian jurisdiction in respect of a contract to promote immigration to Brazil.

For Belgium, see, for instance, *Feldman v. Etat de Bahia* (1907) (*Pasicrisie belge*, 1908 (Brussels), vol. II, p. 55 (see also *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 484), where Bahia was denied immunity although under the Brazilian Constitution it was regarded as a sovereign State.

²⁵² See, for example, *Kawanakao v. Polybank* (1907) (see footnote 244 above), where the territory of Hawaii was considered to be sovereign for the purpose of State immunity. The Court said:

“The doctrine [of sovereign immunity] is not confined to powers that are sovereign in the full sense of judicial theory, but normally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights.” (*Op. cit.*, p. 349.)

See also a series of cases concerning the Philippine Islands: *Bradford v. Chase National City Bank of New York* (1938) (*Annual Digest ... 1938-1940* (London), vol. 9 (1942), case No. 17, p. 35). See also *Hans v. Louisiana* (1890) (*United States Reports*, vol. 134 (1910), p. 1; *South Dakota v. North Carolina* (1904) (*ibid.*, vol. 192 (1911),

(iii) *Proceedings considered to be against another State*

(11) It is not difficult to envisage circumstances in which political subdivisions of a foreign State may in fact be exercising governmental authority assigned to them by the federal union, and proceedings are brought against them for acts performed by them on behalf of the State. Such proceedings could be regarded as in effect directed against the State. There are cases where, dictated by expediency,²⁵³ the courts have refrained from entertaining suits against such autonomous entities, holding them to be an integral part of the foreign Government.²⁵⁴

(12) Whatever the status of a political subdivision of a State, there is nothing to preclude the possibility of such autonomous entities being constituted or acting as organs of the central Government or as State agencies performing sovereign acts of the foreign State.²⁵⁵

p. 286; *United States v. North Carolina* (1890) (*ibid.*, vol. 136 (1910), p. 211; *Rhode Island v. Massachusetts* (1846) (B. C. Howard, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, 2nd ed., vol. IV (1909), p. 591; and cases cited above in footnotes 244 and 246. See, however, *Commonwealth of Australia v. New South Wales* (1923) (*Annual Digest ... 1923-1924* (London), vol. 2 (1933), case No. 67, p. 131:

“The appellation ‘sovereign State’ as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning”.

²⁵³ For example, in the case *Sullivan v. State of São Paulo* (1941) (see footnote 251 above), Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States; Judge Learned Hand expressed his doubts whether every political subdivision of a foreign State was immune which exercised substantial governmental power. See also *Yale Law Journal* (New Haven, Conn.), vol. 50, No. 6 (April 1941), pp. 1088 *et seq.*; *Cornell Law Quarterly Review* (Ithica, N.Y.), vol. 26 (1940-1941), pp. 720 *et seq.* *Harvard Law Review* (Cambridge, Mass.), vol. LV, No. 1 (November 1941), p. 149; *Michigan Law Review* (Ann Arbor, Mich.), vol. 40, No. 6 (April 1942), pp. 911 *et seq.*; *Southern California Law Review* (Los Angeles, Calif.), vol. 15 (1941-1942), p. 258. This was the most commented case of that time.

²⁵⁴ In *Van Heyningen v. Netherlands Indies Government* (1948) (see footnote 247 above), the Supreme Court of Queensland (Australia) granted immunity to the Netherlands Indies Government. Judge Philip said:

“In my view, an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of its Government a governmental control of part of its territory which it creates into a legal entity, it seems to me that that legal entity cannot be sued here, because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court.” (*Op. cit.*, p. 140.)

²⁵⁵ This possibility was pointed out by Pillet, commenting on a French case denying immunity, *Ville de Genève, v. Consorts de Civry* (1894) (Sirey, *Recueil ... 1896* (see footnote 251 above), pp. 225 *et seq.*). See also *Rousse et Maber v. Banque d'Espagne* (1937) (Sirey, *Recueil général des lois et des arrêts*, 1938 (Paris), part 2, p. 17), where the Court of Appeal of Poitiers envisaged the same possibility; Rousseau, in his note (*ibid.*, pp. 17-23), thought that provincial autonomies such as the Basque Government might at the same time be “an executive organ of a decentralized administrative unit”. Compare the English Court of Appeal in *Kahan v. Pakistan Federation* (1951) (see footnote 245 above). See also *Huttinger v. Upper Congo-Great African Lakes Railways Co. et al.* (1934) (*Annual Digest ... 1933-1934* (London), vol. 7, case No. 65, pp. 172-173), and the cases cited in footnote 247 above.

A constituent state of a federal union normally enjoys no immunity as a sovereign State, unless it can establish that the proceeding against it in fact implicates the foreign State. This uncertain status of political subdivisions of a State is further preserved by regional agreements such as the European Convention on State Immunity, 1972.²⁵⁶

(d) *Proceedings against organs, agencies or instrumentalities of another State*

(13) Proceedings against organs, agencies or instrumentalities of another State may, as indeed they often do, implicate the foreign State concerned, especially in regard to the activities performed by such State agencies or instrumentalities in the exercise of governmental authority of the State. State organs, agencies or instrumentalities may vary in their formation, constituent components, functions and activities, depending upon the political, economic and social structures of the State and ideological considerations. It is not possible to examine every variety or variation of the organs, agencies and instrumentalities of a State. It is nevertheless useful to illustrate some of the more usual denominations and practical examples which, for the sake of convenience, could be grouped under two headings: State organs and departments of government, and agencies or instrumentalities of State.

(i) *State organs and departments of government*

(14) Just as the State is represented by its Government, which is identified with it for most practical purposes, the Government is often composed of State organs and departments or ministries that act on its behalf. Such organs of State and departments of government can be and are often constituted as separate legal entities within the internal legal system of the State. Lacking as they do international legal personality as a sovereign entity, they could nevertheless represent the State or act on behalf of the central Government of the State, which they in fact compose as integral parts of it. Such State organs or departments of government comprise the various ministries of a Government,²⁵⁷ including the armed forces,²⁵⁸ the subordinate divisions or departments

²⁵⁶ See footnote 232 above. The Convention came into force on 11 June 1976 between Austria, Belgium and Cyprus and has since been ratified by the United Kingdom and the Netherlands. Article 28, para. 1, confirms non-enjoyment of immunity by the constituent states of a federal State, but para. 2 permits the federal State to make a declaration that its constituent states may invoke the provisions of the Convention.

²⁵⁷ See, for instance, *Bainbridge v. The Postmaster General* (1905) (United Kingdom, *The Law Reports, King's Bench Division*, 1906, vol. I, p. 178); *Henon v. Egyptian Government and British Admiralty* (1947) (*Annual Digest ...*, 1947 (London), vol. 14 (1951), case No. 28, p. 78); *Triandafilou v. Ministère public* (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 39, No. 2 (April 1945), p. 345); *Piascik v. British Ministry of War Transport* (1943) (*Annual Digest ...*, 1943-1945 (London), vol. 12 (1949), case No. 22, p. 87); and *Turkish Purchases Commission case* (1920) (*Annual Digest ...* 1919-1922 (London), vol. 1 (1932), case No. 77, p. 114).

²⁵⁸ See, for example, the opinion of Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon* (1812) (Cranch (*op.cit.* see note 235 above), pp. 135-137). See also various Status of Forces Agreements and Foreign Visiting Forces Acts.

within each ministry, such as embassies,²⁵⁹ special missions²⁶⁰ and consular posts,²⁶¹ and offices, commissions, or councils²⁶² which need not form part of any ministry but are themselves autonomous State organs answerable to the central Government, or to one of its departments, or administered by it. Other principal organs of the State such as the legislature and the judiciary of a foreign State would be equally identifiable with the State itself if an action were or could be instituted against them in respect of their public or official acts.

(ii) *Agencies or instrumentalities of State*

(15) There is in practice no hard-and-fast line to be drawn between agencies or instrumentalities of a State and State organs and departments of government under the previous subheading. The expression "agencies or instrumentalities" indicates the interchangeability of the two terms.²⁶³ Proceedings against an agency of a foreign Government²⁶⁴ or an instrumentality of a foreign State, whether or not incorporated as a separate entity,²⁶⁵ could be considered to be a proceeding against

²⁵⁹ Embassies are subsidiary organs of the State, being part of the Ministry of Foreign Affairs or the Foreign Office of the sending State. Their status is governed by the 1961 Vienna Convention on Diplomatic Relations.

²⁶⁰ Special missions are also covered by State immunity as contained in the 1969 Convention on Special Missions. See also the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

²⁶¹ See the 1963 Vienna Convention on Consular Relations.

²⁶² See, for example, *Mackenzie-Kennedy, v. Air Council* (1927) (United Kingdom, *The Law Reports, King's Bench Division*, 1927, vol. II, p. 517); *Graham and others v. His Majesty's Commissioners of Public Works and Buildings* (1901) (*ibid.*, 1901, vol. II, p. 781); *Société Viajes v. Office national du tourisme espagnol* (1936) (*Annual Digest ...*, 1935-1937 (London), vol. 8 (1941), case No. 87, p. 227); *Telkes v. Hungarian National Museum*, No. II (1942) (*Annual Digest ...*, 1941-1942 (London), vol. 10 (1945), case No. 169, p. 576).

²⁶³ See, for example, the United States of America Foreign Sovereign Immunities Act of 1976 (*United States Code, 1976 Edition*, vol. 8, title 28, chap. 97 (text reproduced in United Nations, *Materials on jurisdictional immunities ...*, pp. 55 *et seq.*)), which, in sect. 1603 (b), defines "agency or instrumentality of a foreign State" as an entity "(1) which is a separate legal person, (2) which is an organ of a foreign state or political division thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen or a State of the United States as defined in section 1332 (c) and (d) of this title nor created under the laws of any third country."

²⁶⁴ See, for example, *Krajina v. The Tass Agency and another* (1949) (*Annual Digest ...*, 1949 (London), vol. 16, (1955), case No. 37, p. 129); compare *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (*Annual Digest ...*, 1923-1924 (London), vol. 2 (1933), case No. 73, p. 138), and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (United Kingdom, *The Law Reports, Queen's Bench Division*, 1957, vol. 1, p. 438), in which Lord Justice Jenkins observed:

"Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery." (*Ibid.*, p. 466.)

²⁶⁵ For a different view, see the opinions of Lord Justices Cohen and Tucker in *Krajina v. The Tass Agency* (1949) (see footnote 264 above), and in *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 264 above), where Lord Justice Parker said:

"I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to

the foreign State, particularly when the cause of action relates to the activities conducted by the agency or instrumentality of a State in the exercise of governmental authority or part of the sovereign power of that State.²⁶⁶

(e) *Proceedings against State agents or representatives of a foreign Government*

(16) It is not likely that the types of beneficiaries or categories of recipients of State immunities as so far listed are exhaustive or in any way comprehensive of the growing list of persons and institutions to which State immunity may apply. Another important group of persons who, for want of a better terminology, will be called agents of State or representatives of government should also be mentioned. Proceedings against such persons in their official or representative capacity, such as personal sovereigns, ambassadors and other diplomatic agents, consular officers and other representatives of government may be said to be against the foreign State they represent in respect of an act performed by such representatives on behalf of the foreign Government in the exercise of their official functions.²⁶⁷

(i) *Immunities ratione materiae*

(17) Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*. Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign

State in respect of an act performed by him in his official capacity. State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities, being immunity *ratione materiae*.²⁶⁸

(ii) *Immunities ratione personae*

(18) Of all the immunities enjoyed by representatives of Government and State agents, two types of beneficiaries of State immunities deserve special attention, namely, the immunities of personal sovereigns and those of ambassadors and diplomatic agents.²⁶⁹ Apart from immunities *ratione materiae* by reason of the activities or the official functions of representatives, personal sovereigns and ambassadors are entitled, to some extent in their own right, to immunities *ratione personae* in respect of their persons or activities that are personal to them and unconnected with official functions. The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated. All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts.²⁷⁰ Indeed, even such immunities inure not to the personal benefit of sovereigns and ambassadors but to the benefit of the States they represent, to enable them to fulfil their representative functions or for the effective perfor-

sue and be sued is wholly inconsistent with it remaining and being a department of State." (*Op. cit.*, p. 472.)

See also *Emergency Fleet Corporation, United States Shipping Board v. Western Union Telegraph Company* (1928) (*United States Reports*, vol. 275 (1928), p. 415):

"Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." (*Ibid.*, pp. 425-426)

See, however, the certificate of the United States Ambassador regarding the status of the U.S. Shipping Board in the case *Compañía Mercantil Argentina* (1924) (cited in footnote 264 above).

²⁶⁶ See *Dollfus Mieg et Cie v. Bank of England* (1950) and *United States of America and Republic of France v. Dollfus Mieg et Cie and Bank of England—Gold Bars case* (1952) (*Annual Digest ... 1949* (London), vol. 16 (1955), case No. 36, p. 103); and *Monopole des tabacs de Turquie et al. v. Régie co-intéressée des tabacs de Turquie* (1930) (*Annual Digest ... 1929-1930* (London), vol. 5 (1935), case No. 79, p. 123).

²⁶⁷ The fact that the immunities enjoyed by representatives of government, whatever their specialized qualifications, diplomatic or consular or otherwise, are in the ultimate analysis State immunities has never been doubted. Rather, it has been unduly overlooked. Recently, however, evidence of their connection is reflected in some of the replies and information furnished by Governments. The Jamaican legislation and the Moroccan decision on diplomatic immunities and Mauritian law on consular immunities are outstanding reminders of the closeness of identities between State immunities and other types of immunities traceable to the State (see A/CN.4/343, note 8).

²⁶⁸ Immunities *ratione materiae* may outlive the tenure of office of the representatives of a foreign State. They are nevertheless subject to the qualifications and exceptions to which State immunities are ordinarily subject in the practice of States. See, for instance, *Carlo d'Austria v. Nobili* (1921) (*Annual Digest ... 1919-1922* (London), vol. 1 (1932), case No. 90, p. 136) and *La Mercantile v. Regno de Grecia* (1955) (*International Law Reports, 1955* (London), vol. 22 (1958), p. 240), where the contract concluded by the Greek Ambassador for the delivery of raw materials was imputable to the State, and therefore subject to the local jurisdiction.

²⁶⁹ Historically speaking, immunities of sovereigns and ambassadors developed even prior to State immunities. They are in State practice regulated by different sets of principles of international law. It is submitted, in strict theory, that all jurisdictional immunities are traceable to the basic norm of State sovereignty. See S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), chaps. 1 and 2; E. Suy, "Les bénéficiaires de l'immunité de l'Etat", *L'immunité de juridiction et d'exécution des Etats*, Actes du colloque conjoint des 30 et 31 janvier 1969 des Centres de droit international (Brussels, Editions de l'Institut de sociologie, 1971), pp. 257 *et seq.*

²⁷⁰ Thus in *The Empire v. Chang and others* (1921) (*Annual Digest ... 1919-1922* (London), vol. 1, case No. 205, p. 288), the Supreme Court of Japan confirmed the conviction of former employees of the Chinese legation in respect of offences committed during their employment as attendants there, but unconnected with their official duties. See also *Léon v. Díaz* (1892) (*Journal du droit international privé* (Clunet) (Paris), vol. 19, p. 1137), concerning a former Minister of Uruguay in France, and *Laperdrix et Penquer v. Kouzouboff et Belin* (1926) (*ibid.*, vol. 53 (January-February 1926), pp. 64-65), where an ex-secretary of the United States Embassy was ordered to pay an indemnity for injury in a car accident.

mance of their official duties.²⁷¹ This proposition is further reflected, in the case of diplomatic agents, in the rule that diplomatic immunities can only be waived by an authorized representative of the sending State and with proper governmental authorization.²⁷²

(f) *Proceedings affecting State property or property in the possession or control of a foreign State*

(19) Without closing the list of beneficiaries of State immunities, it is necessary to note that actions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered in the practice of States to be proceedings which in effect implicate the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions *in rem* or in admiralty against State-owned or State-operated vessels used for defence purposes and other peaceful uses,²⁷³ but also measures of prejudgment attachment or seizure (*saisie conservatoire*) as well as execution or measures in satisfaction of judgement (*saisie exécutoire*). The post-judgement or execution order will not be considered in the present part of the report, since it concerns not only immunity from jurisdiction but beyond that, also immunity from execu-

tion, a further stage in the process of jurisdictional immunities.²⁷⁴

(20) As has been seen, the law of State immunities has developed in the practice of States not from proceedings instituted directly against foreign States or Governments in their own name, but more indirectly through a long line of actions for the seizure or attachment of vessels for maritime liens or collision damages or salvage services.²⁷⁵ State practice has been rich in instances of State immunities in respect of their men-of-war,²⁷⁶ visiting forces,²⁷⁷ ammunitions and weapons²⁷⁸ and aircraft.²⁷⁹ The criterion for the foundation of State immunity is not limited to the claim of title or ownership by the foreign Government,²⁸⁰ but clearly encompasses cases of property in actual possession or control of a foreign State.²⁸¹ The Court should not so exercise its jurisdiction as to put a foreign sovereign to election between being deprived of property or else submitting to the jurisdiction of the Court.²⁸²

(21) The obligation of paragraph 3 dispenses with the need to have a separate definition of a "foreign State", as it seems to specify the entities which could be classified as the beneficiaries of State immunity, without attempting to define the term "State" for the present purpose. These entities are entitled to State immunity whether or not forming an integral part of the foreign State and whether or not organized as legal persons with separate legal personality under the internal law of a State. For the purposes of State immunity,

²⁷¹ See, for example, the judgement of the Court of Geneva in the case *V... et Dicker v. D...* (1927) (*ibid.*, vol. 54 (January-February 1927), p. 1179), where an action by the mother and newly-born child was allowed to proceed against an ex-diplomat. Commenting on the decision, Noël-Henry said:

"... the real basis of immunity is the necessity of the function. Consequently, the principle is that the diplomat is covered by immunity only when he is fulfilling his functions ... When he has relinquished his post, he can be sued, except in connection with acts performed by him in the fulfilment of his functions; moreover, it is not so much the immunity of the diplomat that is involved as the immunity of the Government which he represents." (*Ibid.*, p. 1184.)

See also M. Brandon, "Report on diplomatic immunity by an Inter-departmental Committee on State immunities", *International and Comparative Law Quarterly* (London), vol. 1 (July 1952), p. 358; P. Fiore, *Trattato di diritto internazionale pubblico*, 3rd ed. rev. (Turin, Unione tipografico-editrice, 1887-1891), p. 331, para. 491.

²⁷² See, for instance, *Dessus v. Ricoy* (1907) (*Journal du droit international privé* (Clunet) (Paris), vol. 34 (1907), p. 1086), where the Court said:

"... since the immunity of diplomatic agents is not personal to them, but is an attribute and a guarantee of the State they represent ..., the agent cannot waive his immunity, especially when he cannot produce in support of a waiver of immunity any permission to do so issued by his Government."

See also *Reichenbach et Cie v. Mme Ricoy* (1906) (*ibid.*, p. 111; *Cottenet et Cie v. Dame Raffalovich* (1908) (*ibid.*, vol. 36 (1909), p. 150); the *Grey* case (1953) (*ibid.*, vol. 80 (1953), p. 886); and *Procureur général près de la Cour de cassation v. S. E le Docteur Franco-Franco* (1954) (*ibid.*, vol. 81, No. 1 (1954), p. 786). See also the provisions of the 1961 Vienna Convention on Diplomatic relations.

²⁷³ See in this connection the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) (*League of Nations, Treaty Series*, vol. CLXXVI, p. 199); the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 1958) (United Nations, *Treaty Series*, vol. 516, p. 205), the Convention on the High Seas (Geneva, 1958) (*ibid.*, vol. 450, p. 11) and the Convention on the Law of the Sea (Geneva, 1982) (A/CONF.62/122 and corrigenda).

²⁷⁴ Immunities from execution will form the subject of further study on the basis of a subsequent report to be prepared by the Special Rapporteur.

²⁷⁵ See, for example, *The Schooner "Exchange" v. McFaddon* (1812) (see footnote 235 above); *The "Prins Frederik"* (1820) (J. Dodson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1815-1822) (London), vol. II (1828), p. 451); *The "Charkieh"* (1873) (United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 97).

²⁷⁶ See, for example, *The "Constitution"* (1879) (United Kingdom, *The Law Reports, Probate Division*, vol. IV (1879), p. 39); *The "Ville de Victoria"* and *The "Sultan"* (1887) (See G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. II, p. 303); *"El Presidente Pinto"* (1891) and *"Assari Tewfik"* (1901) (see C. Baldoni, "Les navires de guerre dans les eaux territoriales étrangères", *Recueil des cours de l'Académie de droit international de la Haye, 1938-III* (Paris, Sirey, 1938), vol. 65, pp. 247 *et seq.*)

²⁷⁷ See, for example, the case *The Schooner "Exchange"* (1812) and the Status of Forces Agreements, mentioned in footnote 258 above.

²⁷⁸ See, for example, *Vavasseur v. Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (1878), p. 351).

²⁷⁹ See, for example, the case *Hong Kong Aircraft—Civil Air Transport Inc. v. Central Air Transport Corp.* (1953) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council*, 1953, p. 70).

²⁸⁰ See, for example, *Juan Ysmael & Co., v. Government of the Republic of Indonesia* (1954) (*International Law Reports, 1954* (London), vol. 21 (1957), p. 95), and also cases involving bank accounts of a foreign Government, such as *Trendtex Trading Corporation Ltd., v. The Central Bank of Nigeria* (1977) (*International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471).

²⁸¹ See, for example, *The "Philippine Admiral"* (1975) (*International Legal Materials*, vol. XV, No. 1 (January 1976), p. 133).

²⁸² *Dollfus Mieg et Cie v. Bank of England* (1950) (see footnote 266 above).

State organs and agencies or instrumentalities are entities organized as such under the internal law of the State of which they form part.

Article 8. Express consent to the exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

Commentary

(a) *The relevance of consent and its consequences*

(1) In the present part of the draft articles, article 6 enunciates the rule of State immunity while article 7 sets out the modalities for giving effect to State immunity. Following these two propositions, a third logical element is the notion of "consent",²⁸³ the various forms of which are also dealt with in subsequent articles of this part.

(2) Article 8 above deals exclusively with express consent by a State in the manner specified therein, namely, consent given by a State in an international agreement, in a written contract, or *in facie curiae*.

(i) *Absence of consent as an essential element of State immunity*

(3) As has been intimated in article 6 on State immunity and more clearly indicated in article 7 on the obligation to refrain from subjecting another State to its jurisdiction, the absence or lack of consent on the part of the State against which the court of another State has been asked to exercise jurisdiction is presumed. State immunity under article 6 does not apply if the State in question has consented to the exercise of jurisdiction by the court of another State. There will be no obligation under article 7 on the part of a State to refrain in compliance with its rules of competence from exercising jurisdiction over or against another State which has consented to such exercise. The obligation to refrain from subjecting another State to its jurisdiction is not an absolute obligation. It is distinctly qualified, *inter alia* by the phrase "without its consent", or is conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought.

²⁸³ The notion of "consent" is also relevant to the theory of State immunity in another connection. The territorial or receiving State is sometimes said to have consented to the presence of friendly foreign forces passing through its territory and to have waived its normal jurisdiction over such forces. See, for example, Chief Justice Marshall in *The Schooner "Exchange" v. MacFaddon* (1812) (*op. cit.*), (see note 235 above, pp. 136-137).

(4) Consent, the absence of which has thus become an essential element of State immunity, is worthy of the closest attention. The obligation to refrain from exercising jurisdiction against another State or to implead another sovereign government is based on the assertion or presumption that such exercise is *without consent*. Lack of consent appears to be presumed rather than asserted in every case. State immunity applies on the understanding that the State against which jurisdiction is to be exercised does not consent, or is not willing to submit to the jurisdiction. This unwillingness or absence of consent is generally assumed, unless the contrary is indicated. The court exercising jurisdiction against an absent foreign State cannot and does not generally assume or presume that there is consent or willingness to submit to its jurisdiction. There must be proof or evidence of consent to satisfy the exercise of existing jurisdiction or competence against another State. Any formulation of the doctrine of State immunity or its corollary is incomplete without reference to the notion of consent, or rather the lack of consent, as a constitutive element of State immunity or of the correlative duty to refrain from subjecting another State to local jurisdiction.

(5) Express reference to absence of consent as a *conditio sine qua non* of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to Member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction.²⁸⁴ The expression "*without consent*" in connection with the obligation to decline the exercise of jurisdiction is sometimes rendered in judicial references as "against the will of the sovereign State" or "against the unwilling sovereign".²⁸⁵

(ii) *Consent as an element permitting exercise of jurisdiction*

(6) If the lack of consent operates as a bar to the exercise of jurisdiction, it is interesting to examine the effect of consent by the State concerned. In strict logic, it follows that the existence of consent on the part of the State against which legal proceedings are instituted

²⁸⁴ See, for example, the reply of Trinidad and Tobago (June 1980) to question 1 of the questionnaire addressed to Governments:

"The common law of the Republic of Trinidad and Tobago provides specifically for jurisdictional immunities for foreign States and their property and generally for non-exercise of jurisdiction over foreign States and their property *without their consent**. A court seized of any action attempting to implead a foreign sovereign or State would apply the rules of customary international law dealing with the subject." (United Nations, *Materials on jurisdictional immunities* ..., p. 610).

²⁸⁵ See, for example, Lord Atkin in *The "Cristina"* (1938), *Annual Digest ... 1938-40* (London), vol. 9, case No.86, p. 250):

"The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law, which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, *they will not by their process make him against his will a party to legal proceedings** whether the proceedings involve process against this person or seek to recover from him specific damages." (*Ibid.*, p. 252.)

should operate to remove this significant obstacle to the assumption and exercise of jurisdiction. If absence of consent is viewed as an essential element constitutive of State immunity, or conversely as entailing the disability, or lack of power, of an otherwise competent court to exercise its existing jurisdiction, the expression of consent by the State concerned eliminates this impediment to the exercise of jurisdiction. With the consent of the sovereign State, the court of another State is thus enabled or empowered to exercise its jurisdiction by virtue of its general rules of competence, as though the foreign State were an ordinary friendly alien capable of bringing an action and being proceeded against in the ordinary way, without calling into play any doctrine or rule of State or sovereign immunity. Consent amounts therefore to a prior condition permissive of the exercise of normal competence by the territorial authority or local court. It is conceivable that in some instances consent may even give rise to jurisdiction; it is in such circumstances constitutive of competence itself. As such, consent could in some circumstances provide a legal basis, ground, justification—or indeed the foundation for—jurisdiction, not only an opportunity or facility for the assumption or exercise of existing jurisdiction.²⁸⁶

(b) *The expression of consent to the exercise of jurisdiction*

(7) The implication of consent, as a legal theory in partial explanation or rationalization of the doctrine of State immunity, refers more generally to the consent of the State not to exercise its normal jurisdiction against another State or to waive its otherwise valid jurisdiction over another State without the latter's consent. The notion of consent therefore comes into play in more ways than one, with particular reference in the first instance to the State consenting to waive its jurisdiction (hence another State is immune from such jurisdiction) and to the instances under consideration, in which the existence of consent to the exercise of jurisdiction by another State precludes the application of the rule of State immunity.

(8) In the circumstances under consideration, that is, in the context of the State against which legal proceedings have been brought, there appear to be several recognizable methods of expressing or signifying consent. In this particular connection, consent should not be taken for granted, nor readily implied. Any theory of "implied consent" as a possible exception to the general principles of State immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognized exception. There is therefore no room for implying the consent of an un-

willing State which has not expressed its consent in a clear and recognizable manner, including by the means provided in article 9. Nor is the implication of consent of a non-consenting State admissible in this context as an exception to State immunity. The existence, expression or proof of consent of the State in litigation is extinctive of immunity itself and not in any sense an exception thereto. It remains to be seen how such consent would be given or expressed so as to remove the obligation of the court of another State to refrain from the exercise of its jurisdiction against an equally sovereign State.

(i) *Consent given in writing for a specific case*

(9) An easy and indisputable proof of consent is furnished by the State's expressing its consent in writing on an *ad hoc* basis for a specific case before the authority when a dispute has already arisen. A State is always free to communicate the expression of its consent to the exercise of jurisdiction by the court of another State in a legal proceeding against itself or in which it has an interest, by giving evidence of such consent in writing, properly executed by one of its authorized representatives such as an agent or counsel, or through diplomatic channels or any other generally accepted channels of communication. By the same method, a State could also make known its unwillingness or lack of consent, or give evidence in writing which tends to disprove any allegation or assertion of consent.²⁸⁷

(ii) *Consent given in advance in a written agreement*

(10) The consent of a State could be given in advance in general or for one or more categories of disputes or cases. Such expression of consent is binding on the part of the State giving it in accordance with the manner and circumstances in which consent is given and subject to the limitations prescribed by its expression. The nature and extent of its binding character depend on the party invoking such consent. For instance, if consent is expressed in a provision of a treaty concluded by States, it is certainly binding on the consenting State, and States parties entitled to invoke the provisions of the treaty could avail themselves of the expression of such consent. The law of treaties upholds the validity of the expression of consent to jurisdiction as well as the applicability of other provisions of the treaty. Consequently, lack of privity to the treaty precludes non-parties from the benefit or advantage to be derived from the provisions thereof. If, likewise, consent is expressed in a provision of an international agreement concluded by States and international organizations, the permissive effect of such consent is available to all parties including international organizations. On the other hand, the extent to which individuals and corporations may successfully invoke one of the provisions of the

²⁸⁶ Thus, the Fundamentals of Civil Procedure of the USSR and the Union Republics, Approved in the Law of the Union of Soviet Socialist Republics dated 8 December 1961, provides in article 61: "The filing of a suit against a foreign State, the collection of a claim against it and the attachment of the property located in the USSR may be permitted *only** with the *consent** of the competent organs of the State concerned." (United Nations, *Materials on jurisdictional immunities* ..., p. 40).

²⁸⁷ See, for example, statements submitted in writing to the Court by accredited diplomats, in *Krajina v. The Tass Agency and another* (1949); compare *Compañía Mercantil Argentina v. United States Shipping Board* (1924) and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (cases cited in footnote 264 above).

treaty or international agreement is either negative or non-existent.

(11) Indeed, the practice of States does not go so far as to support the proposition that the court of a State is bound to exercise its existing jurisdiction over or against another sovereign State which has previously expressed its consent to such jurisdiction in the provision of a treaty or an international agreement,²⁸⁸ or indeed in the express terms of a contract²⁸⁹ with the individual or corporation concerned. While the State having given express consent in any of these ways may be bound by such consent under international law or internal law, the exercise of jurisdiction or the decision to exercise or not to exercise jurisdiction is exclusively within the province and function of the trial court itself. In other words, the rules regarding the expression of consent by the State involved in a litigation are not absolutely binding on the court of another State, which is free to continue to refrain from exercising jurisdiction, subject, of course, to any rules deriving from the internal law of the State concerned. The court can and must devise its own rules and satisfy its own requirements regarding the manner in which such a consent could be given with desired consequences. The court may refuse to recognize the validity of consent given in advance and not at the time of the proceeding, not before the competent authority, or not given *in facie curiae*.²⁹⁰ The proposition formulated in draft article 8 is therefore discretionary and not mandatory as far as the court is concerned. The court may or may not exercise its jurisdiction. Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent.

²⁸⁸ There are certain multilateral treaties in point such as the 1972 European Convention on State Immunity (see footnote 232 above) and the 1926 Brussels Convention (see footnote 273 above), and those listed in United Nations, *Materials on jurisdictional immunities* ..., part III, sect. B, pp. 150 *et seq.* There are also a number of relevant bilateral trade agreements between non-socialist countries, between socialist countries and developed countries and between socialist countries and developing countries (*ibid.*, part 3, sect. A.3 and A.4, pp. 140 *et seq.*).

²⁸⁹ See, for example, an agreement between the Banque Française du Commerce Extérieur and the Kingdom of Thailand signed on 23 March 1978 in Paris by the authorized representative of the Minister of Finance of Thailand. Article III, para. 3.04 provides:

"For the purpose of jurisdiction and of execution or enforcement of any judgement or award, the Guarantor certifies that he waives and renounces hereby any right to assert before an arbitration tribunal or court of law or any other authority any defence or exception based on his sovereign immunity." (*Malaya Law Review* (Singapore), vol. 22, No. 1 (July 1980), p. 192, footnote 22).

²⁹⁰ See, for example *Duff Development Co. Ltd. v. Government of Kelantan and another* (1924) (see footnote 244 above), where by assenting to the arbitration clause in a deed, or by applying to the courts to set aside the award of the arbitrator, the Government of Kelantan did not submit to the jurisdiction of the High Court in respect of a later proceeding by the company to enforce the award (*op. cit.*, pp. 809 and 810). See also *Kahan v. Pakistan Federation* (1951) (see note 245 above) and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see note 264 above).

(12) Consent to the exercise of jurisdiction in a proceeding before a court of another State covers the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review, but not execution of judgement.

Article 9. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or
(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or
(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Commentary

(1) Article 9 deals with circumstances under which participation by a State in a proceeding before the courts of another State may be regarded as evidence of consent by that participating State to the exercise of jurisdiction by the courts concerned. The conduct or acts of a State from which consent may be thus implied are carefully stipulated under the three paragraphs of the article.

(2) Further clarification may be necessary, especially with respect to paragraph 2 of the article, to deal with other issues not yet fully covered, such as the question of appearance by a State in a proceeding before the court of another State merely to make a statement or give evidence in a matter concerning the proceeding.

(3) While it is necessary to exclude any implication of consent in this particular connection of non-application of State immunity in the event of consent to submit to the jurisdiction, the expression of consent or its communication in any event must be explicit. Consent could be evidenced by positive conduct of the State; it cannot be presumed to exist by sheer implication, nor by mere silence, acquiescence or inaction on the part of that State. A clear instance of conduct or action amounting to the expression of assent, concurrence, agreement, approval or consent to the exercise of jurisdiction is illustrated by entry of appearance by or on behalf of the State contesting the case on the merits. Such conduct may be in the form of a State requesting to be joined as party to the litigation, irrespective of the degree of its preparedness or willingness to be bound by the decision or the extent of its prior acceptance of subsequent en-

forcement measures or execution of judgement.²⁹¹ There is clearly an unequivocal evidence of consent to the assumption and exercise of jurisdiction by the court if and when the State knowingly enters an appearance in answer to a claim of right or to contest a dispute involving the State or over a matter in which it has an interest, and when such entry of appearance is unconditional and unaccompanied by a plea of State immunity, despite the fact that other objections may have been raised against the exercise of jurisdiction in that case on grounds recognized either under general conflict rules or under the rules of competence of the trial court other than by reason of jurisdictional immunity.

(4) By choosing to become a party to a litigation before the court of another State, a State clearly consents to the exercise of such jurisdiction, regardless of whether it is a plaintiff or a defendant, or indeed is in an *ex parte* proceeding, or an action *in rem* or in a proceeding seeking to attach or seize a property which belongs to it or in which it has an interest or property which is in its possession or control. A State does not, however, consent to the exercise of jurisdiction of another State by entering a conditional appearance or by appearing expressly to contest or challenge jurisdiction on the grounds of sovereign immunity or State immunity, although such appearances accompanied by further contentions on the merits to establish its immunity could result in the actual exercise of jurisdiction by the court.²⁹²

(5) In point of fact, the expression of consent either in writing, which is dealt with in article 8, or by conduct which is the subject of the present commentary, entails practically the same results. They all constitute voluntary submission by a State to the jurisdiction, indicating a willingness and readiness on the part of a sovereign State of its own free will to submit to the consequences

²⁹¹ Although, for practical purposes, F. Laurent in his *Le droit civil international* (Brussels, Bruylant-Christophe, 1881), vol. III, pp. 80-81, made no distinction between "power to decide" (jurisdiction) and "power to execute" (execution), consent by a State to the exercise of the power to decide by the court of another State cannot be presumed to extend to the exercise of the power to execute or enforce judgement against the State having consented to the exercise of jurisdiction by appearing before the court without raising a plea of jurisdictional immunity.

²⁹² There could be no real consent without full knowledge of the right to raise an objection on the ground of State immunity (*Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 264 above)), but see also Earl Jowitt, in *Juan Ysmael & Co. v. Government of the Republic of Indonesia* (1954) (see footnote 280 above), where he said *obiter* that a claimant Government:

"... must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim." (*Op. cit.*, p. 99.)

Cf. the *Hong Kong Aircraft* case (see footnote 279 above), in which Sir Leslie Gibson of the Supreme Court of Hong Kong did not consider mere claim of ownership to be sufficient (*International Law Reports, 1950* (London), vol. 17, case No. 45, p. 173). Contrast Justice Scrutton in *The "Jupiter" No. 1* (1924) (United Kingdom, *The Law Reports, Probate Division, 1924*, p. 236), and Lord Radcliffe in the *Gold bars* case (1952) (*op.cit.* (see footnote 266 above), pp. 176-177).

of adjudication by the court of another State, up to but not including measures of execution.

(a) *Instituting or intervening in a legal proceeding*

(6) One clearly visible form of conduct from which consent might be implied consists in the acts of bringing an action or instituting a legal proceeding before a court of another State. By becoming a plaintiff before the judicial authority of another State, the claimant State, seeking judicial relief or other remedies, manifestly submits to the jurisdiction of the forum. There can be no doubt that when a State initiates a litigation before a court of another State, it has irrevocably submitted to the jurisdiction of that other State to the extent that it can no longer be heard to complain against the exercise of the jurisdiction it has itself initially invoked.²⁹³

(7) The same result follows in the event that a State intervenes in a proceeding before a court of another State, unless the intervention is exclusively or simultaneously accompanied by a plea of State immunity or made purposely to object to the exercise of jurisdiction on the ground of its sovereign immunity.²⁹⁴ Similarly, a State which participates in an interpleader proceeding voluntarily submits to the jurisdiction of that court. Any positive action by way of participation in the merits of a proceeding by a State on its own initiative and not under any compulsion is inconsistent with a subsequent contention that the volunteering State is being impleaded against its will. However, participation for the limited purpose of objecting to the continuation of the proceedings will not be viewed as consent to the exercise of jurisdiction.²⁹⁵

(b) *Entering an appearance on a voluntary basis*

(8) A State may be said to have consented to the exercise of jurisdiction by a court of another State without being itself a plaintiff or claimant, or intervening in proceedings before that court. For instance, a State may volunteer its appearance or freely enter an appearance, not in answer to any claim or any writ of summons, but

²⁹³ For example, the European Convention on State Immunity (see footnote 232 above), which provides, in article 1, para. 1, that:

"A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State."

²⁹⁴ Thus, according to article 1, para. 3, of the European Convention on State Immunity:

"A Contracting State which makes a counterclaim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counterclaim but also to the principal claim."

²⁹⁵ See, for example, art. 13 of the European Convention on State Immunity:

Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it."

See also *Dollfus Mieg et Cie S.A. v. Bank of England* (1950) (see footnote 266 above).

of its own free will to assert an independent claim in connection with proceedings before a court of another State. Unless the assertion is one concerning jurisdictional immunity in regard to the proceedings in progress, entering an appearance on a voluntary basis before a court of another State constitutes another example of consent to the exercise of jurisdiction, after which no plea of State immunity could be successfully raised.

(9) By way of contrast, it follows that failure on the part of a State to enter an appearance in a legal proceeding is not to be construed as passive submission to the jurisdiction. Alternatively, a claim of interest by a State in property under litigation is not inconsistent with its assertion of jurisdictional immunity.²⁹⁶ A State cannot be compelled to come before a court of another State to assert an interest in a property against which an action *in rem* is in progress, if that State does not

²⁹⁶ For example, in *The "Jupiter"* No. 1 (1924) (see footnote 292 above), Justice Hill held that a writ *in rem* against a vessel in the possession of the Soviet Government must be set aside inasmuch as the process against the ship compelled all persons claiming interests therein to assert their claims before the court, and inasmuch as the USSR claimed ownership in her *and did not submit to the jurisdiction*. Contrast *The "Jupiter"* No. 2 (1925), where the same ship was then in the hands of an Italian company and the Soviet Government did not claim an interest in her. (United Kingdom, The Law Reports, Probate Division, 1925, p. 69.

choose to submit to the jurisdiction of the court entertaining the proceedings.

(10) The fact that a State voluntarily submits to the jurisdiction of a court of another State by any of the recognized means or methods outlined above entails the consequence of disentitlement of that State from pleading jurisdictional immunity. Thus, if a State has intervened or taken a step in proceedings before a court of another State, it must be deemed to have submitted to the jurisdiction of that court, unless it can justify the assertion that such intervention or such a step as was taken in the proceedings was only for the purpose of claiming immunity, or asserting an interest in property in circumstances such that the State would have been entitled to immunity had the proceedings been brought against it, or indeed in ignorance of the possibility of invoking immunity.²⁹⁷

²⁹⁷ See, for example, subsections 4 (a) and 4 (b) of section 2 of the United Kingdom State Immunity Act 1978 (*The Public General Acts 1978* (H.M. Stationery Office), part. I, chap. 33, p. 715; text reproduced in United Nations, *Materials on jurisdictional immunities* . . . , pp. 41 *et seq.*) Subsection 5 does not regard as voluntary submission any step taken by a State on proceedings before a court of another State:

"... in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable."

Delay in raising a plea or defence of jurisdictional immunity may create an impression in favour of submission.

Chapter VI

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

A. Introduction

199. The Commission began its consideration of the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier at its twenty-ninth session in 1977, pursuant to General Assembly resolution 31/76 of 13 December 1976. At its thirtieth session, in 1978, the Commission considered the report of the Working Group on the topic introduced by its Chairman, Mr. Abdullah El-Erian. The result of the study undertaken by the Working Group was submitted to the General Assembly at its thirty-third session.²⁹⁸ The Assembly, at that session, after having discussed the results of the Commission's work, recommended in resolution 33/139 of 19 December 1978 that:

the Commission should continue the study, including those issues it has already identified, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in the light of comments made during the debate on this item in the Sixth Committee at the thirty-third session of the General Assembly and comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument...

200. In its resolution 33/140 of 19 December 1978, the General Assembly decided that it:

will give further consideration to this question and expresses the view that, unless Member States indicate the desirability of an earlier consideration, it would be appropriate to do so when the International Law Commission submits to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

201. At the thirty-first session, in 1979, the Commission again established a Working Group which studied issues concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. As recommended by the Working Group the Commission, at that session, appointed Mr. Alexander Yankov Special Rapporteur for the topic and reached the conclusion that he would be entrusted with the preparation of a set of draft articles for an appropriate legal instrument.²⁹⁹

²⁹⁸ See *Yearbook ... 1978*, vol. II (Part Two), pp. 138-144, paras. 137-144.

²⁹⁹ For the historical review of the work of the Commission on the topic up to 1981, see *Yearbook ... 1979*, vol. II (Part Two), p. 170, paras. 149-155; *Yearbook ... 1980*, vol. II (Part Two), pp. 162-165, paras. 145-176; *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 230-249.

202. At its thirty-second session, in 1980, the Commission had before it a preliminary report³⁰⁰ submitted by the Special Rapporteur, and also a working paper prepared by the Secretariat.³⁰¹ At that session, the Commission examined the preliminary report in a general discussion.³⁰² The General Assembly, by resolution 35/163 of 15 December 1980, recommended that the Commission, taking into account the written comments of Governments and views expressed in debates in the General Assembly, should continue its work on the topic with a view to the possible elaboration of an appropriate legal instrument.

203. At its thirty-third session, in 1981, the Commission had before it the second report submitted by the Special Rapporteur³⁰³ containing the text of six draft articles which constituted part I, entitled "General provisions": "Scope of the present articles" (art. 1);³⁰⁴ "Couriers and bags not within the scope of the present articles" (art. 2);³⁰⁵ "Use of terms" (art. 3);³⁰⁶

³⁰⁰ *Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335.

³⁰¹ A/CN.4/WP.5.

³⁰² *Yearbook ... 1980*, vol. I, pp. 260-264, 1634th meeting, and pp. 274-287, 1636th and 1637th meetings, *Yearbook ... 1980*, vol. II (Part Two), pp. 162-165, paras. 147-176.

³⁰³ *Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2.

³⁰⁴ Draft article 1 read:

"Article 1. Scope of the present articles

"1. The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, or with other States or international organizations, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags.

"2. The present articles shall apply also to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, and with other States or international organizations, and also to official communications of these missions and delegations with the sending State or with each other, by employing consular couriers and bags, and couriers and bags of the special missions or other missions or delegations."

³⁰⁵ Draft article 2 read:

"Article 2. Couriers and bags not within the scope of the present articles

"1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

"2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

“Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags” (art. 4),³⁰⁷ “Duty to respect international law and the laws and regulations of the receiving and the transit

State” (art. 5),³⁰⁸ and “Non-discrimination and reciprocity” (art. 6).³⁰⁹ In introducing the report, the Special Rapporteur indicated that the provisional adoption by the Commission of draft articles 1 to 6 could

“(a) the legal status of such couriers and bags;

“(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles.”

³⁰⁶ Draft article 3 read:

“Article 3. Use of terms

“1. For the purposes of the present articles:

“(1) ‘diplomatic courier’ means a person duly authorized by the competent authorities of the sending State and provided with an official document to that effect indicating his status and the number of packages constituting the diplomatic bag, who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the diplomatic mission, consular post, special mission or other missions or delegations of the sending State, wherever situated, as well as to other States and international organizations, and is accorded by the receiving State or the transit State facilities, privileges, and immunities in the performance of his official functions;

“(2) ‘diplomatic courier *ad hoc*’ means an official of the sending State entrusted with the function of diplomatic courier for special occasion only, who shall cease to enjoy the facilities, privileges and immunities accorded by the receiving or the transit State to a diplomatic courier, when he has delivered to the consignee the diplomatic bag in his charge;

“(3) ‘diplomatic bag’ means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions or other missions or delegations, wherever situated, as well as with other States or international organizations, dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight and which is accorded by the receiving or the transit State facilities, privileges and immunities in the performance of its official function;

“(4) ‘sending State’ means a State dispatching a diplomatic bag, with or without a courier, to its diplomatic mission, consular post, special mission or other missions or delegations, wherever situated, or to other States or international organizations;

“(5) ‘receiving State’ means a State on whose territory:
(a) a diplomatic mission, consular post, special mission or permanent mission is situated, or
(b) a meeting of an organ or of a conference is held;

“(6) ‘host State’ means a State on whose territory:
(a) an organization has its seat or an office, or
(b) a meeting of an organ or a conference is held;

“(7) ‘transit State’ means a State through whose territory and with whose consent the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

“(8) ‘third State’ means any State other than the sending State, the receiving State and the transit State;

“(9) ‘diplomatic mission’ means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

“(10) ‘consular post’ means any consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

“(11) ‘special mission’ means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a special task;

“(12) ‘mission’ means, as the case may be, the permanent mission or the permanent observer mission;

“(13) ‘permanent mission’ means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

“(14) ‘permanent observer mission’ means a mission of permanent character representing a State, sent to an international organization by a State not a member of that organization;

“(15) ‘delegation’ means, as the case may be, the delegation to an organ or the delegation to a conference;

“(16) ‘delegation to an organ’ means the delegation sent by a State to participate on its behalf in the proceedings of the organ;

“(17) ‘observer delegation’ means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;

“(18) ‘observer delegation to an organ’ means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the organ;

“(19) ‘delegation to a conference’ means the delegation sent by a State to participate on its behalf in the proceedings of the conference;

“(20) ‘observer delegation to a conference’ means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the conference;

“(21) ‘international organization’ means an intergovernmental organization;

“(22) ‘organ’ means:

(a) any principal or subsidiary organ of an international organization, or

(b) any commission, committee or sub-group of any such organ, in which States are members;

“(23) ‘conference’ means a conference of States.

“2. The provisions of paragraph 1, subparagraphs (1), (2), and (3), on the terms ‘diplomatic courier’, ‘diplomatic courier *ad hoc*’ and ‘diplomatic bag’ may apply also to consular courier and consular courier *ad hoc*, to couriers and *ad hoc* couriers of special missions and other missions or delegations, as well as to the consular bag and the bags of special missions and other missions and delegations of the sending State.

“3. The provisions of paragraphs 1 and 2 of the present article 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 other international instruments or the internal law of any State.”

³⁰⁷ Draft article 4 read:

“Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags

“1. The receiving State shall permit and protect free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts and other missions or delegations as well as between those missions, consular posts and delegations, wherever situated, or with other States or international organizations, as provided for in article 1.

“2. The transit State shall facilitate free communication through its territory effected through diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article.”

³⁰⁸ Draft article 5 read:

“Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State

“1. Without prejudice to his privileges and immunities, it is the duty of the diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.

“2. The diplomatic courier also has a duty not to interfere in the internal affairs of the receiving and the transit State.

provide a useful working basis for the continuation of the work on other articles constituting part II, relating to the status of the courier and part III on the status of the bag. The six draft articles comprised three main issues, namely, the scope of the draft articles on the topic, the use of terms, and the general principles of international law relevant to the status of the diplomatic courier and the diplomatic bag.

204. After discussion of the second report at that session, the Commission referred the six draft articles to the Drafting Committee, but the Drafting Committee did not consider them owing to lack of time.³¹⁰

205. The General Assembly, by paragraph 3 (b) of resolution 36/114 of 10 December 1981, recommended that, taking into account the views expressed in the debates in the Assembly, the Commission should continue its work aimed at the preparation of draft articles on this topic.

B. Consideration of the topic at the present session

206. The Commission at the present session had before it the third report on the topic submitted by the Special Rapporteur (A/CN.4/359 and Corrs.1-4 and Add.1).³¹¹ Since the six draft articles³¹² contained in the second report were not considered by the Drafting Committee, the Special Rapporteur re-examined them, in the light of discussions in the Commission as well as in the Sixth Committee of the General Assembly at its thirty-sixth session,³¹³ and re-introduced them, as amended, in

the third report. The third report consisted of two parts and contained fourteen draft articles. Part I, entitled "General provisions", contained the following six draft articles: "Scope of the present articles" (art. 1); "Couriers and bags not within the scope of the present articles" (art. 2); "Use of terms" (art. 3); "Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags" (art. 4); "Duty to respect international law and the laws and regulations of the receiving and the transit State" (art. 5); and "Non-discrimination and reciprocity" (art. 6). Part II, entitled "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag", contained eight draft articles: "Proof of status" (art. 7); "Appointment of a diplomatic courier" (art. 8); "Appointment of the same person by two or more States as a diplomatic courier" (art. 9); "Nationality of the diplomatic courier" (art. 10); "Functions of the diplomatic courier" (art. 11); "Commencement of the functions of the diplomatic courier" (art. 12); "End of the function of the diplomatic courier" (art. 13); and "Persons declared *non grata* or not acceptable" (art. 14).

207. The third report submitted by the Special Rapporteur was considered by the Commission at its 1745th to 1747th meetings, from 14 to 16 July 1982. In introducing his report, the Special Rapporteur stated the three main purposes of his third report: firstly, bearing in mind the enlarged membership of the Commission, to provide continuity between the previous and the present reports; secondly, to revise the texts of draft article 1 to 6 in the light of comments made in the Commission and the Sixth Committee; and, thirdly, to propose the first set of draft articles on the status of the diplomatic courier and his official functions.

208. The Special Rapporteur reviewed the structure of the draft articles which had tentatively been approved by the Commission. He stated that throughout his work on the topic he had been aware of the need for an empirical and pragmatic approach. Such an approach, in his opinion, should not of course lead to undue restraint in seeking solutions that had not been settled adequately under the rules of existing law. It was the understanding of the Special Rapporteur that the elaboration of a comprehensive set of rules on this topic required a close examination of State practice and an endeavour to meet the needs of the dynamic developments in the area of diplomatic communications.

209. While there was general support for the topic and approach taken by the Special Rapporteur, a number of suggestions were made by the members of the Commission. Most of these suggestions were of a drafting nature, and some related to the substance and the design of the draft articles. Commenting in general on the topic, a few members of the Commission stated that they realized that there were some small gaps in the existing codification conventions, and that therefore the Special Rapporteur should have a modest aim at filling only those gaps.

³⁰⁹ "3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations or by other rules of general international law or by any special agreements in force between the sending State and the receiving or the transit State."

³⁰⁹ Draft article 6 read:

"Article 6. Non-discrimination and reciprocity"

"1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.

"2. However, discrimination shall not be regarded as taking place:

"(a) where the receiving State applies any of the provisions of the present draft articles restrictively because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in the sending State;

"(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that it is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States."

³¹⁰ *Yearbook ... 1981*, vol. 1, pp. 255-260, 1691st meeting, and pp. 273-281, 1693rd and 1694th meetings; *Yearbook ... 1981*, vol. II (Part Two), pp. 159-162, paras. 230-249.

³¹¹ Reproduced in *Yearbook ... 1982*, vol. II (Part One).

³¹² See footnotes 304 to 309 above.

³¹³ See "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 180-200.

1. PART I OF THE DRAFT ARTICLES:
"GENERAL PROVISIONS"

210. With regard to part I of the draft articles, the Special Rapporteur had re-examined draft articles 1 to 6 and had submitted revised versions of some of those articles, in the light of the comments made both in the Commission and in the Sixth Committee of the General Assembly, and because the draft articles had not been considered by the Drafting Committee, due to lack of time, the previous year.

(a) *Scope of the draft articles*

211. On the scope, the Special Rapporteur proposed two draft articles, namely, article 1 (Scope of the present articles)³¹⁴ and article 2 (Couriers and bags not within the scope of the present articles).³¹⁵ With regard to article 1, a comprehensive and uniform approach was adopted by the Special Rapporteur in order to cover all the different kinds of couriers and bags used by States in their official communications with their missions abroad. The Special Rapporteur stated that he had not retained the concepts of "official courier" and "official bag" as initially suggested. Instead, he had proposed an assimilation formula comprising all kinds of couriers and bags, using as a model the status of the diplomatic courier as defined under the 1961 Vienna Convention on Diplomatic Relations, with appropriate adjustments.

212. On the basis of comments made in the Sixth Committee of the General Assembly,³¹⁶ the Special Rapporteur deleted the words "... or other States or international organizations" from draft article 1. The other changes to draft article 1 were of a drafting nature.

213. Draft article 2 provided that the draft articles should not apply to international organizations. The Special Rapporteur suggested, for practical reasons, that couriers and bags other than those used by States

³¹⁴ Draft article 1 as revised read:

"Article 1. Scope of the present articles"

"The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags, as well as consular couriers and bags, couriers and bags of the special missions, permanent missions or delegations."

³¹⁵ Draft article 2 read:

"Article 2. Couriers and bags not within the scope of the present articles"

"1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

"2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

"(a) the legal status of such couriers and bags;

"(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles."

³¹⁶ See "Topical summary ..." (A/CN.4/L.339), para. 192.

should be left aside for the time being. Such an approach, in the opinion of the Special Rapporteur, would make it possible to concentrate on the examination of the most common type of courier and bag, without, however, losing sight of those used by international organizations. Draft article 2, paragraph 2, in fact contained a safeguard provision with a view to protecting the legal status of couriers and bags used by international organizations. Draft article 2 was therefore proposed without any change. The Special Rapporteur mentioned that if necessary the problem of couriers and bags used by international organizations could be considered at a later stage of the work of the Commission. With the assistance of the Secretariat, he had been compiling relevant materials in that connection and there would be no difficulty in reverting to the matter at any stage.

214. While some members of the Commission agreed with the general scope of the draft articles, they expressed uncertainty about a few points. With regard to the limitation of draft articles to cover official communications of missions and delegations not only with the sending State but also with each other, some expressed the view that little was known about the practice of States in that area. One member of the Commission explained the practice of his own country in which communications never passed through one diplomatic mission to another, but always through the capital.

215. Some members expressed regret that couriers and bags used for official purposes by international organizations were excluded from the draft. While they understood the reason, they feared that the Commission could be confronted at some later date with a request to take up a separate topic of couriers and bags used by international organizations. It was unfortunate, one member thought, that the suggestion to provide a special general denomination for all couriers and bags had not been accepted; the terms "official courier" and "official bag" would have been a useful innovation.

216. Several members thought that the scope of the article should be expanded to include communications of national liberation movements. A member of the Commission asked the Special Rapporteur whether the draft articles were intended to apply also to diplomatic communications during armed conflict.

217. Some members thought that it should be made clear that this draft applies to communications with official delegations or special missions of the sending State in countries with which the sending State has no diplomatic relations.

218. The Special Rapporteur, replying to comments made on draft article 1, stated that he had attempted to work out a uniform and comprehensive set of rules to apply to all couriers and bags, based upon the relevant provisions of the four codification conventions³¹⁷ and

³¹⁷ The 1961 Vienna Convention on Diplomatic Relations; the 1963 Vienna Convention on Consular Relations; the 1969 Convention on Special Missions; and the 1975 Vienna Convention on the Representation of States in their Relations with Organizations of a Universal Character.

State practice. In relation to the comment made by one of the members of the Commission that article 1 should be redrafted to focus on couriers and bags as instruments of communication, the Special Rapporteur hoped that the Drafting Committee would give that proposal careful consideration.

219. With regard to extending the scope of articles to include couriers and bags of international organizations or other subjects of international law such as national liberation movements, the Special Rapporteur recalled that he had included those two categories in his preliminary report; however, the general view of the Commission and of the Sixth Committee was to exclude them from the draft. The Special Rapporteur stated that the door was open to include the above two categories in the scope of the draft articles and he requested the members to be more specific concerning their view. Perhaps, he thought, the Commission could consider including a provision at the end of the draft articles to that effect.

(b) Use of terms

220. Article 3 related to the use of terms.³¹⁸ The Special Rapporteur had revised draft article 3 on the

³¹⁸ Draft article 3 as revised read:

"Article 3. Use of terms

"1. For the purpose of the present articles:

"(1) 'diplomatic courier' means a person duly authorized by the competent authorities of the sending State entrusted with the custody, transportation and delivery of the diplomatic bag to the diplomatic missions, consular posts, special missions, permanent missions or delegations of the sending State, wherever situated;

"(2) 'diplomatic courier *ad hoc*' means an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions;

"(3) 'diplomatic bag' means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea;

"(4) 'sending State' means a State dispatching a diplomatic bag, with or without a courier, to its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated;

"(5) 'receiving State' means a State on whose territory:

"(a) diplomatic missions, consular posts, special missions or permanent missions are situated; or

"(b) a meeting of an organ of an international organization or an international conference is held;

"(6) 'transit State' means a State through whose territory the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

"(7) 'diplomatic mission' means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

"(8) 'consular post' means any consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

"(9) 'special mission' means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter, for the purpose of dealing with it on specific questions or performing a special task in relation to it;

basis of criticisms in the Commission and the Sixth Committee. The draft article was shorter and did not include substantive definitions.

221. Members of the Commission were in general satisfied with the changes the Special Rapporteur had introduced in the draft article. A number of drafting points were made for the benefit of the Special Rapporteur and the Drafting Committee. There were also some comments on the definitions as well as the form of the draft article.

222. Several members stated that the definition of "diplomatic courier" should extend to a person who was entrusted with the custody, transportation and delivery of the bag not only to the missions, etc., of the sending State but also from those missions back to the sending State. One member referred to references in other articles to "consular courier" and "consular bag" and wondered whether the Special Rapporteur wished to give the same treatment to the two types of bags; if so, he thought it should be clarified.

223. Some members were of the view that the terms "diplomatic mission", "consular post", "special mission" and "permanent mission", defined in draft article 3, were intended to convey indirectly the same meaning as that given to them in certain conventions that had already been adopted. Therefore they suggested, in order to simplify the draft, grouping these terms together in one paragraph reading: "The terms 'diplomatic mission', etc., shall bear the meanings assigned to them in ... and ... and conventions respectively". One member was uncertain about the definition of "diplomatic courier" and "diplomatic courier *ad hoc*". He thought that a "courier *ad hoc*" was always a "diplomatic courier".

224. Another member of the Commission raised the point that the global notion of "official" couriers and bags could have been more advisable. Responding to the latter point, the Special Rapporteur stated that the global notion of these two terms had in fact been suggested in his preliminary report, but he had decided, in the light of the comments made in the Commission and

"(10) 'permanent mission' means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

"(11) 'delegation' means the delegation sent by a State to participate on its behalf in the proceedings of either an organ of an international organization or an international conference;

"(12) 'international organization' means an intergovernmental organization.

"2. The provisions of paragraph 1, subparagraphs (1), (2) and (3), on the terms 'diplomatic courier', 'diplomatic courier *ad hoc*' and 'diplomatic bag' may also apply to consular courier and consular courier *ad hoc*, to couriers and couriers *ad hoc* of special missions, permanent missions or delegations, as well as to the consular bag and the bags of special missions, permanent missions or delegations of the sending State.

"3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in other international instruments or the internal law of any State."

the Sixth Committee and for practical reasons, to use terms that were widely recognized. The notion of communication, as he understood it, had two aspects, one relating to means and the other relating to the network. The notion of communication as it related to means was basically derived from article 27 of the 1961 Vienna Convention on Diplomatic Relations and from State practice. Thus, the means of communication involved were such public services as postal, telephone, telex and radio services and, in addition, official correspondence and messages in code and cipher dispatched by sealed pouch with or without diplomatic couriers. Communication, in that sense, was clearly very wide in scope. Communication in the sense of a network of communications between the sending State and its missions abroad or between the missions themselves, was much more restricted in scope. In that connection, the Special Rapporteur drew attention to the relevant part of the Commission's commentary to its draft article which formed the basis for article 27 of the 1961 Vienna Convention on Diplomatic Relations, which he had referred to in his second report.³¹⁹ Article 27 of that Convention explicitly provides for official communications not only between the sending State and its missions abroad, but also between those missions themselves. He further stated that there was an abundance of bilateral treaties and State practice in the matter which underlined the wide scope of a network of communications.

225. The Special Rapporteur further stated that the four codification conventions did not differentiate between the status of consular couriers and that of other types of couriers. He agreed that the receiving State was not always the final destination. He thought that various drafting points made should be examined by the Drafting Committee to that effect.

(c) General principles

226. With regard to the general principles, the Special Rapporteur proposed three draft articles: article 4 (Freedom of Communications for all official purposes effected through diplomatic couriers and diplomatic bags),³²⁰ article 5 (Duty to respect international law and the laws and regulations of the receiving and the transit

³¹⁹ *Yearbook ... 1981*, vol. II (Part One), p. 168, document A/CN.4/347 and Add.1 and 2, para. 81.

³²⁰ Draft article 4 as revised read:

"Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags"

"1. The receiving State shall permit and protect on its territory free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts, special missions, permanent missions or delegations as well as between those missions, consular posts and delegations, wherever situated, as provided for in article 1.

"2. The transit State shall facilitate free communication through its territory effected through diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article."

State),³²¹ and article 6 (Non-discrimination and reciprocity).³²²

227. Introducing articles 4 to 6, the Special Rapporteur stated that the principles formulated in these three articles should be considered together as establishing a legal framework for the rights and obligations of the sending, receiving and transit States and, exceptionally, of a third State. The interplay of these principles, in the view of the Special Rapporteur, provided a sound basis for effective reciprocity and a viable balance between the rights and obligations of the States concerned.

228. There were some drafting points suggested by members of the Commission. In connection with paragraph 2 of draft article 5, two members did not see how it would be possible for the diplomatic courier to interfere in the internal affairs of the receiving and the transit States in the discharge of his functions, which was simply to deliver a bag. One member thought paragraph 3 of article 5 did not appear to add anything to the article. Another member suggested that the term "third State" in subparagraph 2 (b) of article 6 should be defined or replaced by "other States".

229. In connection with articles 5 and 6, one member of the Commission stated that he was not familiar with the practice in the matter of diplomatic couriers and bags with respect to the transit State. Even if it was not a firmly established practice, he believed that the draft ar-

³²¹ Draft article 5 as revised read:

"Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State"

"1. Without prejudice to the facilities, privileges and immunities accorded to a diplomatic courier, it is the duty of the sending State and its diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.

"2. The diplomatic courier also has a duty, in the discharge of his functions, not to interfere in the internal affairs of the receiving State and the transit State.

"3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations of 1961 or by other rules of international law or by any special agreements in force between the sending State and the receiving State or the transit State."

³²² Draft article 6 read:

"Article 6. Non-discrimination and reciprocity"

"1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.

"2. However, discrimination shall not be regarded as taking place:

"(a) where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in the sending State;

"(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that it is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States."

ticles should stipulate that the transit State should give non-discriminatory treatment to diplomatic couriers and bags irrespective of whether that State had diplomatic relations with the sending State.

230. In reference to the term "permit and protect" in paragraph 1 of article 4, the Special Rapporteur stated that it was a standard expression used in all four codification conventions and had been used for purposes of uniformity. With regard to the point concerning the duty of the sending State, the purpose, he stated, had been to strike a balance between the rights and the obligations of the sending and the receiving States. The expression "in the discharge of his functions", he said, was intended to convey the idea that the courier should not be involved in activities which are inconsistent with international law and the laws and regulations of the receiving or the transit State while performing his functions. Perhaps, he stated, the wording should be reconsidered.

2. PART II OF THE DRAFT ARTICLES : "STATUS OF THE DIPLOMATIC COURIER, THE DIPLOMATIC COURIER *AD HOC* AND THE CAPTAIN OF A COMMERCIAL AIRCRAFT OR THE MASTER OF A SHIP CARRYING A DIPLOMATIC BAG"

231. Part II of the draft articles contained articles 7 to 14 and dealt with the status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship.

(a) *Proof of status*

232. Draft article 7 (Proof of status)³²³ was proposed by the Special Rapporteur in order to indicate the requirements regarding the identification of documents or credentials that attested to the status of the courier. Introducing the draft article, the Special Rapporteur stated that the term "courier's passport" had always given rise to confusion. Therefore he suggested that a courier, in addition to carrying a passport, whether diplomatic, service or ordinary, should also carry an official document stating that the bearer was a diplomatic courier. The document should also indicate the number of packages that constituted the diplomatic bag.

(b) *Appointment of a diplomatic courier*

233. Draft article 8 (Appointment of a diplomatic courier)³²⁴ dealt with an essential element in the legal

³²³ Draft article 7 read:

"Article 7. *Proof of status*

"The diplomatic courier shall be provided, in addition to his passport, with an official document indicating his status and the number of packages constituting the diplomatic bag as accompanied by him."

³²⁴ Draft article 8 read:

"Article 8. *Appointment of a diplomatic courier*

"Subject to the provisions of articles 9, 10 and 11, diplomatic couriers and diplomatic couriers *ad hoc* are freely appointed by the competent authorities of the sending State or by its diplomatic missions, consular posts, special missions, permanent missions or delegations, and are admitted to perform their functions on the territory of the receiving State or the transit State."

status of the courier. The act of appointment, in the view of the Special Rapporteur, fell within the internal jurisdiction of the sending State; it further defined the category of the courier—whether he was a professional or an *ad hoc* courier. The Special Rapporteur in introducing draft article 8 stated that, while the appointment of a courier was essentially a matter of internal law, when it came to the status of the courier there might be international implications as, for instance, where a courier was refused a visa on the ground that he was not acceptable.

234. Some members of the Commission thought that the word "freely" in article 8 lacked clarity and had no place there. As to the phrase "and are admitted to perform their functions on the territory of the receiving State or the transit State", one member thought that this was clearly belied by draft article 14, in the case of which they were not admitted; he doubted whether that formulation was quite correct.

235. In relation to the objections raised by several members concerning the use of the word "freely" in article 8, the Special Rapporteur stated that this term had been used in all four codification conventions, and he had not wished to depart from it. In reply to a point concerning the consent of the receiving State to a multiple appointment, the Special Rapporteur said that he believed that the consent was necessary.

236. Draft article 9 (Appointment of the same person by two or more States as a diplomatic courier)³²⁵ had been proposed by the Special Rapporteur in order to deal with a practice that had been introduced for financial and personnel considerations by neighbouring States or States in the same region or those that enjoyed special relationships. A few members pointed out that the draft article contained nothing about the possible agreement or objection of the receiving State. They wondered whether the qualification contained in the Vienna Convention on Diplomatic Relations, "unless objection is offered by the receiving State", should not also be embodied in article 9.

(c) *Nationality of the diplomatic courier*

237. Draft article 10 (Nationality of the diplomatic courier)³²⁶ was designed by the Special Rapporteur to

³²⁵ Draft article 9 read:

"Article 9. *Appointment of the same person by two or more States as a diplomatic courier*

"Two or more States may appoint the same person as a diplomatic courier or diplomatic courier *ad hoc*."

³²⁶ Draft article 10 read:

"Article 10. *Nationality of the diplomatic courier*

"1. The diplomatic courier should, in principle, have the nationality of the sending State.

"2. Diplomatic couriers may not be appointed from among the persons having the nationality of the receiving State except with the express consent of that State, which may be withdrawn at any time.

"3. The receiving State may reserve the same right under paragraph 2 with regard to:

avoid difficulties and confusion of duties. Some members of the Commission thought that article 10 was a little too strong, or at least not sufficiently clear. Although two or more States could not normally appoint a national of a third State as a diplomatic courier, paragraphs 2 and 3 of the article, in their view, would apply even in the case of a person appointed as a diplomatic courier by two or more States.

(d) *Functions of the diplomatic courier*

238. Draft article 11 (Functions of the diplomatic courier)³²⁷ was considered by the Special Rapporteur as being instrumental for the exercise by the State of its right to diplomatic communication. Introducing the article, he stated that the right of a diplomatic mission to free and secure communication for official purposes was perhaps, in practical terms, the most important of all diplomatic privileges and immunities. The main subject of legal protection was the official correspondence which constituted the content of the bag. The Special Rapporteur made a distinction between the content of the functions of the courier which were inherent in the status of the courier, and the necessity for the accomplishment of his official task and activities which were alien to or went beyond those functions. The Special Rapporteur stated that existing multilateral conventions did not contain adequate definitions regarding the scope and content of the official functions of the courier.

239. One member thought that the description of the functions of the diplomatic courier in article 11 was not completely consistent with the definition of the term "diplomatic courier" in subparagraph (1) of paragraph 1 of article 3. According to article 11, the diplomatic courier must take care of the diplomatic bag and deliver it to its final destination. Under article 3, however, the diplomatic courier was entrusted with the custody, transportation and delivery of the diplomatic bag.

240. The Special Rapporteur agreed that the terminology in this article should be harmonized with that used in article 3, subparagraph 1 (1).

"(a) nationals of the sending State who are permanent residents of the receiving State;

"(b) nationals of a third State who are not also nationals of the sending State.

"4. The application of this article is without prejudice to the appointment of the same person by two or more States as a diplomatic courier, as provided in article 9."

³²⁷ Draft article 11 read:

"Article 11. *Functions of the diplomatic courier*

"The functions of the diplomatic courier shall consist in taking care of and delivering to its destination the diplomatic bag of the sending State or its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated."

(e) *Duration of the functions*

241. Draft article 12 (Commencement of the functions of the diplomatic courier)³²⁸ dealt with the important moment of time at which the functions of the courier commenced; this was relevant for determining the beginning of the application of the facilities, privileges and immunities accorded to the courier. The Special Rapporteur stated that, in his view, privileges and immunities similar to those accorded to diplomatic couriers need not be provided to captains of commercial aircraft or masters of ships; the captain or the master had full authority within the aircraft or the ship, but was not supposed to carry the bag outside the aircraft or the ship.

242. In connection with draft article 13 (End of the function of the diplomatic courier)³²⁹ the Special Rapporteur pointed out that there was no specific provision in the four codification conventions on the matter. He accordingly thought that there was a need for a comprehensive, though not exhaustive, set of rules relating to the termination of the functions of the courier.

243. When introducing draft article 14 (Persons declared *non grata* or not acceptable)³³⁰ the Special Rapporteur pointed out that there was some confusion surrounding the term "not acceptable", which was used both *ratione temporis* and *ratione personae*. In the conventions, *persona non grata* applied to diplomatic agents, and "not acceptable" to persons without diplomatic rank. In some cases "not acceptable" could be seen in terms of a sequence of events, in which case a

³²⁸ Draft article 12 read:

"Article 12. *Commencement of the functions of the diplomatic courier*

"The functions of the diplomatic courier shall commence from the moment he is crossing the territory of the transit or receiving State, depending upon which of these events occurs first."

³²⁹ Draft article 13 read:

"Article 13. *End of the function of the diplomatic courier*

"The function of a diplomatic courier comes to an end, *inter alia*, upon:

"(a) the completion of his task to deliver the diplomatic bag to its final destination;

"(b) the notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated;

"(c) notification by the receiving State to the sending State that, in accordance with article 14, it refuses to recognize the official status of the diplomatic courier;

"(d) the event of the death of the diplomatic courier."

³³⁰ Draft article 14 read:

"Article 14. *Persons declared non grata or not acceptable*

"1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier of the latter State is declared *persona non grata* or not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his function.

"2. In cases when a diplomatic courier is declared *persona non grata* or not acceptable in accordance with paragraph 1 prior to the commencement of his function, the sending State shall send another diplomatic courier to the receiving State."

ratione temporis element might be involved; that should not confuse the issue.

244. In connection with article 12, some members of the Commission pointed out that there was a difference between the commencement of the courier's function and the time when he begins to enjoy privileges and immunities. The commencement of the courier's functions was the time when a diplomatic bag was entrusted to the courier, even if he was in the territory of the sending State. The time when the diplomatic courier began to enjoy privileges and immunities was when he was crossing the transit State or had entered the receiving State.

245. Regarding article 13, some members stated that, in their view, the courier was still performing his functions after having delivered a bag and while awaiting another bag. Some members also thought subparagraph (d) of article 13 should be omitted, since in the event of the death of a diplomatic courier, it was obvious that his functions came to an end. Comments, however, were made that the protection of the diplomatic bag must be secured in such cases.

246. Some drafting comments were made in relation to article 14. Several members suggested the deletion of paragraph 2; others thought that, if it were to be maintained, it should at least be made facultative rather than obligatory. Some members in addition suggested that it should be made clear that the status of the bag should not change in cases where the courier was declared *persona non grata* or not acceptable upon arrival in the receiving State.

247. The Special Rapporteur agreed that the commencement of the functions of the duties of the courier, as opposed to the moment of acknowledgement by the receiving State, deserved careful reconsideration. He believed that article 13, subparagraph (a), on the completion of the courier's task, was important for differentiating between the status of a courier *ad hoc* and a professional courier; according to international law, a courier *ad hoc* ceased to enjoy privileges and immunities upon completion of his task. He would gladly delete subparagraph (d) of article 13, to which several members had objected, but wished to point out that that point should come into the forefront in connection with the status of the bag in part III. The Special Rapporteur

agreed, as several members had pointed out, that the complete incapacitation of the courier as well as the situation envisaged by article 14, paragraph 2, were highly relevant to the status of the bag.

248. The Special Rapporteur expressed appreciation to the Codification Division of the Office of Legal Affairs for up-dating the collection of bilateral and multilateral treaties and the analytical survey of State practice. Upon the suggestion of the Special Rapporteur, the Commission requested the Secretariat: (a) to up-date the collection of treaties relating to the topic and other related materials in the field of diplomatic and consular relations in general and official communications exercised through couriers and bags in particular; (b) to renew the request addressed to States by the Secretary-General to provide further information on national laws and regulations and other administrative acts, as well as procedures and recommended practices, judicial decisions, arbitral awards and diplomatic correspondence in the fields of diplomatic law and with respect to the treatment of couriers and bags (information has been received from the Governments of thirteen States (A/CN.4/356 and Add.1, Add.1-3)³³¹ in response to the circular letter of the Legal Counsel dated 14 October 1981 requesting States to provide such information); (c) to prepare a preliminary analytical survey of State practice, including *travaux préparatoires* of the four multilateral conventions, as well as an examination of State practice as evidenced by bilateral and multilateral treaties, national legislation, regulations and procedures, in accordance with a tentative list of issues and the structure of the draft articles which the Special Rapporteur had submitted and guidelines and draft articles which he intended to submit covering part II of the draft, on the status of the courier, and part III, on the status of the bag; and (d) to up-date the statement on the status of the four multilateral conventions in the field of diplomatic law elaborated under the auspices of the United Nations.

249. At the conclusion of the debate, the Commission decided to refer the fourteen draft articles proposed by the Special Rapporteur in his third report to the Drafting Committee.

³³¹ Reproduced in *Yearbook ... 1982*, vol. II (Part One).

Chapter VII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. The law of the non-navigational uses of international watercourses

250. At its 1745th meeting, on 14 July 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic "The law of the non-navigational uses of international watercourses".

251. At the present session, replies received from the Governments of two Member States (A/CN.4/352 and Add.1)³³² to the questionnaire on the topic formulated by the Commission in 1974 were circulated. Also circulated, pursuant to a decision of the Commission taken at its thirty-third session,³³³ was the third report on the topic (A/CN.4/348 and Corr.1)³³⁴ submitted by the former Special Rapporteur, Mr. Stephen M. Schwebel, who had begun the preparation of that report prior to his resignation from the Commission in 1981 on his election to the International Court of Justice.

B. Draft Code of Offences against the Peace and Security of Mankind

252. At its 1745th meeting, on 14 July 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic "Draft Code of Offences against the Peace and Security of Mankind". At the same meeting the Commission established a Working Group on the topic, chaired by the Special Rapporteur, and composed as indicated in paragraph 8, above.

253. During the present session, comments and observations on the topic were received from the Governments of eight Member States, pursuant to the invitation extended under paragraph 3 of General Assembly resolution 36/106 of 10 December 1981. As requested by the Assembly in paragraph 4 of that resolution, those comments and observations were circulated (A/CN.4/358 and Add.1-4),³³⁵ and other documentation was submitted by the Secretariat. The Secretariat also furnished the members of the Working Group with additional relevant materials.

254. The Working Group met on 20 July 1982 and held a preliminary exchange of views on the requests addressed to the Commission by the General Assembly in its resolution 36/106. Members referred, in particular, to the importance and urgency of the topic and the priority to be accorded to it in the context of the Com-

mission's five-year programme as well as to the scope and structure of the draft Code and the possibility of presenting a preliminary report to the General Assembly bearing, *inter alia*, on those aspects of the topic.

255. On the recommendation of the Working Group, the Commission decided to accord the necessary priority to the draft Code of Offences against the Peace and Security of Mankind within its five-year programme. The Commission intends, at an early stage during its next session, to proceed to a general debate in plenary on the basis of a first report to be submitted by the Special Rapporteur. The Commission will present to the General Assembly at its thirty-eighth session the conclusions of that general debate.

256. Also on the recommendation of the Working Group, the Commission decided to request the Secretariat to give the Special Rapporteur the assistance that may be required and to submit to the Commission all necessary source materials including, in particular, a compendium of relevant international instruments and an up-to-date version of the analytical paper prepared pursuant to General Assembly resolution 35/49 of 4 December 1980,³³⁶ analysing the comments and observations from Governments of Member States which may be received in writing or made in debates in the General Assembly.

C. Programme and methods of work of the Commission

257. At its 1706th meeting, on 13 May 1982, the Commission decided to establish a Planning Group of the Enlarged Bureau for the present session. The Group was composed of the First Vice-Chairman, Mr. Leonardo Díaz González (Chairman), Mr. Jorge Castañeda, Mr. Andreas J. Jacovides, Mr. S. P. Jagota, Mr. Abdul G. Koroma, Sir Ian Sinclair, Mr. Constantin A. Stavropoulos, Mr. Doudou Thiam and Mr. Nikolai A. Ushakov. The Group was entrusted with the task of considering the programme and methods of work of the Commission, including the question of its documentation, and of reporting thereon to the Enlarged Bureau. The Planning Group met on 18 May and 14 July 1982. Members of the Commission who were not members of the Group were invited to attend and a number of them participated in the meetings.

258. On the recommendation of the Planning Group, the Enlarged Bureau recommended that the Commission include paragraphs 259 to 272, below, in its report

³³² Reproduced in *Yearbook ... 1982*, vol. II (Part One).

³³³ *Yearbook ... 1981*, vol. II (Part Two), p. 164, footnote 686.

³³⁴ Reproduced in *Yearbook ... 1982*, vol. II (Part One).

³³⁵ *Idem*.

³³⁶ (A/36/535).

to the General Assembly on the work of its present session. At its 1752nd meeting, on 23 July 1982, the Commission considered the recommendations of the Enlarged Bureau and, on the basis of these recommendations, adopted the following paragraphs.

259. At the beginning of the five-year term of office of the newly constituted Commission, the current programme of work, pursuant to General Assembly resolution 36/114 of 10 December 1981, consisted of the following topics: question of treaties concluded between States and international organizations or between two or more international organizations; State responsibility; international liability for injurious consequences arising out of acts not prohibited by international law; the law of the non-navigational uses of international watercourses; jurisdictional immunities of States and their property; status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; and relations between States and international organizations (second part of the topic). In addition, by resolution 36/106 of 10 December 1981, the General Assembly invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind.

260. Also by resolution 36/114, the General Assembly endorsed the conclusion reached by the Commission at its thirty-third session³³⁷ regarding the establishment, at the present session, of general objectives and priorities which would guide its study of the topics on its programme of work within the term of office of Commission members elected at the thirty-sixth session of the General Assembly. Furthermore, by resolution 36/106, the General Assembly requested the Commission to consider, at its present session, the question of the draft Code of Offences against the Peace and Security of Mankind in the context of its five-year programme.

261. The Commission, at its present session, reaffirms the conclusion formulated in the report on its thirty-third session³³⁸ according to which:

The establishment, in conformity with relevant General Assembly resolutions, of general objectives and priorities guiding the programme of work to be undertaken by the Commission during a term of its membership, or for a longer period if appropriate, appears to be an efficient and practical method for the planning and timely carrying out of the work programme of the Commission.

As the Commission has already indicated,³³⁹ while the adoption of any rigid schedule of operation would be impracticable, the use of goals in planning its activities affords a helpful framework for decision-making.

262. In establishing general objectives and priorities which would guide the study of the topics in its current work programme, due account must be taken not only of the level of importance and urgency attached to the various topics under the relevant resolutions of the General Assembly, but also of the progress achieved

thus far in the work on each topic as well as the state of readiness for making further progress, bearing in mind the different degrees of complexity and delicacy of the various topics.

263. In this, the first year of the term of office of its present membership, the Commission, as requested by the General Assembly in resolution 36/114, completed the second reading of the draft articles on the law of treaties between States and international organizations or between international organizations. Bearing in mind the progress of work achieved at the present session on the remaining topics in the current programme and in the light of the considerations mentioned above, the Commission concluded that it would endeavour to accomplish by the end of the five-year term, which began in 1982, the following: complete the first reading of part 2 of the draft articles on responsibility of States for internationally wrongful acts, with the possibility of undertaking the second reading of part 1 of that draft; complete the first reading of the draft articles on jurisdictional immunities of States and their property; make substantial progress in the first reading of the draft articles on the law of the non-navigational uses of international watercourses; complete the first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; advance its work on international liability for injurious consequences arising out of acts not prohibited by international law; and continue its study of the second part of the topic of relations between States and international organizations. Furthermore, as regards the draft Code of Offences against the Peace and Security of Mankind, the Commission draws attention to the conclusion recorded above in paragraph 255.

264. At its thirty-fifth session, the Commission, in the light of the general objectives described above, intends to establish and convene its Drafting Committee at the commencement of that session so as to allow it to complete, at an early juncture, its work on the draft articles referred to it at the present session, and of which it remains seized, on State responsibility, jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. At the same time, the Commission will take up the preliminary report to be submitted by the newly appointed Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, a first report to be submitted by the new Special Rapporteur on the law of the non-navigational uses of international watercourses, and further reports to be submitted by the respective Special Rapporteurs on the three topics on which draft articles are being elaborated, as well as those reports that may be submitted on other topics.

265. As to the allocation of time at its thirty-fifth session for topics in its current programme of work, the Commission will take the appropriate decisions at the beginning of that session when arranging for the organization of its work. The Commission is, however,

³³⁷ *Yearbook ... 1981*, vol. II (Part Two), p. 164, para. 258.

³³⁸ *Ibid.*

³³⁹ *Yearbook ... 1975*, vol. II, p. 184, document A/10010/Rev.1., para. 147.

aware that in the time available it may not be possible to consider all the topics in that programme.

266. In the context of continuing to keep under review the possibility of improving further the Commission's present procedures and methods of work, the Planning Group during the present session held an initial exchange of views on the matter. Questions which were deemed by the Group to merit special attention included, *inter alia*, the question of providing additional assistance to Special Rapporteurs in the accomplishment of their tasks, including the possibility of providing technical or expert advice; the question of examining ways to encourage greater response from Governments of Member States to Commission questionnaires or requests for written comments and observations; the question of how best to organize the time available to the Commission, such as concentrating its attention on a smaller number of topics at any one session; and the question of exploring possibilities for further expanding and intensifying research work on the topics considered by the Commission as well as other substantive servicing given to it by its secretariat and the Codification Division as a whole. The Commission intends, at its next and future sessions, to continue its consideration of these and other questions and to examine them in greater detail within the framework of the continuous review of its procedures and methods of work with the aim of improving them further so as to ensure the timely and effective fulfilment of the tasks entrusted to it; to this end, it may be anticipated that the Planning Group to be established at the next session of the Commission will devote several meetings to these matters.

267. Concerning the question of documentation, the Commission again wishes to convey its appreciation to the General Assembly for having maintained the provision of summary records of the meetings of the Commission by its decision 34/418 of 23 November 1979 and by its resolutions 34/141 of 17 December 1979, 35/10 B of 3 November 1980, 35/163 of 15 December 1980 and 36/114 of 10 December 1981. In that connection, the Commission reiterates the considerations which it set forth in its report on the work of its thirty-second (1980) session,³⁴⁰ in particular the conclusion reached at that session that:

The continuance of the present system of summary records corresponds to what has been a consistent policy of the General Assembly since the establishment of the Commission, and constitutes an inescapable requirement for the procedures and methods of work of the Commission and for the process of codification of international law in general.

268. In addition, the Commission notes with satisfaction that in implementing regulations for the control and limitation of documentation originating in the Secretariat, the Secretariat services concerned have acted without prejudice to the provision reflected in paragraph 10 of General Assembly resolution 32/151, and reaffirmed by resolutions 34/141, 35/163 and 36/114. By that provision, the Assembly endorsed the

conclusion reached by the Commission at its twenty-ninth (1977) session that, *inter alia*, "In the matter of legal research—and codification of international law demands legal research—limitations on the length of documents cannot be imposed".³⁴¹

269. By paragraph 5 of section II of General Assembly resolution 36/117 A of 10 December 1981, entitled "Future work of the Committee on Conferences", subsidiary organs of the Assembly were requested "to ensure that their reports shall be as brief as possible and shall not exceed the desired limit of thirty-two pages". In 1977, at its twenty-ninth session, the Commission had occasion to address itself to the form and presentation of its report to the General Assembly, including the question of the length of Commission reports. In connection with the request made in resolution 36/117 A, the Commission would like to draw the attention of the General Assembly to the relevant passages of the report on its twenty-ninth session,³⁴² which it now reaffirms. As stated by the Commission in 1977, the length of a given report of the Commission is not a matter that can be decided *a priori* and without regard to the provisions of the Statute of the Commission and to the position of the Commission in the process of codification as a whole. To fix in advance and *in abstracto* any maximum or minimum so far as the length of the report is concerned does not seem a course of action that the Commission could endorse. The report on the work done by the Commission at a particular session should be short or long according to the Commission's perception of the need for explaining the work accomplished at that session and justifying the draft articles contained therein to the General Assembly and Member States.

270. As indicated above, the Commission will continue to keep under review the possibility of improving further its present procedures and methods with a view to the timely and effective fulfilment of the tasks entrusted to it by the General Assembly. In that context and bearing in mind the considerations which it formulated in 1977 referred to above, as well as the views expressed on the matter in the Sixth Committee of the General Assembly, the Commission will continue in its efforts to present to the General Assembly reports on its work which are consistent with the requirements of its Statute and which respond to the needs of the General Assembly and Member States.

271. The Commission was informed of the contents of a bulletin circulated by the Secretary-General in which Secretariat officials were directed to, *inter alia*, request subsidiary organs which appoint Special Rapporteurs to assist the Secretariat in its endeavour to control documentation by establishing, in the case of such reports, a maximum limit of 32 pages. In the observations of the Commission on the item "Review of the multilateral treaty-making process",³⁴³ it was indicated

³⁴¹ *Yearbook ... 1977*, vol. II (Part Two), p. 132, para. 123.

³⁴² *Ibid.*, pp. 132-133, paras. 124-126.

³⁴³ *Yearbook ... 1979*, vol. II (Part One), p. 210, document A/CN.4/325, para. 104.

³⁴⁰ *Yearbook ... 1980*, vol. II (Part Two), pp. 168-169, paras. 189-190.

that Special Rapporteurs are one of the institutional features "which contribute to the efficient performance of its functions by the Commission" and which have served it well. Their reports on the various topics which have been entrusted to them and which constitute the Commission's current programme form the very basis of work for the Commission. The length and contents of such reports vary not only according to the scope and complexity of the topic in question, but also according to many other factors, such as the stage of the Commission's work on the topic, the nature and number of proposals made by the Special Rapporteur, in particular draft articles with supporting data derived from, *inter alia*, State practice and doctrine, including analysis of relevant debates held in the General Assembly and of comments and observations submitted by Governments, etc. What is necessary to bear in mind is that the reports of Special Rapporteurs constitute a critical component of the methods and techniques of work of the Commission established in its Statute, which enable it to fulfil, in accordance with that Statute, the tasks entrusted to it by the General Assembly. The Commission therefore considers that it cannot fix in advance and *in abstracto* the length of reports of Special Rapporteurs. However, it wishes to assure the Secretariat that the Commission and its Special Rapporteurs are fully conscious of the felt need for achieving economies whenever possible in the overall volume of United Nations documentation and will continue to bear such considerations in mind.

272. Finally, the Commission wishes to express regret that, without prior notice, the practice followed since 1949 of listing in each summary record of a Commission meeting the names of Commission members present at that meeting was discontinued. The Commission feels that such information should be available to the General Assembly, to Governments of Member States and to the public at large. The discontinuance of this practice affects the presentation of the summary records in the final form as published in volume I of the *Yearbook of the International Law Commission*, which is, pursuant to General Assembly resolution 987 (X) of 3 December 1955 and subsequent Commission decisions, published under the authority and control of the International Law Commission.³⁴⁴ The Commission is therefore of the view that the practice of listing in each summary record of its meetings the members attending that particular meeting should be reinstated by the Conference and General Services Division of the United Nations Office at Geneva.

D. Co-operation with other bodies

1. INTER-AMERICAN JURIDICAL COMMITTEE

273. Mr. Doudou Thiam, Chairman of the Commission at its thirty-third session, attended, as an observer

³⁴⁴ See *Yearbook ... 1956*, vol. II, p. 301, document A/3159, paras. 39-45; *Yearbook ... 1969*, vol. I, p. 148, 1020th meeting, paras. 2-5; *Yearbook ... 1972*, vol. I, p. 14, 1151st meeting, para. 56, and pp. 41-42, 1157th meeting, paras. 43-44; and *Yearbook ... 1979*, vol. II (Part Two), p. 90, footnote 485.

for the Commission, the session of the Inter-American Juridical Committee held in January-February 1982 at Rio de Janeiro, and made a statement before the Committee.

274. The Inter-American Juridical Committee was represented at the thirty-fourth session of the Commission by Mr. G. Ortiz Martin, who addressed the Commission at its 1726th meeting, on 14 June 1982.

275. The observer for the Inter-American Juridical Committee referred to the Committee's recent activities and, in particular, to the preparation of a draft inter-American convention on international jurisdiction for the extraterritorial validity of foreign judgements, which would supplement existing conventions. That topic had been discussed at the first and second specialized conferences on private international law, held in Panama City and Montevideo, respectively, and, in April 1980, in Washington D.C., where the first meeting of private international law experts had included in its agenda an item on international jurisdiction, with a view to supplementing, where necessary, the rules of international procedural law. It had then drafted bases of international jurisdiction for the extraterritorial validity of foreign judgements and the rapporteur entrusted with the topic had described the efforts made to find terms that would apply both to the common-law system and to the Latin American system of law. The Committee had then considered the bases of international jurisdiction and the replies of jurists to a questionnaire sent to them by the General Secretariat of OAS. During the article-by-article consideration of that text, questions on the use of terms had been raised and amendments had been proposed. Various other documents had been prepared and, in January 1982, the Committee had decided that the bases should take the form of a convention which, although it could stand on its own, might serve to implement article 2 (d) of the Inter-American Convention on the Extraterritorial Validity of Foreign Judgements and Arbitral Awards, signed at Montevideo on 8 May 1979. In order to fill a gap in that article, the draft Convention contained a provision which would enable the States parties to the Montevideo Convention to apply the rules of that Convention in the event of a dispute, but which would not prevent the draft Convention from remaining open for signature and accession by States which had not signed the Montevideo Convention. During the discussion of the title of the draft Convention, it had been agreed that the Spanish term "*competencia*" could be translated by the English term "jurisdiction". Restrictions on the subject-matter of judgements had been retained in the draft, but a provision had been added so that the States parties could declare that they would apply the rules of the Convention to one or more of the subject-matters not covered by that instrument; such a declaration could be made at any time. The draft Inter-American Convention would be useful to the American States, whether they belonged to the common-law system or to the Latin American system of law, and it would provide a universal standard for States other than those of the American continent which decided to accede to it.

276. The observer for the Inter-American Juridical Committee also referred to the development of international law in the Americas. He stressed that the main legacy left by the Spaniards and Portuguese had been international public law, which Vitoria had created and Suarez had expanded in order to protect the new Latin American nations. International law was thus part and parcel of Latin American culture, as the people of America had realized at the end of the wars of independence, when Simón Bolívar had convened the first congress that was to unite all the peoples of America as one. That had been the first positive step in the work, conferences, meetings and institutes which had led to the establishment of the Pan-American Union, in which the United States of America had taken part and of which it had been a fervent supporter. International law had thus developed because the representatives of the peoples of Latin America had gone on meeting and trying to establish a legal framework for the settlement of their disputes. In Europe, it had been only later, with the establishment of the League of Nations, that such an international union had been born. In Latin America, however, theories had continued to be put forward, including the Bustamante Code,³⁴⁵ which had been adopted in 1928 and represented the first codification of uniform rules of private law. It should also be borne in mind that the Treaty of Chapultepec³⁴⁶ had paved the way for the establishment of the United Nations, whose Charter recognized the regional value of OAS and its right to conclude its own treaties and conventions of all kinds.

277. The observer for the Inter-American Juridical Committee said in conclusion that, as a result of current unrest, the Latin American countries would have to re-examine their constitutions and the treaties that bound them to determine whether they were operating properly and effectively or whether they should be amended or supplemented. In the final analysis, what the world needed was an international law that would be respected out of a concern for justice.

278. The observer reiterated its request that, when members of the Commission visited the Inter-American Juridical Committee, they should give lectures as part of the international law courses which the Committee had been organizing for the past several years.

2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

279. Mr. Doudou Thiam, Chairman of the Commission at its thirty-third session, attended, as an observer for the Commission, the thirty-sixth session of the European Committee on Legal Co-operation, held in November 1981 at Strasbourg, and made a statement before the Committee.

³⁴⁵ Official name of the Code of Private International Law, contained in the Convention on Private International Law, adopted on 20 February 1928 at Havana (League of Nations, *Treaty Series*, vol. LXXXVI, p. 111).

³⁴⁶ Final act of the Inter-American Conference on Problems of War and Peace, adopted on 8 March 1945 at Mexico City (*The International Conferences of American States, Second Supplement, 1942-1954* (Washington, D.C., Pan American Union, 1958)).

E. Date and place of the thirty-fifth session

280. The Commission decided to hold its next session at the United Nations Office at Geneva from 3 May to 22 July 1983.

F. Representation at the thirty-seventh session of the General Assembly

281. The Commission decided that it should be represented at the thirty-seventh session of the General Assembly by its Chairman, Mr. Paul Reuter.

G. International Law Seminar

282. Pursuant to paragraph 9 of General Assembly resolution 36/114 of 10 December 1981, the Office of Legal Affairs, acting in conjunction with the United Nations Office at Geneva, organized the eighteenth session of the International Law Seminar during the thirty-fourth session of the Commission. The Seminar is intended for advanced students of the subject and junior government officials who normally deal with questions of international law in the course of their work.

283. A selection committee met under the chairmanship of Mr. Philippe Gibrain, Director of the Seminar, representing Mr. Erik Suy, the Legal Counsel of the United Nations. The Committee comprised four other members: Mr. M. A. Boisard (UNITAR), Mr. E. Chrispeels (UNCTAD), Mr. B. G. Ramcharan (Division of Human Rights) and Mr. M. Sebti (Division of Administration). Twenty-four participants, all of different nationalities and a great majority from developing countries, were selected from among the 51 candidates. Four other persons attended the session of the Seminar as observers.

284. During the session, which was held at the Palais des Nations from 10 to 28 May 1982, the participants were able to follow the Commission's work and had access to the facilities of the United Nations Library, as well as attending a film show given by the United Nations Information Service. They were given copies of the basic documents necessary for following the discussions of the Commission and the lectures at the Seminar and were also able to obtain, or to purchase at reduced cost, United Nations printed documents which were unavailable or difficult to find in their countries of origin. At the end of the session, the Chairman of the Commission and the Director-General of the United Nations Office at Geneva handed participants a certificate testifying to their diligent work at the eighteenth session of the Seminar.

285. During the three weeks of the session, the following six members of the Commission gave lectures, which were followed by discussions: Mr. A. J. Jacovides (Law of the Sea: Islands Delimitation—settlement of disputes); Mr. A. G. Koroma (The Special Committee on the Charter of the United Nations and the draft Manila declaration on the peaceful settlement of disputes); Mr. C. Flitan (The peaceful settlement of disputes); Mr. S. P. Jagota (Recent developments in the law of the sea); Mr. A. Yankov (Freedom of com-

munication and development of diplomatic law); and Mr. S. Sucharitkul (State immunity and commercial activities in international law).

286. In addition, lectures were given by Mr. C. Swinarski, of the Legal Office of the ICRC, on "International humanitarian law as part of public international law"; Mr. F. Wolf, Assistant Director-General and Legal Adviser of the ILO, on "The International Labour Organisation and the dynamics of international law"; and Mr. K. Nyameke, Acting Director, Division of Human Rights, on "The activities of the Division of Human Rights".

287. This year the City of Geneva gave an official reception for the Seminar participants in the Alabama Room at the Hôtel de Ville. During the reception Mr. R. Vieux, Chief of Protocol of the City of Geneva, gave a talk on the international aspects of Geneva. The programme of the Seminar included a visit to the headquarters of the ICRC. The participants took part in a round table under the chairmanship of Mr. J. Moreillon, Director of the Department of Principles and Law of the International Committee of the Red Cross, and were then received by Mr. Alexandre Hay, President of the International Committee.

288. As in the past, none of the costs of the Seminar fell on the United Nations, which was not asked to contribute to the travel or living expenses of participants.

The Governments of Austria, Denmark, Finland, the Federal Republic of Germany, Jamaica, the Netherlands, Norway and Spain made fellowships available to participants from developing countries. Funds were also made available for that purpose by the Dana Fund for International and Comparative Legal Studies (of Toledo, Ohio). With the award of fellowships it is possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from participating, solely by lack of funds. This year fellowships were awarded to 16 participants. Of the 403 participants, representing 103 nationalities, who have been accepted since the beginning of the Seminar, fellowships have been awarded to 184 participants.

289. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which give the young lawyers selected for the Seminar the possibility of familiarizing themselves with the Commission's work and with the activities of the many international organizations which have their headquarters at Geneva. In order to ensure the continuance and growth of the Seminar, and in particular to enable a larger number of fellowships to be awarded, it is to be hoped that as many States as possible will make a contribution, even a token one, to the travelling and living expenses which may have to be met, thus demonstrating their interest in the sessions of the International Law Seminar.

ANNEX

Comments and observations of Governments and principal international organizations on articles 61 to 80 and annex of the draft articles on treaties concluded between States and international organizations or between international organizations adopted, by the International Law Commission at its thirty-second session*

CONTENTS

	<i>Page</i>
A. COMMENTS AND OBSERVATIONS OF GOVERNMENTS	127
1. Bulgaria	127
2. Byelorussian Soviet Socialist Republic	128
3. Canada	128
4. Czechoslovakia	130
5. Denmark	130
6. German Democratic Republic	131
7. Germany, Federal Republic of	131
8. Spain	132
9. Ukrainian Soviet Socialist Republic	133
10. Union of Soviet Socialist Republics	134
11. United Kingdom of Great Britain and Northern Ireland	134
B. COMMENTS AND OBSERVATIONS OF THE UNITED NATIONS AND THE INTERNATIONAL ATOMIC ENERGY AGENCY	135
1. United Nations	135
2. International Atomic Energy Agency	136
C. COMMENTS AND OBSERVATIONS OF OTHER INTERNATIONAL ORGANIZATIONS.....	139
1. Council of Europe	139
2. Council for Mutual Economic Assistance	145
3. European Economic Community	145

*
* * *

NOTE

For the text of the draft articles on treaties concluded between States and international organizations or between international organizations adopted on first reading by the International Law Commission, see *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.*

Comments and observations of Governments and principal international organizations on articles 1 to 60 of the said draft articles are reproduced in annex II to the report of the Commission on its thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), p. 181).

Sources for the multilateral conventions concluded under the auspices of the United Nations which are cited in the present annex are given on p. 6 above.

A. Comments and observations of Governments

1. Bulgaria

*[Original: English]
[30 April 1982]*

1. The Government of the People's Republic of Bulgaria notes with satisfaction that draft articles 61 to 80 concerning treaties concluded between States and international organizations or between interna-

* Comments and observations reproduced in this annex were originally circulated in documents A/CN.4/350 and Add.1-6, Add.6/Corr.1 and Add.7-11. Some of these comments and observations relate not only to articles 61 to 80 and annex of the above-mentioned draft articles, but also to other articles of the draft, or contain general remarks relating to the draft as a whole.

tional organizations, as well as draft articles 1 to 60, adopted by the International Law Commission on first reading at its thirty-second session in 1980, are a valuable contribution to the regulation of treaty relations between States and international organizations or between international organizations themselves, and should be highly appreciated. In general, they reflect the practice followed so far in this field and, in accordance with the approach adopted by the Commission, they follow as close as possible the structure and terminology of the Vienna Convention on the Law of the Treaties.

2. Along with the high assessment which the Bulgarian Government gives to the draft prepared by the Commission, it considers that some

remarks and improvements of a preliminary order could be made in order to emphasize the specific nature of the international organizations as subjects of international law of limited legal capacity, as laid down accordingly in their statutes, as well as to ensure more adequate implementation following the draft's final adoption.

3. Thus, for example, in the drafting of article 62, paragraph 2, the Bulgarian Government considers that the term "boundary" should be specified as "State boundary". Besides, it considers that on a matter of such importance touching upon the interests of States alone, the participation of an international organization as an equal party to the treaty is unfounded.

4. The Bulgarian Government wishes to draw attention to the fact that the three-month period for raising objections under article 65, paragraph 2, may prove insufficient for studying the circumstances and motivations invoked by the party to the treaty under paragraph 1 of the same article.

5. The Bulgarian Government furthermore considers that the submission, upon request by one of the parties, of disputes concerning the application or the interpretation of articles 53 or 64 to the International Court of Justice for a decision, as envisaged in article 66, subparagraph 1 (a), is not fully justified or purposeful. What is more, article 65, paragraph 3, refers to Article 33 of the United Nations Charter, which envisages precisely a judicial settlement as one of the possibilities for settling the dispute by choice of the parties to it.

6. The Bulgarian Government also considers that the application of the procedure envisaged in article 66, subparagraph 1 (b), and specified in the annex to the draft articles, will be difficult and not quite effective, bearing in mind the complex mechanism and the volume of work that must be done in appointing conciliators for the States and for the international organizations. The problem of the choice of these persons by the international organizations would present further difficulties. Considering the availability of a great variety of peaceful means for settlement of disputes, envisaged in the Charter of the United Nations and tested in practice, one may doubt whether this procedure will be often used by the parties to the dispute, and will find a truly effective implementation.

7. The Bulgarian Government proposes that draft article 80 should envisage registration of treaties as a possibility for the parties, taking into account the provision of Article 102 of the Charter of the United Nations to invoke the treaties at the United Nations bodies. This matter should be decided upon by the parties to the treaty if they consider it appropriate.

2. Byelorussian Soviet Socialist Republic

[Original: Russian]
[10 June 1982]

1. The draft articles on treaties between States and international organizations or between international organizations elaborated by the International Law Commission are an acceptable basis for the preparation of an international convention on that topic.

2. The text has been prepared on the basis of the corresponding provisions of the Vienna Convention on the Law of Treaties. It does not, however, fully take into account the specific features of treaties in which international organizations participate. Simply to borrow provisions on treaties concluded between States without due regard to the specific legal relations and to the juridical status of international organizations cannot be considered a sound procedure.

3. More particularly, the mere transfer of the provisions concerning a fundamental change of circumstances into article 62, paragraph 2, is open to question.

4. Article 66, subparagraph 1 (a) provides for the right of any of the parties to a dispute to submit that dispute to the International Court of Justice. The Byelorussian SSR's position of principle on this question is that in each specific case the consent of all parties to the dispute is required for the submission of the dispute to the International Court. A number of other States are known to take the same position in this matter. The question also arises whether international organizations can lawfully submit cases to the International Court, since under the Statutes of the Court only States, and more partic-

ularly States parties to the Statutes of the International Court, may be parties to disputes investigated by the Court.

5. As regards article 80, which provides for the registration in the United Nations Secretariat of international treaties concluded between States and international organizations or between two or more international organizations, the Byelorussian SSR takes the view that the inclusion of such an obligation for international organizations parties to such treaties is inappropriate. The provision unlawfully extends the scope of Article 102 of the United Nations Charter, which provides for such action only by States Members of the United Nations.

6. The provisions on conciliation procedures established in application of draft article 66 and contained in the annex to the draft articles need to be thoroughly revised and simplified. The procedures are extremely complicated and cumbersome and therefore difficult to apply in practice. More particularly, the procedure laid down in paragraph 1 of section I of the annex for drawing up a list of conciliators is open to question.

7. The Byelorussian SSR expresses the hope that at the second reading of the articles its comments on draft articles 61 to 80 will be taken into account by the International Law Commission.

3. Canada

[Original: French]
[28 April 1982]

1. Although the final form which the draft will take has not yet been decided, the comments which follow have been formulated as for a draft international convention. However, this position should not be taken as precluding any option of which the Government of Canada may wish to avail itself in this regard in the future. Furthermore, while bearing in mind the Commission's working hypothesis that the draft should follow the Vienna Convention on the Law of Treaties as closely as possible, the Government of Canada regards that hypothesis as one of the arguments in favour of the wording of the draft, without according it any absolute value, given the diversity of the situations covered by the two texts. In this regard, the Government of Canada also reserves the right to take a position at the appropriate time.

The following comments relate mainly to those aspects of the draft articles which appear open to question.

2. *Article 61.* The content of this article, and in particular of paragraph 2, appears ambiguous in the context of an international organization, especially in view of the lack of certainty as to the exact meaning of article 27, paragraph 2. If the latter provision to be taken as meaning (*in fine*) "... unless performance of the treaty ... is subject to the possibility of the exercise of the functions and powers of the organization", article 61, paragraph 2, would be clearer if it began: "In view of the condition laid down in article 27, paragraph 2 ...", with the rest of the paragraph remaining unchanged. The import of this would be that an international organization could invoke the impossibility of performing the treaty only where the disappearance or destruction of the object indispensable for the execution of the treaty was attributable to the action of factors beyond the control of the organization and of its member States themselves (e.g. adoption of an amendment to the constituent treaty abolishing an organ or preventing certain expenditures; refusal of member States to contribute to the execution of a treaty with money, personnel or equipment; arbitration ruling declaring the organization to be incompetent in respect of the execution of the treaty), as opposed to acts attributable to the organization itself, such as resolutions or decisions relating to its internal administration.

3. *Article 62.* The above comments also apply to paragraph 3 of this article. A fundamental change of circumstances, independent of the wishes of the organization (e.g. mass withdrawal of member States), would constitute grounds for terminating the commitments of an international organization, whereas, for example, a change in the structure of the organization pursuant to a decision of the organization itself and rendering the execution of the treaty significantly more difficult, would not constitute such grounds.

4. *Article 63.* Ignorance of the relations of representation between international organizations and States (members or even non-members) would appear difficult to explain in the light of interna-

tional practice. Not only are these relations amply provided for (permanent missions to international organizations, representatives or missions to States), but, in certain cases, are necessary to the execution of the treaty by virtue of its provisions (e.g. assistance agreements under UNDP requiring the presence of permanent representatives of the participating organizations in the territory of the receiving States; international inspection or observation agreements entailing the presence of inspectors or observers mandated by the international organization; agreements relating to the stationing of United Nations peacekeeping forces, etc.). It would seem advisable, therefore, to designate the existing text of article 63 as paragraph 1 and to add the following as paragraph 2:

“The severance of relations of representation between States and international organizations parties to a treaty or between international organizations party to a treaty shall not affect the legal relations established between those parties by the treaty, except in so far as the existence of relations of representation is indispensable for the application of the treaty”.

The title of article 63 should also be amended to read “Severance of diplomatic or consular relations or relations of representation”. In order to avoid any confusion between the severance of relations of representation and the withdrawal of a State from the international organization (see art. 73, para. 2), as well as any prejudice to the possible effects of article 36 *bis* and article 70, paragraph 1, it might be advisable to add to article 2, paragraph 1, the following subparagraph (*k*):

“ ‘Relations of representation’ means relations, reciprocal or otherwise, between States and international organizations or between international organizations, entailing the continuous presence, in the accrediting State or at the accrediting organization, of duly authorized persons representing the interests of the accredited party.”

5. *Article 65.* Paragraphs 2 and 4 are potentially contradictory, since, under paragraph 2, action may be taken after the expiry of a period of three months following notification and in the absence of objections (see art. 62), whereas, under paragraph 4, notifications and objections appear to be governed by the “relevant rules of the organization”. Consequently, there is nothing to prevent an organization which is precluded by the internal rules from raising an objection prior to the expiry of the period in question, from claiming that the objection is valid, on the basis, not of article 65, paragraph 2, but of its own rules (a similar situation exists in article 45, paragraphs 2 and 3). While such a claim would probably be incompatible with the spirit of article 27, paragraph 2, the draft as a whole nevertheless does not appear to contain a general rule concerning the reciprocal effects of treaties concluded by international organizations and their internal rules. The Commission might therefore reconsider the possibility of inserting in the draft an article 5 to read:

“The provisions of the present articles apply to any treaty to which an international organization is a party, except where such treaty derogates from them”.

The inclusion of a general rule of this kind would enable the provisions of article 65, paragraph 2, and article 45, paragraph 3, to be deleted and would, at the same time, eliminate a potential conflict which might upset the economy of the present draft. Such a solution would also induce international organizations to take steps to make their internal procedures compatible with the short notice periods necessitated by the nature of treaty relations between subjects of international law.

6. *Article 66 and annex.* The distinctions drawn in the three paragraphs of this article and their consequences in the form of variants of the conciliation procedure set out in the annex, do not entirely meet the criterion which is nevertheless recognized by the Commission as of paramount importance, namely the existence of a peremptory norm of international law. While it may be accepted that international organizations are not competent to appeal to the International Court of Justice under the dispute procedure and that they would probably have difficulty in gaining a hearing under the advisory opinion procedure, it would nevertheless seem essential that decisions affecting international organizations, in respect of the application or interpretation of articles 53 and 64, should be entrusted to a body for the legal settlement of disputes (i.e. international arbitration), rather

than to a body for the political settlement of such disputes (i.e. international conciliation).

Article 66, paragraph 1, should therefore be redrafted to show clearly that it relates solely to disputes concerning the application or interpretation of a peremptory norm of international law (arts. 53 and 64), and should be followed by two subparagraphs (*a*) and (*b*), of which the first would concern only States parties to a dispute and would keep its current wording (*in fine*), and the second would cover all disputes to which organizations were parties and would provide for the mandatory settlement of disputes by international arbitration. The annex could then also include provisions concerning the appointment of arbitrators similar to those which it already contains concerning conciliators, and subparagraph 2 (*a*) could be deleted as no longer necessary.

In addition, the distinction between conciliation procedures involving only States and procedures involving both States and international organizations (art. 66, paras. 2 and 3) appears unnecessary. All such disputes could be governed by one provision contained in a new paragraph 2 and differing from the two existing paragraphs only in the designation of the parties: “... an objection was raised by one or more States or by one or more international organizations against an international organization or a State ...”. Similarly, the existing paragraph 2 of the annex could embody only provisions (i) and (ii) of subparagraphs (*a*) and (*b*), which stipulate the different procedures for the appointment of two conciliators by States and international organizations respectively, and could include a subparagraph (*c*) stipulating that States and international organizations, acting jointly as one party to a dispute, shall appoint two conciliators by common agreement, in accordance with the conditions applicable to them under paragraphs (*a*) (i); (*b*) (i); (*a*) (ii); (*b*) (ii), respectively. In this regard, the provisions of the existing subparagraphs (*b*) (i) and (ii) should include and exclude respectively persons having working links with the international organization, regardless of their duration and nature. Paragraph 2 (*bis*) seems unnecessary.

7. Quite apart from the above observations, the current wording of article 66 and the annex calls for the following drafting changes in order to avoid ambiguities:

(*a*) the period of twelve months (art. 66, paras. 1, 2 and 3) should begin with the raising of the first objection, in chronological order;

(*b*) The number of States and international organizations constituting a party to a dispute should be limited to those which have expressed the wish to be considered as such at the time when the matter is submitted to the International Court of Justice or the request for conciliation is submitted to the Secretary-General of the United Nations or the President of the ICJ. Others having an interest in the outcome of the dispute may be heard by the ICJ (Article 34, paras. 2 and 3, and Articles 62 and 63 of the Statute). It would be advisable to provide for the same possibility for the procedure before the Conciliation Commission;

(*c*) Wherever a number of States or international organizations may appoint one conciliator (annex, subparas. 2 (*a*) (ii), (*b*) (ii) and (*c*) (ii)), the word “list” should be made plural;

(*d*) In order to avoid unnecessary delays, the Commission might suggest, in the annex, a standard international conciliation procedure, which would be automatically applicable, except in the case of a specific objection by the parties.

8. *Article 76.* The references to relations of representation between States and international organizations (see para. 4 above) should be included in both sentences of this article.

9. *Article 77.* The addition of the words “the classification and registration” in subparagraph 1 (*g*) seems advisable (see art. 80, para. 1); subparagraph 2 (*b*) would be clearer if it read “where appropriate, of the organization designated as depositary”.

10. *Article 79.* Paragraph 1 should provide for the association with the correction procedure of States and international organizations which participated in the negotiations and are collectively responsible for errors.

4. Czechoslovakia

[Original: English]
[19 May 1982]

The Czechoslovak Socialist Republic highly appreciates the results of the work of the International Law Commission achieved in the course of the past years in the preparation of draft articles on treaties concluded between States and international organizations or between international organizations. Having carefully studied draft articles 61 to 80, it wishes to submit the following comments on them:

1. As is known, the Commission, when drafting the articles of the treaty, proceeded from the provisions of the Vienna Convention on the Law of Treaties (contractual law). In preceding comments by the Czechoslovak Socialist Republic, this was assessed in a very positive way, since we believe that this kind of codification of international law helps to unify the legal standards regulating the problems at hand. At the same time, however, the Czechoslovak Socialist Republic repeatedly drew attention to the fact that an analogy between the draft which is now being prepared and the Vienna Convention has certain limits, resulting from the different scope of the subjectivity of States and international organizations. In contrast to States as the original subjects of international public law which can, within the framework of limits defined by *jus cogens*, conclude treaties on everything possible, international organizations, as we have already noted, can only conclude agreements, the contents of which are covered by the functions entrusted to the organization by States. And in the differing extent of the subjectivity of States and international organizations, which has not always been sufficiently reflected in the draft articles, one must look for the roots of the reservations and comments by the Czechoslovak Socialist Republic in respect of draft articles 61 to 80.

2. Particularly unacceptable for the Czechoslovak Socialist Republic is the provision of article 62, paragraph 2, which forbids the possibility of invoking a fundamental change of circumstances in the cases when the treaty establishes a boundary. In our opinion, an international organization is not competent, in view of its limited legal personality, to withdraw from the treaty establishing the boundary since such competence only belongs to States as sovereign subjects of international law and not to international organizations, whose legal personality and capacity to contract are, as we stated before, secondary, derived from the legal personality of the member States of the organization.

3. The negative point of view of the Czechoslovak Socialist Republic in regard to draft article 65, paragraph 2, on the procedure to be followed by the parties to a treaty with respect to invalidity or termination of the treaty or withdrawal from it, is due to the three months' limit—proposed by the Commission—for raising objections in cases when another contracting party invokes invalidity, withdrawal from or termination of the treaty. It might happen that the objection would not be raised in time due to the fact that the bodies of international organizations meet sometimes at longer intervals than three months which would result in practical difficulties in the implementation of the treaty. The Czechoslovak Socialist Republic also takes a negative attitude towards the view of the Commission according to which the objection may subsequently be recalled. Although this question is not clearly substantiated in the commentary of the Commission,¹ it is possible to assume that such a view is based on the consideration that the objection could be raised for an international organization by an administrative body of the organization within the fixed time limit of three months, and the respective body could recall it later on. Such a solution, although it is conditioned by internal rules of an international organization, is not suitable because it gives too much power to the administrative body, regardless of the fact that this body does not necessarily have that power on the basis of its statute—in which case it would be difficult to preserve the limit of three months. For the above-mentioned reasons, the Czechoslovak Socialist Republic recommends re-examining the question of a three months' limit for raising objections by another party in the cases when one contracting party refers to the invalidity, withdrawal from or termination of the treaty fixed in draft article 65, paragraph 2, so as to take into consideration a different position of States and international organizations, as well as the solution to which the Commission came

in the course of the second reading when formulating articles 19 to 23 of the codification document which is now being prepared.

4. The Czechoslovak Socialist Republic also has reservations of principle in respect of draft article 66, concerning the solution of disputes which may arise in connection with the request for the termination of the treaty, withdrawal from it or with the question of invalidity of the treaty, and recommends the deletion of subparagraph 1 (a) providing for obligatory jurisdiction of the International Court of Justice. The provision on obligatory jurisdiction is, in the opinion of the Czechoslovak Socialist Republic, at variance with the freedom of decision of the parties in the dispute to choose the means of its solution. We consider it sufficient to solve disputes on the basis of the means stated in Article 33 of the United Nations Charter and recommend therefore, in the course of the second reading of draft articles, to examine draft article 66 in the spirit of what is mentioned above.

5. In connection with the annex to the draft articles, the Czechoslovak Socialist Republic assesses positively the fact that the annex, relatively sufficiently, reflects the different extent of legal subjectivity of States and international organizations, yet simultaneously draws attention to the rather complicated election of the members of the Conciliation Commission which, in Czechoslovakia's opinion, should be simplified.

6. The Czechoslovak Socialist Republic expresses its positive view of draft article 73 of the codification document which is being prepared, which concerns the succession of States, the responsibility of States and international organizations, outbreak of hostilities, termination of the existence of an international organization and termination of participation by a State in the membership of an organization. These are, in essence, problems the codification of which is already solved in other instruments (Vienna Convention on Succession of States in Respect of Treaties, 1978) or of which the codification is being prepared (responsibility of States, succession of States in respect of matters other than treaties). Paragraph 2 of article 73 states that the draft shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization. Though the draft article leaves open a number of questions relating to treaties between States and international organizations or between international organizations, it is not expedient to try to solve them within the framework of this draft. At the same time, however, we express our conviction that due attention will be paid also to this sphere of problems in the course of further codification work.

7. The Czechoslovak Socialist Republic has furthermore reservations in respect of draft article 80, on registration and publication of treaties, with regard to the fact that Article 102 of the United Nations Charter—on which draft article 80 of the codification document which is being prepared is based—regulates the registration of the treaties concluded only between States; it is not obligatory for international organizations to send their international treaties to the United Nations Secretariat for registration.

5. Denmark

[Original: English]
[24 February 1982]

Article 66

1. From a general point of view, the settlement procedures which have been laid down in article 66, and which correspond to the system of the Vienna Convention on the Law of Treaties, are acceptable to Denmark.

2. As for the annex to article 66, Denmark finds, however, that the square brackets in paragraph 1, second sentence, should be removed in order to establish that international organizations to which the articles are applicable also shall be invited to nominate two conciliators. Particularly in the matter of settling disputes, it is of importance that the parties should be accorded equal status. Neither fundamental nor practical reasons seem to militate against affording international organizations the same opportunities as States to nominate conciliators.

¹ Yearbook ... 1980, vol. II (Part Two), p. 85.

Article 73

3. Denmark share the Commission's view that it will hardly be possible to transpose *in extenso* the provisions of article 73 of the Vienna Convention to the treaties referred to in the draft articles.
4. Denmark agrees to the solution by which the principle contained in article 73 of the Vienna Convention has been included in paragraph 1 with regard to States. However, for international organizations, it should be carefully considered whether the provision in paragraph 2 is appropriate.
5. It is, admittedly, very difficult in relation to both States and international organizations to give an exhaustive list of cases which should be subject to the reservation set out in article 73, and that, indeed, never was the Commission's intention. However, the present wording of paragraph 2 of the draft article—with explicit emphasis on the international responsibility and the addition of two further situations which are not mentioned in the Vienna Convention—might suggest that the enumeration is in fact exhaustive in regard to international organizations.
6. The problem can be solved by mentioning explicitly in article 73 that the enumeration is not exhaustive. That solution might give rise to difficulty of a systematic nature. Since the enumeration in paragraph 1, which corresponds to that given in article 73 of the Vienna Convention—which also cannot be regarded as exhaustive—does not contain any explicit statement to that effect, the greatest possible conformity between the two sets of rules which is generally aimed at could not be achieved on this point. However, this inconvenience is, in the view of the Danish Government, of minor importance compared to the advantage of a clearer formulation of the scope of the paragraph.

Final provisions

7. Final provisions have not been drafted because, as stated in the Commission's report,² this question should be left to the body entrusted with the task of elaborating the final instrument of codification. Denmark is of the opinion that such a procedure may often be expedient. However, in cases like the present there might be a need for drafting by the Commission of the final provisions too. In the event of codification of the draft articles in the form of a convention, it would be useful if there existed analyses and recommendations as to the modalities for signature of and accession to the convention by international organizations.

6. German Democratic Republic

[Original: English]
[22 April 1982]

The German Democratic Republic believes that articles 61 to 80 and annex of the draft articles on treaties concluded between States and international organizations or between international organizations, as presented by the International Law Commission after the first reading, as well as draft articles 1 to 60 which were submitted to States for comments in 1981, are basically mature enough for the second reading. The German Democratic Republic can agree in general to the majority of the draft articles in their present version.

Because of the difference between the legal quality of States and that of international organizations, some draft articles should, however, take more account of the specific nature of treaties to which international organizations are parties. In particular, the German Democratic Republic wishes to make the following observations in this regard.

1. *Article 61.* It would be appropriate to make more allowance for the specific status of international organizations, especially in cases where the state of legal facts and conditions upon which the application of a given treaty was founded has ceased to exist. Since international organizations do not exist, and cannot act, independently from their member States, such legal situations are likely to disappear more often in the case of international organizations than they would in the case of States.

2. *Article 62.* Non-application of the rule of a fundamental change of circumstances to treaties establishing a boundary as laid down in article 62, paragraph 2, of the Vienna Convention on the Law of Treaties is highly consistent with the particular importance of boundaries and of treaties establishing boundaries for the preservation of international peace and the development of good neighbourly relations. In the opinion of the German Democratic Republic, the term "boundary" comprises exclusively boundaries between the territories of States.

The German Democratic Republic appreciates that the principle of non-application of the rule of a fundamental change of circumstances with regard to treaties establishing a boundary has been embodied in the present codification project. But also in this case, the term "boundary" should only be meant to apply in respect of State frontiers.

It is the view of the German Democratic Republic that with this principle being applied, account should also be taken of the fact that international organizations have no right to exercise authority over the territory of a State and cannot therefore exercise the rights and duties flowing from those stipulations of a treaty which establish a boundary, as referred to in article 62, paragraph 2. A treaty establishing a boundary may confer only certain control or guarantee functions upon international organizations. For that reason it should be examined whether it would be appropriate for article 62, paragraph 2, to differentiate between States parties to a treaty and organizations parties to a treaty.

3. *Article 63.* Besides the severance of diplomatic or consular relations between States parties to a treaty, this article should also deal with the severance of relations between States parties to a treaty and an international organization party to a treaty, or between international organizations. This would unambiguously provide that the severance of such relations would not affect the legal relations established by a treaty.

In making this observation, the German Democratic Republic believes that relations between States and international organizations and between international organizations are now developing on a large scale and that this trend is likely to gain momentum henceforth. This trend should be taken into account in the present codification project, which will, upon completion and entry into force, for a long time determine the law of treaties between States and international organizations and between international organizations.

4. *Article 66.* With regard to the obligatory procedures for the peaceful settlement of disputes as set forth in article 66, the German Democratic Republic wishes to reaffirm its fundamental legal position that procedures which are unilaterally set in motion by one party to a dispute are in contradiction with the generally recognized principle of international law according to which international disputes are to be settled on the basis of the sovereign equality of States and in conformity with the principle of free choice of means.

5. *Article 80.* In accordance with article 102 of the Charter of the United Nations, treaties concluded between international organizations should not be registered, or at least be registered on an optional basis.

6. In conclusion, the German Democratic Republic expresses its hope that further work on the codification project in the Commission will be continued steadily and along proven lines so that the second reading of the draft articles can be completed soon.

7. Federal Republic of Germany

[Original: English]
[24 February 1982]

1. The present comments deal with articles 61 to 80 of the International Law Commission's draft, which have already been commented on verbally during the deliberations of the Sixth Committee of the General Assembly, in November 1980. Since then, the second reading has commenced and partial results have been made available. In its appraisal during the deliberations of the Sixth Committee in 1981, the Federal Republic of Germany welcomed the fact that the Commission regards the Vienna Convention on the Law of Treaties as the model to be used as far as possible, adapting it in line with the particular

² *Yearbook ... 1980*, vol. II (Part Two), p. 64, para. 53.

features of treaties in which international organizations participate.³ During the second reading, the Commission has until now systematically adhered to this approach and has, with regard to the substantive provisions of articles 1 to 26, kept to a minimum the deviations from the Vienna Convention. There is therefore reason to hope that in the continuation of the second reading, the middle section, with article 36 *bis* (highly important, not only for the European Economic Community) and parts V and VI, commented on here, will be aligned in a suitable and reasonable manner with the Vienna Convention. It is also hoped that the Commission will be able to complete the second reading in 1982 as planned. The Commission will again be faced with the difficult problems deriving from the particular conditions of international organizations participating in treaties, especially the different treatment accorded to them by the International Court of Justice.

2. In the provisions of *part V: Invalidity, termination and suspension of the operation of treaties*—the Commission has placed international organizations on a par with States, proceeding on the assumption that international organizations which are parties to treaties are responsible to the same degree as States participating in treaties; like the latter, they must account for any violation when concluding and performing treaties. This assumption and its consequences are to be welcomed. It is therefore logical to adopt the principles of the Vienna Convention with regard to supervening impossibility of performance (art. 61) and fundamental change of circumstances (art. 62). It has been foreseen that additional questions may occur when international organizations participate in treaties. These have rightly not been included in the provisions of the draft, because that would exceed the scope of these new provisions (cf. art. 73).

3. In its commentary to article 63 (paras. 2 and 3), the Commission has conceded that the basic idea of *articles 63 and 74* must be applied to international organizations even though there are no diplomatic and consular relations between them and States. The basic idea also holds true for the official relations between States and international organizations, which are highly formalized in some cases (permanent missions). Their absence does not prevent the conclusion or existence of treaties.

However, so far, articles 63 and 74 of the draft do not place international organizations on a par with States. In order to remedy this shortcoming, the Federal Republic of Germany had proposed in 1980 in the Sixth Committee that the wording of the two articles be supplemented as follows: "(diplomatic or consular) or other formal relations", and furthermore that article 63 be reworded to read "between parties to a treaty" and article 74 to read "between two or more States or between a State and an international organization or between international organizations".⁴ These proposals are repeated here.

4. It is to be welcomed that in the *procedure* for contesting the validity of treaties and the *settlement of disputes* pursuant to part V, section 4, international organizations are in principle placed on a par with States along the lines of the Vienna Convention. As in the Convention, the procedures are confined to the circumstances dealt with in part V, lest the existing system be abandoned. In view of this regrettable, but probably indispensable, limitation, the procedures provided for in the Vienna Convention must, however, be extended as far as possible to international organizations. As regards system and scope, the draft should follow the structure of the Vienna Convention, because this was achieved through a difficult compromise at the United Nations Conference on the Law of Treaties without which the Convention would hardly have been accepted. The solution should be extended fully to international organizations.

Despite some misgivings about the three-month period, which is rather short for international organizations, the arrangement of the Vienna Convention has fortunately been retained for *article 65*. It has to be accepted that international organizations, in order to observe the three-month period, might be induced to raise objections which they subsequently withdraw *ex abundante cautela*. The essential principle is that international organizations should be given equal

treatment—neither discrimination against them nor advantages over participating States.

5. *Article 66*, however, does not afford equal treatment for international organizations and States to the extent actually possible without deviating from the principle of the Vienna Convention. In paragraphs 2 and 3, a judicial decision is not envisaged for all instances in which *jus cogens* is at dispute. The Federal Republic of Germany has already criticized the shortcoming verbally in 1980 in the Sixth Committee.⁵ In its view, in disputes involving *jus cogens* a judicial decision should be obligatory in all cases. Moreover, in view of the importance of the role of the International Court of Justice for the interpretation of *jus cogens*, the possibility of requesting advisory opinions from it pursuant to Article 96 of the United Nations Charter should not go unmentioned, in so far as this is possible for the international organizations concerned and represents a suitable and adequate solution.

6. Placing international organizations on a par with States also involves the *nomination of conciliators* for the conciliation procedure. In paragraph 1 of the annex, the capacity of international organizations to nominate candidates is still placed in brackets. These should be dropped, since there are no obvious reasons why international organizations participating in treaties on equal terms should not be entitled to participate in drawing up the list of conciliators.

7. In part IV, the wording which *article 73* will ultimately be given is especially important in terms of substantive law. In the draft, a number of marginal questions have deliberately been excluded, including the succession of international organizations (or succession of States transferring powers to international organizations), responsibility (analogous to State responsibility and liability), the conclusion of treaties by subsidiary organizations, etc. Other questions belonging to this complex which do not arise when reproducing the Vienna Convention but are closely linked with the implementation of the provisions of a treaty are those concerning the relationship between international organizations and their member States, e.g., voting rights and distribution of powers for the performance of a treaty. It seems justified to exclude expressly or tacitly those complexes from the draft because otherwise the scope of the Vienna Convention would be transcended. Article 73 could, while retaining an inexhaustive list of the excluded matters, be given the form of a general reservation regarding the particular conditions of international organizations participating in treaties. Such a general reservation might prove useful to prevent provisions of the draft from impeding the future development of this subject-matter (cf. the provisions of the third United Nations Conference on the Law of the Sea in respect of participation of international organizations).⁶

8. Although the Commission has not yet discussed the *final provisions* for a convention codifying the subject-matter dealt with in the draft, it has announced that this question will be dealt with during the second reading. As stated in its comments of 10 March 1981,⁷ the Federal Republic of Germany expects international organizations capable of concluding treaties to be granted the right to participate on equal terms, as they already do in the work of the Commission, in a conference for drafting a convention on treaties between States and international organizations. In creating such a convention, they should be allowed to participate in the deliberations, voting, signing and ratification in the same manner as the participating States.

9. In the second reading of draft articles 1 to 26 it proved possible to clarify and simplify the *drafting*. Among the provisions discussed here, only article 73 and the annex appear to offer any prospects of redactional simplification.

8. Spain

[Original: Spanish]
[21 October 1981]

The Spanish Government has examined with the utmost interest and thoroughness articles 61 to 80 of the draft articles on treaties con-

³ *Ibid.*, para. 13.

³ *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 44th meeting, para. 34.*

⁴ *Ibid.*, *Thirty-fifth Session, Sixth Committee, 45th meeting, para. 15.*

⁶ Annex IX to the Convention on the Law of the Sea, signed on 30 April 1982 (A/CONF.62/122 and corrigenda).

⁷ *Yearbook ... 1981*, vol. II (Part Two), p. 186, annex II, sect. A.7, I, para. 7.

cluded between States and international organizations or between international organizations, elaborated by the International Law Commission. Generally speaking, it endorses the Commission's method of maintaining the greatest possible parallelism and uniformity with the articles of the Vienna Convention on the Law of Treaties of 1969. It would thus be possible to avoid an excessive dualism of regimes and to facilitate the process of comparison. Having made this general observation, the Spanish Government wishes to comment specifically on a few articles.

1. Article 63 of the draft elaborated by the Commission refers to the severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations. The article affords a solution identical to the one contained in article 63 of the 1969 Vienna Convention: the severance of diplomatic or consular relations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

The Commission has also considered the situation in which the permanent delegation of a State to an international organization is recalled or the representatives of a State do not participate in the organs of the organization, and has noted that, since treaties establishing international organizations are treaties between States, such a situation concerns the regime of the treaties governed by the Vienna Convention. In addition, however, the Commission has taken into account the fact that in certain specific cases, treaties concluded between an organization and a non-member State or even one of its member States may establish obligations between the parties whose performance calls for the creation of such specific organic relations as the local appointment of representatives, delegations and expert commissions, possibly of a permanent kind. According to the Commission's report, "If these organic relations were severed, a principle analogous to that laid down in article 63 for diplomatic and consular relations would have to be applied."¹ While the Spanish Government endorses that conclusion, it believes that it should be embodied expressly and precisely in the articles now under consideration.

2. Article 65 lays down the procedure to be followed when a party impeaches the validity of a treaty, terminates it, withdraws from it or suspends its operation. The article also provides that objections may be raised within three months of the date of the relevant notification. The Spanish Government believes that such a time-limit is too short for international organizations, since, as the Commission noted in its commentary, "some of the organs competent to take such a decision meet only infrequently."² Nevertheless, the Commission preferred to retain the three-month time-limit in the knowledge that organizations might later decide to withdraw their objections. The Commission thus implied that international organizations might follow a policy of automatically raising provisional objections which could subsequently be withdrawn after in-depth consideration.

In that connection, it should be noted that the raising of an objection requires an express and formal act on the part of the competent organ of an international organization; that organ must be given an opportunity to meet and take a decision. It should also be borne in mind that the organ in question might not wish to follow a policy of raising automatic or provisional objections to claims by any other party affecting the validity, termination or suspension of a treaty. With a view to averting such difficulties, the Spanish Government believes that the time-limit for the raising of objections by international organizations should be extended.

3. The Spanish Government understands why article 66 had to be different from the corresponding article of the 1969 Vienna Convention with regard to the settlement of disputes concerning the application or the interpretation of articles 53 or 64 (*jus cogens*). Under Article 34 of the Statute of the International Court of Justice, international organizations do not have *jus standi* before the Court; it is therefore not possible to institute mandatory recourse to the jurisdiction of the Court in disputes to which an international organization is a party.

¹ *Yearbook ... 1980*, vol. II (Part Two), p. 84, para. (3) of the commentary to article 63.

² *Ibid.*, para. (4) of commentary.

The Spanish Government believes, however, that it would be possible, in the case of disputes concerning *jus cogens* to which an international organization is a party, to institute mandatory recourse to arbitration, inasmuch as the parties could very well establish a means of arbitral jurisdiction to which the international organization would have access. Mandatory recourse to such jurisdiction, in the opinion of the Spanish Government, would be highly desirable, as a way of dispelling the uncertainty resulting from the present imprecision of many peremptory norms of international law.

4. The annex to the draft articles deals with "procedures established in application of article 66". Section I deals with the establishment of the Conciliation Commission. Paragraph 1 of that section refers to the list of conciliators to be drawn up and maintained by the Secretary-General of the United Nations.

As to the persons whose names should be on the list, there are square brackets around the text that would enable any international organization to which the articles have become applicable to nominate two conciliators. The square brackets were used because of some opposition to that provision within the Commission. The Spanish Government considers that the square brackets should be deleted and that international organizations should be given the opportunity to nominate conciliators for the list to be drawn up and maintained by the Secretary-General. The reason is that in the settlement of disputes it is essential to respect most scrupulously the principle of equality of parties; in the event of a dispute between a State and an international organization, both parties should be given an equal opportunity to have among the conciliators persons nominated by them.

9. Ukrainian Soviet Socialist Republic

[Original: Russian]
[25 May 1982]

In assessing the continued work of the International Law Commission on the question of treaties concluded between States and international organizations or between international organizations, the Ukrainian SSR notes with satisfaction that the draft articles prepared on this subject on the whole constitute an acceptable basis for the preparation of a corresponding international legal document.

However, a number of provisions in articles 61 to 80 give rise to separate comments and require some amplification.

1. In an endeavour to bring the content of the draft articles as close as possible to the 1969 Vienna Convention on the Law of Treaties, the Commission frequently reproduces the corresponding formulations without taking proper account of or duly reflecting in full the specific character of agreements to which international organizations are parties. Thus, automatically transferring provisions on the inadmissibility of terminating treaties establishing boundaries in the event of a fundamental change of circumstances to article 62, paragraph 2, cannot be regarded as justifiable in substance.

2. The question of the possibility of the judicial settlement of disputes concerning the existence, interpretation or application of imperative rules of public international law is not regulated with sufficient clarity. In article 66, which allows for this possibility, it should be clearly stipulated that the submission of any such dispute to the International Court of Justice for its consideration, or to arbitration, requires in each case the consent of all the parties to the dispute.

3. The conciliation procedures proposed by the Commission in the annex to the draft articles in application of this article also appear to be complicated and rather long. To ensure the effectiveness and facilitate the practical application of these procedures, they should be substantially simplified, in particular, by improving as far as possible the machinery for the establishment and functioning of the Conciliation Commission.

4. The question of the procedure for registering international treaties in which at least one of the parties is an international organization requires further study. In drafting the corresponding provisions during the second reading, it is essential to bear in mind that the State and the international organization cannot be placed on the same footing in this respect.

10. Union of Soviet Socialist Republics

[Original: Russian]
[26 May 1982]

The draft articles on treaties between States and international organizations or between international organizations elaborated by the International Law Commission are capable of serving as an appropriate basis for the preparation of an international convention on that topic.

At the same time, account should be taken in the second reading of draft articles 61 to 80 of the following considerations in particular:

1. It would seem that, with regard to the carrying over into the draft of individual provisions of the 1969 Vienna Convention on the Law of Treaties, in a number of cases, the well-known specific features of treaties in which international organizations are participants, as compared with treaties concluded between States, have not been taken fully into account. In particular, the justification of the simple transfer into article 62, paragraph 2, of the provisions concerning a fundamental change of circumstances is open to question.
2. Article 66, subparagraph 1 (a), provides that any of the parties to a dispute may submit that dispute to the International Court of Justice for a decision. In keeping with the Soviet Union's position of principle, the competent Soviet organs consider it advisable for this subparagraph to be so worded as to make the consent of all parties to a dispute necessary for the submission of that dispute to the International Court of Justice or to arbitration.
3. Draft article 80 provides for the transmission to the United Nations Secretariat, for registration and publication, of treaties, i.e. treaties between one or more States and one or more international organizations or between international organizations, which have entered into force. It is hardly appropriate to establish such an obligation for international organizations which are parties to treaties of the kind in question, since that is to overstep the bounds of article 102 of the Charter of the United Nations, which provides for the relevant action only on the part of States Members of the United Nations.
4. The annex to the draft articles contains provisions on conciliation procedures established in application of draft article 66. Those procedures are unnecessarily cumbersome, thereby making them extremely difficult both to understand and to apply. They should be made very much simpler. The URSS has, in particular, doubts concerning the procedure laid down in paragraph 1, section I of the annex, for the formation of a list of conciliators.

II. United Kingdom of Great Britain and Northern Ireland

[Original: English]
[8 June 1982]

1. In response to the Note from the Secretary-General dated 31 August 1981, the United Kingdom submits brief written comments on the second part of the International Law Commission's draft articles on treaties concluded between States and international organizations or between international organizations (comprising draft articles 61 to 80 inclusive and annex), provisionally adopted on first reading by the Commission in 1980. The present comments should be read as a supplement to the written comments submitted by the United Kingdom in 1981 on draft articles 1 to 60 inclusive,¹⁰ the general comments in which are intended to apply equally to draft articles 61 to 80 as to the earlier articles. By the same token, it is not the United Kingdom's intention to comment separately on the draft articles already mentioned in the written comments submitted on behalf of the European Economic Community on 18 March 1982,¹¹ which the United Kingdom hereby endorses. The present written comments are confined to certain questions connected with the provisions for settlement of disputes incorporated in the draft articles.
2. The United Kingdom wishes to begin with the preliminary observation that draft article 66, and the associated annex, are predicated on the assumption that the Commission's draft will ultimately gain the

form of an international convention. Since the jurisdiction of third party settlement procedures is established only through the formal consent of the parties, it is only in the context of a binding treaty instrument that the means of settlement provided for in draft article 66 and the annex can validly be established. Nevertheless, it should be noted that the question of the eventual form of the Commission's draft articles remains open, and will ultimately be a matter for the General Assembly to decide once the Commission has completed the second reading of the entire draft and forwarded it to the General Assembly with an appropriate recommendation. That said, and without prejudice to this ultimate decision, the United Kingdom welcomes (for reasons which will be stated below) the initiative of the Commission in including the provisions in question in its draft. The United Kingdom observes also that, on the assumption that any treaty instrument resulting from the Commission's proposals will be open to participation by international organizations having the necessary competence, it will be essential that the procedures for the settlement of disputes, no less than all other provisions, should take full account of the interests of such organizations; in particular, it must be an essential feature of any system for the settlement of disputes that it places all parties to an eventual dispute on a footing of equality.

3. The United Kingdom recognizes that the Commission is breaking new ground in incorporating, for the first time, provisions for the settlement of disputes in a set of draft articles. The United Kingdom's unreserved welcome for this initiative is born of two elements. The more general is the United Kingdom's firm attachment to clear and effective mechanisms for the binding settlement of disputes arising out of treaty obligations, including third party procedures. The United Kingdom notes in this connection that all the conventions adopted by plenipotentiary conferences on the basis of draft articles prepared by the Commission have included provisions of one kind or another for the settlement of disputes. To this is added a particular reason, duly recognized in paragraphs (1) to (4) of the Commission's commentary to draft article 66,¹² that Part V of the Vienna Convention on the Law of Treaties (dealing with the "Invalidity, Termination and Suspension of the Operation of Treaties") was considered at the United Nations Conference on the Law of Treaties to require adequate safeguards for its application, and that the settlement of disputes procedures in article 66 of the Convention accordingly have a substantive aspect. More particularly, articles 53 and 64 (dealing with the issue of *jus cogens*) were adopted only as part of a wider understanding amongst the negotiating States that their operation should be controlled by effective provisions for the binding settlement of disputes arising out of their interpretation or application. This fact alone would have rendered it impossible for the Commission to transpose the substance of articles 53 and 64 into the present draft, without at the same time proposing equivalent protection in the way of settlement of dispute procedures.

4. In its commentary to draft article 66, the Commission correctly points out that, under the Statute of the International Court of Justice, only States may be parties in contentious cases before the Court and that, in consequence, it is not possible to carry into the present draft the substance of article 66, subparagraph (a) of the Vienna Convention (which offers jurisdiction on the International Court of Justice over disputes relating to the issue of *jus cogens*), in so far as the dispute in question is one to which one or more international organizations is a party. Instead, the Commission proposes, in paragraphs 2 and 3 of draft article 66, that disputes of this kind should be referred to the conciliation procedure defined in the annex, in the same way as all other disputes relating to part V of the draft articles. It is clear that this would represent a major change of substance, by comparison with the system of the Vienna Convention, since the results of the conciliation procedure are in no sense binding on the parties to the dispute (para. 6 of the annex) and, indeed, the whole object of the conciliation procedure is not to reach a decision in accordance with the applicable rules of international law, but, in terms, to facilitate an amicable settlement of the dispute between the parties (paras. 5 and 6 of the annex).

5. It is evident that the Commission gave serious consideration, as an alternative to falling back on the weaker procedure of conciliation, to the possibility of a solution based on reference to the International

¹⁰ *Yearbook ... 1981*, vol. II (Part Two), p. 190, annex II, sect. A.14.

¹¹ See below, sect. C.3 of the present annex.

¹² *Yearbook ... 1980*, vol. II (Part Two), pp. 86-87.

Court of Justice for an advisory opinion. The Commission appears to have rejected this possibility because the procedural and substantive problems were thought to render the advisory opinion procedure imperfect and uncertain. The United Kingdom questions whether, in reaching this conclusion, the Commission in fact gave sufficient weight to the consideration, which was evidently of considerable importance at the Conference on the Law of Treaties, that jurisdiction over *jus cogens* questions should specifically be conferred on the International Court of Justice, as the principal judicial organ of the United Nations, in view of the fundamental nature of *jus cogens* claims and the severe repercussions of claims to nullify treaty obligations on this ground. For this reason, the United Kingdom believes that further consideration should be given by the Commission to a solution by way of the advisory opinion procedure, associated with a suitable undertaking on the part of the international organizations and States parties to the dispute (which would no doubt have to be specified in the article itself) to abide by the terms of an advisory opinion delivered pursuant to the article in question. Models for a settlement of disputes procedure of this kind are to be found in numerous agreements between international organizations within the United Nations family. If the Commission felt able to follow this route, it would have the inestimable advantage of ensuring that one tribunal, and one tribunal only, was endowed with primary jurisdiction in relation to *jus cogens*, thus eliminating the possibility of a multiplicity of competences and the consequent risk of a widely diverging jurisprudence on a question of this importance. If, however, the Commission were nevertheless to arrive at the conclusion that the procedural obstacles were too great to enable it to recommend a solution of this type, the Commission ought in those circumstances to attach overriding importance to the need for disputes of this character to be subject not only to binding decision, but also to a decision based on law. In this perspective, a settlement of disputes provision based on binding arbitration would be greatly preferable to the conciliation procedure provided for, and the Commission might wish to give consideration to the drafting of a separate portion of the annex designed to lay down the details of a system of arbitration, and thus eliminating so far as possible the purely *ad hoc* element.

6. Finally, the United Kingdom considers it of overriding importance that nothing done in the context of settlement of disputes in the present draft articles should have the effect of undermining the protection offered to States parties to the Vienna Convention by article 66, subparagraph (b), thereof. The United Kingdom takes due note of the fact that, under the Commission's draft, disputes solely between States, even if arising under a treaty to which international

organizations were also parties, would be subject to settlement procedures under draft article 66, paragraph 1, designed to be identical with their counterparts in the Vienna Convention. Nevertheless, the United Kingdom doubts whether any dispute raising issues of *jus cogens*, because of its fundamental character and profound effects, could in practice remain confined to a limited number of parties to a multilateral treaty: it is more than likely that any such dispute would rapidly pass outside the scope of paragraphs 1 and 2 of the Commission's draft article 66, and become one to be dealt with under paragraph 3. The United Kingdom fears that the procedural situation thus brought about would be sufficiently complex to cast unacceptable doubt on the compulsory jurisdiction of the International Court of Justice under article 66, subparagraph (b), of the Vienna Convention, bearing in mind the provisions of article 30 of that Convention (Application of successive treaties relating to the same subject-matter). This provides in itself an additional powerful reason for making every effort to direct the jurisdiction over *jus cogens* disputes to the International Court of Justice. In any event, however, both for the reason just given and for the wider reasons adverted to in paragraph 1 of the United Kingdom's written comments of 1981,¹³ the United Kingdom would urge the Commission to consider the incorporation in its draft articles of a general provision based upon the concept underlying article 30, paragraph 2, of the Vienna Convention.

7. As already indicated, the above comments are predicated on the assumption that the Commission's draft articles will ultimately gain the form of an international convention. If that were not to be the case (if, for example, the Commission were in the event to recommend some lesser form of instrument, not of a treaty character), then the question of settlement of disputes procedures addressed above might not present itself in so acute a form, if at all. Conversely, however, if the Commission were to decide in favour of recommending the conclusion of a convention on the basis of its draft articles, then it would be right for the Commission to consider at the same time the means whereby international organizations might become parties to such a convention. For the reasons discussed above in connection with part V of the draft articles, if for no others, international organizations having the requisite capacity would have to be brought within the scope of any such Convention, with the full rights of parties. It would undoubtedly be useful for the Commission to consider this question and to incorporate into its recommendations to the General Assembly its proposals as to the modalities by which the desired result might be brought about.

¹³ See footnote 10 above.

B. Comments and observations of the United Nations and the International Atomic Energy Agency

1. United Nations

[Original: French]
[14 April 1982]

The following preliminary comments and observations concern draft articles 61 to 80. The preliminary comments and observations by the United Nations on draft articles 1 to 60 will be found in the report of the International Law Commission on its thirty-third session.¹⁴ As was the case of that series, the following comments and observations are of a preliminary character; the United Nations intends to submit its formal comments and observations after the Commission has completed its elaboration of the whole of the text.

Article 67, para. 2; article 77, subpara. 1 (a)

1. For the reasons already given in connection with article 2, subparagraphs 1 (c) and (c bis), article 7, para. 4 and article 11,¹⁵ it would appear desirable to use the same term (probably "full powers") for

representatives of States and representatives of international organizations.

Article 76, para. 1

2. The decision by the Commission not to mention in the draft articles the possibility of designating more than one international organization to serve as depositary of the same treaty is to be welcomed, in the view of the United Nations.

3. Apart from the reasons already mentioned by the Commission in its commentary,¹⁶ it should be emphasized that the difficulties to which the multiple-depositary procedure has given rise in the case of States would be greatly compounded in the case of depositary international organizations. This is so because the practice of international organizations, whether depositary functions are entrusted to the organization as such or to its chief administrative officer, often derives, in part at least, from recommendations or decisions taken by one or more of the collective organs of the organization. Thus, the Secretary-General of the United Nations, in his capacity as the

¹⁴ Yearbook ... 1981, vol. II (Part Two), p. 196, annex II, sect. B.1.

¹⁵ *Ibid.*, p. 197, subsect. II, para. 3.

¹⁶ Yearbook ... 1980, vol. II (Part Two), p. 95.

depository of multilateral treaties, has to take into account the recommendations and requests of the General Assembly in such areas as reservations and participation.¹⁷

4. This circumstance makes it clear that, should two or more organizations be designated to serve as depositaries for the same treaty, the possible necessity for each of them to abide by or obtain decisions from collective organs that may be competent might result in legal situations that would be of great theoretical and practical complexity, if not completely insoluble, especially as concurrent decisions would have to be obtained from all the organizations involved.

5. This also holds true, albeit to a lesser extent, for the sharing of depository functions, a fortunately rather rare procedure under which, typically, one organization serves as the depository for the treaty itself while another organization performs depository functions in respect of subsequent formalities (ratification, accessions, etc., and even amendments).¹⁸

Article 77, subparas. 1 (f) and (g) and subparas. 2 (a) and (b)

6. Reference is made to the previous preliminary comments and observations, concerning article 14 and article 2, subpara. 1 (*b, bis*), with regard to the procedure of "formal confirmation".¹⁹

7. The provision of article 77, subpara. 1 (*g*), relating to registration is identical to the corresponding provision in the Vienna Convention on the Law of Treaties.

8. The obligation to register treaties is, of course, embodied in article 102 of the Charter of the United Nations. It consequently applies to States Members of the United Nations with respect to treaties entered into after the coming into force of the Charter. Additionally, the General Assembly of the United Nations has adopted "regulations to give effect to Article 102 of the Charter of the United Nations", which it has amended on various occasions.²⁰

9. Apart from the formality of registration *stricto sensu*, that is, the mandatory formality deriving immediately from Article 102 of the Charter, the above-mentioned regulations of the General Assembly provide for a supplementary procedure; filing and recording (for treaties entered into before the coming into force of the Charter or to which no State Member of the United Nations is a party). Furthermore, the Secretariat of the United Nations has continued to inscribe in the register of the League of Nations subsequent actions (other than treaties), in respect of multilateral treaties formerly deposited with the Secretary-General of the League of Nations, and it also registers at the request of the parties concerned, in the same way, subsequent actions relating to all other treaties registered with the League of Nations (registrations in annex C of the *Treaty Series*). It is to be noted that the two supplementary procedures mentioned above are optional for States and international organizations other than the United Nations (see article 10 of the General Assembly regulations).

10. It may be unfortunate, as the Commission's commentary would tend to show,²¹ that the wording of article 77 (Functions of depositaries) differs, as regards registration, from that of article 80 (Registration and publication of treaties), in that article 77, subpara. (*g*), refers to registration only while article 80, para. 1 refers explicitly to registration and filing and recording.

11. That being so, and considering that the Commission decided to retain the language of the Vienna Convention, it should be noted that the United Nations practice has consistently been to give the fullest effect to the provisions of the General Assembly regulations mentioned

¹⁷ With regard to reservations, see General Assembly resolutions 598 (VI) of 12 January 1952 and 1452 B (XIV) of 7 December 1959. With regard to participation in multilateral treaties deposited with the Secretary-General, see the decision taken by the General Assembly at its twenty-eighth session, on 14 December 1973, relating to the "all States" clause.

¹⁸ This is the case for the first GATT agreements, for example.

¹⁹ *Yearbook ... 1981*, vol. II (Part Two), p. 198, annex II, sect. B.1, subsect. II, para. 14.

²⁰ Resolution 97 (I), adopted by the General Assembly on 14 December 1946, modified by resolutions 364 B (IV) of 1 December 1949, 482 (V) of 12 December 1950 and 33/141 of 19 December 1978.

²¹ *Yearbook ... 1980*, vol. II (Part Two), pp. 96 *et seq.*

above. Consequently, the United Nations does not expect that the wording the Commission decided to retain will be a source of difficulties.

12. The Commission appears to have entertained some doubts as to article 77, subparas. 2 (*a*) and (*b*), the substance of which it nevertheless decided to retain as these provisions appeared in the Vienna Convention. The United Nations welcomes this decision, for the provisions concerned play an important role in its practice. While subparagraph (*a*) will cover the straightforward case of the depository informing the signatories and contracting parties of the existence and the nature of a difference between two or more among them, subparagraph (*b*) provides a logical and very useful procedure in the case of a depository organization which is not a signatory or contracting party but simply a *third party beneficiary under the treaty*. Thus, the Secretary-General of the United Nations, as the depository for the Convention on the Privileges and Immunities of the United Nations²² and the Convention on the Privileges and Immunities of the Specialized Agencies²³ may be confronted with instruments of ratification, accession, etc., accompanied by reservations the acceptability of which may appear doubtful in view of the goals of those conventions. In such cases, the practice of the Secretary-General has been to consult the organizations concerned before receiving the instrument in deposit, and it is naturally conceivable that certain organs of those organizations might express their views concerning the acceptability of the reservations. Since this procedure might be substituted, at least initially, for direct referral of the difference to the signatories and contracting parties—without excluding, incidentally, recourse to the latter procedure—the use of the conjunction "or" at the end of article 77, subpara. 2 (*a*) becomes entirely understandable.

Article 80

13. In general, reference should be made to the comments already included under article 77 (see paras. 7-11 above).

14. It may be useful to note that for the purpose of Article 102 of the Charter and the related regulations the Secretariat of the United Nations has consistently, for several years already, considered that the designation of a State, an international organization or the chief administrative officer of such an organization is tantamount to the authorization for the depository to proceed with registration (or filing and recording) without any further formality being required. Accordingly, article 80, para. 2, as retained by the Commission does not raise any difficulty for the Organization.

2. International Atomic Energy Agency

[Original: English]
[11 March 1982]

The International Atomic Energy Agency has not recently furnished comments and observations on any of the draft articles. We have now had the benefit of considering the tenth report on the question by the Special Rapporteur, Mr. Paul Reuter,²⁴ made in the light of comments and observations submitted by several Governments and organizations. Our comments will therefore not be confined to articles 61 to 80. Rather, the following general comments apply to the whole of the draft articles, and more detailed comments are given in regard to particular articles.

I. GENERAL COMMENTS

1. The International Law Commission and, especially, the Special Rapporteur are to be complimented on the rigorously pursued logic, scholarship and fine draftsmanship with which they have adduced and displayed the differences between the law of treaties to which only States are parties and treaties to which organizations are parties. In the day-to-day legal practice of IAEA, resort is frequently had to the Vienna Convention on the Law of Treaties, which is treated as a "handy manual" of the law affecting the Agency's treaties with States

²² United Nations, *Treaty Series*, vol. 1, p. 15.

²³ *Ibid.*, vol. 33, p. 261.

²⁴ *Yearbook ... 1981*, vol. II (Part One), p. 43, document A/CN.4/341 and Add.1.

and other organizations and other treaties of interest to it to which only States are parties. The Convention is also referred to as a paradigm for treaty drafting. We therefore fully endorse the working method of the Commission in basing the draft articles firmly on the format and texts of the Vienna Convention.

2. In earlier drafts of the draft articles, the drafting style adopted by the Commission maximized those differences which the Commission considered existed in comparison with the law of treaties between States. At its best, this displayed clearly the full rigour of the Commission's thinking; at times, however, as the Special Rapporteur has since recognized, it produced over-elaborate texts, with a loss of clarity of expression as compared with equivalent articles of the Vienna Convention. The suggestions for simplified drafting, aided by additional definitions of terms, made by the Special Rapporteur in his tenth report, are well conceived and helpful in simplifying the texts. This simplified drafting decreases the optical differences which had given a somewhat exaggerated emphasis to the substantive differences between the draft articles and the Vienna Convention.

3. The substantive differences which remain, some of which appear to stem from differing positions held within the Commission by members coming from different major legal systems of the world, are not numerous and in some cases might not justify the practical significance given to them. The single difference between States and organizations, which in effect has made the present topic a necessary one to be addressed by the Commission, is the derivative treaty-making capacity of international organizations as compared with the sovereign capacity of States, which is governed in each particular case by the relevant rules of the organization. Once this difference is provided for, as it is in article 6 of the draft articles, most other differences are both contingent and of lesser legal significance. Given that, according to its rules, it is within the capacity of a given organization to negotiate and conclude a particular treaty, then in principle, public international law should apply on a basis of equality to that organization and a State or other organization party to the same treaty. Both States and international organizations are subjects of international law, upon which the law bears in almost all respects equally, and it would not be helpful to introduce distinctions of terminology or practice other than ones which necessarily flow from general deficiencies of capacity in international organizations, as compared with the sovereign capacities of States.

4. In this regard, it is doubtful if the differential terminology "ratification/act of formal termination" and "full powers/powers" adopted by the Commission, is so necessitated. Ratification as used in the Vienna Convention is a concept of public international law taking effect internationally between States and is not to be confused with the legislative or governmental administrative act having effect in the national law of the State, by which authority is granted for the international act of ratification to be effected by the State. It would seem that in principle the international act of ratification of a treaty could be performed equally by an international organization as by a State. Similarly, the documents denoted respectively by the terms "full powers" and "powers" in the draft articles are the same in substance and effect, and there does not seem to be a practical reason to use different terminology.

5. When the Commission has completed its consideration of the draft articles and makes its final report on them, the similarities and differences between the law and practice affecting treaties to which organizations are parties and treaties to which only States are parties, will have been fully and extensively considered and will be succinctly displayed in the draft articles. States and organizations will then be able to judge the need for formalizing the codification of the differences. It may be that the members of the General Assembly might consider it preferable to rest on the work of the Commission, leaving the draft articles to stand as a valuable elicitation of what *mutatis mutandis* means in the application *mutatis mutandis* of the Vienna Convention to treaties between States and organizations, and between organizations. It may be doubted whether a diplomatic conference such as was convened to negotiate the Vienna Convention would improve significantly on the Commission's work. Indeed, subtleties of law and ideology which have been reconciled in the draft articles might be disturbed.

II. COMMENTS ON PARTICULAR ARTICLES

1. *Article 2, subparas. 1 (b) and (b bis).* See general comments (para.4). In IAEA's practice, its consent to be bound by treaty is normally given by signature alone, consequent on prior approval of the treaty and authorization of signature by its Board of Governors. It has not been the practice of the Agency to adhere to treaties by a two-step procedure of signature plus some further act of confirmation. Nothing in the relevant rules of the Agency would prevent such procedure. "Ratification" could appropriately apply to the second step if it should be necessary for the Agency to use such procedure.

2. The Convention on the Physical Protection of Nuclear Material,²⁵ of which the Director General of IAEA is depositary and which was opened for signature on 3 March 1980, has been signed by the European Atomic Energy Community (EURATOM) and it is expected that the Community will in due course deposit an instrument of ratification as provided in article 18, subpara. 4 (b) and para. 5 of the Convention.

3. *Article 2, subparas. 1 (c) and (c bis).* See general comments (para.4). The IAEA's practice in regard to presentation to a treaty partner of a document designating a representative for the purpose of performing an act with respect to a treaty is undeveloped. Ostensible authority is normally sufficient for officials negotiating, adopting or authenticating a text, although within the organization responsibility for such treaty acts is often specifically allocated in writing by the Director General. The Agency has not to date communicated in a document the consent of the organization to be bound by a treaty, signature of the treaty having been the usual means of establishing consent. There is no support in the Agency's practice for the use of the term "powers" as opposed to "full powers".

4. *Article 4.* The text adopted by the Commission on first reading does not appear to include an equivalent to the qualifying phrase in article 4 of the Vienna Convention "which are concluded". Without this qualifying phrase, the article could apply retroactively to "such treaties" concluded before the "[entry into force] of the said articles".

5. *Article 6.* It is important (see the text adopted by the Commission on first reading) that the term used in respect of rules be the one defined in article 2, subpara.1 (j).

6. *Article 9.* The two-thirds majority rule is consistent with the statute of the IAEA, the rules of procedure of the General Conference and the provisional rules of procedure of the Board of Governors. Nevertheless, the working rule of the Agency, including in relation to negotiation of treaty texts, is consensus.

7. *Article 11, para. 2.* The Agency's consent to be bound by the Agreement on the privileges and immunities of the International Atomic Energy Agency²⁶ exemplifies consent "by any other means". A bilateral treaty relationship with a member State is constituted by the latter's deposit with the Director General of an instrument of acceptance; the Agency's consent to be bound is not actively expressed, being evidenced by the initial approval of the Agreement by the Board of Governors.

8. *Article 14.* See general comments above (para.4) and comment on article 2, subparas. 1 (b) and (b bis), above.

9. *Article 16.* As a drafting matter, both the wording adopted by the Commission on first reading and the simplified text suggested by the Special Rapporteur in his tenth report²⁷ suggest that a State may make formal confirmation and that an organization may establish consent to be bound by an instrument of ratification, interchangeably. The ambiguity would be avoided if the one term "ratification" were used.

10. *Article 17.* This article is consistent with the practice adopted in the Convention on the Physical Protection of Nuclear Material

²⁵ IAEA, *Convention on the Physical Protection of Nuclear Material*, Legal Series No. 12 (Vienna, 1982), p. 386.

²⁶ United Nations, *Treaty Series*, vol. 374, p. 147.

²⁷ *Yearbook ... 1981*, vol. II (Part One), p. 55, document A/CN.4/341 and Add.1, para. 50.

already mentioned, which in paragraph 4 (c) of article 18 requires an organization becoming party to the Convention to communicate to the depositary a declaration indicating which articles of the Convention do not apply to it.

11. *Article 19.* The Special Rapporteur's analysis regarding reservations in his tenth report²⁸ is especially helpful and persuasive. The draft article proposed in that report,²⁹ combining the former article 19 and 19 *bis* adopted in first reading, is a considerable improvement. It is noted that as compared with the former article 19, which referred to "a treaty between several international organizations", the new draft article would not exclude reservations to bilateral treaties; it is therefore more consistent with article 19 of the Vienna Convention. While it normally makes little sense to contemplate reservations to bilateral treaties, the Agreement on the Privileges and Immunities of IAEA does contemplate that member States may make certain reservations to it. As already indicated, (see para. 7 above), the treaty relationship here is a bilateral one, as between the Agency and each accepting member State. Where the Agency has objected to a reservation put forward by a member, it has sought withdrawal of the reservation and the deposit of a new instrument of acceptance. In more than one case, failure to resolve such a situation has resulted in non-acceptance by the Agency of the instrument of acceptance, and the Agreement has not come into force in those cases.

12. *Article 20.* The combination of the former draft articles 20 and 20 *bis* in one article as suggested by the Special Rapporteur in his tenth report³⁰ commends itself in the light of the preceding analysis of the Special Rapporteur. The new draft might now assume the same title as that of article 20 of the Vienna Convention; in addition, it would seem that it would benefit from completion with the final words of the latter, namely, "whichever is later". With regard to objections which have been indicated to the giving of tacit consent by organizations, it may be noted that such consent to a reservation need not entail passivity by the organization internally: the onus would be on the organization to take whatever measures were necessary according to its rules to actively consider whether or not the reservations were acceptable to it. In this way, the (non-) action of an international organization could still, if necessary, "be clearly and unequivocally reflected in the actions of its competent body".³¹

13. *Article 27.* This article, even as redrafted in the Special Rapporteur's tenth report,³² does not appear to run entirely parallel to article 27 of the Vienna Convention. This is because of lack of equivalence between "the rules of the organization" as defined in article 2, subpara. 1 (j) of the draft articles, and the term "internal law" as used in article 27 of the Convention. The customary law rule reflected in article 27 of the Convention is that obligations in international law take priority over conflicting provisions of national law, the assumption being that the State will ensure at all times that its national law is such as to allow its international obligations to be fulfilled. This rule may well be valid also in respect of international organizations if limited likewise to the internal law of the organizations. The definition in draft article 2 subpara. 1 (j), however, imports also the constituent instruments of the organization. These are of a different order from the internal law of a State. The statutes of organizations are notorious documents on the international plane and must be taken to be known to the treaty partners of the organizations. Furthermore, by action of international law, an act of the organization or a treaty obligation undertaken by it contrary to its statute will be invalid. It is difficult to see how such an invalid act or obligation can be enforced against the organization when it is *ultra vires* the organization *ab initio*. Putting aside the additional complication that a sovereign State can more easily ensure the compatibility with its international obligations of its internal law than can an organization, it may be desirable to achieve better equivalence between the concepts of internal law of States and of organizations. It may also be observed, in the light of the above com-

ment, that there is a sense, with reference to draft article 27, paragraph 2, in which the performance of a treaty by an organization cannot be other than subject to the exercise of the functions and powers of the organization: the organization can only act according to its functions and powers.

14. *Article 36 bis.* This article appears to be virtually irrelevant to IAEA, but is unexceptionable in the new wording suggested by the Special Rapporteur in his tenth report.³³ It is suggested, however, that the words "for them" should be restored in the *chapeau* after "obligations arising"—otherwise the question is raised (wrongly) of States members assenting to obligations arising for the organizations. It may be noted that subparagraph (a) of the draft would not at present apply to the Agency, since its relevant rules do not provide that its members shall be bound by treaties which are concluded by the Agency but to which they are not parties. Further, it seems unlikely that subparagraph (b) would find application as regards the Agency.

15. *Article 39.* It is noted that the reference in paragraph 1 to part II of the draft articles has the effect of applying draft article 6 to the same effect as the second paragraph of article 39. The latter may therefore be redundant. It is not clear why the exception in the second sentence of article 39 of the Vienna Convention is not reproduced.

16. *Article 46.* Paragraph 3 of this draft article poses something of a dilemma for organizations and their members. A treaty which is *ultra vires* the statute of an organization may be valid as against the other parties to it according to paragraph 3, but would be invalid as against the member States of the organization if disowned by its competent organs. Moreover, the other parties to the treaty might be member States.

17. *Article 62, para. 2.* The possibility of IAEA being a party to a boundary treaty is likely to remain academic. We note, however, that it does not seem necessary to depart from the wording of paragraph 2 of article 62 of the Vienna Convention in order to cover the cases envisaged by paragraph (11) of the commentary.³⁴ Further, that wording would cover the hypotheses discussed in the preceding paragraphs 9 and 10, which after all might not be so remote.

18. *Article 65, para. 4.* This paragraph appears to be redundant.

19. *Article 67, para. 2.* The mandatory provision "shall produce" applied by the last sentence to representatives of organizations contrasts with the permissive provision "may be called on to produce" applied to representatives of States in the preceding sentence and in article 67 of the Vienna Convention. While agreeing with the Commission that if stricter rules are to apply to the dissolution of a treaty, then "only one solution is possible",³⁵ we would consider it preferable to state the solution permissively, as for States, rather than mandatorily. In the case of IAEA, the authority for an act dissolving a treaty would be a decision of the Board of Governors, which would be evidenced definitively by the official records of the Board. It should not be necessary to produce a further document ("powers"), which would not add to the definitive statement of the official records. IAEA would therefore wish to take the position that the official record of a decision could be produced as "appropriate powers" for purposes of the provision in question, notwithstanding that this might not be fully consistent with a literal reading of article 3, subpara. 1 (c *bis*).

20. *Article 74.* Given, first, that even between States there is no legal nexus between treaty relations and diplomatic and consular relations, and, secondly, that as between organizations and States doctrines of diplomatic and consular relations do not apply,³⁶ then it may be questioned whether it is relevant or necessary to provide a draft article parallel to article 74 of the Vienna Convention. The Commission's draft article appears to be designed to knock down a straw man which would not have been set up except for reason of maintaining the appearance of a parallel with the Vienna Convention.

²⁸ *Ibid.*, pp. 56-60, paras. 53-67.

²⁹ *Ibid.*, p. 60, para. 69.

³⁰ *Ibid.*, p. 63, para. 83.

³¹ Written comments of the USSR (1981); see *Yearbook ... 1981*, vol. II (Part Two), p. 190, annex II, sect. A.13, para. 2.

³² *Yearbook ... 1981*, vol. II (Part One), p. 65, document A/CN.4/341 and Add.1, para. 88.

³³ *Ibid.*, p. 69, para. 104.

³⁴ *Yearbook ... 1980*, vol. II (Part Two), p. 83.

³⁵ *Ibid.*, p. 89, para (3) of the commentary to art. 67.

³⁶ *Ibid.*, p. 94, paras. (1) and (2) of the commentary to art. 74.

21. *Annex.* It is noted that the annex, unlike the adjective law expressed in the draft articles, is executory. It could not be executed on the basis of a mere declaration of endorsement, for example, by the

General Assembly of the validity of the draft articles, or other non-binding adoption of the draft articles. This would be one reason for adoption of the Commission's work as a convention.

C. Comments and observations of other international organizations

1. Council of Europe

[Original: French]
[11 January 1982]

Observations of the secretariat of the Council of Europe³⁷ (November 1981)

This note contains the observations of the secretariat of the Council of Europe³⁸ concerning the above-mentioned draft articles as adopted by the International Law Commission, on first reading, at its thirty-second session, for articles 27 to 80, and on second reading, at its thirty-third session, for articles 1 to 26. These observations take into account, on the one hand, the practice of the Council of Europe with regard to agreements between States and international organizations or between international organizations and, on the other hand, the practice of the Secretary-General of the Council of Europe in his capacity as depositary of international agreements and conventions.

It may be recalled that already in 1968 the secretariat of the Council of Europe submitted observations concerning the draft articles on the law of treaties (which became the Vienna Convention).³⁹ The current draft articles on treaties between States and international organizations are adapted from the Vienna Convention and respect its spirit, form and structure as far as possible. To a great extent, therefore, they repeat the provisions of the Vienna Convention, with the result that many of the observations made in 1968 on the subject of treaties between States remain valid and apply to the current draft articles.

II. GENERAL OBSERVATIONS

1. The practice of the Council of Europe with regard to agreements⁴⁰ between States and international organizations or between international organizations is limited. In the main, such practice relates to:

(a) *Treaties to which the Council of Europe is a party*, including, on the one hand, the Special Agreement relating to the Seat of the Council of Europe (ETS 3) and the Supplementary Agreement to the General Agreement on Privileges and Immunities of the Council of Europe (ETS 4), concluded between the Council and France, and, on the other hand, *co-operation agreements with other international organizations*, which usually make provision for the exchange of information, consultation on matters of mutual interest and the exchange of observers;

(b) *Multilateral treaties which were concluded within the Council of Europe and to which other international organizations are parties*, as in the case of a few conventions and agreements whose provisions allow the European Economic Community to become a party.⁴¹

³⁷ The Council of Europe also transmitted copies of two of its publications: *Statute of the Council of Europe (with Amendments)*, European Treaty Series (ETS) No. 1, and "Model final clauses of conventions and agreements concluded within the Council of Europe", which were available for consultation by Commission members upon request.

³⁸ These observations reflect the views of the secretariat and are not to be interpreted as necessarily reflecting the views of every State member of the Council.

³⁹ A/CONF.39/7, pp. 14-37.

⁴⁰ The conventions and agreements concluded within the framework of the Council of Europe, numbered in chronological order according to the date of their signature, are published in the European Treaty Series (ETS).

⁴¹ It should be noted that EEC has 10 member States: Belgium; Denmark; France; Germany, Federal Republic of; Greece; Ireland; Italy; Luxembourg; the Netherlands and the United Kingdom of Great Britain and Northern Ireland, which are also members of the Council of Europe. The Council has 21 member States.

2. As far as co-operation agreements are concerned, about twenty have been concluded to date. In many cases, such an agreement is in the form of an exchange of letters and in other cases, in the form of a single instrument signed by the representatives of the two parties. Such agreements are, as a rule, rather succinct and are confined to general questions (exchange of information, mutual consultation, and the like).

3. Although article 13 of the statute of the Council of Europe states that: "The Committee of Ministers is the organ which acts on behalf of the Council of Europe in accordance with Articles 15 and 16", nothing in the statute expressly establishes the capacity of the Council to conclude treaties, or specifies which organ is competent to assume obligations on behalf of the Council at the international level. Nevertheless, in a 1951 resolution, the Committee of Ministers declared itself competent to conclude with intergovernmental organizations agreements on matters within the competence of the Council.⁴²

4. The actual procedure with regard to the conclusion of such agreements has varied so much that it is difficult to pin-point common rules underlying the procedure followed. It is possible, however, to identify three main groups:

(a) The first group includes agreements which are negotiated by the Secretary-General, and which enter into force subject to the subsequent approval of the Committee of Ministers of the Council (see, for example, the Agreement between the Council of Europe and UNESCO (1952), the Agreement concluded with the United International Bureaux for the Protection of Intellectual Property (1957), the Agreement concluded with the International Commission on Civil Status (1955) and the Agreement with FAO (1956));

(b) The second group includes agreements to which the Committee of Ministers gives prior approval in a decision (in some cases, in a resolution); the Secretary-General is responsible for transmitting the agreement to the other party (see, for example, the exchange of letters dated 15 November 1951 and 4 August 1952 constituting an Agreement between the Secretariat General of the Council of Europe and the Secretariat General of the Brussels Treaty Organisation, the Agreement of 8 December 1960 between ILO and the Council of Europe concerning the establishment and operation of the International Training Information and Research Centre, and the exchange of letters of 18 August 1959 constituting an Agreement between the Committee of Ministers of the Council of Europe and the Commission of the EEC).

(c) The third group includes agreements concluded by the Secretary-General acting either on instructions from the Committee of Ministers or with its authorization (see, for example, the exchange of letters dated 17 March and 22 May 1954, constituting an Agreement between the Council of Europe and the European Conference of Ministers of Transport, and the exchange of letters of 15 December 1951, constituting an agreement between the Secretariat General of the Council of Europe and the Secretariat of the United Nations, updated by the exchange of letters of 19 November 1971, constituting an Agreement).

The aforementioned agreements may therefore be in the form of an exchange of letters or that of a single instrument.

5. Some agreements, however, apparently do not follow the pattern of practice just outlined: agreements concluded by the Secretary-General solely on his own responsibility. Either an exchange of letters or a single instrument could constitute such an agreement. In either event, the Secretary-General's signature is an expression of consent to

⁴² See appendix to the present comments for the relevant section of the resolution adopted by the Committee of Ministers at its eighth session, May 1951.

be bound by the treaty (see, for example, the Agreement of 12 January 1954 between the Council of Europe and UNIDROIT, the Agreement of 13 December 1955 between the Council of Europe and the Hague Conference on Private International Law, and the exchange of letters of 1 and 9 February 1960 between the Secretary-General of the Council of Europe and the Secretary-General of INTERPOL constituting an agreement between the two organizations.

6. The second category of agreements referred to above (subpara. 1(b)) includes a few multilateral treaties concluded within the Council of Europe and reflects recent changes in the Council's treaty practice. The question whether international organizations could become parties to conventions and agreements of the Council of Europe did not arise until 1974, in connection with the role of EEC with regard to the draft European convention for the protection of international watercourses against pollution.⁴³ Before then, only States, and in some cases only member States, could become parties to the European Treaties. The draft convention for the protection of international watercourses against pollution has not yet been adopted by the Committee of Ministers; however, since 1974, the provisions of several other instruments adopted by the Council have allowed EEC to become a party. They include: the European Convention for the Protection of Animals kept for farming purposes of 10 March 1976 (ETS 87); the European Convention for the Protection of Animals for Slaughter of 10 May 1979 (ETS 102); and the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979 (ETS 104).

These Conventions are *open for signature* by member States and by the *European Economic Community*. They are subject to ratification, acceptance or approval.

7. EEC also has the option of becoming a party to two other European Treaties, simply by signing them. However, since such an eventuality was not envisaged when the Treaties were adopted, *additional protocols* have had to be concluded. They are the Additional Protocol of 24 June 1976 (ETS 89) to the European Agreement on the Exchange of Tissue-typing Reagents of 24 June 1976 (ETS 84); and the Additional Protocol of 10 May 1979 (ETS 103) to the European Convention for the Protection of Animals during International Transport of 13 December 1968 (EST 65).

8. All these treaties therefore come within the scope of the draft articles prepared by the International Law Commission. The regime that applies to the treaties sometimes differs, as indicated below, from the regime of the Commission's draft.

9. Recently, EEC also asked to become a party to three Council agreements in the field of public health. Since the Council's Committee of Ministers has already agreed in principle, the text of the necessary instruments is being negotiated and drawn up.

II. OBSERVATIONS ON THE DRAFT ARTICLES

Article 2 (Use of terms)

1. *Subparagraph 1 (b bis)*: "act of formal confirmation". This provision reserves the term "ratification" for the act of a State, while the corresponding act of an international organization is termed an "act of formal confirmation". This distinction is not found in the terminology used by the Council of Europe.

As far as the European Treaty Series is concerned, the European Convention for the Protection of Animals Kept for farming purposes (ETS 87), the European Convention for the Protection of Animals for Slaughter (ETS 102) and the Convention on the Conservation of European Wildlife and Natural Habitats (ETS 104) afford EEC the opportunity of becoming a party thereto and *signing, ratifying, accepting or approving* these instruments as if it were a member State.⁴⁴

As to agreements concluded by the Council of Europe with other international organizations, the act whereby the Council establishes its consent to be bound by such an agreement usually takes the form of a

decision of approval adopted by the Committee of Ministers or a *resolution* approving such an agreement (see the observations below concerning arts. 11 to 15).

The practice of the Council of Europe is therefore in line with the terminology used in subparagraph (*b ter*) rather than with the terminology used in subparagraph (*b bis*).

2. *Subparagraph 1 (j)*: "rules of the organization". With regard to the definition of the term "rules of the organization", it is worth recalling that, already in 1968,⁴⁵ the Council of Europe had, in connection with the draft articles on the law of treaties (which became the Vienna Convention), expressed the hope that amendments would be made to the text of draft article 4, dealing with "relevant rules of the organization", in order to specify that:

(a) the rules of the organization comprised both the already existing rules and *those which might be established in the future*; and

(b) the rules of the organization might consist of *practices* which, without being laid down in a legal instrument, guided the activity of the organs of the organization.

The question touched upon in the commentary to this provision, whether "the rules of the organization" do not also include *treaties concluded by the organization*, is quite pertinent. Such a question may even be raised with regard to *treaties to which the organization is not a party*, but which have been concluded within the organization and *confer on it a number of rights and obligations*, which it accepts, at least implicitly.

Article 6 (Capacity of international organizations to conclude treaties)

3. Nothing in the statute expressly establishes the capacity of the Council of Europe to conclude treaties. It may, however, be argued that such capacity derives implicitly from article 40, paragraph (*b*), of the statute, the final sentence of which reads:

"In addition a special Agreement shall be concluded with the Government of the French Republic defining the privileges and immunities which the Council shall enjoy at its seat."

This reference to the Agreement relating to the seat, traditionally concluded by the organization in question with the host State, includes an implicit recognition of the Council's capacity to conclude treaties.

4. Similarly, article 20 of the General Agreement on Privileges and Immunities of the Council of Europe (ETS 2) provides that:

"The Council may conclude with any Member or Members supplementary agreements modifying the provisions of this General Agreement, so far as that Member or those Members are concerned."

5. Finally, reference should be made to the aforementioned 1951 resolution of the Committee of Ministers, in which the Committee declared itself competent to conclude with other international organizations agreements on matters within the competence of the Council.⁴⁶

Article 7 (Full powers and powers)

(a) *Deposit of instruments of ratification, acceptance, approval or accession*

6. According to this article, full powers are required, *inter alia*: "for the purpose of *expressing the consent* of the State to be bound by such a treaty".

Under articles 14 and 15, such consent may be expressed by means of ratification, acceptance, approval or accession. According to article 2, subparas. 1 (*b*) and (*b ter*), the acts designated by those terms mean in each case:

"the international act so named whereby a State [or an international organization] establishes on the international plane its consent to be bound by a treaty".

If the act is signed by the head of State, the head of Government or the Minister for Foreign Affairs, no confirmation of their competence to

⁴³ See *Yearbook ... 1974*, vol. II (Part Two), pp. 346, document A/CN.4/274, paras. 376-377.

⁴⁴ See also the draft European convention for the protection of international watercourses against pollution (see footnote 43 above).

⁴⁵ See footnote 39 above.

⁴⁶ See the appendix to the present comments.

represent the State is required (art. 7, subpara. 1 (a)). Accordingly, the person depositing the above-mentioned instruments does not necessarily have to be invested with full powers. This rule is consistent with the practice followed with regard to States by the Secretary-General of the Council of Europe in his capacity as depositary of the European Treaties. On the other hand, full powers are required in the case of EEC acts.

(b) *Adoption of treaties concluded within an international organization*

7. As will be explained below in the observations relative to article 9, the adoption of the text of conventions elaborated within the Council of Europe, including those to which EEC is allowed to become a party, takes the form of a decision of the Committee of Ministers.⁴⁷ According to well-established practice, the representatives of States members of the Committee of Ministers do not have to produce full powers when decisions relating to the adoption of a convention are being taken. Yet article 7, subpara 2 (d), in stipulating that heads of permanent missions to an international organization, in virtue of their functions, are competent to represent their States for the purpose of adopting the text of a treaty, limits such competence to cases in which the treaty is concluded between one or more States and *that organization*. According to the practice of the Council of Europe, heads of permanent missions have also been considered competent to represent their States, without having to produce full powers, for the purpose of adopting the text of a (multilateral) treaty which has been drawn up within the Council and to which certain other international organizations are parties (as in the case of treaties to which EEC may become a party).

(c) *Signatures deferred subject to ratification*

8. The question of signatures deferred subject to ratification is not covered in article 7. The deferment of signature does not imply any of the acts referred to in that article, namely (a) adoption or authentication of the text of a treaty; or (b) expression of the consent of the State to be bound by such a treaty. In international practice as it relates to multilateral agreements, signatures are often deferred. Such a procedure is, for example, very much in evidence in the Council of Europe, where signature may be deferred before or after the entry into force of an agreement.

(d) *"Communication" of the consent of the organization to be bound by a treaty*

9. The use of the word "communicating" in article 7, paragraph 4, seems restrictive and apparently fails to cover all the cases in which the representative of an international organization concludes agreements with States or with other international organizations. Several co-operation agreements between international organizations are concluded by their Secretaries-General, on their own authority, on their own initiative and with due regard for their statutory functions. In such cases, not only do they communicate the consent of the organization to be bound by the agreement; they also *express* such consent.⁴⁸

Article 9 (Adoption of the text)

(a) *Decision to adopt the text*

10. According to the commentary of the Commission to the draft articles on the law of treaties (which became the Vienna Convention), the term "adoption" signifies the "rules by which the form and content of the proposed treaty are settled"; it is specified that "At this stage, the negotiating States are concerned only by drawing up the text of the treaty as a document setting out the provisions of the proposed treaty ...".⁴⁹ Article 9 establishes the rule that the adoption of the text

takes place by the *consent of all the participants* in its drawing up (or by a majority vote in the case of a treaty adopted at an international conference).

11. The practice of the Council of Europe requires a distinction to be made according to whether the instrument in question is a co-operation agreement with an international organization or a multilateral treaty to which EEC may become a party. In the case of a co-operation agreement, the application of article 9 would pose no special problem. The agreement would be bilateral and its terms would be agreed by the two parties. On the other hand, in the case of a multilateral treaty which is concluded within the Council and to which EEC may become a party, *the adoption of the text* of the treaty does not take place as a result of coinciding decisions reached individually by the negotiating parties, but *takes the form of a decision adopted by the Committee of Ministers*. This is the usual practice (not only of the Council of Europe, but also of other international organizations) with regard to treaties concluded between member States. This practice has also been followed in the aforementioned cases of conventions which were concluded within the Council of Europe and to which EEC was allowed to become a party.

(b) *Applicable voting rule*

12. While this decision of the Committee of Ministers may be described as a decision to adopt the text within the meaning of the draft articles, the applicable *voting rule* is not the one set forth in draft article 9 (the unanimity rule), but the rule derived from the relevant provisions of the statute of the Council of Europe (art. 20) and the rules of procedure for meetings of the Ministers's Deputies (art. 8): adoption requires a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the body in question. Once there is such a majority, the treaty is open for signature, unless there are clear signs of opposition on the part of a representative.

13. At the same time, such a decision by the Committee of Ministers to adopt a treaty may give rise to a situation in which States or international organizations *that participated in the drawing-up of the text are not called on to participate in adopting it* within the Committee of Ministers. That would be the case of States not belonging to the Council of Europe and of international organizations which have participated in the drawing-up of a treaty and are entitled to become parties to it, but *are not represented in the Committee of Ministers* and therefore do not participate in the adoption decision.

Article 10 (Authentication of the text)

(a) *Adoption as a means of authentication*

14. In its practice in treaty matters, the Council of Europe has no special procedure for the authentication of the text of a treaty concluded within its framework of the Council. When the Committee of Ministers has decided in favour of the text of a treaty, in the manner described in the observations on article 9 above, this is considered as a text *ne varietur*. Since this decision is the last stage in the process of drawing up the multilateral treaties concluded within the Council of Europe, authentication of the text is identical to its "adoption". In view of the fact that this practice is not peculiar to the Council of Europe, but is followed by other international organizations and at international conferences, it might be desirable to include "adoption" among the means of authentication of the text of a treaty.

15. However, the discovery, *before signature of the treaty*, of a *substantive error* in the text approved by the Committee of Ministers of the Council of Europe does not give rise to the correction procedure described in article 79 of the Commission's draft. Such an error is corrected, before the signature of the text, by a *decision of the Committee of Ministers* taken by the same procedure as the decision on the "adoption" of the text of the treaty. Thus "adoption" in this case does not have the implications for the correction of errors associated in the Commission's draft with authentication of the text.

(b) *Deferred signature*

16. Article 10, paragraph 2, cites signature as a means of authenticating the text of a treaty. In the case of multilateral treaties, signature does not have this meaning unless all the negotiating

⁴⁷ The only exception to date is the European Convention on the International Classification of Patents for Invention (ETS 17), which was submitted to a diplomatic conference.

⁴⁸ Agreements concluded by the Council of Europe with the Hague Conference on Private International Law (13 December 1955) and the Council of Europe with UNIDROIT (12 January 1954).

⁴⁹ *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. 14, para. (1) of the commentary to article 8 (Adoption of the text).

representatives sign the text immediately or shortly after its adoption. *A multilateral treaty which provides for deferred signatures could therefore not be authenticated* by this means, because it might enter into force even before signature by all the negotiating States.

— *Article 11* (Means of expressing consent to be bound by a treaty);

Article 12 (Consent to be bound by a treaty expressed by signature);

Article 14 (Consent to be bound by a treaty expressed by ratification, act or formal confirmation, acceptance or approval); and

Article 15 (Consent to be bound by a treaty expressed by accession)

(a) *Practice of the Council of Europe in treaty matters*

17. In connection with these articles, which contain provisions governing the means of expressing consent to be bound by a treaty, it is appropriate to summarize the relevant practice of the Council of Europe in treaty matters, while emphasizing that these observations relate only to the above-mentioned category of those multilateral treaties concluded within the Council of Europe in which EEC participates.

18. In considering this practice, a distinction has first to be made between *agreements*, which may be signed with or without reservation in respect of ratification or acceptance, and *conventions*, always subject to ratification, acceptance or approval (cf. "Model final clauses"). Furthermore, ratification, acceptance or approval must always be preceded by signature.

19. Secondly, a distinction is also made between the different means of expressing consent to be bound by a treaty from the point of view of the degree of entitlement of a State to become a party to the treaty. *Signature*, and thus ratification, acceptance and approval, are in principle restricted to *member States* of the Council of Europe, whereas *accession*, after the entry into force of the treaty, is in general open only to *non-member States*.

20. As noted above, this practice has recently undergone a degree of *evolution*, in that currently several conventions provide for the participation of *the European Economic Community, which is allowed to sign and ratify, accept or approve the conventions as if it were a member State* (although such ratification, acceptance or approval is not taken into account as regards the entry into force of these conventions, and only the ratifications of member States count for this purpose).⁵⁰

21. The possibility of becoming a party to a convention or an agreement concluded within the Council of Europe by means of *accession* is in general governed by express provisions contained in the final clauses of those instruments. At present *this possibility exists only for non-member States*, and thus international organizations are not allowed to accede to these treaties. Furthermore, in every case accession is possible only *after the entry into force* of the convention or agreement, in accordance with the provisions relating to the number of ratifications or signatures without reservation in respect of ratification required for that purpose. The accession of non-member States thus has no effect on the entry into force of the treaties in question.

(b) *The draft articles of the International Law Commission*

22. By contrast with the practice of the Council of Europe, the Commission's draft articles draw no distinction between the different means of expressing the consent to be bound by a treaty from the point of view of the degree of entitlement of a State or organization to become a party to the treaty. Articles 12 and 14 concerning signature and ratification give no definition of those States or organizations which are entitled to become parties to the treaty by means of signature, ratification, act of formal confirmation, acceptance or approval. Article 15, relating to accession, merely stipulates that accession by a State or by an international organization has to be provided for in the case of "that State" or "that organization".

⁵⁰ The Convention on the Conservation of European Wildlife and Natural Habitats (ETS/104), however, specifies that it shall enter into force once it has been ratified, accepted or approved by five States, of which at least four shall be member States of the Council of Europe.

23. Articles 12 and 14 refer respectively to signature and ratification as means of expressing consent to be bound by a treaty when "the *negotiating States or negotiating organizations* were agreed that signature should have that effect/that ratification should be required". According to article 2, subpara.1 (e), the expression "negotiating States and negotiating organizations" is to be understood as meaning those States or organizations "*which took part in the drawing-up and adoption of the text of the treaty*".

24. As explained above in connection with the practice of the Council of Europe, it would be possible in certain cases for non-member States of the Council, or international organizations, which may have taken part in the drawing-up of the draft treaty or agreement, not to participate in the "adoption" of the text and hence not to be regarded as "negotiating" States or organizations within the meaning of the provisions drafted by the Commission.

25. As regards the rule set forth in draft article 15, subpara. (c), it should be made clear that this provision applies only when the treaty contains no clause expressly governing accession. Those agreements and conventions concluded within the Council of Europe which are not "closed", i.e. restricted to member States of the Organization, generally contain a clause setting forth the procedures for accession. A number of these clauses require a decision of the Committee of Ministers (invitation or prior agreement) as one of the conditions of such accession. It is thus evident that the rule contained in the aforementioned subparagraph (c) applies only in the absence of a clause expressly governing accession.

Article 17 (Consent to be bound by part of a treaty and choice of differing provisions)

26. The practice of the Council of Europe in treaty matters contains no examples of treaties which permit a choice between differing provisions (paras. 3 and 4) or, in other words, the existence of alternative and mutually exclusive provisions.

27. However, as regards the possibility of being bound by part of a treaty there are five conventions concluded within the Council which permit only certain parts of their provisions (paras. 1 and 2) to be accepted as binding, namely: the European Convention for the Peaceful Settlement of Disputes (ETS 23); the European Social Charter (ETS 35); the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (ETS 43); the European Code of Social Security (ETS 48); and the European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (ETS 101). None of these conventions, however, is at present open to participation by EEC. The provision in article 17 of the draft of the International Law Commission is not therefore directly relevant to the practice of the Council of Europe in this area.

Article 19 (Formulation of reservations)

28. The practice of the Council of Europe in treaty matters follows the rules contained in this provision. Examples may be quoted in each of the three categories described in the subparagraphs of the draft article:

(a) Certain agreements and conventions concluded within the Council of Europe expressly state that *reservations are not permitted* or that ratification, acceptance, accession or signature without reservations as to ratification, etc. *automatically implies acceptance of all the provisions of the treaty* (subparas. 1 (a) and 2 (a)); such is the case, for example, of the European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories (ETS 53) and of the European Agreement concerning Programme Exchanges by means of Television Films (ETS 27).

(b) In other cases, *specified reservations are expressly authorized by the text of the treaty* (subparas. 1 (b) and 2 (b)), as in the case, for example, of the European Convention for the Peaceful Settlement of Disputes (ETS 23). Certain conventions, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5) and the European Convention on Establishment (ETS 19), permit a reservation only to the extent that a law in force in the territory of a party at the time of signature or of the deposit of its instrument of ratification is not in conformity with a particular provision of the Convention.

In this context it should be stressed that the recent practice of the Council of Europe tends towards the system of "negotiated" reservations; the text of *the only permissible reservations* is established during the drawing-up of the convention or agreement. These reservations then appear either in the actual text of the convention or agreement or, more frequently, in an annex of the text, and any contracting State may declare that it avails itself of one or more of these reservations.³¹ This system of negotiated reservations is also provided for in the "Model final clauses", which nevertheless make it clear that such a system is only one example of the different arrangements possible for the formulation of reservations and, in particular, that the list of authorized reservations is not necessarily exclusive.

(c) When the text of a treaty says nothing about reservations (subparas. 1 (c) and 2 (c)), it is accepted that they may be formulated with respect to any of the provisions of the convention or agreement on condition that they are not incompatible with the object and purpose of the treaty. This applies, for example, to the European Convention for the Protection of Animals Kept for Farming Purposes (ETS 87) and the European Convention for the Protection of Animals for Slaughter (ETS 102). In order to clarify the situation, and in the absence of any established practice in the matter, the reservation is brought to the attention of the member States, all contracting parties, and also EEC when the Community is permitted to participate in the convention or agreement.

Article 21 (Legal effects of reservations and of objections to reservations)

29. This article specifies that the application of a reservation automatically brings into effect the rule of reciprocity in relations between the reserving State and the other parties.

30. The practice of the Council of Europe is different. The "Model final clauses for conventions and agreements concluded within the Council of Europe" contains the following provision:

"A contracting Party which has made a reservation in respect of a provision of (this Agreement) (this Convention) may not claim the application of that provision by any other Party*."*

Nevertheless, *the other parties* have the option, in their relations with the party which has formulated the reservation, *to rely or not to rely* on the modification resulting from the reservation; in other words, they may accept "one-way" reservations.

31. According to this practice, the application of a reservation does not automatically modify the provisions of the treaty to which it relates, for the reserving State and for the other parties in their reciprocal relations; its effect is only to deprive the State which has formulated the reservation, on the one hand, of the right to claim application of the provision to which the reservation relates, in international relations and in relations with the other parties, and the other parties, on the other hand, of the right to invoke the treaty obligation covered by that reservation in relations with that State.

32. It should nevertheless be noted that the "Model final clauses" are in no way binding and that different solutions may be chosen in particular cases.

Article 22 (Withdrawal of reservations and of objections to reservations)

33. According to the practice of the Council of Europe, any contracting State (or organization) which has made a reservation may at any time wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary-General (cf. "Model final clauses", art.(e), para. 2).

³¹ This is the case, for example, of the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles (ETS 29), the European Convention on the Punishment of Road Traffic Offences (ETS 52), the Convention on the reduction of cases of Multiple Nationality and on Military Obligations in cases of Multiple Nationality (ETS 43) and the European Convention providing a uniform Law on arbitration (ETS 56). Of the conventions which provide for accession by EEC, the Convention on the Conservation of European Wildlife and Natural Habitats (ETS 104) falls into this category, but it does not provide for reservations on the part of EEC, that possibility being confined to "States" (art. 22, para. 1).

Article 23 (Procedure regarding reservations)

34. In the text of the articles concerning the communication of reservations and objections, it would be advisable to take account of the treaties which provide for a depositary other than the Government of a State entitled to become a party to the treaty. In such cases, the communication should be addressed to the depositary, which is responsible for bringing it to the attention of the other States concerned.

35. Under the terms of paragraph 1 of this article, the reservation must be communicated to international organizations and States "*entitled to become parties to the treaty*", a term which is not defined in article 2 of the Commission's draft. It would appear that in many cases this category of organizations and States is very difficult to define. In the circumstances, it might therefore be preferable to mention, in addition to the contracting States and organizations and the parties, *only the States and organizations which participated in the negotiation of the treaty*.

36. The rule contained in paragraph 2 of this article is in conformity with the practice of the Council of Europe. The "Model final clauses" specify that, when a reservation is formulated at the time of signing the treaty, it must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty.³² In such a case, the reservation shall be considered as having been made on the date of its confirmation.

Article 24 (Entry into force)

37. The entry into force of the multilateral conventions and agreements concluded within the Council of Europe is governed by provisions incorporated in those instruments. The "Model final clauses" (which, it should be remembered, are intended to serve only as a guide) state that the conventions and agreements of the Council of Europe shall enter into force on the first day of the month following the expiration of a specified period after the date on which a given number of member States of the Council of Europe have expressed their consent to be bound by the convention or agreement in question. A similar rule applies to the entry into force of the treaty in respect of any State, or of EEC, which subsequently expresses its consent to be bound by it.

Article 25 (Provisional application)

38. Provisional application has already been provided for in a number of instruments drawn up within the Council of Europe,³³ all of which, however, are treaties concluded between States only.

Article 29 (Territorial scope of treaties)

(a) *Procedures provided for in the "Model final clauses"*

39. In the practice of the Council of Europe, a practice which is also followed in the case of treaties open to participation by EEC, any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which the convention or agreement shall apply (art.(d), para. 1, of the "Model Final Clauses").

40. Furthermore, any State may at any later date, by a declaration addressed to the Secretary-General of the Council of Europe, extend the application of the treaty to any other territory specified in the declaration (art.(d), para. 2). In addition, any declaration made by a State for the purpose of specifying the territory or territories to which the treaty shall apply may be withdrawn by a notification addressed to the Secretary-General (art.(d), para. 3).

(b) *Text proposed by the International Law Commission*

41. In comparison to the practice of the Council of Europe, the provision proposed by the Commission gives rise to certain reservations

³² Of the European treaties which provide for the participation of EEC, only the Convention on the Conservation of European Wildlife and Natural Habitats (ETS 104) contains a clause relating to reservations, which specifies that only States may formulate reservations; the same option is not available to EEC.

³³ General Agreement on Privileges and Immunities of the Council of Europe (ETS 2); Third Protocol to that General Agreement (ETS 28); Convention on the elaboration of a European Pharmacopoeia (ETS 50).

(which had already been formulated in 1968 in the context of the draft articles on the law of treaties),⁴⁴ in that it has not been clearly determined whether the words "Unless a different intention appears from the treaty or is otherwise established" also refer to *unilateral declarations* of the parties concerned. Indeed, it is uncertain whether these words "give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory", which was the view of the Commission in its commentary to the draft articles on the law of treaties.⁴⁵

Article 39 (General rule regarding the amendment of treaties) and

Article 40 (Amendment of multilateral treaties)

42. Here too, in the practice of the Council of Europe a distinction must be drawn between:

(a) The co-operation agreements concluded by the organization with other international organizations, these being bilateral agreements in relation to which the rule in article 39 does not give rise to problems, since any alteration must necessarily be subject to an agreement between the parties; and

(b) The multilateral agreements which are concluded within the Council of Europe and which are open to participation by EEC. It has been observed that there are few such treaties. They include the following, which contain provisions in respect of amendments: European Convention for the Protection of Animals Kept for Farming Purposes (ETS 87); European Agreement on the Exchange of Tissue-typing Reagents (ETS 84); Convention on the Conservation of European Wildlife and Natural Habitats (ETS 104).

These treaties clearly illustrate the different solutions which are applied in the treaty practice of the Council of Europe when amending clauses are provided for in European treaties. Thus,

- (i) The European Convention for the Protection of Animals Kept for Farming Purposes provides for the Committee of Ministers to have the last word as the organ competent to amend the Convention. The proposal for amendment, however, comes from a Standing Committee composed of the contracting parties and established under the Convention itself.
- (ii) The European Agreement on the Exchange of Tissue-typing Reagents makes the Contracting Parties solely responsible for amendments.
- (iii) The Convention on the Conservation of European Wildlife and Natural Habitats, while leaving the last word to the contracting parties, none the less provides for intervention by the Committee of Ministers, which may in certain circumstances give preliminary approval to the proposed amendment.

43. In the light of these different solutions and the experience of the General Secretariat of the Council of Europe, it seems that the general rule contained in article 39, which stipulates that "A treaty may be amended by the conclusion of an agreement between the parties", is formulated in too categorical and rigid a fashion. According to the specific provisions of certain treaties, the amendment is subject to a decision in which not only the parties to the treaty participate but also other States (meeting in the Committee of Ministers of the Council of Europe). In cases where the agreement of these other States is required for adoption of the amendment, the agreement will not have the effect accorded to it by the general rule in article 39 unless these other States concur in the decision.

44. According to article 40, paragraph 2, "Any proposal to amend a multilateral treaty ... must be notified to *all the contracting States and organizations* or, as the case may be, to *all the contracting organizations*, each one of which shall have the right to take part ...". In this connection it should be noted that, where the treaty has been drawn up within an organ of an international organization, such as the Council of Europe, not only the contracting States and organizations but also the other member States of the organization may have a legitimate interest in being informed of the proposed amendments and in par-

ticipating in the decisions thereon, without it being necessary to make a specific stipulation to that effect in the treaty concerned. It might therefore be advisable to mention in this context either the *States and organizations which have participated in negotiation of the treaty* (thus including the member States of the organization within which the treaty was drawn up), or the *organ within which the treaty was drawn up*.

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

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

(a) *Procedure for denunciation established by the treaty itself*

45. Article 56 states the conditions under which a party may denounce a treaty. It does not give rise to problems in relation to the practice of the Council of Europe, in that it excludes the case in which the treaty provides "for denunciation or withdrawal".

46. Article 65, on the other hand, which establishes the procedures to be followed with respect to the withdrawal of one party from a multilateral treaty, has no such exclusion with respect to the provisions of the treaty itself regarding the procedure for denunciation. In particular, article 65 states that the party wishing to withdraw from a treaty should first express its claim in writing, giving reasons ("shall indicate ... the reasons therefor").

47. In the practice of the Council of Europe, as embodied in the "Model final clauses" any party to a treaty may at any time denounce the convention or agreement binding on it by means of a notification addressed to the Secretary-General without adducing the reasons for which it is denouncing the treaty. In addition, such denunciation shall become effective automatically on the first day of the month following the expiration of a specified period after the date of receipt of the notification by the Secretary-General (art.(f)). It is thus effective from that date and, in this respect, the practice of the Council of Europe also differs from the solution envisaged in article 65, which provides for a period (three months, except in cases of special urgency) during which a party may not carry out its proposed measure. The Secretary-General, for his part, is required to communicate the denunciation to all the member States of the Council of Europe and to any State which has acceded to the convention or agreement (art.(g) of the "Model final clauses") and to EEC if the convention or agreement is open to the latter's participation.

(b) *Notification of the denunciation to the depositary*

48. Article 65 also states that the notification should be addressed solely to "the other parties". It would seem desirable to take into account those treaties for which provision has been made for a depositary other than the Government of a party and to stipulate that the parties should address the notification required in article 65, paragraph 1, to that depositary also.

Article 77 (Functions of depositaries)

(a) *Obligation to transmit the texts of the treaty and to inform of certain acts relating to the treaty*

49. Draft article 77 obliges the depositary to transmit to the *States entitled to become parties to the treaty* a copy of the original text and of any further text of the treaty (art. 77, subpara. 1 (b)) and to inform those States of certain acts relating to the treaty (subparas. 1 (e) and (f)). As mentioned above (para. 35), in connection with article 23, the scope of the term "States ... entitled to become parties to the treaty" may be difficult to define. It would therefore be preferable to restrict the depositary's obligation to the *States and organizations which have participated in the negotiation of the treaty, to the contracting States and organizations and to the parties*, within the meaning of the definitions given in article 2 of the Commission's draft.

50. In the case of the conventions and agreements concluded within the Council of Europe, the notifications must be addressed, as a general rule, to the member States of the Council and to any State

⁴⁴ See footnote 39 above.

⁴⁵ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference ...*, p. 33, para. (4) of the commentary to art. 25 (Application of treaties to territory).

which has acceded to the convention or agreement (cf. art. (g) of the "Model final clauses") and must also be addressed to EEC if the Community is permitted to participate in the convention or agreement. It goes without saying that a State or an organization which is entitled to become a party to the treaty and which is not included among the States or organizations mentioned above may at any time apply to the depositary for any information regarding the treaty to which it may become a party.

(b) *Registering the treaty with the Secretariat of the United Nations*

51. Co-operation agreements concluded by the Council of Europe with other international organizations are not subject to any registration. For multilateral treaties concluded within the Council of Europe (and particularly those open to participation by EEC), see below, the commentary to article 80.

Article 78 (Notifications and communications)

52. In the practice of the Council of Europe, the date on which a notification takes effect is generally determined on the basis of its receipt by the Secretary-General of the Council (cf. art. (d), paras. 2 and 3, of the "Model final clauses": declaration concerning the territories to which the convention or agreement shall apply and withdrawal of such a declaration; art. (e), para. 2: withdrawal of reservations; art. (f), para. 2: denunciation).

Article 79 (Corrections of errors in texts or in certified copies of treaties)

53. In respect of conventions and agreements concluded within the Council of Europe, the practice regarding correction of errors is as follows: if the text of a convention or an agreement contains a substantive error, the Committee of Ministers corrects the error and authorizes the Secretary-General to certify the correction. Thus authorized, the Secretary-General prepares and signs a *procès-verbal* of the rectification, a copy of which is transmitted to each member State of the Council and to any State which has acceded to the treaty concerned. The question has not been raised in connection with treaties which provide for the accession of EEC. The *procès-verbal* of rectification is also transmitted for registration to the Secretariat of the United Nations (cf. the observations above regarding article 10).

Article 80 (Registration and publication of treaties)

54. After their entry into force, conventions and agreements concluded within the Council of Europe are subject to registration with the Secretariat of the United Nations through the good offices of the Secretary-General of the Council of Europe as depositary of those treaties. The European Conventions on the Protection of Animals Kept for Farming Purposes and for the Protection of Animals for Slaughter were submitted for registration in 1979 and 1982 respectively.

Appendix

RESOLUTION ADOPTED BY THE COMMITTEE OF MINISTERS
AT ITS EIGHTH SESSION, MAY 1951⁶⁶

*Relations with Intergovernmental and Non-governmental
International Organizations*

(i) The Committee of Ministers may, on behalf of the Council of Europe, conclude with any intergovernmental organization agreements on matters which are within the competence of the Council. These agreements shall, in particular, define the terms on which such an organization shall be brought into relationship with the Council of Europe.

(ii) The Council of Europe, or any of its organs, shall be authorized to exercise any functions coming within the scope of the Council of Europe which may be entrusted to it by other European intergovernmental organizations. The Committee of Ministers shall conclude any agreements necessary for this purpose.

(iii) The agreement referred to in paragraph (i) may provide, in particular:

(a) that the Council shall take appropriate steps to obtain from, and furnish to, the organizations in question regular reports and information, either in writing or orally;

(b) that the Council shall give opinions and render such services as may be requested by these organizations.

(iv) The Committee of Ministers may, on behalf of the Council of Europe, make suitable arrangements for consultation with international non-governmental organizations which deal with matters that are within the competence of the Council of Europe.

2. Council for Mutual Economic Assistance

[Original: Russian]
[16 November 1981]

... The secretariat of the Council for Mutual Economic Assistance notes with satisfaction the considerable work done by the International Law Commission on the preparation of the second part of the draft articles on treaties concluded between States and international organizations or between international organizations.

As the CMEA secretariat stated in the comments it submitted in 1980,⁶⁷ with regard to articles 1 to 60 of the draft, articles 61 to 80 on the whole appear to deserve approval and can provide a sound basis for the preparation of final draft articles on this matter by the Commission.

At the same time, some articles, in the CMEA secretariat's view, need to be made more precise.

1. This applies in particular to article 80 of the draft, which should be made optional both as regards the registration of treaties by the parties and as regards the obligation of the Secretariat of the United Nations to register the treaties concerned. For this reason it would be appropriate to state in this article that treaties may be transmitted to the Secretariat of the United Nations for possible registration and publication.

2. In article 65, paragraph 2, it would seem appropriate, taking account of the specific situation of international organizations, to allow international organizations a period of more than three months to raise any objections.

3. European Economic Community

[Original: English/French]
[18 March 1982]

I. GENERAL

The Community congratulates the International Law Commission and its eminent Special Rapporteur, Mr. Paul Reuter, on having considerably simplified, on second reading at the thirty-third session, the draft of articles 1 to 6 which had been adopted on first reading.

This simplification is particularly applicable in the present case since it arose from the recognition that treaties to which international organizations are party differ in law hardly at all from treaties between States. The Community considers that the spirit, if not the letter, of most of the rules established in the Vienna Convention on the Law of Treaties applies fully to both types of treaties; in other words, treaties concluded between States and treaties to which one or more international organizations are contracting parties. Thus, in the Community's view, it is important that international organizations, which increasingly participate in treaty relations, should be placed on the same footing as States as regards the conclusion and implementation of treaties, in so far as the subject matter can justify this.

II. COMMENTS AND OBSERVATIONS ON THE VARIOUS DRAFT ARTICLES

As in its previous comments and observations on draft articles 1 to 60, the Community will confine itself to a number of articles which are of particular interest to it. These comments must be seen in the light of the statement contained in its above-mentioned comments

⁶⁶ "Texts of a Statutory Character", annexed to *Statute of the Council of Europe (with Amendments)* (ETS 1).

⁶⁷ *Yearbook ... 1981*, vol. II (Part Two), p. 201, Annex II, sect. C.1.

⁶⁸ *Yearbook ... 1981*, vol. II (Part Two), p. 201, Annex II, sect. C.2.

concerning the international legal personality of the European Economic Community and its capacity to conclude treaties in areas where the member States have transferred to it their competences to act on both the internal and the external levels.

These comments and observations, which follow the order of the articles, are as follows:

Article 63 (Severance of diplomatic or consular relations)

1. The text adopted by the Commission is based on the idea that diplomatic and consular relations can only exist between States. However, as the Commission so well expressed "relations between international organizations and States have, like international organizations themselves, developed a great deal, particularly, but not exclusively, between organizations and their member States".

2. The Community would also like to point out that, in order to take account of the *sui generis* nature of its relations, and to some extent taking as basis the diplomatic and consular relations between States, there have been established, on a permanent basis, both the Community's own representations to third countries and international organizations and representations of many third countries to these institutions.

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

3. The Community welcomes the fact that the Commission's draft contains provisions on the settlement of disputes even though these provisions, like the Vienna Convention, only cover part V of the draft dealing with invalidity, termination and suspension of the operation of treaties.

4. The Community considers here that the text cannot pass over the more general problems raised by the interpretation of provisions such as articles 53, 64 or 71. For instance, the Community notes that the definition of the concept: "new imperative standard of general international law" has still not been clarified.

5. The Community has noted that paragraphs 2 and 3 of article 66 refer to *any* of the articles in part V of the draft articles. This means that paragraphs 2 and 3 provide for mandatory recourse to conciliation in the case of dispute involving any article in part V, including disputes relating to the application or interpretation of articles 53 or 64. The Community considers that, in addition to the conciliation procedure provided for in paragraphs 2 and 3, article 66 should provide for compulsory arbitration.

6. In the Community's view, the establishment of procedures for the settlement of disputes must be based on the principle of equality between the parties concerned. The Community therefore deems it essential for the international organizations, in particular the Com-

³⁹ *Yearbook ... 1980*, vol. II (Part Two), p. 83, para. (2) of the commentary to art. 63.

munity, to be authorized to nominate the same number of candidates as States for the list of qualified conciliators which, pursuant to the annex, should be drawn up and held by the Secretary-General of the United Nations. The current version of the annex appears to indicate some hesitation over this point, since this provision has been placed in square brackets. The Community encourages the Commission to withdraw this reservation.

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 the participation by a State in the membership of an organization)

7. This draft article concerns legal problems of considerable complexity and importance:

Firstly: the establishment of the consequences of the international responsibility of an international organization towards its member States and towards third countries and the other organizations with which it has concluded a treaty;

Secondly: the consequences of the termination of the existence of an international organization;

Thirdly: the consequences of the termination of the participation of a State as a member of an organization.

8. The Community agrees with the view expressed by the Commission in its commentary that the provisions of this draft article deal with very delicate matters. The draft of article 73 as it stands provides in particular a general reservation as to the possible legal effect of the occurrence of a situation referred to in the article's provisions, and it would seem adequate at present to maintain the position now adopted by the Commission.

Article 74 (Diplomatic and consular relations and the conclusion of treaties)

9. The Community would refer to the comments it made above, paras. 1 and 2, on draft article 63 and would point out again that it maintains representation with many third countries and organizations. It should be recognized that the severance of such relations between the Community and third parties has in itself no legal effect on treaty relations, unless the application of the treaty expressly requires the existence of such relations.

III

To conclude, the Community welcomes the extent to which the international organizations to which the draft articles are to apply have been given the opportunity to play an active role in the elaborating of the present draft. The Community looks forward to the continuation of an equally active role of full participation in this process through the final elaboration of the draft articles and subsequent procedures for transforming them into a suitable international instrument, which may take the form of an international treaty.

⁴⁰ *Ibid.*, pp. 91 *et seq.*