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REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/5809*

Report of the International Law Commission covering the work of its sixteenth session, 11 May — 24 July 1964

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CHAPTER I

Organization of the Session

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with its Statute annexed thereto, as subsequently amended, held its sixteenth session at the European Office of the United Nations, Geneva. The session had been scheduled to last from 11 May to 17 July and was extended to 24 July by a decision adopted by the Commission at its 728th meeting of 21 May 1964. The work of the Commission during this session is described in this report. Chapter II of the report contains nineteen articles on the application, effects, modification and interpretation of treaties. Chapter III contains sixteen articles on the topic of special missions. Chapter IV relates to the programme of work and organization of future sessions of the Commission. Chapter V deals with a number of administrative and other questions.

A. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members :

Mr. Roberto Ago (Italy)
Mr. Gilberto Amado (Brazil)
Mr. Milan Bartoš (Yugoslavia)
Mr. Herbert W. Briggs (United States of America)
Mr. Marcel Cadieux (Canada)
Mr. Erik Castrén (Finland)
Mr. Abdullah El-Erian (United Arab Republic)
Mr. Taslim O. Elias (Nigeria)
Mr. Eduardo Jiménez de Aréchaga (Uruguay)
Mr. Victor Kanga (Cameroon)
Mr. Manfred Lachs (Poland)
Mr. Liu Chieh (China)
Mr. Antonio de Luna (Spain)
Mr. Radhabinod Pal (India)

Mr. Angel M. Paredes (Ecuador)
 Mr. Obed Pessou (Dahomey)
 Mr. Paul Reuter (France)
 Mr. Shabtai Rosenne (Israel)
 Mr. José María Ruda (Argentina)
 Mr. Abdul Hakim Tabibi (Afghanistan)
 Mr. Senjin Tsuruoka (Japan)
 Mr. Grigory I. Tunkin (Union of Soviet Socialist Republics)
 Mr. Alfred Verdross (Austria)
 Sir Humphrey Waldock (United Kingdom of Great Britain and Northern Ireland)
 Mr. Mustafa Kamil Yasseen (Iraq)

3. On 12 May 1964, the Commission elected Mr. Paul Reuter (France) and Mr. José María Ruda (Argentina) to fill the vacancies which had arisen in consequence of the election of Mr. André Gros (France) and Mr. Luis Padilla Nervo (Mexico) as judges of the International Court of Justice.

B. OFFICERS

4. At its 722nd meeting, held on 11 May 1964, the Commission elected the following officers:

Chairman: Mr. Roberto Ago
First Vice-Chairman: Mr. Herbert W. Briggs
Second Vice-Chairman: Mr. Grigory I. Tunkin
Rapporteur: Mr. Mustafa Kamil Yasseen

5. At its 727th meeting, held on 20 May 1964, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Herbert W. Briggs
Members: Mr. Taslim O. Elias; Mr. Eduardo Jiménez de Aréchaga; Mr. Antonio de Luna; Mr. Paul Reuter; Mr. Shabtai Rosenne; Mr. Grigory I. Tunkin; Sir Humphrey Waldock; Mr. Mustafa Kamil Yasseen. Mr. Milan Bartoš took part in the Committee's work as a Special Rapporteur on special missions when the articles relating to that topic were considered. In addition, the Commission, at its 762nd meeting held on 9 July, appointed Mr. Obed Pessou as a member of the Committee. At its 727th meeting, the Commission also decided to request the Drafting Committee to assume responsibility for the preparation of the Spanish texts of the draft articles, in addition to the English and French texts.

6. The Secretary-General of the United Nations attended the 767th meeting, held on 16 July 1964. The Chairman of the Commission and the Secretary-General made statements on that occasion.

7. The Chairman stressed that at the time the United Nations was founded no one could have realized the extent and the urgency which the task of the International Law Commission, established under Article 13 of the Charter, would have in the future. However, a great revolution was now taking place in the world society under the auspices and with the encouragement of the United Nations, which had given independence to a great number of States. That event

had thrust into the foreground the pressing need for the codification and evolution of the law of the community of States. The Commission was devoting itself to the revision, clarification and codification of the main topics of international law, where principles demanded to be restated on the basis of the widest possible agreement of States and on a sound, scientific foundation, in matters like the law of treaties and State responsibility. The Chairman expressed his conviction that should the Commission complete its ambitious programme, and if the States consummated this work in diplomatic conferences, progress without precedent since the time of Grotius would have been achieved.

8. The Secretary-General, in reply to the Chairman of the International Law Commission, stated that from all available accounts the Commission's work was quite impressive. He stressed that one of the basic principles of the Charter was that all Member States should practise tolerance, live as good neighbours and unite towards the achievement of common objectives. He felt confident that the founding fathers of the Charter had in mind the harmonizing of all United Nations activities — political, economic, social and legal.

9. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 760th meeting, held on 7 July 1964. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

C. AGENDA

10. The Commission adopted an agenda for the sixteenth session consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. Prolongation of the session.
3. Law of treaties.
4. Special missions.
5. Relations between States and inter-governmental organizations.
6. Organization of future sessions.
7. Date and place of the seventeenth session.
8. Co-operation with other bodies.
9. Other business.

11. In the course of the session, the Commission held fifty-three public meetings and four private meetings. In addition, the Drafting Committee held ten meetings. The Commission considered all the items on its agenda.

CHAPTER II

Law of Treaties

A. INTRODUCTION

Summary of the Commission's proceedings

12. At its fourteenth and fifteenth sessions the Commission provisionally adopted parts I (articles 1-29)¹

¹ *Yearbook of the International Law Commission, 1962, vol. II, pp. 161-186.*

and II (articles 30-54)² of its draft articles on the law of treaties, consisting respectively of twenty-nine articles on the conclusion, entry into force and registration of treaties and twenty-five articles on the invalidity and termination of treaties. In adopting parts I and II the Commission decided, in accordance with articles 16 and 21 of its Statute, to submit them, through the Secretary-General, to Governments for their observations. At its fifteenth session the Commission decided to continue its study of the law of treaties at its next session, to give the topic priority, and to take up at that session the questions of the application, interpretation and effects of treaties.

13. At the present session of the Commission, the Special Rapporteur accordingly submitted a report (A/CN.4/167 and Add.1-3) on the application, effects, revision and interpretation of treaties. The Commission considered that report at its 726th-755th, 759th-760th, 764th-767th and 770th meetings and adopted a provisional draft of articles upon the topics mentioned, which is reproduced in the present chapter together with commentaries upon the articles. These articles (articles 55-73) constitute part III—the final part—of the Commission's draft on the law of treaties.

14. The modification and interpretation of treaties are topics which have not been the subject of reports by any of the Commission's three previous Special Rapporteurs on the law of treaties. The topic of the application and effects of treaties, on the other hand, was the subject of a study by Sir Gerald Fitzmaurice in his fourth and fifth reports in 1959 and 1960.³ The Commission duly took these reports into account at the present session.

15. As stated in paragraph 18 of its report for 1962⁴ and repeated in paragraph 12 of its report for 1963,⁵ the Commission will at a later stage consider whether the three parts on the law of treaties should be amalgamated to form a single draft convention or whether the codification of the law of treaties should take the form of a series of related conventions. In accordance with its decisions at its two previous sessions, the Commission has provisionally prepared the present draft in the form of a third group of articles closely related to parts I and II which have already been transmitted to Governments for their observations. The present draft has therefore been designated "The Law of Treaties — Part III". At the same time, following its decision at its previous session, and without thereby prejudging in any way its decision concerning the form in which its work on the law of treaties should ultimately be presented, the articles in part III have been numbered consecutively after the last article of part II—the first article being numbered 55. The Commission now intends, at its session in 1965, to

commence its re-examination of all the draft articles in the light of the observations to be received from Governments. In the course of the present session the Commission has noted that apart from any matters of substance that may be raised in the future, certain of the articles already provisionally adopted require further consideration in order to ensure their proper coordination with other articles. It has also noted that, while the juxtaposition of some topics had been convenient for purposes of study, it may not necessarily be appropriate in the final arrangement of the draft articles, and that in consequence some readjustment of the material in the different parts and sections of the draft may be found to be desirable. At the same time, it recognized that special attention will have to be given to ensuring as full consistency as is possible in the use of terminology in the final drafts.

16. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit its draft concerning the effects, application, modification and interpretation of treaties, through the Secretary-General, to Governments for their observations. The Commission, in this connexion, wishes to recall its decision of 1958⁶ that the Commission should prepare its final draft only at the second session following that in which its first draft had been prepared. However, it expresses its hope that the observations of Governments on part III of the law of treaties may be available to it before the commencement of its eighteenth session in 1966.

The scope of the present group of draft articles

17. The present group of draft articles covers the broad topics of the application, effects, modification and interpretation of treaties. Following the decision of the Commission in 1963 to postpone consideration of the question of conflicts between treaties until its sixteenth session, the Commission has now re-examined that question, which it found to be closely connected above all with the rules concerning the modification and interpretation of treaties. It has therefore included an article—article 63—on that matter in the present group of draft articles. At the same time the Commission re-affirmed its provisional decision of 1963, referred to in paragraph (2) of the commentary to article 41, to retain article 41 for the time being in part II.

18. The matters dealt with in part III have a certain connexion with two topics which are to be the subject of separate studies by the Commission and which were, in 1963, assigned to two other Special Rapporteurs, namely, State responsibility, and succession of States and Governments. In the case of the responsibility of States, the Commission considered how far it should formulate provisions regarding the legal liability arising from a failure to perform treaty obligations. This question involves not only the general principles governing the reparation to be made for a breach of a treaty, but also the grounds that may be invoked in justification of the non-performance of a

² *Yearbook of the International Law Commission, 1963*, vol. II, pp. 189-217.

³ *Yearbook of the International Law Commission, 1959*, vol. II, p. 37, and *Yearbook of the International Law Commission, 1960*, vol. II, p. 69.

⁴ *Yearbook of the International Law Commission, 1962*, vol. II, p. 160.

⁵ *Yearbook of the International Law Commission, 1963*, vol. II, p. 189.

⁶ *Yearbook of the International Law Commission, 1958*, vol. II, pp. 107 and 108, paras. 60-61.

treaty. The Commission decided to exclude from its codification of the law of treaties matters related to the topic of State responsibility, and to take them up when it comes to deal with that topic itself.⁷ In the case of succession of States and Governments, the question was whether this topic should or should not be dealt with in connexion with the territorial scope of treaties and with the effects of treaties on third States. The Commission decided that this question should be left aside from the present group of draft articles. The Commission, as already indicated in the decision recorded in paragraph 58 of its report for 1963, intends to study the question on the basis of a report to be submitted by the Special Rapporteur on the topic of succession of States and Governments.

19. In examining the question of the territorial application of treaties, the Commission considered whether it should include provisions dealing with the possibility of the extension of a treaty to the territory of a third State with its authorization. The Commission concluded that although instances of these practices are found, they are rare, and turn upon special circumstances, so that particular treatment of them in the form of draft articles in part III would not be warranted.

20. The Commission also considered whether it should include an article covering the making of treaties by one State on behalf of another or by an international organization on behalf of a member State. As to the latter type of case, some members felt that it was too closely connected with the general problem of the relations between an international organization and its member States to be dealt with conveniently as part of the general law of treaties. Other members took the view that cases — and these are found in practice — where an international organization enters into a treaty not simply on its own behalf but in the name of its members may constitute the latter actual parties to the treaty and should therefore be covered in the general law of treaties. As to the former type of case — where one State authorizes another to conclude a treaty in its name and thereby make it a party to the treaty — some members noted that, although instances occurred, they were infrequent, and these members felt hesitation about including specific provisions to cover this practice from the point of view of the principle of the equality and independence of States. Other members pointed out that the practice, if not extensive, has a certain importance with regard to economic unions, such as the Belgo-Luxembourg Economic Union, where treaties may be concluded by one State on behalf of the Union. These members also felt that the expanding diplomatic and commercial activity of States and the variety of their associations with one another might lead to an increase in cases of this type, and that it was, on the whole, desirable to provide for them in the draft articles. The Commission decided that, in any event, the question really belonged to part I of the draft articles since it concerned the conclusion rather than the appli-

cation of treaties. It therefore postponed its decision regarding the inclusion of an article on this question until its next session when it intends to re-examine its draft of part I.

21. In examining the question of treaties and third States, the Commission considered a proposal that it should include a provision formally reserving from the operation of articles 58 to 61 the so-called "most-favoured-nation clause". In support of this view it was urged that the broad and general terms in which those articles had been provisionally adopted might blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with article 61, dealing with the revocation or amendment of provisions regarding obligations or rights of States not parties to treaties. The Commission, however, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, did not consider that these clauses are in any way touched by articles 58 to 61 and for that reason decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not think it advisable to deal with them in the present codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.

22. The Commission also considered the application of treaties providing for obligations or rights to be performed or enjoyed by individuals. Some members of the Commission desired to see a provision on that question included in the present group of draft articles, but other members considered that such a provision would go beyond the present scope of the law of treaties, and in view of the division of opinion the Special Rapporteur withdrew the proposal.

23. The draft articles have provisionally been arranged in three sections covering: (i) the application and effects of treaties, (ii) the modification of treaties, and (iii) the interpretation of treaties. The definitions contained in article 1 of part I are applicable also to part III and it was not found necessary to add any further definitions for the purposes of this part. The articles formulated by the Commission in this part, as in parts I and II, contain elements of progressive development as well as of codification of the law.

24. The text of draft articles 55-73 and the commentaries as adopted by the Commission on the proposal of the Special Rapporteur are reproduced below:

B. DRAFT ARTICLES ON THE LAW OF TREATIES

Part III. — Application, effects, modification and interpretation of treaties

Section I: The application and effects of treaties

Article 55. Pacta sunt servanda

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

⁷ However, a specific reservation on this matter is included in article 63, paragraph 5, for the reasons given in the commentary to that article.

Commentary

(1) *Pacta sunt servanda*⁸ — the rule that treaties are binding on the parties and must be performed in good faith — is the fundamental principle of the law of treaties. Its importance is emphasized by the fact that it is enshrined in the preamble to the Charter of the United Nations. So far as the obligations of the Charter itself are concerned, paragraph 2 of Article 2 expressly provides that Members are to “fulfil in good faith the obligations assumed by them in accordance with the present Charter”.

(2) There is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*.⁹ In its opinion on the admission of a State to the United Nations (Article 4 of the Charter)¹⁰ the International Court of Justice, without referring to paragraph 2 of Article 2, said that the conditions for admission laid down in Article 4 did not prevent a Member from taking into account in voting “any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article”. Again, speaking of certain valuations to be made under articles 95 and 96 of the Act of Algeciras, the Court said in the *Case concerning rights of nationals of the United States of America in Morocco (Judgement of 27 August 1952)*:¹¹ “The power of making the valuations rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith”. Similarly, the Permanent Court of International Justice, in applying treaty clauses prohibiting discrimination against minorities, insisted in a number of cases¹² that the clauses must be so applied as to ensure the absence of discrimination in fact as well as in law; in other words, the obligation must not be evaded by a merely literal application of the clauses. Numerous precedents could also be found in the jurisprudence of arbitral tribunals. To give only one example, in the *North Atlantic Coast Fisheries Arbitration* the Tribunal, dealing with Great Britain’s right to regulate fisheries in Canadian waters in which she had granted certain fishing rights to United States nationals by the Treaty of Ghent, said:

“ . . . from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is

⁸ See the full discussion of the principle *pacta sunt servanda* in the commentary to article 20 of Harvard Law School, *Research in International Law*, part III, Law of Treaties, *American Journal of International Law* (1935), Supplement No. 4, p. 977; J. L. Kunz, “The Meaning and the Range of the Norm *Pacta Sunt Servanda*”, *American Journal of International Law*, vol. 39 (1945), pp. 180-197; C. Rousseau, *Principes généraux du droit international public* (1944), pp. 355-364.

⁹ See especially Bin Cheng, *General Principles of Law* (1953), chapter III.

¹⁰ *I.C.J. Reports 1948*, p. 63.

¹¹ *I.C.J. Reports 1952*, p. 212.

¹² For example, *Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzig territory*, P.C.I.J. (1932), Series A/B, No. 44, p. 28; *Minority Schools in Albania*, P.C.I.J. (1935), Series A/B, No. 64, pp. 19-20.

limited to such regulations as are made in good faith, and are not in violation of the Treaty.”¹³

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

(4) Some members felt that there might be advantage in also stating that a party must abstain from acts calculated to frustrate the objects and purposes of the treaty. The Commission, however, considered that this was implicit in the obligation to perform the treaty in good faith and that the rule should be stated in as positive and simple a form as possible.

Article 56. Application of a treaty in point of time

1. The provisions of a treaty do not apply to a party in relation to any fact or act which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party, unless the contrary appears from the treaty.

2. Subject to article 53, the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides.

Commentary

(1) The present article concerns the temporal scope of the provisions of a treaty. It is implicit in the very concept of a treaty’s being in force that it should govern the relations of the parties with respect to all facts, acts or situations which occur or arise during the period while it is in force and which fall within its provisions. But it is a question as to whether and to what extent a treaty may apply to facts, acts or situations which occurred or arose before it came into force or occur or arise after it has terminated.

(2) *Prior facts, acts or situations.* There is nothing to prevent the parties from giving a treaty, or some of its provisions, retroactive effects if they think fit. It is

¹³ *Reports of International Arbitral Awards*, vol. XI, p. 188. The Tribunal also referred expressly to “the principle of international law that treaty obligations are to be executed in perfect good faith”.

essentially a question of their intention. The general rule, however, is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms. This rule was endorsed and acted upon by the International Court of Justice in the *Ambatielos* case (jurisdiction),¹⁴ where the Greek Government contended that under a treaty of 1926 it was entitled to present a claim based on acts which had taken place in 1922 and 1923. Recognizing that its argument ran counter to the general principle that a treaty does not have retroactive effects, that Government sought to justify its contention as a special case by arguing that during the years 1922 and 1923 an earlier treaty of 1886 had been in force between the parties containing provisions similar to those of the 1926 Treaty. This argument was rejected by the Court which said :

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

A good example of a treaty having such a “special clause” or “special object” necessitating retroactive interpretation is to be found in the *Mavrommatis Palestine Concessions* case.¹⁵ The United Kingdom contested the Court’s jurisdiction on the ground, *inter alia*, that the acts complained of had taken place before Protocol XII to the Treaty of Lausanne had come into force, but the Court said :

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

(3) The non-retroactivity principle has come under consideration in international tribunals most frequently in connexion with jurisdictional clauses providing for the submission to an international tribunal of “disputes”, or specified categories of “disputes”, between the parties. Then the word “disputes” is apt to cover

any dispute which exists between the parties after the coming into force of the treaty. It matters not either that the dispute concerns events which took place prior to that date or that the dispute itself arose prior to it ; for the parties have agreed to submit to arbitration or judicial settlement all their existing disputes without qualification. The Permanent Court said in the *Mavrommatis Palestine Concessions* case :

“The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. . . . The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above.”¹⁶

When a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate indirectly to limit *ratione temporis* the application of the jurisdictional clause. Thus in numerous cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms the European Commission of Human Rights has held that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question.¹⁷

(4) If, however, a fact, act or situation which first occurred or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date. Thus, while the European Commission of Human Rights has not considered itself competent to inquire into the propriety of legislative, administrative or judicial acts completed and made final before the entry into force of the European Convention, it has assumed jurisdiction where there were fresh proceedings or recurring applications of those acts after the Convention was in force.¹⁸

(5) Paragraph 1 of the article accordingly states that the “provisions of a treaty do not apply to a party

¹⁴ *Ibid.*, p. 35 ; cf. the *Phosphates in Morocco* case, *P.C.I.J.* (1938), Series A/B, No. 74, p. 24. The application of the different forms of clause limiting *ratione temporis* the acceptance of the jurisdiction of international tribunals has not been free from difficulty, and the case law of the Permanent Court of International Justice and the International Court of Justice now contains a quite extensive jurisprudence on the matter. Important though this jurisprudence is in regard to the Court’s jurisdiction, it concerns the application of particular treaty clauses, and the Commission does not consider that it calls for detailed examination in the context of the general law of treaties.

¹⁵ See *Yearbook of the European Convention of Human Rights* (1955-1957), pp. 153-159 ; *ibid.* (1958-1959), pp. 214, 376, 382, 407, 412, 492-494 ; *ibid.* (1960), pp. 222, 280, 444 ; and *ibid.* (1961), pp. 128, 132-145, 240, 325.

¹⁶ Case of *De Becker*, see *Yearbook of the European Convention of Human Rights* (1958-1959), pp. 230-235 ; Application No. 655/59, *Yearbook of the European Convention of Human Rights* (1960), p. 284.

¹⁴ Judgement of 1 July 1952 ; *I.C.J. Reports* 1952, p. 40.

¹⁵ *P.C.I.J.* (1924), Series A, No. 2, p. 34.

in relation to any fact or act which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party, unless the contrary appears from the treaty". In other words, the treaty will not apply to facts or acts which are completed or to situations which have ceased (and do not recur) before the treaty comes into force. The more general phrase "unless the contrary appears from the treaty" is used in preference to "unless the treaty otherwise provides" in order to allow for cases where the very nature of the treaty indicates that it is intended to have certain retroactive effects.

(6) *Subsequent facts, acts or situations.* After its termination a treaty *ex hypothesi* does not operate upon any fact or act which then occurs or any situation which then arises or exists; nor is a fact, act or situation which then occurs or exists brought within the treaty merely because it is a recurrence or continuation of one which occurred or existed during the period while the treaty was in force. Moreover, it is only in rare cases, such as article XIX of the Convention on the Liability of the Operators of Nuclear Ships, that a provision is expressed to be applicable after the termination of the treaty. On the other hand, the treaty continues to have effects for the purpose of determining the legality or illegality of any act done while the treaty was in force or of any situation resulting from its application; in other words, rights acquired under the treaty, whether in consequence of its performance or its breach do not lapse on its termination.¹⁹ This aspect of the matter is covered in article 53 which deals with the legal consequences of the termination of a treaty.²⁰

(7) Paragraph 2 of the present article accordingly provides that "subject to article 53, the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides". In re-examining article 53 in connexion with the drafting of the present article, the Commission noted that its wording might need some adjustment in order to take account of acquired rights resulting from the illegality of acts done while the treaty was in force.

Article 57. The territorial scope of a treaty

The scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty.

Commentary

(1) Certain types of treaty, by reason of their subject matter, are hardly susceptible of territorial appli-

¹⁹ Thus, in the *Case concerning the Northern Cameroons (I.C.J. Reports 1963, p. 15)*, the International Court assumed that a State remains responsible after the termination of a treaty for any breach that may have occurred while it was in force. However, no reparation was claimed in that case and, owing to the special circumstances, the Court declined, after the termination of the Trusteeship Agreement, to adjudicate upon the question whether or not it had been infringed.

²⁰ *Yearbook of the International Law Commission, 1963, vol. II, p. 216.*

cation in the ordinary sense. Most treaties, however, have their effect territorially and a question may then arise as to what is their precise territorial scope. In some cases the provisions of the treaty expressly relate to a particular territory or area, for example the Treaty of 21 October 1920 recognizing the sovereignty of Norway over Spitzbergen²¹ and the Antarctic Treaty of 1 December 1959.²² In other cases, the terms of the treaty indicate that it relates to particular areas. Certain United Kingdom treaties dealing with domestic matters are expressly limited to Great Britain and Northern Ireland and do not relate to the Channel Islands and the Isle of Man.²³ So, too, after the creation of the United Arab Republic certain treaties were concluded by it whose scope was limited territorially to one part of the Republic. Again, States whose territory includes a free zone may find it necessary to except this zone from the scope of a commercial treaty. Another example is a boundary treaty which applies to particular areas and regulates problems arising from mixed populations, such as the languages used for official purposes. On the other hand, many treaties, which are applicable territorially, contain no indication of any restriction of their territorial scope, for example treaties of extradition or for the execution of judgements.

(2) The Commission considers that the territorial scope of a treaty depends on the intention of the parties and that it is only necessary in the present articles to formulate the general rule which should apply in the absence of any specific provision or indication in the treaty as to its territorial scope. State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the view that a treaty is to be presumed to apply to all the territory of each party unless a contrary intention appears from the treaty.²⁴ Accordingly, it is this rule which is formulated in the present article.

(3) The term "the entire territory of each party" is a comprehensive term designed to embrace all the land and appurtenant territorial waters and air space which constitute the territory of the State. The Commission preferred this term to the term "all the territory or territories for which the parties are internationally responsible", which is found in some recent multilateral conventions. It desired to avoid the nuances and con-

²¹ League of Nations, *Treaty Series*, vol. II, p. 8.

²² United Nations, *Treaty Series*, vol. 402, p. 71.

²³ For example, the Agreement between the Government of Great Britain and Northern Ireland and the USSR on Relations in the Scientific, Technological, Educational and Social Fields 1963-1965 (United Kingdom Treaty Series No. 42 of 1963); the Convention of 1961 between Austria and Great Britain for the Reciprocal Recognition and Enforcement of Foreign Judgements defines the UK as comprising England and Wales, Scotland and Northern Ireland (United Nations, *Treaty Series*, vol. 453, p. 268).

²⁴ See Lord McNair, *Law of Treaties* (1961), pp. 116-117; S. Rosenne, "United Nations Treaty Practice", *Recueil des Cours de l'Académie de droit international*, vol. 86 (1954), pp. 374-375; Summary of practice of the Secretary-General as depositary of multilateral agreements (ST/LEG/7), paras. 102-103; Succession of States in relation to General Multilateral Treaties of which the Secretary-General is Depositary (A/CN.4/150), paras. 73-74 and 138 (*Yearbook of the International Law Commission, 1962, vol. II, pp. 115, 123*).

trovercy arising from the association of the latter term with the so-called "colonial clause". It held that its task in codifying the modern law of treaties should be confined to formulating the general rule regarding the territorial scope of a treaty.

(4) The point was made during the discussion that the territorial scope of a treaty may be affected by questions of State succession. The Commission, as already indicated in paragraph 18 above, decided that this aspect of the territorial scope of treaties should be examined in connexion with its study of the topic of succession of States and Governments.

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

A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon a State not party to it without its consent.

Commentary

(1) There appears to be almost universal agreement that the rule laid down in this article — that a treaty applies only between the parties — is the fundamental rule governing the effect of a treaty upon States not parties.²⁵ It appears originally to have been derived from Roman law in the form of the well-known maxim *pacta tertiis nec nocent nec prosunt* — agreements neither impose obligations nor confer benefits upon third parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States. There is abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists. In the *Case concerning certain German interests in Polish Upper Silesia*²⁶ the Permanent Court said that "A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States".

(2) *Obligations.* International tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose any obligation on States which are not parties to them nor modify in any way their legal rights without their consent. In the *Island of Palmas* case,²⁷ for example, dealing with a supposed recognition of Spain's title to the island in treaties concluded by that country with other States, Judge Huber said: "It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the "Philippines" could

not be binding upon the Netherlands. . .".²⁸ In another passage he said:²⁹ ". . . whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers"; and in a third passage³⁰ he emphasized that ". . . the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers". In short, treaties concluded by Spain with other States were *res inter alios acta* which could not, as treaties, be in any way binding upon the Netherlands. In the *Case of the Free Zones of Upper Savoy and the District of Gex*³¹ it was a major multilateral treaty — the Versailles Peace Treaty — which was in question, and the Permanent Court held that article 435 of the Treaty was "not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it". Similarly, in the *River Oder Commission* case³² the Permanent Court declined to regard a general multilateral treaty of a law-making character — the Barcelona Convention of 1921 on the Régime of Navigable Waterways of International Concern — as binding upon Poland, who was not a party to the treaty. Nor in the *Eastern Carelia* case³³ did the Permanent Court take any different position with regard to the Covenant of the League of Nations.

(3) *Rights.* Examples of the application of this rule to substantive rights can also be found in the jurisprudence of arbitral tribunals. In the *Clipperton Island*³⁴ arbitration the arbitrator held that Mexico was not entitled to invoke against France the provision of the Act of Berlin of 1885 requiring notification of occupations of territory, *inter alia*, on the ground that Mexico was not a signatory to that Act. In the *Forests of Central Rhodopia* case³⁵ the arbitrator, whilst upholding Greece's claim on the basis of the provision in the Treaty of Neuilly, went on to say:

" . . . until the entry into force of the Treaty of Neuilly, the Greek Government, not being a signatory of the Treaty of Constantinople, had no legal grounds to set up a claim based upon the relevant stipulations of that Treaty."³⁶

(4) The question whether the rule *pacta tertiis nec nocent nec prosunt* admits of any actual exceptions in international law is a controversial one which divided the Commission. There was complete agreement amongst the members that there is no exception in the case of obligations; a treaty never by its own force alone creates obligations for non-parties. The division of opinion related to the question whether a treaty may of its own

²⁵ *Ibid.*, p. 850.

²⁶ *Ibid.*, p. 842.

²⁷ *Ibid.*, p. 870.

²⁸ *P.C.I.J.* (1932), Series A/B, No. 46, p. 141; and *ibid.* (1929), Series A, No. 22, p. 17.

²⁹ *Ibid.* (1929), Series A, No. 23, pp. 19-22.

³⁰ *Ibid.* (1923), Series B, No. 5, pp. 27-28; cf. the somewhat special case of the *Aerial Incident of 27 July 1955*, *I.C.J. Reports* 1959, p. 138.

³¹ *Reports of International Arbitral Awards*, vol. II, p. 1105.

³² *Ibid.*, vol. III, p. 1405.

³³ English translation from *Annual Digest and Reports of International Law Cases*, 1933-1934, case No. 39, at p. 92.

²⁵ Professor G. Scelle, stressing the difference in character between treaties and private law contracts, went so far as to object to the application between States of the principle *pacta tertiis nec nocent nec prosunt*, a principle devised for the private law contractual relations of individuals [*Précis de droit des gens* (1934), vol. II, pp. 345-346 and 367-368]. But he is alone in disputing the validity in international law of the *pacta tertiis* principle as a general principle of the law of treaties.

²⁶ *P.C.I.J.* (1926), Series A, No. 7, p. 29.

²⁷ *Reports of International Arbitral Awards*, vol. II, p. 831.

force confer rights upon a non-party. One group of members considered that, if the parties so intend, a treaty may have this effect, although the non-party is not, of course, obliged to accept or exercise the right. Another group of members considered that no actual right exists in favour of the non-party unless and until it is accepted by the non-party. The Commission was able to agree upon a formulation of article 60 under which it is said that a right may arise for a State from a provision of a treaty to which it is not a party, if it expressly or impliedly assents thereto. The matter is discussed more fully in the commentary to article 60 and is mentioned here only because the division of opinion in the Commission on this point complicated the drafting of the present article. The first group of members would have preferred in the present article to qualify the general statement of the *pacta tertiis* rule by the words "subject to article 60". The second group, however, considered that this would have presented article 60 as an actual exception to the rule and have thereby implied that in certain cases a treaty may of its own force create a right in favour of a non-party. The solution arrived at to preserve an equilibrium between the respective doctrinal points of view was to entitle the present article "General rule limiting the effects of treaties to the parties", thus indicating that there are further rules in the following articles, but without indicating whether or not they are to be regarded as exceptions to the general rule. The words "without its consent" were included at the end of the article purely for logical reasons, since both articles 59 and 60 mention the element of consent and thereby safeguard the position of the non-party with regard to the rejection of the obligation or right.

Article 59. Treaties providing for obligations for third States

An obligation may arise for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound.

Commentary

(1) The primary rule, formulated in the previous article, is that the parties to a treaty cannot impose an obligation on a third State without its consent. That rule is one of the bulwarks of the independence and equality of States, and the present article does not depart from it. On the contrary, it underlines that the consent of a State is always necessary if it is to be bound by a provision contained in a treaty to which it is not a party. Under it two conditions have to be fulfilled before a non-party can become bound: first, the parties to the treaty must have intended the provision in question to be the means of establishing an obligation for the State not a party to the treaty; and, secondly, the third State must have expressly agreed to be bound by the obligation. The Commission recognized that when these conditions are fulfilled there is, in effect, a second collateral agreement between the parties to the treaty, on the one hand,

and the third State on the other; and that the juridical basis of the latter's obligation is not the treaty itself but the collateral agreement. However, even if the matter is viewed in this way, the case remains one where a provision of a treaty concluded between certain States becomes directly binding upon another State which is not and does not become a party to the treaty.

(2) The application of this article is illustrated by the Permanent Court's approach to article 435 of the Treaty of Versailles in the *Free Zones* case.³⁷ By that article the parties to the Treaty of Versailles declared that certain provisions of treaties, conventions and declarations and other supplementary acts concluded at the end of the Napoleonic wars with regard to the neutralized zone of Savoy "are no longer consistent with present conditions"; took note of an agreement reached between the French and Swiss Governments to negotiate the abrogation of the stipulations relating to this Zone; and added that those stipulations "are and remain abrogated". Switzerland was not a party to the Treaty of Versailles, but the text of the article had been referred to her prior to the conclusion of the Treaty. The Swiss Federal Council had further addressed a note³⁸ to the French Government informing it that Switzerland found it possible to "acquiesce" in article 435, but only on certain conditions. One of those conditions was that the Federal Council made the most express reservations as to the statement that the provisions of the old treaties, conventions, etc., were no longer consistent with present conditions, and said that it would not wish its acceptance of the article to lead to the conclusion that it would agree to the suppression of the régime of the free zones. France contended before the Court that the provisions of the old treaties, conventions, etc., concerning the free zones had been abrogated by article 435. In rejecting this contention, the Court pointed out that Switzerland had not accepted that part of article 435 which asserted the obsolescence and abrogation of the free zones:

"Whereas, in any event, Article 435 of the Treaty of Versailles is not binding on Switzerland, which is not a Party to this Treaty, except to the extent to which that country has itself accepted it; as this extent is determined by the note of the Swiss Federal Council of May 5th, 1919, an extract from which constitutes Annex I to this article; as it is by this action and by this action alone that the Swiss Government has 'acquiesced' in the 'provisions of Article 435', namely 'under the conditions and reservations' which are set out in the said note."

(3) During the discussion some members referred to treaty provisions imposed upon an aggressor State and raised the question of the application of the present article to such provisions. The Commission recognized that they would fall outside the principle laid down in the present article, and would concern the question of the sanctions for violations of international law. At the same time, it noted that article 36, which provides for

³⁷ *P.C.I.J.* (1929), Series A, No. 22, pp. 17-18; *ibid.* (1932), Series A/B, No. 46, p. 141.

³⁸ The text of the relevant part of this note was annexed to article 435 of the Treaty of Versailles.

the nullity of any treaty procured by the threat or use of force, is confined to cases where the threat or use of force is "in violation of the principles of the Charter of the United Nations". A treaty provision imposed upon an aggressor State not a party to the treaty would not infringe article 36.

Article 60. Treaties providing for rights for third States

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

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

Commentary

(1) This article deals with the case of rights and formulates the conditions under which a State may be entitled to invoke a provision of a treaty to which it is not a party. The case of rights, as already explained in the commentary to article 58, is more controversial than that of obligations. The reason is that the question of the need for the consent of the third State presents itself in a somewhat different light than in the case of obligations. The parties to a treaty cannot, in the nature of things, impose a right on a third State because a right, even when effectively granted, may always be disclaimed or waived. Consequently, under the present article the question is not whether the third State's consent is required in order to protect it against any derogation from its independence, but whether its "acceptance" of the provisions is or is not essential to the creation of the right.

(2) The Commission noted that treaty practice shows a not inconsiderable number of treaties containing stipulations in favour of States not parties to them. In some instances, the stipulation is in favour of individual States, as, for example, provisions in the Treaty of Versailles in favour of Denmark³⁹ and Switzerland.⁴⁰ In some instances, it is in favour of a group of States, as in the case of the provisions in the Peace Treaties after the two world wars which stipulated that the defeated States should waive any claims arising out of the war in favour of certain States not parties to the treaties.⁴¹ A further case is Article 35 of the United Nations Charter, which stipulates that non-members have a right to bring disputes before the Security Council or General Assembly. Again, the Mandate and Trusteeship Agreements contain provisions stipulating

for certain rights in favour respectively of Members of the League and of the United Nations, though in these cases the stipulations are of a special character as being by one member of an international organization in favour of the rest.⁴² In other instances, the stipulation is in favour of States generally, as in the case of provisions concerning freedom of navigation in certain international rivers, and through certain maritime canals and straits.

(3) A number of writers,⁴³ including the authors of both the principal textbooks on the law of treaties, maintain that a treaty cannot of its own force create an actual right in favour of a third State. Broadly, the view of these writers is that, while a treaty may certainly confer, either by design or by its incidental effects, a benefit on a third State, the latter can only acquire an actual right through some form of collateral agreement between it and the parties to the treaty. In other words, they hold that a right will be created only when the treaty provision is intended to constitute an offer of a right to the third State which the latter has accepted. Similarly, for these writers it goes without saying that, in the absence of such a collateral agreement, the parties to a treaty are completely free, without obtaining the consent of the third State, to abrogate or amend the provision creating the benefit in its favour. They take the position that neither State practice nor the pronouncements of the Permanent Court in the *Free Zones* case⁴⁴ furnish any clear evidence of the recognition of the institution of *stipulation pour autrui* in international law.

(4) Another group of writers,⁴⁵ which includes the three previous Special Rapporteurs on the law of treaties, takes a quite different position. Broadly, the view of these writers is that there is nothing in international law to prevent two or more States from effectively creating a right in favour of another State by treaty, if they so intend; and that it is always a question of the intention of the parties in concluding the particular treaty. According to them, a distinction has to be drawn between a treaty in which the intention of the parties is merely to confer a benefit on the other State and one in which their intention is to invest it with an

³⁹ See the *South-West Africa Cases*, I.C.J. Reports 1962, pp. 329-331 and p. 410; the *Northern Cameroons Case*, I.C.J. Reports 1963, p. 29.

⁴⁰ For example, C. Rousseau, *Principes généraux du droit international public* (1944), pp. 468-477; Lord McNair, *Law of Treaties* (1961), pp. 309-312; L. A. Podestá Costa, *Manual de Derecho Internacional Público*, para. 157; G. Salvioi, *Les règles générales de la Paix, Recueil des Cours de l'Académie de droit international*, vol. 46 (1933), pp. 29-30.

⁴¹ P.C.I.J. (1932), series A/B, No. 46, p. 147.

⁴² For example, J. L. Brierly, *Law of Nations* (5th edition, 1955), pp. 251-252; Sir Hersch Lauterpacht, *Development of International Law by the International Court* (1958), pp. 306-310; Sir Gerald Fitzmaurice, Fifth Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1960, vol. II, pp. 81 and 102-104; E. Jiménez de Aréchaga, "Treaty Stipulations in favor of Third States", *American Journal of International Law*, vol. 50 (1956), pp. 358-387; Harvard Law School, *Research in International Law, American Journal of International Law*, vol. 29, Supplement (1935), part III, Law of Treaties, pp. 924-937; M. Lachs, *Le développement et les fonctions des traités internationaux, Recueil des Cours de l'Académie de droit international*, vol. 92 (1957), pp. 313-314.

³⁹ Article 109 of the Treaty of Versailles.

⁴⁰ Articles 358 and 374 of the Treaty of Versailles.

⁴¹ See E. Jiménez de Aréchaga, "Treaty Stipulations in favor of Third States", *American Journal of International Law*, vol. 50 (1956), p. 355.

actual right. In the latter case these writers hold that the other State acquires a legal right to invoke directly and on its own account the provision conferring the benefit, and does not need to enlist the aid of one of the parties to the treaty in order to obtain the execution of the provision. This right is not, in their opinion, conditional upon any specific act of acceptance by the other State — any collateral agreement between it and the parties to the treaty. These writers maintain that, on the whole, modern State practice confirms the recognition in international law of the principle that a treaty may confer an enforceable right on a State not a party to it. They also maintain that authority for this view is to be found in the report of the Committee of Jurists to the Council of the League on the Aaland Islands question⁴⁶ and more especially in the judgement of the Permanent Court in 1932 in the *Free Zones* case where it said :

“It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case : it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.”⁴⁷

(5) The opinion of the Commission, as stated in the commentary to article 58, was divided on this question. Some members in general shared the views of the first group of writers set out in paragraph 3 above, while other members in general shared the views of the second group set out in paragraph 4. The Commission, however, concluded that this division of opinion amongst its members was primarily of a doctrinal character and that the two opposing doctrines did not differ very substantially in their practical effects. Both groups considered that a treaty provision may be a means of establishing a right in favour of a third State ; and that the third State is free to accept or reject the right as it thinks fit. The difference was that according to one group the treaty provision constitutes no more than the offer of a right until the beneficiary State has in some manner manifested its acceptance of the right, whereas according to the other group the right arises at once and exists unless and until disclaimed by the beneficiary State. The first group, on the other hand, conceded that acceptance of a right by a third State, unlike acceptance of an obligation, need not be express but may take the form of a simple exercise of the right offered in the treaty. Moreover, the second group, for its part, conceded that a disclaimer of what they considered

to be an already existing right need not be express but may in certain cases occur tacitly through failure to exercise it. Consequently, it seemed to the Commission that in practice the two doctrines would be likely to give much the same results in almost every case. Nor did the Commission consider that the difference in doctrine necessarily led to different conclusions in regard to the right of the parties to the treaty to revoke or amend the provisions relating to the right. On the contrary, it was unanimous in thinking that until the beneficiary State had manifested its assent to the grant of the right, the parties should remain free to revoke or amend the provision without its consent ; and that afterwards its consent should always be required unless it appeared from the treaty that the provision was intended to be revocable. Being of the opinion that the two doctrines would be likely to produce different results only in very exceptional circumstances,⁴⁸ the Commission decided to frame the article in a neutral form which, while meeting the requirements of State practice, would not prejudice the doctrinal basis of the rule.

(6) Paragraph 1 therefore lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question or to a group of States to which it belongs or to States generally. The intention to accord the right is of cardinal importance, since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision. Examples of stipulations in favour of individual States, groups or States generally have already been mentioned in paragraph 2. The second condition is the express or implied assent of the beneficiary State. The formulation of this condition in the present tense “if the State expressly or impliedly assents thereto” is designed to leave open the doctrinal question whether juridically the right is created by the treaty or by the beneficiary State’s act of acceptance. According to one school, of thought, as already explained, the assent of the intended beneficiary, even though it may merely be implied from the exercise of the right, constitutes an “acceptance” of an offer made by the parties ; according to the other school of thought, assent is only significant as an indication that the right is not disclaimed by the beneficiary.

(7) Paragraph 2 merely specifies that in exercising the right a beneficiary State must comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. The words “or established in conformity with the treaty” take account of the fact that not infrequently conditions for the exercise of the right may be laid down in a supplementary instrument or in some cases unilaterally by one of the parties. For example, in the case of a provi-

⁴⁶ League of Nations, *Official Journal*, Special Supplement No. 3 (October 1920), p. 18 ; see also Harvard Law School, *Research in International Law, A.J.I.L.*, vol. 29, Supplement (1935), part III, Law of Treaties, pp. 927-928.

⁴⁷ *P.C.I.J.* (1932), Series A/B. No. 46, pp. 147-148 ; in the course of that case, however, three judges expressly dissented from the view that a stipulation in favour of a State not a party to the treaty may of itself confer an actual right upon that State.

⁴⁸ See, for example, the controversy between the United States Treasury, and the State Department as to whether the Finnish Peace Treaty had actually vested a right in the United States to avail itself or not to avail itself of a waiver of Finland’s claims ; E. Jiménez de Aréchaga, “Treaty Stipulations in favor of Third States”, *American Journal of International Law*, vol. 50 (1956), p. 355.

sion allowing freedom of navigation in an international river or maritime waterway, the territorial State has the right in virtue of its sovereignty to lay down relevant conditions for the exercise of the right provided, of course, that they are in conformity with its obligations under the treaty.

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

When an obligation or right has arisen under article 59 or 60 for a State from a provision of a treaty to which it is not a party, the provision may be revoked or amended only with the consent of that State, unless it appears from the treaty that the provision was intended to be revocable.

Commentary

(1) Article 61 deals with the position of the parties to a treaty in regard to the revocation or amendment of a provision intended to give rise to an obligation or right for a State not a party to the treaty. The Commission, as already stated in paragraph (5) of the commentary to the previous article, was unanimously of the view that in the case of a right, the parties are free to revoke or amend the provision at any time before the beneficiary State has manifested its assent; but that afterwards they may do so only with its consent, unless it appears from the treaty that the provision was intended to be revocable. It considered that the same rule should apply in the case of an obligation. Although a beneficiary State would not normally have any interest in objecting to the revocation of a provision subjecting it to an obligation, this might not always be so; and its consent was certainly necessary for any amendment of a provision under which it had accepted an obligation.

(2) The article accordingly lays down that when under article 59 or 60 a State not a party to a treaty has accepted an obligation or assented to a right, the provision relating to such obligation or right may be revoked or amended only with the consent of that State, unless it appears from the treaty that the provision was intended to be revocable. Thus, by implication, the article also lays down that prior to such assent the provision may be revoked or amended by agreement between the parties alone. The Commission recognized that the revocable character of the provision might also appear from transactions made between the parties and the beneficiary State. It felt, however, that this would constitute an agreement between the parties and the beneficiary and need not be mentioned in the present article.

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

Nothing in articles 58 to 60 precludes rules set forth in a treaty from being binding upon States not parties to that treaty if they have become customary rules of international law.

Commentary

(1) The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime régime, which afterwards comes to be generally accepted by other States as customary international law, as, for example, the Hague Conventions regarding the rules of land warfare,⁴⁹ the agreements for the neutralization of Switzerland, and various treaties regarding international riverways and maritime waterways. Or a multi-lateral treaty, formulating new general norms of international law and drawn up between a large number of States, may be ratified only by some of the negotiating States and yet come to be generally accepted as enunciating rules of customary law. So too a codifying convention purporting to state existing rules of customary law may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the convention.

(2) In none of these cases, however, can it properly be said that the treaty itself has legal effects for States not parties to it. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law. In short, for these States the source of the binding force of the rules is custom, not the treaty. For this reason the Commission did not think that this process should be included in the draft articles as a case of a treaty having legal effects for third States. It did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 58 to 60, it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from being binding on non-parties if they have become customary law.

(3) In connexion with its examination of article 59 and of the present article, the Commission considered whether treaties creating so-called "objective régimes", that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case of treaties having effects for third States.⁵⁰ Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, treaties providing for freedom of navigation in inter-

⁴⁹ Held by the International Military Tribunal at Nürnberg to enunciate rules which had become generally binding rules of customary law.

⁵⁰ See generally Sir Gerald Fitzmaurice's Fifth Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1960, vol. II, pp. 69-107; and Sir Humphrey Waldock's Third Report, *vide supra*, pp. 5-65, article 63 and commentary.

national rivers or maritime waterways ; and they cited the Antarctic Treaty as a recent example of such a treaty.⁵¹ Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes*, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 59 or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article. As the theory of treaties creating objective régimes was controversial and its acceptability to States somewhat doubtful, the Commission concluded that to recognize that such treaties create special legal effects for non-parties would be premature at the present stage of the development of international relations. It considered that article 60, which provides for treaties where the parties intend to create rights in favour of States generally, together with the process mentioned in the present article, furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which, if it falls short of what some members of the Commission regard as desirable, goes as far as is likely to be acceptable to States. Accordingly, it decided not to formulate any special provisions on treaties creating so-called objective régimes.

Article 63. Application of treaties having incompatible provisions

1. Subject to Article 103 of the Charter of the United Nations, the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs.

2. When a treaty provides that it is subject to, or is not inconsistent with, an earlier or a later treaty, the provisions of that other treaty shall prevail.

3. When all the parties to a treaty enter into a later treaty relating to the same subject matter, but the earlier treaty is not terminated under article 41 of these articles, the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.

4. When the provisions of two treaties are incompatible and the parties to the later treaty do not include all the parties to the earlier one :

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

(b) **As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty applies ;**

(c) **As between a State party to both treaties and a State party only to the later treaty, the later treaty applies.**

⁵¹ See also Lord McNair, *Law of Treaties* (1961), chapter XIV ; C. Rousseau, *Principes généraux du droit international public* (1948), pp. 462-464 and 477-484 ; M. Lachs, *Le développement et les fonctions des traités internationaux, Recueil des Cours de l'Académie de droit international*, vol. 92 (1957), pp. 315-317.

5. Paragraph 4 is without prejudice to any responsibility which a State may incur by concluding or applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Commentary

(1) The question of conflicts between incompatible provisions of successive treaties was discussed by Sir Hersch Lauterpacht in successive reports in 1953⁵² and 1954⁵³ in the context of the validity of treaties, and again by Sir Gerald Fitzmaurice in his third report⁵⁴ in 1958 in the same context. The present Special Rapporteur also examined this question in the context of "validity" in his second report⁵⁵ presented to the Commission in 1963, but in that report he suggested that the question ought rather to be considered in the context of the "application" of treaties, and the Commission, without in any way prejudging its position on the point, decided to postpone its consideration of the question until its present session.⁵⁶

(2) One type of case is where the parties to a later treaty do not include all the parties to an earlier treaty with which its provisions are incompatible. The majority of the members of the Commission who took part in the discussion in 1963 were inclined to take the view that leaving aside the case of conflict with a rule of *jus cogens*, which is an independent principle governed by the provisions of articles 37 and 45 of part II, the fact that a treaty is incompatible with the provisions of an earlier treaty binding upon some of its parties does not deprive the later treaty of validity ; and that, accordingly, this type of case raises primarily questions of priority of application and of State responsibility. Some members, however, although agreeing that this was true as a general rule, were not convinced that it necessarily held good in every case. In particular, these members expressed doubts as to the validity of a treaty which conflicts with a prior treaty neutralizing or demilitarizing a territory or embodying a political settlement of general importance. During that discussion reference was also made to : (1) clauses found in certain treaties, e.g. Article 103 of the United Nations Charter, which claim priority for their provisions over those of any other treaty ; (2) clauses found in some treaties dealing specifically with their relation to previous treaties ; and (3) possible cases of conflict between treaties having entirely different parties. Another point mentioned was the relation of the question of conflicts between treaties to that of the modification of treaties. The other type of case is where all the parties to the earlier treaty are also parties to the later one. The Commission in 1963 recognized that in those cases there is always

⁵² *Yearbook of the International Law Commission, 1953*, vol. II, p. 156.

⁵³ *Yearbook of the International Law Commission, 1954*, vol. II, p. 133.

⁵⁴ *Yearbook of the International Law Commission, 1958*, vol. II, pp. 27 and 41.

⁵⁵ *Yearbook of the International Law Commission, 1963*, vol. II, pp. 53-54, article 14 and commentary.

⁵⁶ *Ibid.*, p. 189, para. 15 ; see also discussion at the 685th, 687th and 703rd meetings of the Commission.

a preliminary question of construction of the two treaties in order to determine the extent of their incompatibility and the intentions of the parties with respect to the maintenance in force of the earlier treaty. Some members considered that for this reason these cases ought not to be dealt with in part II under the heading, "implied termination of treaties" but in the present part under the heading, "application of treaties". The Commission, however, decided that, even if there were a preliminary question of interpretation in these cases, there was still the problem of the conditions under which that interpretation should be regarded as leading to the conclusion that the treaty has been terminated, and it adopted article 41 concerning the implied termination of a treaty as a result of the subsequent conclusion of another treaty wholly incompatible with it. The Commission also decided provisionally to retain the article in the section dealing with termination of treaties but to reconsider it at the sixteenth session.⁵⁷ Accordingly the Commission has re-examined both categories of conflicts between treaties in connexion with its discussion of the application of treaties on the basis of a fresh study by the Special Rapporteur oriented to the application instead of to the validity of treaties.

(3) The question of treaties having incompatible provisions, considered from the point of view of "application of treaties", has close connexions both with the provisions of articles 58 to 60 concerning the legal effects of treaties on third States, and with articles 65 to 68 concerning the modification of treaties. Thus, the principle that a treaty cannot impose obligations on a third State or deprive it of its legal rights is of paramount importance in those cases of incompatibility where the parties to the later treaty do not include all the parties to the earlier one. As to the link with modification of treaties, an amending instrument is frequently another treaty the parties to which do not include all the parties to the earlier treaty, so that the amendment gives rise to a case of incompatible treaties.

(4) In the discussion in 1963, some members of the Commission considered that the article should emphasize the invalidity of a treaty which conflicts with a *jus cogens* provision.⁵⁸ However, in the light of articles 37 and 45, one of the two treaties will be void; and since that treaty is not a treaty in force there can be no question of its application. For this reason, the Commission recognized that it is unnecessary to repeat the *jus cogens* rule in the present article, which concerns the application of incompatible treaties.

(5) It was also suggested, in the discussion in 1963, that the overriding character of Article 103 of the Charter should find expression in the article. At the present session the Commission, without prejudging in any way the interpretation of Article 103 or its application by the competent organs of the United Nations, decided to recognize in the present article the overriding character of Article 103 of the Charter with respect to any treaty obligations of Members, and paragraph 1 accordingly provides that the rules laid down in the present article

for regulating the obligations of States parties to successive treaties which are incompatible with one another are subject to Article 103 of the Charter.

(6) Paragraph 2 concerns clauses inserted in a treaty for the purpose of determining the relation of its provisions to those of other treaties entered into by the contracting States. Some of these clauses do no more than confirm the general rules of priority contained in paragraphs 3 and 4 of this article. Others, like paragraph 2 of article 73 of the Vienna Convention of 1963 on Consular Relations,⁵⁹ which recognizes the right to supplement its provisions by bilateral agreements, merely confirm the legitimacy of bilateral agreements which do not derogate from the obligations of the general Convention. Certain types of clause may, however, influence the operation of the general rules, and therefore require special consideration. For example, a number of treaties contain a clause in which the parties declare either that the treaty is not incompatible with, or that it is not to affect, their obligations under another designated treaty. Many older treaties⁶⁰ provided that nothing contained in them was to be regarded as imposing upon the parties obligations inconsistent with their obligations under the Covenant of the League; and today a similar clause giving pre-eminence to the Charter is found in certain regional treaties.⁶¹ Other examples are: article XVII of the Universal Copyright Convention of 1952,⁶² which disavows any intention to affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works; article 30 of the Geneva Convention of 1958 on the High Seas⁶³ and article 73 of the Vienna Convention on Consular Relations, all of which disavow any intention of overriding existing treaties. Such clauses, in so far as they relate to existing treaties concluded by the contracting States with third States, merely confirm the general rule *pacta tertiis non nocent*. But they may go beyond that rule because in some cases not only do they affect the priority of the respective treaties as between States parties to both treaties, but they may also concern future treaties concluded by a contracting State with a third State. They appear in any case of incompatibility to give pre-eminence to the other treaty. Accordingly, even if in particular instances the application of these clauses may not differ from the general rules of priority set out in paragraphs 3 and 4, it is thought that they should be made the subject of a separate rule in the present article. Paragraph 2 accordingly lays down that, whenever a treaty provides that it is subject to, or is not inconsistent with, an earlier

⁵⁹ United Nations Conference on Consular Relations, *Official Records*, vol. II, p. 187.

⁶⁰ See article 16 of the Statute of 1921 on the Régime of Navigable Waterways of International Concern (League of Nations, *Treaty Series*, vol. VII, p. 61); Article 4 of the Pan-American Treaty of 1936 on Good Offices and Mediation (League of Nations, *Treaty Series*, vol. CLXXXVIII, p. 82) and the further list of treaties cited in C. Rousseau, *Principes généraux du droit international public* (1944), pp. 789-790.

⁶¹ For example, Article 10 of the Inter-American Treaty of Reciprocal Assistance (United Nations, *Treaty Series*, vol. 21, p. 101).

⁶² United Nations, *Treaty Series*, vol. 216, p. 148.

⁶³ United Nations Conference on the Law of the Sea, 1958, *Official Records*, vol. II, p. 138.

⁵⁷ *Yearbook of the International Law Commission*, 1963, vol. II, p. 203, para. (2).

⁵⁸ *Ibid.*, pp. 198-199, commentary to article 37.

or a later treaty, the provisions of that other treaty should prevail.

(7) Certain treaties contain a clause of the reverse type by which it is sought to give the treaty priority over another treaty incompatible with it. One form of such clause looks only to the past, and provides for the priority of the treaty over existing treaties of the contracting States which are incompatible with it. Another form looks only to the future, and specifically requires the contracting States not to enter into any future agreement which would be inconsistent with its obligations under the treaty. Some treaties, like the Statute on the Régime of Navigable Waterways of International Concern,⁶⁴ contain both forms of clause; a few, like the League Covenant (Article 20) and the United Nations Charter (Article 103), contain single clauses which look both to the past and the future. Leaving Article 103 of the Charter out of the discussion for the reasons already indicated, it is clear that quite different legal considerations apply to clauses that look to the past from those which apply to clauses that look to the future.

(8) A clause purporting to override an earlier treaty presents no difficulty when all the parties to the earlier treaty are also parties to the treaty which seeks to override it. As the Commission pointed out in its commentary to article 41,⁶⁵ the parties to the earlier treaty are always competent to abrogate it, whether in whole or in part, by concluding another treaty with that object. That being so, when they conclude a second treaty incompatible with the first, they are to be presumed to have intended to terminate the first treaty or to modify it to the extent of the incompatibility, unless there is evidence of a contrary intention. Accordingly, in these cases the inclusion of a clause in the second treaty expressly proclaiming its priority over the first does no more than confirm the absence of any contrary intention. When, on the other hand, the parties to a treaty containing a clause purporting to override an earlier treaty do not include all the parties to the earlier one, the rule *pactas tertiis non nocent* automatically restricts the legal effect of the clause. The later treaty, clause or no clause, cannot deprive a State which is not a party thereto of its rights under the earlier treaty. It is, indeed, clear that an attempt by some parties to a treaty to deprive others of their rights under it by concluding amongst themselves a later treaty incompatible with those rights would constitute an infringement of the earlier treaty. For this reason clauses of this kind are normally so framed as expressly to limit their effects to States parties to the later treaty. Article XIV of the Convention of 25 May 1962 on the Liability of Operators of Nuclear Ships, for example, provides:

"This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Conventions would be in conflict with it;

⁶⁴ Articles 13 and 18, League of Nations, *Treaty Series*, vol. VII, p. 36.

⁶⁵ *Yearbook of the International Law Commission*, 1963, vol. II, p. 203.

however, nothing in this Article shall affect the obligations of Contracting States to non-Contracting States arising under such International Conventions."⁶⁶

Similarly, many treaties amending earlier treaties provide for the supersession of the earlier treaty in whole or in part, but at the same time confine the operation of the amending instrument to those States which become parties to it.⁶⁷ The effect then is that the amendments come into force only for the parties to the later treaty in their relations *inter se*, while the earlier treaty remains applicable in their relations with States which are parties to the earlier but not to the later treaty. In other words, as between two States which are parties to both treaties, the later treaty prevails, but as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty prevails. These are the rules laid down in paragraph 4 (a) and (b) of the article, so that the insertion of this type of clause in no way modifies the application of the normal rules.

(9) When a treaty contains a clause purporting to override *future* treaties inconsistent with it, the clause can be of no significance if all the parties to the earlier treaty are also parties to the later one, because when concluding the later treaty they are fully competent to abrogate or modify the earlier treaty which they themselves drew up. More difficult, however, and more important, is the effect of such a clause in cases where the parties to the later treaty do not include all the parties to the earlier one. The clause in the earlier treaty may be so framed as to prohibit the parties from concluding with any State whatever a treaty conflicting with the earlier treaty; e.g. article 2 of the Nine-Power Pact of 1922 with respect to China.⁶⁸ Or it may refer only to agreements with third States, as in the case of article 18 of the Statute on the Régime of Navigable Waterways of International Concern:

"Each of the Contracting States undertakes not to grant, either by agreement or in any other way, to a non-Contracting State treatment with regard to navigation over a navigable waterway of international concern which, as between Contracting States, would be contrary to the provisions of this Statute."⁶⁹

⁶⁶ *American Journal of International Law*, vol. 57 (1963), p. 275.

⁶⁷ Article 1 of all the United Nations protocols amending League of Nations treaties declares: "The Parties to the present Protocol undertake that as between themselves they will, in accordance with the provisions of the present Protocol, attribute full legal force and effect to, and duly apply, the amendments to this instrument as they are set forth in the annex to the present Protocol". See, for example, Protocol of 1948 amending the International Convention of 1928 relating to Economic Statistics (United Nations, *Treaty Series*, vol. 20, p. 229); Protocol of 1953 amending the Geneva Slavery Convention of 1926 (United Nations, *Treaty Series*, vol. 182, p. 51). Cf. also article 59 of the Geneva Convention 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (United Nations, *Treaty Series*, vol. 75, p. 66).

⁶⁸ League of Nations, *Treaty Series*, vol. XXXVIII, p. 281: "The Contracting Powers agree not to enter into any treaty, agreement, arrangement, or understanding, either with one another, or, individually or collectively, with any Power or Powers, which would infringe or impair the principles stated in article 1."

⁶⁹ League of Nations, *Treaty Series*, vol. VII, pp. 36-61.

Or, again, the aim of the clause may be to prohibit the contracting States from entering into agreements *inter se* which would derogate from their general obligations under a convention.⁷⁰ These clauses do not appear to modify the application of the normal rules for resolving conflicts between incompatible treaties. Some obligations contained in treaties are in the nature of things intended to apply generally to all the parties all the time. An obvious example is the Nuclear Test-Ban Treaty, and a subsequent agreement entered into by any individual party contracting out of its obligations under that Treaty would manifestly be incompatible with the Treaty. Other obligations may be of a purely reciprocal kind, so that a bilateral treaty modifying the application of the convention *inter se* the Contracting States is compatible with its provisions. But even then the parties may in particular cases decide to establish a single compulsive régime for matters susceptible of being dealt with on a reciprocal basis, e.g., copyright or the protection of industrial property. The chief legal relevance of a clause asserting the priority of a treaty over subsequent treaties which conflict with it therefore appears to be in making explicit the intention of the parties to create a single "integral" or "interdependent" treaty régime not open to any contracting out. In short, by expressly forbidding contracting out, the clause predicates in unambiguous terms the incompatibility with the treaty of any subsequent agreement concluded by a party which derogates from the provisions of the treaty. But it is not believed that the insertion of such a clause can in any other respect give a treaty any greater priority than attaches to it by the fact of its being earlier in point of time.

(10) Any treaty laying down "integral" or "interdependent" obligations not open to contracting out must be regarded as containing an implied undertaking not to enter into subsequent agreements with conflict with those obligations, and some members of the Commission considered that this should be specifically provided for in the article itself. The very fact that a State accepts obligations of that nature in a treaty implies also its acceptance of an obligation not to conclude any subsequent agreement conflicting with the treaty except with the consent of the other parties. If it does so, it violates its obligations to the other parties under the treaty and, by reason of the rule *pacta tertiis non nocent* (article 58), it cannot invoke the subsequent agreement to relieve it of its responsibility for that violation. In consequence, as between that State and any party to the earlier treaty which has not consented to the later treaty, the obligations of the earlier treaty prevail. This is the normal rule of priority formulated in paragraph 4 (b), and the insertion of a special clause in the earlier treaty claiming priority for its provisions merely confirms, and does not modify, the operation of that rule. To attribute special effects to the insertion of such a clause would lead to absurd results.

⁷⁰ For example, article 15 of the 1883 Convention for the International Protection of Industrial Property (de Martens, *Nouveau Recueil général*, 2ème série, vol. X, p. 133); article 20, Berlin Convention of 1908 for the Protection of Literary Property (de Martens, *Nouveau Recueil général*, 3ème série, vol. IV, p. 590).

Many treaties laying down the most fundamental "integral" or "interdependent" obligations do not contain any explicit undertaking against contracting out or any clause claiming special priority for their provisions. The Kellogg-Briand Pact, the Genocide Convention, and the Nuclear Test-Ban Treaty are examples, and it is impossible to suppose that the absence from such treaties of any explicit undertaking against contracting out and of any special priority clause weakens or affects their impact upon a subsequent agreement which is incompatible with their provisions. Accordingly, the majority of the Commission took the view that the presence or absence of a specific clause regarding future treaties has no bearing on the formulation of the rules governing the *priority* of conflicting treaties.

(11) It follows from paragraphs (5) to (10) above that none of the clauses found in treaty practice asserting the priority of a particular treaty over other treaties requires special mention in the present article, apart from Article 103 of the Charter. Viewing the matter as one of the application of treaties in force, none of these clauses appears to modify the operation of the normal rules of priority. The real issue is a different one — the question discussed in a preliminary way by the Commission in 1963, whether a subsequent agreement which conflicts with a treaty containing "interdependent" or "integral" type obligations is merely incapable of being invoked against parties to the earlier treaty or whether it is wholly void. This question, which is examined in paragraphs (14) to (17) of this commentary, does not turn on the presence or absence of a special clause but on the "interdependent" or "integral" character of the obligations undertaken in the earlier treaty.⁷¹

(12) Paragraph 3 deals with cases where all the parties to a treaty, whether with or without additional States, enter into a later treaty which is incompatible with the earlier one, and from a different angle it covers the same ground as article 41 adopted at the previous session. The provisional decision of the Commission in 1963 to characterize these cases as instances of implied termination of an earlier treaty was confirmed by the majority of members who took part in

⁷¹ A treaty containing "interdependent type" obligations as defined by a previous Special Rapporteur (Sir Gerald Fitzmaurice, Third Report in *Yearbook of the International Law Commission*, 1958, vol. II, article 19 and commentary) is one where the obligations of each party are only meaningful in the context of the corresponding obligations of every other party, so that the violation of its obligations by one party prejudices the treaty régime applicable between them all and not merely the relations between the defaulting State and the other parties. Examples given by him were treaties of disarmament, treaties prohibiting the use of particular weapons, treaties requiring abstention from fishing in certain areas or during certain seasons, etc. A treaty containing "integral type" obligations was defined by the same Special Rapporteur as one where the force of the obligation is "self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others". The examples given by him were the Genocide Convention, Human Rights Conventions, the Geneva Conventions of 1949 on prisoners of war, etc., International Labour Conventions and treaties imposing an obligation to maintain a certain régime or system in a given area, such as the régime of the Sounds and the Belts at the entrance to the Baltic Sea.

the discussion at the present session. On the other hand, the fact that the question of the "implied termination" of the earlier treaty can be determined only after ascertaining the extent of the conflict between the two treaties gives these cases a certain connexion with the present article. It therefore seems desirable to mention these cases in paragraph 3, with a cross-reference to article 41. In examining the question at the present session the Commission felt that a minor modification to article 41 may be desirable so as to transfer cases of a partial conflict between two treaties from article 41 to the present article. As adopted in 1963, the opening phrase of paragraph 1 of article 41 speaks of termination "in whole or in part", but the distinction between total and partial termination (or suspension) is not continued in the drafting of the rest of the article. Some modification of the wording of the rest of that article might therefore be necessary in any case. Without deciding at this stage on the final form of article 41, opinion in the Commission inclined to accept the view that the appropriate course would be to eliminate the words "in whole or in part" from article 41 and to assign to article 63 cases of partial conflict in which there does not appear to be any intention to terminate the earlier treaty. Paragraph 3 therefore provides, in effect, that, where there is evidence of an intention that the later treaty should govern the whole matter, or where the two treaties are not capable of being applied at the same time, article 41 applies and terminates the earlier treaty, and that in other cases the earlier treaty should apply to the extent that its provisions are not incompatible with those of the later treaty.

(13) Paragraph 4 deals with cases where some, but not all, the parties to an earlier treaty are parties to a later treaty which conflicts with their obligations under the earlier treaty. In such cases the rule *pacta tertiis non nocent* precludes the later treaty from depriving the other parties to the earlier treaty of their rights under that treaty. Then, if the question is viewed simply as one of the priority of the obligations and rights of the interested States and of State responsibility for breach of treaty obligations, the applicable rules appear to be fairly clear. These are the rules formulated in paragraph 4 of this article, under which :

(a) In the relations between two States that are parties to both treaties the later treaty prevails as being a more recent expression of their wills in their mutual relations, i.e., the case is governed by the same rule as in paragraph 3.

(b) In the relations between a State that is a party to both treaties and a State that is a party only to the earlier treaty, the earlier treaty prevails (*pacta tertiis non nocent*).

(c) In the relations between a State that is a party to both treaties and a State that is a party only to the later treaty, the later treaty prevails.

The rules in sub-paragraphs (a) and (b) can hardly be open to doubt, as they are the assumed basis of law upon which many revisions of multilateral treaties, including the United Nations protocols for revising

League of Nations treaties, have taken place.⁷² As to sub-paragraph (c), it seems clear that a State which has entered into both treaties is in principle liable, as between itself and parties to the later treaty, for any failure to perform its obligations under that treaty. Paragraph 5 accordingly reserves the question of responsibility incurred by a State in concluding or applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

(14) The Commission re-examined the question whether all these cases should be dealt with exclusively as questions of priority and of State responsibility for breach of treaty obligations, or whether in some instances the later treaty should be considered void. This question was discussed by the Special Rapporteur at some length in the commentary to article 14 of his second report,⁷³ where he also summarized and examined the views of the two previous Special Rapporteurs. The Commission, without adopting any position on the detailed considerations advanced by the Special Rapporteur, decided to include below, for purposes of information, certain passages in the second report of the Special Rapporteur on the Law of Treaties commenting upon this question.

" . . . Treaties today serve many different purposes : legislation, conveyance of territory, administrative arrangement, constitution of an international organization, etc., as well as purely reciprocal contracts ; and, even if it can be accepted that the illegality of a contract to break a contract is a general principle of law — a point open to question — it does not at all follow that the principle should be applied to treaties infringing prior treaties. The imperfect state of international organization and the manifold uses to which treaties are put seem to make it necessary for the Commission to be cautious in laying down rules which brand treaties as illegal and void. This is not to say that to enter into treaty obligations which infringe the rights of another State under an earlier treaty does not involve a breach of international law involving legal liability to make redress to the State whose rights have been infringed. But it is another thing to say that the second treaty is void for illegality and a complete nullity as between the Parties to it.

"The attitude adopted by the Permanent Court in the *Oscar Chinn* and *European Commission of the Danube* cases hardly seems consistent with the existence in international law of a general doctrine invalidating treaties entered into in violation of the provisions of a prior treaty. In the *Oscar Chinn* case⁷⁴ the earlier treaty was the General Act of Berlin of 1885, which established an international régime for the Congo Basin. That treaty contained no provision authorizing the conclusion of bilateral arrangements between particular parties ; on the contrary it con-

⁷² See "Resolutions of the General Assembly concerning the Law of Treaties" (A/CN.4/154), in *Yearbook of the International Law Commission, 1963*, vol. II, pp. 6-9.

⁷³ *Ibid.*, pp. 55-60, paras. 6-30.

⁷⁴ *P.C.I.J.* (1934), Series A/B, No. 63.

tained a provision expressly contemplating that any modification or improvement of the Congo régime should be introduced by 'common accord' of the signatory States. Nevertheless in 1919 certain of the parties to the Berlin Act, without consulting the others, concluded the Convention of St. Germain whereby, as between themselves, they abrogated a number of the provisions of the Berlin Act, replacing them with a new régime for the Congo. The Court contented itself with observing that, no matter what interest the Berlin Act might have in other respects, the Convention of St. Germain had been relied on by both the litigating States as the source of their obligations and must be regarded by the Court as the treaty which it was asked to apply. Admittedly, the question of the legality of the Convention of St. Germain had not been raised by either party. But the question was dealt with at length by Judges Van Eysinga and Schücking in dissenting opinions⁷⁵ and had, therefore, evidently been debated within the Court. Moreover, these Judges had expressly taken the position that the question of the validity or otherwise of the treaty was not one which could depend on whether any Government had challenged its legality, but was a question of public order which the Court was bound itself to examine *ex officio*. In these circumstances, it is difficult to interpret the Court's acceptance of the Convention of St. Germain as the treaty which it must apply, as anything other than a rejection of the doctrine of the absolute invalidity of a treaty which infringes the rights of third States under a prior treaty.

"The line taken by the Court in its advisory opinion on the *European Commission of the Danube*⁷⁶ was much the same. The Versailles Treaty contained certain provisions concerning the international régime for the Danube, including provisions concerning the composition and powers of the European Commission for that river; at the same time it looked forward to the early conclusion of a further Convention establishing a definitive status for the Danube. A further Convention was duly concluded, the parties to which did not comprise all the parties to the Treaty of Versailles but did include all the States which were concerned in the dispute giving rise to the request for the advisory opinion. In this case the question of the capacity of the States at the later conference to conclude a treaty modifying provisions of the Treaty of Versailles was raised in the arguments presented to the Court, which pronounced as follows:

"In the course of the present dispute, there has been much discussion as to whether the Conference which framed the Definitive Statute had authority to make any provisions modifying either the composition or the powers and functions of the European Commission, as laid down in the Treaty of Versailles, and as to whether the meaning and the scope of the relevant provisions of both the Treaty of Versailles and the Definitive Statute are the same or not. But in the opinion of the Court, as all the Governments

concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Conference under Article 349 of the Treaty of Versailles."⁷⁷

Here again, it is difficult not to see in the Court's pronouncement a rejection of the doctrine of the absolute invalidity of a later treaty which infringes the rights of third States under a prior treaty.⁷⁸ The *Mavrommatis Palestine Concessions* case⁷⁹ was, it is true, a somewhat different type of case, but it also appears to proceed on a basis quite inconsistent with the idea that a later treaty will be void to the extent that it conflicts with an earlier multilateral treaty.

"In its advisory opinion on the Austro-German Customs Union⁸⁰ the Court was only called upon to consider the compatibility of the Protocol of Vienna with the Treaty of St. Germain; it was not asked to pronounce upon the legal consequences in the event of its being found incompatible with the earlier treaty. In two cases concerning Nicaragua's alleged violation of the prior treaty rights of Costa Rica and Salvador by concluding the Bryan-Chamorro Pact with the United States, the Central American Court of Justice considered itself debarred from pronouncing upon the validity of the later treaty in the absence of the United States, over which it had no jurisdiction. It therefore limited itself to holding that Nicaragua had violated her treaty obligations to the other two States by concluding a later inconsistent treaty with the United States.

"International jurisprudence is not perhaps entirely conclusive on the question whether and, if so, in what circumstances, a treaty may be rendered void by reason of its conflict with an earlier treaty. Nevertheless, it seems to the present Special Rapporteur strongly to discourage any large notions of a general doctrine of the nullity of treaties infringing the provisions of earlier treaties,⁸¹ and it accordingly also lends point to the hesitations of Sir G. Fitzmaurice in admitting any cases of nullity where the conflict is with an earlier treaty of a 'mutual reciprocating type'.

"The two cases of nullity tentatively suggested by him,⁸² . . . although they are supported by the Harvard

⁷⁵ *Ibid.*, p. 23.

⁷⁶ The more so as two Judges, Nyholm and Negulesco, took a different line from the Court, holding that any provision of the Statute which conflicted with the Treaty of Versailles would be "null"; *P.C.I.J.* (1927), Series B, No. 14, pp. 73 and 129.

⁷⁷ *P.C.I.J.* (1924), Series A, No. 2.

⁷⁸ *Ibid.* (1931), Series A/B, No. 41.

⁷⁹ See G. Schwarzenberger, *International Law*, pp. 482-487; see also article 18 of the Havana Convention of 1928 on Treaties (Harvard Law School, *Research in International Law*, part III, Law of Treaties, p. 1207) which provided: "Two or more States may agree that their relations are to be governed by rules other than those established in general conventions concluded by them with other States".

⁸⁰ See paragraph 13 of the commentary to article 14 in the present Special Rapporteur's Second Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1963, vol. II, p. 56.

⁷⁵ *Ibid.*, pp. 132-136 and pp. 148-150; see also Judge Hurst's explicit reference to the question, pp. 122-123.

⁷⁶ *P.C.I.J.* (1927), Series B, No. 14.

Research Draft, hardly seem consistent with the attitude of the Court in the *Oscar Chinn* and *European Commission of the Danube* cases. In the former case there was an express stipulation that any modifications of the Berlin Act should be by 'common accord', yet the Court considered it sufficient that no State had challenged the Convention of St. Germain. It does not seem that the Court would have adopted any different view, if the stipulation had taken the form of an express prohibition against contracting out of the treaty otherwise than by 'common accord'. It is also arguable that there is implied in every multilateral treaty an undertaking not to violate its provisions by entering into inconsistent bilateral agreements.⁸³ Accordingly, it hardly seems justifiable to provide, as a special case, that a later treaty shall be void, if it conflicts with a prior treaty which contains an express prohibition against inconsistent bilateral agreements. An undertaking in a treaty not to enter into a conflicting treaty does not, it is thought, normally affect the treaty-making capacity of the States concerned, but merely places them under a contractual obligation not to exercise their treaty-making powers in a particular way. A breach of this obligation engages their responsibility; but the later treaty which they conclude is not a nullity. Similarly, if the general view be adopted — as it was by the previous Special Rapporteur — that a later treaty concluded between a limited group of the parties to a multilateral treaty is not normally rendered void by the fact that it conflicts with the earlier treaty, his second tentative exception to the rule does not appear to justify itself. This exception was cases where the later treaty 'necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty'. The question of nullity does not arise at all unless the later treaty materially conflicts with the obligations of the parties under the earlier treaty. Can it make any difference whether the infringement of those obligations is direct or indirect, if it is the logical effect of the later treaty? Of course, if the later treaty is susceptible of different interpretations or is capable of performance in different ways, it may not be possible to know whether there is any conflict with the earlier treaty until the later treaty has been interpreted and applied by the States concerned. But if it is in fact interpreted and applied in a manner which violates the earlier treaty, can it reasonably be differentiated from a treaty whose terms unambiguously violate the earlier treaty?"

(15) A number of precedents in State practice with regard to the modification of treaties appear to support the relativity of obligations principle applied by the Court in the cases examined in the above passages of the Special Rapporteur's second report. Furthermore, as a previous Special Rapporteur pointed out,⁸⁴ chains of multilateral treaties dealing with the same subject-matter are extremely common, and are based on the

assumed possibility of some of the parties to a treaty concluding a new treaty modifying or superseding the earlier one in their relations *inter se*, while leaving it in force with respect to States which do not become parties to the new treaty. It is the exception rather than the rule for all the parties to the first treaty to become parties to the revising instrument, and until the state of international relations permits a much larger acceptance of majority decisions, the *inter se* principle is likely to remain an essential instrument for bringing treaty situations up to date. Moreover, multilateral treaties creating "interdependent" or "integral" type obligations are the very classes of treaty in which a "chain" of instruments is found, e.g. the Hague Conventions on the rules of warfare, the Geneva Conventions on prisoners of war, etc., the "river" conventions and large numbers of technical conventions. Accordingly, it seemed to the majority of the members of the Commission necessary to be cautious in proclaiming the absolute nullity of any type of agreement purely on the ground of its conflict with an earlier one.

(16) The nullity of a treaty may result from a lack of competence of the parties to conclude it. If in any given case such a lack of competence results from the conclusion of a prior treaty, it is thought that it will be because of the particular subject-matter of the obligations and not because of their "integral" or "interdependent" character alone. "Integral" or "interdependent" obligations may vary widely in importance. Some, although important enough in their own spheres, may deal with essentially technical matters; while others deal with matters of vital public concern, such as the maintenance of peace, nuclear tests, traffic in women and children, or in narcotics. Some of the rules laid down in treaties touching these matters may be of a *jus cogens* character, and the Commission has made specific provision in articles 37 and 45 for the nullity of treaties which conflict with such rules. The majority of the members of the Commission felt that it would be undesirable to go beyond that. Paragraph 4 of the present article is therefore based on the relative priority, rather than the nullity, of the conflicting treaties, and paragraph 5, as stated, reserves all question of State responsibility. To draw up the article in this way is not to condone the conclusion of a treaty the effect of which is to violate obligations under an earlier treaty; nor is it to authorize departures from the rules concerning the consents required for the modification of treaties, as specified in articles 65 to 68. If a State in concluding a treaty sets aside its obligations to another State under an earlier treaty without the latter's consent, it engages its international responsibility for the breach of the earlier treaty. But it is believed that in the present condition of international law the matter is to be resolved on the plane of State responsibility and not of the competence of the offending State.

(17) Accordingly, no exceptions to the rules stated in paragraph 4 are provided, other than the general exceptions of conflict with a rule of *jus cogens* and conflict with an obligation of Members of the United Nations under the Charter. Paragraph 5, however, underlines that even if a later treaty may under these

⁸³ See the general discussion of this point in paragraph (10) above.

⁸⁴ Sir Gerald Fitzmaurice, Third Report, *Yearbook of the International Law Commission, 1958*, vol. II, p. 43, para. 88.

rules be valid and prevail in the relations of the parties to that treaty, it does not mean that they may not be liable under the principle of State responsibility for any breach of their obligations under another treaty which the conclusion or application of the later treaty may involve.

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

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

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

3. Under the conditions specified in article 46, if the disappearance of such means relates to particular clauses of the treaty, the severance of diplomatic relations may be invoked as a ground for suspending the operation of those clauses only.

Commentary

(1) This article contemplates only the situation which arises when diplomatic relations are severed between two parties to a treaty, whether bilateral or multilateral, between which normal diplomatic relations had previously subsisted. For the reasons stated in paragraph 14 of the Commission's report for 1963,⁸⁵ the question of the effect upon treaties of the outbreak of hostilities — which may obviously be a case when diplomatic relations are severed — is not being included in the draft articles on the law of treaties. Similarly, any problems that may arise in the sphere of treaties from the absence of recognition of a government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments, which is excluded from the present discussion for the reasons indicated in paragraph 18 above, or recognition of States and Governments, which the Commission, in 1949, decided to include in its provisional list of topics selected for codification.⁸⁶

(2) There is wide support for the general proposition that the severance of diplomatic relations does not in itself lead to the termination of treaty relationships between the States concerned.⁸⁷ The Commission itself, in 1963, was disinclined to deal with this matter in

the context of the termination of treaties,⁸⁸ and this position corresponds with that of many authorities who do not include the severance of diplomatic relations in their discussion of the grounds for the termination or suspension of the operation of treaties.⁸⁹ That the breaking off of diplomatic relations does not as such affect the operation of the rules of law dealing with other aspects of international intercourse is indeed recognized in article 2, paragraph 3, of the Vienna Convention on Consular Relations, 1963, which provides: "The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations"; while the Vienna Convention on Diplomatic Relations of 1961 contains an article — article 45 — dealing specifically with the rights and obligations of the parties in the event that diplomatic relations are broken off. It therefore seems correct to state that in principle the mere breaking off of diplomatic relations does not of itself affect the continuance in force of the treaty, or the continuance of the obligation of the parties to apply it in accordance with the rule *pacta servanda sunt*.

(3) On the other hand, the effect of the severance of diplomatic relations on the continued operation of the treaty has to be considered in the light of the decisions already reached by the Commission on the termination and suspension of the operation of treaties. In those cases where the execution of the treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties the question of the termination or of the suspension of the operation of the treaty clearly arises.⁹⁰ It is sometimes suggested that in practice difficulties in implementing the treaty could be overcome by using the good offices of another State or by appointing a protecting State. No doubt in many cases this might be so. But a State does not appear to be under any obligation to accept the good offices of another State, or to recognize the nomination of a protecting State in the event of a severance of diplomatic relations; and articles 45 and 46 of the Vienna Convention on Diplomatic Relations of 1961 expressly require the consent of the receiving State in either case. Furthermore, that Convention does not define what is included within the scope of the protection of the interests of a third State. It therefore seems necessary to recognize that cases of supervening impossibility of performance leading to the temporary suspension of the operation of the treaty may occur in consequence of the severance of diplomatic relations.

(4) The Commission was accordingly agreed that, if the severance of the diplomatic relations does not of itself terminate the treaty relationships, it could nevertheless produce cases of supervening impossibility of performance leading to the temporary suspension of the

⁸⁵ *Yearbook of the International Law Commission, 1963*, vol. II, p. 189.

⁸⁶ *Yearbook of the International Law Commission, 1949*, p. 281.

⁸⁷ Cf. Sir Gerald Fitzmaurice, Second Report on the Law of Treaties, article 5 (iii) and para. 34 of the commentary, *Yearbook of the International Law Commission, 1957*, vol. II, p. 42; and Fourth Report on the Law of Treaties, article 4, *Yearbook of the International Law Commission, 1959*, vol. II, p. 54.

⁸⁸ *Yearbook of the International Law Commission, 1963*, vol. I, 697th meeting, p. 161, para. 56.

⁸⁹ Included in this category are C. Rousseau, *Principes généraux du droit international public*, tome I (1944); Academy of Sciences of the USSR, Institute of State and Law, *International Law* (1961); the American Law Institute, Restatement of the Law, *The Foreign Relations Law of the United States*, proposed official draft (1962).

⁹⁰ Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1055-1066; and cf. Lord McNair, *Law of Treaties* (1961), pp. 672-676.

operation of a treaty. Some members of the Commission considered that, since the severance of diplomatic relations indicated an abnormal state of political relations between the two countries concerned, a criterion may also be found in the nature of the treaty; the continued implementation of certain treaties, according to those members, would be incompatible with the severance of diplomatic relations. The view which prevailed, however, was that the situation was analogous to that covered by article 43, paragraph 2, and article 54, of part II, dealing respectively with supervening impossibility of performance and the legal consequences of the suspension of the operation of a treaty.

(5) Paragraph 1 accordingly provides, following the language of article 54, paragraph 1 (b), that the severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty. The expression "severance of diplomatic relations", which appears in article 41 of the Charter and in article 2, paragraph 3, of the Vienna Convention on Consular Relations, 1963, is used in preference to the expression "breaking off of diplomatic relations" found in article 45 of the Vienna Convention of 1961 on Diplomatic Relations. Paragraph 2 provides that the severance of diplomatic relations may be invoked as a ground for suspending the operation of a treaty if, but only if, it results in the disappearance of the means necessary for the application of the treaty — above all where the application of the treaty is dependent upon the existence of the diplomatic channels. Paragraph 3 applies the principle of the separability of treaty provisions as set forth in article 46 of part II, to cases of severance of diplomatic relations. In other words, if the absence of diplomatic relations frustrates the execution only of a particular provision which is separable from the remainder of the treaty under the conditions laid down in that article, it is that provision only the operation of which will be suspended by the severance of diplomatic relations.

Section II: Modification of treaties

Article 65. Procedure for amending treaties

A treaty may be amended by agreement between the parties. If it is in writing, the rules laid down in part I apply to such agreement except in so far as the treaty or the established rules of an international organization may otherwise provide.

Article 66. Amendment of multilateral treaties

1. Whenever it is proposed that a multilateral treaty should be amended in relation to all the parties, every party has the right to have the proposal communicated to it, and, subject to the provisions of the treaty or the established rules of an international organization:

- (a) **To take part in the decision as to the action, if any, to be taken in regard to it;**
- (b) **To take part in the conclusion of any agreement for the amendment of the treaty.**

2. Unless otherwise provided by the treaty or by the established rules of an international organization:

- (a) **An agreement amending a treaty does not bind any party to the treaty which does not become a party to such agreement;**
- (b) **The effect of the amending agreement is governed by article 63.**

3. The application of an amending agreement as between the States which become parties thereto may not be invoked by any other party to the treaty as a breach of the treaty if such party signed the text of the amending agreement or has otherwise clearly indicated that it did not oppose the amendment.

Commentary

(1) A number of the rules contained in articles adopted by the Commission touch one aspect or another of the modification of treaties. The right of denunciation or withdrawal dealt with in articles 38 and 39 furnishes a means by which a party may apply pressure for the amendment of a treaty which it considers to be out of date or defective. The provisions of articles 43 and 44 regarding the termination of treaty clauses by reason of a supervening impossibility of performance or a fundamental change of circumstances may, under the principle of separability laid down in article 46, have the effect of modifying a treaty. Article 58 protects a State from having its rights under a treaty modified by a later treaty unless it is a party to the later treaty or has consented to the modification in question. Article 61 contemplates that in certain special cases a State not a party to a treaty may be entitled to be consulted with regard to the amendment of particular provisions which create legal rights in its favour. Even more important, however, are articles 41 and 63, which deal with the effect of a later treaty upon an earlier treaty covering the same subject-matter; for this is precisely the situation which exists when a treaty is concluded, either between all or some of the parties to an earlier treaty, for the purpose of amending or modifying the earlier treaty. Article 41 contemplates cases where there is an implied termination of the earlier treaty, while article 63 provides for the relative priority of the treaties as between the parties to them, in cases where the earlier treaty is not to be considered as having been terminated under article 41.

(2) Some of the substantive aspects of the modification of treaties are thus covered by the above-mentioned articles; and, since the means for carrying out the deliberate amendment of a treaty is a new treaty, the procedural aspects are largely covered by the provisions of part I relating to the conclusion, entry into force and registration of treaties. The only question, therefore, for the Commission's consideration was whether there are any rules specifically concerned with the modification of treaties which require to be given a place in the draft articles.

(3) Most jurists appear to take the view that, however desirable it may be for orderly processes for modifying treaties to be developed, the modification of

treaties is still essentially a political process. One modern text-book, for example, states :

"As a question of law, there is not much to be said upon the revision of treaties. It frequently happens that a change in circumstances may induce a Government on political grounds to accede to the request of another Government for the termination of a treaty and for its revision in the light of new circumstances. But, as a matter of principle, no State has a legal right to demand the revision of a treaty in the absence of some provision to that effect contained in that treaty or in some other treaty to which it is a party ; a revised treaty is a new treaty, and, subject to the same limitation, no State is legally obliged to conclude a treaty.

"Accordingly, treaty revision is a matter for politics and diplomacy . . .".⁹¹

A similar emphasis on the political character of the process of the amendment of treaties is to be found amongst members of a Committee of the Institute of International Law which examined the modification of collective treaties in 1960.⁹² Members of this Committee, while stressing the importance of inserting in multilateral treaties appropriate legal provisions to facilitate their future amendment, showed no disposition to recognize any specific rules regarding the process of amendment in international law. The Covenant of the League of Nations provided in Article 19 that the Assembly might "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world". But, although much was said and written during the League period concerning the importance of providing for the peaceful change of out-of-date or burdensome treaties, Article 19 was practically a dead-letter. As to the Charter, if Article 14 contains a general provision empowering the General Assembly to consider measures for the peaceful adjustment of any situation regardless of its origin, there is no mention of the modification of treaties as a specific function of the United Nations.⁹³

(4) Nevertheless, the development of international organization and the tremendous increase in multilateral treaty-making has made a considerable impact on the process of amending treaties. In the first place, the amendment of many multilateral treaties is now a matter which concerns an international organization. This is clearly the case where the treaty is the constituent instrument of an organization or where the treaty, like the international labour conventions, is drawn up within an organization. But it is also to

some extent the case where the treaty is concluded under the auspices of an organization and the secretariat of the organization is made the depositary for executing its procedural provisions. In all these cases the drawing up of an amending instrument is caught up in the machinery of the organization or in the functions of the depositary. As a result, the right of each party to be consulted with regard to the amendment or revision of the treaty is largely safeguarded. In the second place, the proliferation of multilateral treaties has led to an increased awareness of the importance of making provision in advance, in the treaty itself, for the possibility of its future amendment.⁹⁴ In the third place, the growth of multilateral treaties having a very large number of parties has made it virtually impossible to limit the amending process to amendments brought into force by an agreement entered into by all the parties to the original treaty ; and has led to an increasing practice, especially in the case of technical conventions, of bringing amending agreements into force as between those States willing to accept the amendment while at the same time leaving the existing régime in force with respect to the other parties to the earlier treaty.⁹⁵ Thus, in 1906 the Geneva Convention of 1864 for the Amelioration of the Condition of Wounded in Armies in the Field was revised by a new Convention which expressly provided that, when duly ratified, it should supersede the 1864 Convention in the relations between the contracting States, but that the 1864 Convention should remain in force in the relations of parties to that Convention who did not ratify the new Convention. A similar provision was inserted in the Hague Convention of 1907 on the Laws and Customs of War on Land, which revised the earlier Convention of 1899. There are numerous later examples of the same technique, notably the United Nations protocols revising certain League of Nations conventions.

(5) Some treaties contain clauses for the amendment and clauses for the revision of treaties,⁹⁶ the former term being used for changing individual provisions of the treaty and the latter for a general review of the whole treaty. If this phraseology has a certain convenience, it is not one which is found uniformly in State practice, and there does not appear to be any difference in the legal process. The Commission therefore considered it sufficient in the present articles to speak of "amendment" as being a term which covers both the amendment of particular provisions and a general review of the whole treaty.⁹⁷ As to the term "revision", the Commission recognized that it is the term commonly found in State practice and that it is also used in some treaties. Nevertheless, having regard to the nuances that became attached to the phrase "revision of treaties" in the period preceding the Second

⁹¹ Lord McNair, *Law of Treaties* (1961), p. 534.

⁹² *Annuaire de l'Institut de droit international*, vol. 49, tome 1 (1961), pp. 229-291.

⁹³ In this connexion it may be recalled that the Commission at its fifteenth session in 1963 suggested that the General Assembly should take the necessary steps to initiate an examination of general multilateral treaties concluded under the auspices of the League of Nations with a view to determining what action might be necessary to adapt them to contemporary conditions. *Yearbook of the International Law Commission, 1963*, vol. II, p. 223, para. 50 (e).

⁹⁴ *Annuaire de l'Institut de droit international*, vol. 49, tome 1 (1961), pp. 95-153.

⁹⁵ E. C. Hoyt, *The Unanimity Rule in the Revision of Treaties* (1959), pp. 28-51.

⁹⁶ Articles 108 and 109 of the Charter ; see also *Handbook of Final Clauses* (ST/LEG/6), pp. 130 and 150.

⁹⁷ Thus, while Chapter XVIII of the Charter is entitled "Amendments", Article 109 speaks of "reviewing" the Charter.

World War, the Commission preferred the term "amendment". The more general term "modification" is used in article 69, which deals with *inter se* agreements, to cover transactions which may vary the treaty between certain of the parties only.

(6) Amendment clauses found in multilateral treaties take a great variety of forms, as appears from the examples given in the *Handbook of Final Clauses*⁹⁸ and from a recent analysis of amendment clauses in a report to the Institute of International Law.⁹⁹ Despite their variety, many amendment clauses are far from dealing comprehensively with the legal aspects of revision.¹⁰⁰ Some, for example, merely specify the conditions under which a proposal for amendment may be put forward, without providing for the procedure for considering it. Others, while also specifying the procedure for considering a proposal, do not deal with the conditions under which an amendment may be adopted and come into force, or do not define the exact effect on the parties to the existing treaty. As to clauses regarding the adoption and entry into force of an amendment, some require its acceptance by all the parties to the treaty, but many admit some form of qualified majority as sufficient. In general, the variety of the clauses makes it difficult to deduce from treaty practice the development of detailed customary rules regarding the amendment of multilateral treaties; and the Commission did not therefore think that it would be appropriate for it to try and frame a comprehensive code of rules regarding the amendment of treaties. On the other hand, it seemed to the Commission desirable that the draft articles should include a formulation of certain general rules concerning the process of amendment and the use of *inter se* agreements. These general rules are contained in the two articles here under consideration and in article 67, while article 68 deals with certain special cases of the modification of treaties.

Article 65

(7) Article 65 specifies the process by which amendment takes place: a treaty may be amended by agreement between the parties and, if the agreement is in writing, the rules laid down in part I apply to it except in so far as the treaty or the established rules of an international organization may otherwise provide. Having regard to the modern practice of amending multilateral treaties by another multilateral treaty which comes into force for those States which ratify it or otherwise become bound by it, the Commission did not specify that the agreement must be between all the parties, as in the case of termination of a treaty under article 40. It felt that the procedure for the adoption of the text and the entry into force of the amending agreement should be governed by articles 6, 23 and 24 of part I. On the other hand, it sought in article 66 to lay down strict rules guaranteeing the right of each party to participate in the process of amendment. The amendment of a treaty is normally effected through the

conclusion of another treaty in written form. However, the Commission recognized that amendment sometimes takes place by oral agreement or by an agreement arrived at tacitly in the application of the treaty. Accordingly, in stating that the rules in part I concerning the conclusion, entry into force and registration of treaties apply to amending agreements, article 65 excepts oral agreements from that provision since they fall outside those rules. It further qualifies that provision "in so far as the treaty or the established rules of an international organization may otherwise provide". This is to take account, first, of the growing practice of including special provisions in multilateral treaties regarding their future amendment and, secondly, of the fact that the constituent instrument or the established practice of many international organizations lays down special rules regarding the amendment either of the constituent instrument or of treaties concluded within the organization.

Article 66

(8) This article deals with the complex process of the amendment of multilateral treaties. The Commission considered whether to formulate any rule specifically for bilateral treaties, but concluded that it would not serve any useful purpose. Where only two parties are involved, the question is essentially one of negotiation and agreement between them, and the rules contained in parts I and II appear to suffice to regulate the procedure and to protect the positions of the individual parties. Moreover, although the Commission was of the opinion that a party is under a certain obligation of good faith to give due consideration to a proposal from the other party for the amendment of a treaty, it felt that such a principle would be difficult to formulate as a legal rule without opening the door to arbitrary denunciations of treaties on the pretended ground that the other party had not given serious attention to a proposal for amendment.

(9) Article 66 is concerned only with the amendment *stricto sensu* of multilateral treaties, that is, with transactions designed to alter provisions of a treaty with respect to all its parties. The intention is to draw up an agreement between the parties generally for modifying the operation of the treaty between them all and not to draw up an agreement between certain parties only for the purpose of modifying its operation between themselves alone. The Commission recognized that an amending instrument drawn up between the parties generally may not infrequently come into force only with respect to some of them, owing to the failure of the others to proceed to ratification, acceptance or approval of the instrument. Nevertheless, it considered that there is an essential difference between amending agreements designed to amend a treaty between the parties generally and agreements designed *ab initio* to modify the operation of the treaty as between certain of the parties only, that is, as *inter se* agreements. Although an amending instrument may equally turn out to operate only between certain of the parties, the Commission considered that a clear-cut distinction must be made between the amendment process *stricto sensu* and

⁹⁸ ST/LEG/6, pp. 130-152.

⁹⁹ E. Giraud, *Annuaire de l'Institut de droit international*, vol. 49, tome 1 (1961), pp. 95-103.

¹⁰⁰ C. W. Jenks, *ibid.*, pp. 254-264.

inter se agreements modifying the operation of the treaty between a restricted circle of the parties. For this reason, *inter se* agreements are dealt with separately in article 67, while the opening words of the present article underline that it is concerned only with proposals to amend the treaty as between all the parties.

(10) Paragraph 1 provides that every party to a multilateral treaty has the right to be informed of any proposal for its amendment, to take part in the decision as to the action, if any, to be taken in regard to the proposal, and to take part in the conclusion of any agreement designed to amend the treaty. Treaties have often in the past been amended or revised by certain of the parties without consultation with the others.¹⁰¹ This has led one recent writer¹⁰² to state: "Though they must be consulted if they are to be bound by a new agreement, the parties to a treaty have no general right to take part in all negotiations respecting revision. The question of which States should be invited to join in discussions of revision is practical rather than legal." Endorsing this conclusion, another authority¹⁰³ has said: "Practice does not indicate that all the parties to an earlier treaty have any general right to take part in negotiations respecting revision, although they cannot be bound by some new treaty concluded without their participation or consent." Another recent writer¹⁰⁴ has independently arrived at a similar conclusion: "Thus, there is no legal obligation to invite all the original parties to a preparatory conference for a new treaty. Such a rule, if it existed, might be a powerful instrument for preventing disputes, but it would also be a formidable factor of stagnation." Although recognizing that instances have been common enough in which individual parties to a treaty have not been consulted in regard to its revision, the Commission does not think that the State practice leads to the conclusion reached by these writers or that the view expressed by them should be the one adopted by the Commission.

(11) If a group of parties has sometimes succeeded in effecting an amendment of a treaty régime without consulting the other parties, equally States left out of such a transaction have from time to time reacted against the failure to bring them into consultation as a violation of their rights as parties.¹⁰⁵ Moreover, there are also numerous cases where the parties have, as a matter of course, all been consulted. A refusal to bring a particular party or parties into consultation has usually been a political decision taken on political grounds and the question whether it was legally justified in the particular case has been left unresolved. The Commission, however, considers that the very nature of the

legal relation established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty. The fact that this has not always happened in the past is not a sufficient reason for setting aside a principle which seems to flow directly from the obligation assumed by the parties to perform the treaty in good faith. There may be special circumstances when it is justifiable not to bring a particular party into consultation, as in the case of an aggressor. But the general rule is believed to be that every party is entitled to be brought into consultation with regard to an amendment of the treaty; and paragraph 1 of article 66 so states the law.

(12) Paragraph 2 (a) is an application to amending instruments of the general rule in article 58 that a treaty does not impose any obligations upon a State not a party to it. Nevertheless, without this paragraph the question might be left open as to whether by its very nature an instrument amending a prior treaty has legal effects for parties to the treaty. Furthermore, the general rule in article 58 is sometimes displaced by a different provision laid down in the original treaty or by a contrary rule applied to treaties concluded within a particular international organization.¹⁰⁶ Article 3 of the Geneva Convention on Road Traffic (1949),¹⁰⁷ for example, provides that any amendment adopted by a two-thirds majority of a conference shall come into force for all parties except those which make a declaration that they do not adopt the amendment. Article 16 of the International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail provides for amendments to come into force for all parties unless it is objected to by at least one-third. Article 52 of the IMCO Constitution contains a provision similar to that in the Road Traffic Convention as does also article 22 of the WHO Constitution for regulations adopted by the WHO Assembly. Paragraph 2 (a) therefore states that an amending instrument is not binding on a party which has not become a party to it unless a different rule is laid down by the treaty or by the established rules of an international organization. Paragraph 2 (b) then provides that the legal effect of amending agreements is governed by the rules regarding the application of treaties having incompatible provisions contained in article 63. Under modern treaty practice, as previously stated, it not infrequently happens that an amending agreement is not ratified by all the parties to the treaty. In that event, there will be two treaties in existence at the same time the provisions of which, *ex hypothesi*, are incompatible and the parties to which are not identical. This is precisely the situation to which paragraphs 4 and 5 of article 63 apply. On the other hand, if all the parties to the treaty become parties also to the amending agreement, then the case will fall under paragraph 3 of that article.

(13) Paragraph 3 deals with the cases, mentioned in previous paragraphs as common in practice, where an agreement, drawn up for the purpose of amending a multilateral treaty generally between the parties, is

¹⁰¹ Well-known examples are the Conventions of 1923, 1928 and 1956 dealing with the status of Tangier, the revision of the Acts of Berlin (1885) and Brussels (1890) by the Treaty of St. Germain, the revision of the Treaty of Lausanne (1923) by the Montreux Convention (1936).

¹⁰² E. C. Hoyt, *The Unanimity Rule in the Revision of Treaties* (1959), p. 250.

¹⁰³ P. C. Jessup, in a foreword to E. C. Hoyt's book, at p. VII.

¹⁰⁴ Jean Leca, *Les Techniques de révision des conventions internationales* (1961), p. 204.

¹⁰⁵ e.g., Italy, the Soviet Union, Sweden, Spain, at various times in regard to the revision of one of the Tangier treaties.

¹⁰⁶ See the *Handbook of Final Clauses* (ST/LEG/6), pp. 135-148; E. Giraud, *Annuaire de l'Institut de droit international*, vol. 49, tome 1 (1961), pp. 139-149.

¹⁰⁷ United Nations, *Treaty Series*, vol. 125, p. 22.

ratified only by some of them and does not come into force for the others. In principle — and this is recognized in article 63 — when States enter into treaties the provisions of which are incompatible with their obligations under a prior treaty, a question of State responsibility may arise. On the other hand, if a party, having been duly consulted under paragraph 1 of the present article concerning a proposal to amend the treaty, afterwards signs the text of the amending agreement or otherwise clearly indicates that it does not oppose the amendment, it would hardly seem to be entitled afterwards to allege that the bringing into force of the amendment between the States accepting it is a breach of the treaty. Some members hesitated to lay down a specific rule on the point suggesting that the point could be left to be settled on the facts of each case by reference to the general principle *Nemo potest venire contra factum proprium*. The majority, however, considered that the inclusion of a specific provision was desirable having regard to the extent and importance of the modern practice under which an agreement amending a multilateral treaty comes into force between the States accepting it, while the original treaty is left in force unamended in the relations of those States which do not become parties to it. Paragraph 3 therefore provides that a party to a treaty which signs the text of an amending instrument or otherwise clearly indicates that it does not oppose the amendment may not afterwards complain of a breach of the treaty because of the amendment being brought into force between the parties ratifying the amending instrument. The object of the provision is to put into the form of a rule what appears to the majority of the Commission to be the existing understanding in regard to the practice in question and to protect in such cases the position of parties which in good faith ratify the amending agreement. The provision does not in any other respect affect the rights of a State which does not accept the amendment. The treaty remains in force for it unamended in its relations with all the original parties, including those who have accepted the amendment. It may still invoke its rights under the earlier treaty. It is precluded only from contesting the right of the other parties to bring the amendment into force as between themselves.

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

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

- (a) **The possibility of such agreements is provided for by the treaty ; or**
- (b) **The modification in question :**
 - (i) **Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations ;**
 - (ii) **Does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole ; and**
 - (iii) **Is not prohibited by the treaty.**

2. Except in a case falling under paragraph 1 (a), the conclusion of any such agreement shall be notified to the other parties to the treaty.

Commentary

(1) This article, as already explained in the commentary to articles 65 and 66, deals not with “ amendment ” of treaties but with “ *inter se* agreements ” ; that is, with agreements entered into by some only of the parties to a multilateral treaty and designed *ab initio* to modify it between themselves alone. Clearly, a transaction in which two or a small group of parties set out to modify the treaty between themselves alone without giving the other parties the option of participating in it is on a somewhat different footing from an amending agreement drawn up between the parties generally, even if ultimately they do not all ratify it. For an *inter se* agreement is more likely to have an aim and effect incompatible with the object and purpose of the treaty. History furnishes a number of instances of *inter se* agreements which substantially changed the régime of the treaty and which overrode the objections of interested States. Nor can there be any doubt that the application, and even the conclusion, of an *inter se* agreement incompatible with the objects and purposes of the treaty may raise a question of State responsibility. Under the present article, therefore, the main issue is the conditions under which *inter se* agreements may be regarded as permissible.

(2) Paragraph 1 (a) first states the obvious principle that an *inter se* agreement is permissible if the possibility of such an agreement was provided for in the treaty ; in other words, if “ contracting out ” was contemplated in the treaty. Then, under paragraph 1 (b), *inter se* agreements are stated to be permissible in other cases only if three conditions are fulfilled. First, the modification must not affect the enjoyment of the rights or the performance of the obligations of the other parties ; that is, it must not prejudice their rights or add to their burdens. Secondly, it must not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty ; for example, an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty would be incompatible with its objects and purposes and not permissible under the present article. Thirdly, the modification must not be one prohibited by the treaty, as for example the prohibition on contracting out contained in article 20 of the Berlin Convention of 1908 for the Protection of Literary Property. These conditions are not alternative, but cumulative. The second and third conditions, it is true, overlap to some extent since an *inter se* agreement incompatible with the objects and purposes of the treaty may be said to be impliedly prohibited by the treaty. Nevertheless, the Commission thought it desirable for the principle contained in the second condition to be stated separately ; and it is always possible that the parties themselves might explicitly forbid any *inter se* modifications, thus excluding even minor modifications not caught by the second condition.

(3) Paragraph 2 seeks to add a further protection

to the parties against illegitimate modifications of the treaty by some of the parties through an *inter se* agreement. Unless the treaty itself provides for the possibility of *inter se* agreements, the conclusion of an *inter se* agreement modifying a multilateral treaty between some only of the parties is required by paragraph 2 to be notified to other parties. The Commission was of the opinion that such notification is necessary if the rights of the other parties are to be adequately safeguarded. It recognized that an amending agreement would in due course have to be registered and published. But in most cases there is a considerable time lag before publication of a treaty in the United Nations *Treaty Series* takes place. Indeed, some members would have preferred paragraph 2 to be so worded as to require notification not of the conclusion of an *inter se* agreement but of any proposal to conclude such an agreement. The Commission, however, felt that timely notification of the conclusion of the agreement was sufficient.

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

The operation of a treaty may also be modified :

(a) **By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible ;**

(b) **By subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions ; or**

(c) **By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.**

Commentary

(1) Article 68 covers three other cases where the modification of a treaty may be brought about by the common consent of the parties. Paragraph (a) is the case where the parties enter into a subsequent treaty, not designed as an amending agreement, but relating to the same subject-matter and to some extent incompatible with the prior treaty. The second treaty, being a later expression of the will of the parties, prevails in accordance with article 63, paragraph 3, with respect to any matter where the provisions of the two treaties are not compatible ; and, by implication, modifies the earlier treaty to the extent of the incompatibility.

(2) Paragraph (b) is the case where the parties by common consent in fact apply the treaty in a manner inconsistent with its provisions. Subsequent practice in the application of a treaty, as stated in paragraph 13 of the commentary to article 69, is decisive as to the interpretation of a treaty when the practice is consistent, embraces all the parties, and shows their common understanding regarding the meaning of the treaty. Equally, a consistent practice, embracing all the parties and establishing their common consent to the application of the treaty in a manner different from that laid down in certain of its provisions, may have

the effect of modifying the treaty. In the *Case concerning the Temple of Preah Vihear*,¹⁰⁸ for example, the boundary line acted on in practice was not reconcilable with the ordinary meaning of the terms of the treaty, and the effect of the subsequent practice was to amend the treaty. Again, in a recent arbitration between France and the United States regarding the interpretation of an Air Transport Services Agreement the Tribunal, speaking of the subsequent practice of the parties, said :

“ This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more : that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim.”¹⁰⁹

And the Tribunal in fact found that the Agreement had been modified in a certain respect by the subsequent practice. Although the line may sometimes be blurred between interpretation and amendment to a treaty through subsequent practice, legally the processes are quite distinct. Accordingly, the effect of subsequent practice in amending a treaty is dealt with in the present article in the section on modification of treaties.

(3) Paragraph (c) is the case where a new rule of customary international law emerges which relates to matters dealt with in the treaty and is binding on all the parties. If a treaty has to be interpreted in the light of the general rules of international law in force at the time of its conclusion in order to establish the meaning of its terms,¹¹⁰ it also has at any given date to be applied in the light of the law in force at that date. This follows from the principle of the so-called inter-temporal law which, in the context of territorial sovereignty, Judge Huber in the *Island of Palmas* arbitration formulated as follows :

“ The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.”¹¹¹

In the law of treaties this means that in the application of a treaty account must at any given time be taken of the “ evolution of the law ”. A particular instance of the working of this principle already appears in article 45 of part II adopted at the fifteenth session under which a treaty or some of its provisions may become void in consequence of the emergence of a new peremptory norm of international law. Paragraph (c) of the present article formulates the general rule under which a treaty may be modified by the emergence

¹⁰⁸ *I.C.J. Reports 1962*, p. 6 ; and see Sir Gerald Fitzmaurice, “ The Law and Procedure of the International Court of Justice, 1951-54 ”, *British Year Book of International Law*, vol. 33 (1957), pp. 252-253.

¹⁰⁹ Decided at Geneva on 22 December 1963, the arbitrators being R. Ago (President), P. Reuter and H. P. de Vries (mimeographed text of decisions of the Tribunal, pp. 104-105).

¹¹⁰ See article 69, paragraph 1 (b).

¹¹¹ *Reports of International Arbitral Awards*, vol. II, p. 845.

of a new rule of customary law affecting the scope or operation of its provisions.

Section III. Interpretation of treaties

Article 69. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term :

(a) In the context of the treaty and in the light of its objects and purposes ; and

(b) In the light of the rules of general international law in force at the time of its conclusion.

2. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble and annexes, any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion.

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

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

(b) Any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation.

Article 70. Further means of interpretation

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

(a) Leaves the meaning ambiguous or obscure ; or

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

Article 71. Terms having a special meaning

Notwithstanding the provisions of paragraph 1 of article 69, a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning.

Commentary

(1) The utility and even the existence of rules of international law governing the interpretation of treaties have sometimes been questioned.¹¹² One commentary on the law of treaties, for example, states :

“ It seems evident that the prescription in advance of hard and fast rules of interpretation . . . contains

¹¹² See Harvard Law School, *Research in International Law*, part III, Law of Treaties (article 19), p. 939.

an element of danger which is to be avoided. In their context . . . the rules . . . seem eminently reasonable and convincing. The difficulty, however, is that, detached from that context, they still retain a certain fictitious ring of unassailable truth, and tend, as do all neatly turned maxims, to imbed themselves in the mind. The resulting danger is that the interpreter, well versed in such rules, may approach his task with a mind partly made up rather than with a mind open to all evidence which may be brought before him. This is to misconceive the function of interpretation.

“ The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some pre-existing specific intention of the parties with respect to every situation arising under a treaty . . . In most instances . . . interpretation involves giving a meaning to a text — not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgement to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve. This is obviously a task which calls for investigation, weighing of evidence, judgement, foresight, and a nice appreciation of a number of factors varying from case to case. No canons of interpretation can be of absolute and universal utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled.”¹¹³

Similarly, a recent book on the law of treaties states :

“ The many maxims and phrases which have crystallized out and abound in the text books and elsewhere are merely *prima facie* guides to the intention of the parties and must always give way to contrary evidence of the intention of the parties in a particular case.”¹¹⁴

The first two¹¹⁵ of the Commission's Special Rapporteurs on the law of treaties in their private writings also expressed doubts as to the existence in international law of any technical rules for the interpretation of treaties.

(2) Another group of writers,¹¹⁶ although they may have reservations as to the obligatory character of certain of the so-called canons of interpretation, have shown less hesitation in recognizing the existence of some general rules for the interpretation of treaties. To

¹¹³ *Ibid.*, p. 946.

¹¹⁴ Lord McNair, *Law of Treaties* (1961), p. 366.

¹¹⁵ J. L. Briery, *Law of Nations* (6th edition, 1963), p. 325. Sir Hersch Lauterpacht, *Rapport à l'Institut de droit international, Annuaire de l'Institut*, vol. 43, tome 1 (1950), pp. 336-374.

¹¹⁶ For example, C. Rousseau, *Principes généraux du droit international public* (1944), pp. 676 *et seq*; Sir E. Beckett, *Annuaire de l'Institut de droit international*, vol. 43, tome 1 (1950), pp. 435-444; V. M. Chourchalov, *Fundamental Questions in the Theory of International Law* (1959), pp. 382-402; C. De Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), pp. 50 *et seq*.

this group belongs Sir Gerald Fitzmaurice, the previous Special Rapporteur on the law of treaties, who in his private writings¹¹⁷ deduced six principles from the jurisprudence of the Permanent Court and the International Court which he regarded as the major principles of interpretation. In 1956, the Institute of International Law¹¹⁸ adopted a resolution in which it formulated, if in somewhat cautious language, two articles containing a small number of basic principles of interpretation.

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

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

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

(c) The declared or apparent objects and purposes of the treaty. Some¹¹⁹ place the main emphasis on the intentions of the parties and in consequence admit a liberal recourse to the *travaux préparatoires* and to other evidence of the intentions of the contracting States as means of interpretation. Some¹²⁰ give great weight to the objects and purposes of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. The majority of modern writers, however, emphasize the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation. It is this view which is reflected in the 1956 resolution of the Institute of International Law mentioned in the previous paragraph.

(4) The great majority of cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation.¹²¹ In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of

statutes and contracts.¹²² Treaty interpretation is, of course, equally part of the everyday work of Foreign Ministries.

(5) Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But, as appears from the passages cited in paragraph (1) above, the question posed by jurists is rather as to the non-obligatory character of many of these principles and maxims ; and it is a question which arises in national systems of law no less than in international law. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document ; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.

(6) Any attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable for the reasons given in the passage cited in paragraph (1). Accordingly the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties. Admittedly, the task of formulating even these rules is not easy, but the Commission considered that there were cogent reasons why it should be attempted. First, the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning. Secondly, having regard to doctrinal differences concerning methods of interpretation, it seems desirable that the Commission should take a clear position in regard to the role of the text in treaty interpretation. Thirdly, a number of articles provisionally adopted by the Commission contain phrases such as " unless a contrary intention appears from the treaty " and the effect of these reservations cannot be properly appreciated if no indication is given in the draft articles as to whether this intention must appear on the face of the text or whether it may be established by reference to other

¹¹⁷ " The Law and Procedure of the International Court of Justice 1951-54 ", *British Year Book of International Law*, vol. 33 (1957), pp. 210-212.

¹¹⁸ *Annuaire de l'Institut de droit international*, vol. 46 (1956), p. 359.

¹¹⁹ For example, Sir Hersch Lauterpacht, *Annuaire de l'Institut de droit international*, vol. 43, tome I (1950), pp. 377-402.

¹²⁰ For example, L. Cavaré, *Le droit international public positif*, 2nd edition (1962), vol. II, p. 112 ; Judge Alvarez in the *Reservations to the Genocide Convention Case*, *I.C.J. Reports 1951*, p. 53.

¹²¹ See Sir Gerald Fitzmaurice, *British Year Book of International Law*, vol. 28 (1951), p. 1, and vol. 33 (1957), p. 203 ; C. Rousseau, *Principes généraux du droit international public* (1944), pp. 676-764 ; and V. D. Degan, *L'interprétation des accords en droit international* (1963), pp. 76-148.

¹²² See G. Hackworth, *Digest of International Law*, vol. 5, pp. 232-234 ; C. De Visscher, *Problèmes d'interprétation judiciaire* (1963), pp. 84-92 and 104-113 ; Lord McNair, *Law of Treaties* (1961), chapters 20-22.

evidence. In addition, the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties.

(7) The Commission adopted three articles dealing generally with the interpretation of treaties, namely articles 69-71, the texts of which are set out at the head of the present commentary,¹²³ and two further articles dealing with treaties which have plurilingual texts (see articles 72 and 73 below). Some writers in their exposition of the principles of treaty interpretation distinguish between law-making and other treaties.¹²⁴ It is true that the character of a treaty may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case.¹²⁵ But for the purpose of formulating the general rules of interpretation the Commission did not think it necessary to make any other distinction between different categories of treaties other than that between unilingual and plurilingual treaties.¹²⁶

(8) In examining the above-mentioned general rules the Commission considered whether the principle expressed in the maxim *Ut res magis valeat quam pereat*, often referred to as the principle of effective interpretation, should be formulated as one of them.¹²⁷ It recognized that in certain circumstances recourse to the principle may be appropriate and that it has sometimes been invoked by the Court. In the *Corfu Channel* case,¹²⁸ for example, in interpreting a Special Agreement the Court said :

“ It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.”

And it referred to a previous decision of the Permanent Court to the same effect in the *Free Zones* case.¹²⁹ The Commission, however, took the view that, in so far as the maxim *Ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 69, paragraph 1, which requires that a treaty shall be interpreted in good faith in accordance

¹²³ See also the formulation of general rules of treaty interpretation by the Institute of International Law, *Annuaire*, vol. 46 (1956), pp. 364-365, and by Sir Gerald Fitzmaurice, *British Year Book of International Law*, vol. 33 (1957) pp. 211-212.

¹²⁴ For example C. Rousseau, *Principes généraux du droit international public* (1944), p. 677.

¹²⁵ For example, the *contra proferentem* principle or the use of *travaux préparatoires*.

¹²⁶ For the special problem of the effect of the subsequent practice of an international organization on the interpretation of its constituent instrument, see paragraph (14) of the present commentary.

¹²⁷ See generally C. Rousseau, *Principes généraux du droit international public* (1944), pp. 680-688 ; V. D. Degan, *L'interprétation des accords en droit international* (1963), pp. 103-106 ; C. De Visscher, *op. cit.*, pp. 84-92.

¹²⁸ *I.C.J. Reports* 1949, p. 24.

¹²⁹ *P.C.I.J.* (1929), Series A, No. 22, p. 13 ; cf. *Acquisition of Polish Nationality*, *P.C.I.J.* (1923), Series B, No. 7, pp. 16-17 and *The Exchange of Greek and Turkish Populations*, *P.C.I.J.* (1925), Series B, No. 10, p. 25.

with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its objects and purposes. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an “ extensive ” or “ liberal ” interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty.¹³⁰ Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of “ effective interpretation ”. The Court, which has by no means adopted a narrow view of the extent to which it is proper to imply terms in treaties, has nevertheless insisted that there are definite limits to the use which may be made of the principle *Ut res magis valeat* for this purpose. In the *Interpretation of the Peace Treaties* Opinion¹³¹ it said :

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

And it emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty. The draft articles do not therefore contain any separate provision regarding the principle of “ effective interpretation ”.

Article 69

(9) This article is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties ; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this — the textual — approach to treaty interpretation, despite its first Rapporteur's¹³² strong advocacy of a more subjective, “ intentions of the parties ”, approach. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find expression in the proceedings of the Institute.¹³³ The textual approach, on the

¹³⁰ See C. De Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), pp. 87-88 ; Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), p. 229.

¹³¹ *I.C.J. Reports* 1950, p. 229.

¹³² Sir Hersch Lauterpacht. At the final discussion of the subject in 1956 Sir Hersch Lauterpacht, having been elected to the Court, was replaced by Sir Gerald Fitzmaurice who, in common with the majority of the members favoured the textual approach.

¹³³ See in particular Sir E. Beckett, *Annuaire*, vol. 43, tome 1 (1950), pp. 435-444 ; Max Huber, *Annuaire*, vol. 44, tome 1 (1952), pp. 198-202 ; and the deliberations in *Annuaire, ibid.*, tome 2, pp. 369-382.

other hand, commends itself by the fact that, as one authority¹³⁴ has put it, " *le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties*". Moreover, the jurisprudence of the Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law.¹³⁵ In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by necessary implication, contain.¹³⁶

(10) Paragraph 1 contains four separate principles. The first — interpretation in good faith — flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith: the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its objects and purposes. These principles have repeatedly been affirmed by the Court.¹³⁷ The present Court in its Opinion on the *Competence of the General Assembly regarding admission to the United Nations* said: ¹³⁸

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

And the Permanent Court in an early Opinion¹³⁹ stressed that the context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole:

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

Again the Court has more than once had recourse to the statement of the objects and purposes of the treaty

in the preamble in order to interpret a particular provision.¹⁴⁰

(11) The fourth principle is the application to treaties of the "inter-temporal" law which, in the words of M. Huber in the *Island of Palmas* arbitration, requires that:

"... a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."¹⁴¹

Instances of the application of this principle to treaties are to be found in the *Grisbadarna*¹⁴² and in the *North Atlantic Coast Fisheries*¹⁴³ arbitrations. In the former the land boundary between Norway and Sweden had been established by treaty in the seventeenth century. Disputes having arisen in the present century concerning certain fisheries, it became necessary to delimit the course of the boundary seaward to the limit of territorial waters. The Tribunal rejected the median-line and thalweg principles for delimiting the maritime boundary on the ground that these principles had not been recognized in the international law of the seventeenth century. Instead, it adopted a line perpendicular to the general direction of the land as being more in accord with the "notions of law prevailing at that time". Similarly in the *North Atlantic Coast Fisheries* arbitration the Treaty of Ghent of 1818 had excluded United States nationals from fishing in Canadian "bays", and thereafter disputes arose as to what exactly was the extent of the waters covered by the word "bays". The Tribunal, in interpreting the language of the 1818 Treaty, excluded from its consideration the so-called ten-mile rule for bays¹⁴⁴ which had not made its appearance in international practice until twenty-one years after the conclusion of the treaty.¹⁴⁵ Again when called upon to construe the expression "any dispute" in treaties of 1787 and 1836 in the *Rights of Nationals of the USA in Morocco*¹⁴⁶ case, the International Court said: "... it is necessary to take into account the meaning of the word 'dispute' at the times when the two treaties were concluded". Accordingly, paragraph 1 (b) provides that the meaning to be given to the terms of a treaty is to be appreciated in the light of the general rules of international law in force at the time of the conclusion of the treaty. Some members of the Commission, while accepting that the initial meaning of the terms of a treaty is governed by the law

¹³⁴ Max Huber, *Annuaire de l'Institut de droit international*, vol. 44, tome 1 (1952), p. 199.

¹³⁵ See examples in V. D. Degan, *L'interprétation des accords en droit international* (1963), pp. 79-83; and Fitzmaurice in *British Year Book of International Law*, vol. 28 (1951), pp. 10-11 and vol. 33 (1957), pp. 212-214.

¹³⁶ For example, in the *United States Nationals in Morocco Case*, *I.C.J. Reports 1952*, pp. 196 and 199.

¹³⁷ See instances cited in V. D. Degan, *L'interprétation des accords en droit international* (1963), pp. 96-98; and in *British Year Book of International Law*, vol. 28 (1951), pp. 10-11 and 18.

¹³⁸ *I.C.J. Reports 1950*, p. 8.

¹³⁹ *Competence of the ILO to Regulate Agricultural Labour*, *P.C.I.J. (1922)*, Series B, Nos. 2 and 3, p. 23; and see Lord McNair, *Law of Treaties* (1961), pp. 381-382.

¹⁴⁰ For example, *United States Nationals in Morocco Case*, *I.C.J. Reports 1952*, pp. 183-184 and pp. 197-198.

¹⁴¹ *Reports of International Arbitral Awards*, vol. II, p. 845.

¹⁴² *Ibid.*, vol. XI, pp. 159-160. English translation in J. B. Scott, *The Hague Court Reports* (1916), p. 129.

¹⁴³ *Ibid.*, vol. XI, p. 196.

¹⁴⁴ "So-called" because in the *Anglo-Norwegian Fisheries* case the International Court rejected the pretensions of this "rule" to be a customary rule of international law; *I.C.J. Reports 1951*, p. 131.

¹⁴⁵ Cf. the *Abu Dhabi Arbitration (International Law Reports, 1951, p. 144)*, where Lord Asquith, as arbitrator, refused to interpret an oil concession granted in 1938 by reference to the continental shelf doctrine which only made its appearance in international law a few years later.

¹⁴⁶ *I.C.J. Reports 1952*, p. 189.

in force at the time of its conclusion, considered that the interpretation of the treaty may be affected by changes in the general rules of international law; and they would have preferred to omit the words "in force at the time of its conclusion". The majority, however, considered that the effect of changes in the law upon a treaty is rather a question of the application of the new law to the treaty — a question of the modification of the rule laid down in the treaty by a later legal rule rather than one of the interpretation of the terms. They recognized that the "scope" of a term may sometimes be altered by a change in the law. For example, if it appears from a treaty that the parties have used terms such as "bay" or "piracy" intending them to have whatever meaning they may be given in general international law, a change in the law will affect the scope of the terms. But the majority considered that whether a change in the law will have this effect depends on the initial intention of the parties in using the terms and that the effect of the change in the law should be regarded as a matter of the application of the law rather than of a rule of interpretation. They preferred in the present article to confine the statement of the rules of interpretation to those dealing with the establishment of the initial meaning of the terms. They felt that the question of the impact of a change in the general rules of international law upon a treaty is sufficiently covered by article 68, paragraph 3, which deals with the modification of treaties by the emergence of new rules of international law.

(12) Paragraph 2 seeks to define what is comprised in the "context of the treaty as a whole" for the purposes of interpretation. This is important not only for the general application of the rules of interpretation but also, as pointed out above, for indicating the scope of the term "unless it appears from the treaty" which is found, in one form or another, quite frequently in these draft articles. That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment; and this would seem also to be the case with documents which are specifically made annexes to the treaty.¹⁴⁷ More difficult is the question how far other documents connected with the treaty are to be regarded as forming part of the "context of the treaty" for the purposes of interpretation. Paragraph 2 proposes that documents which should be so regarded are agreements and instruments related to the treaty and reached or drawn up in connexion with its conclusion. This is not to suggest that these documents are necessarily to be considered as an integral part of the treaty. Whether they are an actual part of the treaty depends on the intention of the parties in each case.¹⁴⁸ What is proposed in paragraph 2 is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.

¹⁴⁷ See C. Rousseau, *Principes généraux du droit international public* (1944), pp. 717-719.

¹⁴⁸ *Ambatielos Case (Preliminary Objection)*, *I.C.J. Reports* 1952, pp. 43 and 75.

(13) Paragraph 3 specifies as further authentic elements of interpretation: (a) agreements between the parties regarding the interpretation of the treaty, and (b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation. As to agreements, a question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision is or is not intended to constitute an agreed basis for its interpretation.¹⁴⁹ But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case¹⁵⁰ the Court said: "... the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty ...". Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation. As to subsequent practice in the application of the treaty, its importance as an element of interpretation is obvious;¹⁵¹ for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.¹⁵² Recourse to it as a means of interpretation is well established in the jurisprudence of international tribunals.¹⁵³ In its opinion on the *Competence of the ILO*¹⁵⁴ the Permanent Court said:

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

At the same time, the Court¹⁵⁵ referred to subsequent practice in confirmation of the meaning which it had deduced from the text and which it considered to be unambiguous. Similarly, in the *Corfu Channel* case,¹⁵⁶ the International Court said:

¹⁴⁹ Cf. the *Conditions of Admission to Membership* case, *I.C.J. Reports* 1948, p. 63.

¹⁵⁰ (Preliminary Objection), *I.C.J. Reports* 1952, p. 44.

¹⁵¹ See Lord McNair, *Law of Treaties* (1961), chapter 24; C. De Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), pp. 121-127.

¹⁵² See Sir Gerald Fitzmaurice, *British Year Book of International Law*, vol. 33 (1957), p. 223. In the *Russian Indemnity* case the Permanent Court of Arbitration said: "... l'exécution des engagements est, entre Etats, comme entre particuliers, le plus sûr commentaire du sens de ces engagements." *Reports of International Arbitral Awards*, vol. XI, p. 433. ["... the fulfilment of engagements between States, as between individuals, is the surest commentary on the effectiveness of those engagements." English translation from J. B. Scott, *The Hague Court Reports* (1916), p. 302].

¹⁵³ See examples in Lord McNair, *Law of Treaties* (1961), chapter 24; C. De Visscher, *op. cit.*, pp. 121-127 and V. D. Degan, *L'interprétation des accords en droit international* (1963), pp. 130-132.

¹⁵⁴ *P.C.I.J.* (1922), Series B, No. 2, p. 39; see also *Interpretation of the Treaty of Lausanne*, *P.C.I.J.* (1925), Series B, No. 2, p. 24; the *Brazilian Loans* case, *P.C.I.J.* (1929), Series A, Nos. 20-21, p. 119.

¹⁵⁵ *Ibid.*, pp. 40-41.

¹⁵⁶ *I.C.J. Reports* 1949, p. 25.

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

The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms. The practice of an individual State may, it is true, have special relevance when it relates to the performance of an obligation which particularly concerns that State. Thus in the *Status of South West Africa* Opinion¹⁵⁷ the Court said:

"Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."

But, in general, the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement. For this reason the Commission considered that subsequent practice establishing the common understanding of all the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements. The practice of individual States in the application of a treaty, on the other hand, may be taken into account only as one of the "further" means of interpretation mentioned in article 70.

(14) In examining the question of subsequent practice the Commission noted that certain of the cases in which the Court had had recourse to this means of interpretation have concerned the interpretation of the constitutions of international organizations,¹⁵⁸ as for example in its recent Opinion on *Certain Expenses of the United Nations*,¹⁵⁹ where it made large use of the subsequent practice of organs of the United Nations as a basis for its findings on a number of points. The problem of the effect of the practice of organs of an international organization upon the interpretation of its constituent instrument raises the question how far individual Member States are bound by the practice. Although the practice of the organ as such may be consistent, it may have been opposed by individual Members or by a group of Members which have been outvoted.¹⁶⁰ This special problem appears to relate to the law of international organizations rather than to the general law of treaties, and the Commission did

not consider that it would be appropriate to deal with it in the present articles.

Article 70

(15) The International Court, and the Permanent Court before it, have frequently stated that where the ordinary meaning of the words is clear and makes sense in the context, there is no occasion to have recourse to other means of interpretation. Many of these statements relate to the use of *travaux préparatoires*. The passage from the Court's Opinion on the *Competence of the General Assembly regarding Admission to the United Nations* cited in paragraph (10) above is one example, and another is its earlier Opinion on *Admission of a State to the United Nations*:¹⁶¹

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

Similarly, the Court has refused to apply the maxim *Ut res magis valeat* and the principle favouring restrictive interpretation when to do so would run counter to a clear meaning.¹⁶² The Commission accordingly considered whether it should limit recourse to means of interpretation outside those mentioned in article 69 to cases where interpretation of the treaty in accordance with article 69 gives either no clear meaning or a meaning which is wholly unreasonable. As already indicated, the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation. It formulated article 69 on that basis, making the ordinary meaning of the terms, the context of the treaty, its objects and purposes, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty. Nevertheless, it felt that it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extensive means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in article 69 has disclosed no clear or reasonable meaning. In practice, international tribunals, as well as States and international organizations, have recourse to subsidiary means of interpretation, more especially *travaux préparatoires*, for the purpose of verifying or confirming the meaning that appears to result from an interpretation of the treaty in accordance with article 69. The Court itself has on numerous occasions referred to the *travaux préparatoires* for the purpose of confirming its conclusions as to the "ordinary" meaning of the text. For example, in its opinion on the *Interpretation of the Convention of*

¹⁵⁷ *I.C.J. Reports 1950*, pp. 135-136.

¹⁵⁸ For example, *The Competence of the ILO*, Opinions, *P.C.I.J. (1922)*, Series B, Nos. 2 and 3, pp. 38-40; *Competence of the General Assembly regarding Admission*, *I.C.J. Reports 1950*, p. 9; *Composition of the Maritime Safety Committee of IMCO*, *I.C.J. Reports 1960*, pp. 167 *et seq.*

¹⁵⁹ *I.C.J. Reports 1962*, pp. 157 *et seq.*

¹⁶⁰ This question is examined in the separate opinion of Judge Spender in the *Expenses* case (pp. 187 *et seq.*); and also, although less directly, by Judge Fitzmaurice (pp. 201 *et seq.*).

¹⁶¹ *I.C.J. Reports 1948*, p. 63.

¹⁶² For example, *The Interpretation of the Peace Treaties* (second phase), *I.C.J. Reports 1950*, p. 229; the *Wimbledon*, *P.C.I.J. (1923)*, Series A, No. 1, pp. 24-25.

1919 concerning the Work of Women by Night¹⁶³ the Permanent Court said :

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

(16) Accordingly, the Commission decided to specify in article 70 that recourse to further means of interpretation, including preparatory work, is permissible for the purpose of verifying or confirming the meaning resulting from the application of article 69 and for the purpose of determining the meaning when the interpretation according to article 69 :

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

The word “ further ” emphasizes that article 70 does not provide for alternative, autonomous means of interpretation but only for means to supplement an interpretation governed by the principles contained in article 69. Sub-paragraph (a) admits the use of these means for the purpose of determining the meaning in cases where there is no clear meaning. Sub-paragraph (b) does the same in cases where interpretation according to article 69 gives a meaning which is “ manifestly absurd or unreasonable in the light of the objects and purposes of the treaty ”. The Court has recognized¹⁶⁴ this exception to the rule that the ordinary meaning of the terms must prevail. On the other hand, the comparative rarity of the cases in which it has done so and the language which it used in the most recent instance — the *South-West Africa Cases* — suggest that it regards this exception as limited to cases where the absurd or unreasonable character of the “ ordinary ” meaning is manifest. In the *South-West Africa Cases*,¹⁶⁵ dealing with the contention that today there is no such thing as “ another Member for the League ” for the purposes of the South West Africa Mandate, the Court said :

“ This contention is claimed to be based upon the natural and ordinary meaning of the words employed in the provision. But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.”

The Commission considered that the exception must be strictly limited, if it is not to weaken unduly the authority of the ordinary meaning of the terms. Sub-paragraph (b) is accordingly confined to cases where interpretation under article 69 gives a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty.

¹⁶³ P.C.I.J. (1932), Series A/B, No. 50, p. 380 ; cf. the *Serbian and Brazilian Loans cases*, P.C.I.J. (1929), Series A, Nos. 20-21, p. 30.

¹⁶⁴ For example, *Polish Postal Service in Danzig*, P.C.I.J. (1925), Series B, No. 11, p. 39 ; *Competence of the General Assembly regarding Admission to the United Nations*, I.C.J. Reports 1950, p. 8.

¹⁶⁵ I.C.J. Reports 1962, pp. 335-336.

(17) The Commission did not think that anything would be gained by trying to define *travaux préparatoires* ; indeed, to do so might only lead to the possible exclusion of relevant evidence.¹⁶⁶ It also considered whether, in regard to multilateral treaties, the article should authorize the use of *travaux préparatoires* only as between States which took part in the negotiations or, alternatively, only if they have been published. In the *River Oder Commission Case* the Permanent Court excluded from its consideration the *travaux préparatoires* of certain provisions of the Treaty of Versailles on the ground that three of the States before the Court had not participated in the conference which prepared the Treaty of Versailles ; and in making this ruling it expressly refused to differentiate between published and unpublished documents. The Commission doubted, however, whether this ruling reflects the actual practice regarding the use of *travaux préparatoires* in the case of multilateral treaties that are open to accession by States which did not attend the conference at which they were drawn up.¹⁶⁷ Moreover, the principle behind the ruling did not seem to be so compelling as might appear from the language of the Court in that case. A State acceding to a treaty in the drafting of which it did not participate is perfectly entitled to request to see the *travaux préparatoires*, if it wishes, before acceding. Nor did the rule seem likely to be practically convenient, having regard to the many important multilateral treaties open generally to accession. These considerations apply to unpublished, but accessible, *travaux préparatoires* as well as to published ones ; and in the case of bilateral treaties or “ closed ” treaties between small groups of States, unpublished *travaux préparatoires* will usually be in the hands of all the parties. Accordingly, the Commission concluded that it should not include any special provision in the article regarding the use of *travaux préparatoires* in the case of multilateral treaties.

Article 71

(18) Article 71 admits as an exception to the ordinary meaning rule laid down in article 69 cases where it is established conclusively that the parties employed a particular term. Some members doubted the need to include a special provision on this point, although they recognized that parties to a treaty not infrequently employ a term with a technical or other special meaning. They pointed out that technical or special use of the term normally appears from the context and the technical or special meaning becomes, as it were, the ordinary meaning in the particular context. Other members, while not disputing that the technical or special meaning of the term may often appear from the context, considered that there was a certain utility in laying down a specific rule on the point, if only to emphasize that the burden of proof lies on the party invoking the special meaning of the term, and the strictness of the proof required. They pointed out that the exception had been referred to more than once by

¹⁶⁶ P.C.I.J. (1929), Series A, No. 23.

¹⁶⁷ See S. Rosenne, “ *Travaux préparatoires* ”, *International and Comparative Law Quarterly*, vol. 12 (1963), p. 1378-1383.

the Court. In the *Legal Status of Eastern Greenland* case, for example, the Permanent Court had said :

"The geographical meaning of the word 'Greenland' i.e., the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention."¹⁶⁸

And the present Court in its *Admission to the United Nations* Opinion both recognized the rule and the strictness of the proof required :

"To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established."¹⁶⁹

The present article thus reflects the position taken by the Court on this point.

Article 72. Treaties drawn up in two or more languages

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.

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

- (a) The parties so agree ; or
- (b) The established rules of an international organization so provide.

Article 73. Interpretation of treaties having two or more texts

1. The different authentic texts of a treaty are equally authoritative in each language, unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.

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

Commentary

(1) The phenomenon of treaties drawn up in two or more languages has become increasingly familiar since 1919 and, with the advent of the United Nations, general multilateral treaties drawn up, or finally ex-

pressed, in five different languages have become not uncommon.¹⁷⁰ When a treaty is plurilingual, there may or may not be a difference in the status of the different language versions for the purposes of interpretation. Each of the versions may have the status of an authentic text of the treaty ; or one or more of them may be merely an "official text", that is, a text which has been signed by the negotiating States but not accepted as authoritative ;¹⁷¹ or one or more of them may be merely an "official translation", that is, a translation prepared by the parties or an individual government or by an organ of an international organization. Whenever there are two or more texts, a question may arise either as to what is the effect of a plurality of authentic texts on the interpretation of the treaty, or as to what recourse may be had to an official text or translation as an aid to the interpretation of the authentic text or texts of the treaty.¹⁷²

Article 72

(2) The first need clearly is to establish which of the different language versions are to be regarded as authentic texts and it is this point with which article 72 deals. Today the majority of more formal treaties contain an express provision determining the status of the different language versions. If there is no such provision, it seems to be generally accepted that each of the versions in which the text of the treaty was "drawn up" is to be considered authentic, and therefore authoritative for purposes of interpretation.¹⁷³ In other words, the general rule is the equality of the languages and the equal authenticity of the texts in the absence of any provision to the contrary. In formulating this general rule, paragraph 1 refers to languages in which the text of the treaty has been "authenticated" rather than "drawn up" or "adopted". This is to take account of article 7 of the present articles in which the Commission recognized "authentication of the text" as a distinct procedural step in the conclusion of a treaty even although, in the case of authentication by signature, the act of authentication may also have other functions.¹⁷⁴

(3) The proviso "except in so far as a different rule may be agreed upon by the parties" is necessary for two reasons. First, treaties sometimes provide expressly that only certain texts are to be authoritative, as in the case of the Peace Treaties concluded after the Second World War which make the French, English and Russian texts authentic while leaving the Italian,

¹⁷⁰ The Commission requested the Secretariat to furnish further information regarding the practice of the United Nations in drawing up the texts of multilingual instruments.

¹⁷¹ For example, the Italian text of the Treaty of Peace with Italy is "official", but not "authentic", since article 90 designates only the French, English and Russian texts as authentic.

¹⁷² See generally the valuable study by J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", *British Year Book of International Law*, vol. 37 (1961), pp. 72-155.

¹⁷³ Lord McNair, *Law of Treaties* (1961), p. 61 ; L. Ehrlich, "L'interprétation des traités", *Recueil des Cours de l'Académie de droit international*, vol. 24 (1928), vol. IV, p. 98.

¹⁷⁴ See the commentary to article 7.

¹⁶⁸ *P.C.I.J.* (1933), Series A/B, No. 53, p. 49.

¹⁶⁹ *I.C.J. Reports 1947-1948*, p. 63.

Bulgarian, Hungarian, etc. texts merely "official".¹⁷⁵ Indeed, cases have been known where one text has been made authentic between some parties and a different text between others.¹⁷⁶ Secondly, a plurilingual treaty may provide that in the event of divergence between the texts a specified text is to prevail. Indeed, it is not uncommon for a treaty between two States, because the language of one is not well understood by the other or because neither State wishes to recognize the supremacy of the other's language, to agree upon a text in a third language and designate it as the authoritative text in case of divergence. A recent example is the Treaty of Friendship concluded between Japan and Ethiopia in 1957¹⁷⁷ in Japanese, Amharic and French, article 6 of which makes the French text authentic *en cas de divergence d'interprétation*. A somewhat special case was that of the Peace Treaties of St. Germain, Neuilly and Trianon, which were drawn up in French, English and Italian and which provided that in case of divergence the French text should prevail, except with regard to parts I and XII, containing respectively the Covenant of the League of Nations and the articles concerning the International Labour Organisation.

(4) Paragraph 2 covers the case of a version of the treaty which is not "authenticated" as a text in the sense of article 7, but which is nevertheless prescribed by the treaty or accepted by the parties as authentic for purposes of interpretation. For example, a boundary treaty of 1897 between Great Britain and Ethiopia was drawn up in English and Amharic and it was stated that both texts were to be considered authentic,¹⁷⁸ but a French translation was annexed to the treaty which was to be authoritative in the event of a dispute. Paragraph 2 also provides for the possibility that, when a treaty is concluded within an organization, the established rules of the organization may prescribe that texts shall be prepared in other official languages of the organization and be considered authentic.¹⁷⁹

Article 73

(5) The plurality of the authentic texts of a treaty is always a material factor in its interpretation, since both or all the texts authoritatively state the terms of the agreement between the parties. But it needs to be stressed that in law there is only one treaty — one set of terms accepted by the parties and one common intention with respect to those terms — even when two authentic texts appear to diverge. In practice, the existence of authentic texts in two or more languages

sometimes complicates and sometimes facilitates the interpretation of a treaty. Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of the languages, the absence of a complete *consensus ad idem*, lack of sufficient time to co-ordinate the texts or unskilful drafting may result in minor or even major discrepancies in the meaning of the texts. In that event the plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty. On the other hand, when the meaning of terms is ambiguous or obscure in one language but it is clear and convincing as to the intentions of the parties in another, the plurilingual character of the treaty facilitates interpretation of the text the meaning of which is doubtful.

(6) The existence of more than one authentic text clearly introduces a new element — comparison of the texts — into the interpretation of the treaty. But it does not involve a different system of interpretation. Plurilingual in expression, the treaty remains a single treaty with a single set of terms, the interpretation of which is governed by the same rules as unilingual treaties, that is, by the rules set out in articles 69-71. The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another. A term of the treaty may be ambiguous or obscure because it is so in all the authentic texts, or because it is so in one text only but it is not certain whether there is a difference between the texts, or because on their face the authentic texts seem not to have exactly the same meaning. But whether the ambiguity or obscurity is inherent in all the texts, or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts requires that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation.¹⁸⁰

(7) Paragraph 1 of article 73 accordingly states that the different authentic texts of a treaty are equally authoritative in each language except when the parties themselves expressly provide that in the case of divergence a particular text is to prevail. Provisions of this kind are quite common and some examples of treaties which give decisive authority to a particular text in

¹⁷⁵ See the Peace Treaties with Italy (article 90), Bulgaria (article 38), Hungary (article 42), Romania (article 40) and Finland (article 36).

¹⁷⁶ Treaty of Brest-Litovsk of 1918 (article 10).

¹⁷⁷ United Nations, *Treaty Series*, vol. 325, p. 91; see other examples mentioned by J. Hardy, *op. cit.*, pp. 126-128.

¹⁷⁸ The treaty actually said "official", but it seems clear that in this instance by "official" was meant "authentic"; Hertslet, *The Map of Africa by Treaty* (third edition), vol. 2, pp. 424-427; cf. the Convention for the Unification of Certain Rules concerning Collisions in Inland Navigation, Hudson, *International Legislation*, vol. 5, pp. 819-822.

¹⁷⁹ See *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7), p. 8.

¹⁸⁰ See J. Hardy, *op. cit.*, pp. 91-111, for some of the relevant jurisprudence of international tribunals.

case of a divergence have already been mentioned in paragraph (3) of this commentary.¹⁸¹ The application of these provisions may raise a difficult problem as to the exact point in the interpretation process at which the provision should be put into operation. Should the "master" text be applied automatically as soon as the slightest difference appears in the wording of the texts? Or should recourse first be had to all, or at any rate some, of the normal means of interpretation in an attempt to reconcile the texts before concluding that there is a case of "divergence"? The jurisprudence of international tribunals throws a somewhat uncertain light on the solution of this problem.¹⁸² Sometimes the tribunal has simply applied the "master" text at once without going into the question whether there was an actual divergence between the authentic texts, as indeed the Permanent Court appears to have done in the case concerning the interpretation of the Treaty of Neuilly.¹⁸³ Sometimes the tribunal has made some comparison at least of the different texts in an attempt to ascertain the intention of the parties.¹⁸⁴ This was also the method adopted by the Supreme Court of Poland in the case of the *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*¹⁸⁵ and this method is regarded as correct in one recent textbook.¹⁸⁶ The question is essentially one of the intention of the parties in inserting the provision in the treaty, and the Commission doubted whether it would be appropriate for it to try and resolve the problem in a formulation of the general rules of interpretation. Accordingly, it seemed to the Commission sufficient in paragraph 1 to make a general reservation of cases where the treaty contains this type of provision.

(8) Paragraph 2 provides, first, that the terms of a treaty are presumed to have the same meaning in each text. Then it provides that — apart from cases where the parties have agreed upon the priority of a particular text — in the event of a divergence between authentic texts a meaning which so far as possible reconciles the different texts shall be adopted. These provisions give effect to the principle of the equality of texts. In the *Mavrommatis Palestine Concessions* case,¹⁸⁷ the Permanent Court was thought by some jurists to lay down a general rule of restrictive interpretation in cases of divergence between authentic texts when it said:

"... where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it [the Court] is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common

¹⁸¹ A few treaties, while not designating a particular text as having decisive authority, prescribe a method of interpretation which is to prevail in case of divergence.

¹⁸² For the cases see J. Hardy, *op. cit.*, pp. 128-136.

¹⁸³ *P.C.I.J.*, Series A, No. 3.

¹⁸⁴ For example, *De Paoli v. Bulgarian State, Tribunaux arbitraux mixtes, Recueil des décisions*, vol. 6, p. 456.

¹⁸⁵ *Annual Digest of International Law Cases, 1929-1930*, case No. 235.

¹⁸⁶ Lord McNair, *Law of Treaties* (1961), p. 435.

¹⁸⁷ *P.C.I.J.* (1924), series A, No. 2, p. 19.

intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English".

But, as has been pointed out by a recent writer,¹⁸⁸ the Court does not necessarily appear to have intended by the first sentence of this passage to lay down as a general rule that the more limited interpretation which can be made to harmonize with both texts is the one which must always be adopted. Restrictive interpretation was appropriate in that case. But the question whether in case of ambiguity a restrictive interpretation ought to be adopted is a more general one the answer to which hinges on the nature of the treaty and the particular context in which the ambiguous term occurs, as has been explained in the commentary to article 71. The mere fact that the ambiguity arises from a difference of expression in a plurilingual treaty does not alter the principles by which the presumption should or should not be made in favour of a restrictive interpretation. Accordingly, while the *Mavrommatis* case¹⁸⁹ gives strong support to the principle of conciliating — i.e., harmonizing — the texts, it is not thought to call for a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts.¹⁹⁰

(9) The Commission considered whether there were any further principles which it might be appropriate to codify as general rules for the interpretation of plurilingual treaties. For example, it examined whether it should be specified that there is a legal presumption in favour of the text with a clear meaning. It felt, however, that to state this as a general rule might be going too far, since much might depend on the circumstances of each case and the evidence of the intention of the parties. Nor did it think that it would be appropriate to formulate any general rule regarding recourse to non-authentic versions, though these are sometimes referred to for such light as they may throw on the matter.

CHAPTER III

Special Missions

A. INTRODUCTION

History of the idea of defining rules relating to special missions in the United Nations

25. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commis-

¹⁸⁸ J. Hardy, *op. cit.*, pp. 76-81, where there is a thorough examination of this precedent.

¹⁸⁹ Cf. *Venezuelan Bond cases*, Moore, *International Arbitrations*, vol. 4, p. 3623; and *German Reparations under article 260 of the Treaty of Versailles* (1924), *Reports of International Arbitral Awards*, vol. I, pp. 437-439.

¹⁹⁰ See also J. Hardy, *op. cit.*, pp. 113-115.

sion observed, however, that the draft " deals only with permanent diplomatic missions. Diplomatic relations between States also assume other forms that might be placed under the heading of ' *ad hoc* diplomacy', covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the special rapporteur to make a study of the question and to submit his report at a future session."¹⁹¹ The Commission decided at its eleventh session (1959)¹⁹² to include the question of *ad hoc* diplomacy as a special topic on the agenda of its twelfth session (1960).

26. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report at the twelfth session,¹⁹³ and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions. The Commission's draft was very brief. It was based on the idea that the rules on diplomatic relations in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed the fact that it had not been able to give this subject the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.¹⁹⁴

27. At its 943rd plenary meeting on 12 December 1960, the United Nations General Assembly decided,¹⁹⁵ on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities. The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee.¹⁹⁶

28. The Sub-Committee noted that these draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent

missions had been finally adopted.¹⁹⁷ For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study of the topic, i.e., that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At a plenary meeting of the Vienna Conference on 10 April 1961, the Sub-Committee's recommendation was adopted.¹⁹⁸

29. The matter was again submitted to the United Nations General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1687 (XVI) in which the International Law Commission was requested to study the subject further and to report thereon to the General Assembly.

30. Pursuant to this decision, the question was referred back to the International Law Commission, which, at its 669th meeting on 27 June 1962, decided to place it on its agenda.¹⁹⁹ The Commission requested the United Nations Secretariat to prepare a working paper²⁰⁰ which would serve as a basis for the discussions on this topic at its 1963 session. The Commission then placed this question on the agenda of its fifteenth session (1963).

31. During its fifteenth session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.²⁰¹

32. In that connexion, the Commission took the following decision :

" With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject."²⁰²

33. In addition, the Commission considered again whether the topic of special missions should also cover

¹⁹¹ *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, para. 51.

¹⁹² *Yearbook of the International Law Commission, 1959*, vol. II, p. 122, para. 43.

¹⁹³ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 108-115.

¹⁹⁴ *Ibid.*, p. 179.

¹⁹⁵ Resolution 1504 (XV).

¹⁹⁶ The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, USSR, United Kingdom, United States and Yugoslavia. See *Yearbook of the International Law Commission, 1963*, vol. II, p. 157, para. 44.

¹⁹⁷ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II (document A/CONF.20/C.1/L.315), p. 45.

¹⁹⁸ *Ibid.* (document A/CONF.20/10/Add.1, resolution I), p. 89.

¹⁹⁹ *Yearbook of the International Law Commission, 1962*, vol. II, p. 196, para. 76.

²⁰⁰ Working paper issued as document A/CN.4/155, published in *Yearbook of the International Law Commission, 1963*, vol. II, pp. 151-158.

²⁰¹ *Ibid.*, p. 225, para. 65.

²⁰² *Ibid.*, para. 64.

the status of government delegates to congresses and conferences. On this point, the Commission at its fifteenth session inserted the following paragraph in its annual report to the United Nations General Assembly :

“ With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.²⁰³ At that session the Commission had also decided not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.”²⁰⁴

34. The Special Rapporteur submitted his report,²⁰⁵ which was placed on the agenda of the Commission's sixteenth session.

35. The Commission considered the report twice. First, at the 723rd, 724th and 725th meetings, it engaged in a general discussion and gave the Special Rapporteur general instructions on continuing his study and submitting the rest of his report at the following session. Secondly, at the 757th-758th, 760th-763rd and 768th-770th meetings, it examined a number of draft articles and adopted the sixteen articles reproduced in the draft below, to be supplemented, if necessary, during its seventeenth session. These articles are submitted to the General Assembly and to the Governments of Member States for information.

B. DRAFT ARTICLES 1 TO 16 AND COMMENTARY

Part I

Section I. General rules²⁰⁶

Article 1.²⁰⁷ The sending of special missions

1. For the performance of specific tasks, States may send temporary special missions with the consent of the State to which they are to be sent.

2. The existence of diplomatic or consular relations between States is not necessary for the sending or reception of special missions.

²⁰³ *Yearbook of the International Law Commission, 1960, vol. I, 565th meeting, para. 26.*

²⁰⁴ *Yearbook of the International Law Commission, 1963, vol. II, p. 225, para. 63.*

²⁰⁵ A/CN.4/166, *vide supra*, pp. 67-117.

²⁰⁶ Articles 1 to 12 were adopted by the Commission at its 768th and 769th meetings, on 17 July 1964, and articles 13 to 16 were adopted at the 770th meeting, on 20 July 1964.

²⁰⁷ The Commission decided that this article would be preceded by a definitions article.

Commentary

(1) Article 1 of the draft on special missions differs from the provisions of the Vienna Convention on Diplomatic Relations. The difference is due to the fact that the tasks and duration of special missions differ from those of regular missions.

(2) A special mission must possess the following characteristics :

(a) It *must be sent by a State* to another State. Special missions cannot be considered to include missions sent by political movements to establish contact with a particular State, or missions sent by States to establish contact with a movement. In the case of insurrection or civil war, however, any such movements which have been recognized as belligerents and have become subjects of international law have the capacity to send and receive special missions. The same concept will be found in the Vienna Convention on Diplomatic Relations [article 3, paragraph 1 (a)].

(b) It *must not be in the nature of a mission responsible for maintaining general diplomatic relations between the States* ; its task must be precisely defined. But the fact that a task is defined does not mean that its scope is severely limited ; in practice, some special missions are given far-reaching tasks of a general nature, including the review of relations between the States concerned and even the formulation of the general policy to be followed in their relations. But the task of a special mission is in any case specified and it differs from the functions of a permanent diplomatic mission, which acts as a general representative of the sending State [article 3, paragraph 1 (a) of the Vienna Convention on Diplomatic Relations]. In the Commission's view, the specified task of a special mission should be to represent the sending State in political or technical matters.

(c) *A State is not obliged to receive a special mission from another State unless it has undertaken in advance to do so.* Here, the draft follows the principle set out in article 2 of the Vienna Convention, but the Commission points out that the way in which consent is expressed to the sending of a permanent diplomatic mission differs from that used in connexion with the sending of a special mission. In the case of a special mission, consent usually takes a more flexible form. In practice, such an undertaking is generally given only by informal agreement ; less frequently, it is given by formal treaty providing that a specific task will be entrusted to the special mission ; one characteristic of a special mission, therefore, is that consent for it must have been given in advance for a specific purpose.

(d) It is of a *temporary* nature. Its temporary nature may be established either by the term fixed for the duration of the mission or by its being given a specific task, the mission usually being terminated either on the expiry of its term or on the completion of its task.²⁰⁸ Regular diplomatic missions are not of this temporary nature, since they are permanent (article 2 of the Vienna Convention on Diplomatic Relations).

²⁰⁸ See article 12.

However, a permanent specialized mission which has a specific sphere of competence and may exist side by side with the regular permanent diplomatic mission is not a special mission and does not possess the characteristics of a special mission. Examples of permanent specialized missions are the United States missions for economic co-operation and assistance to certain countries, the Australian immigration missions, the industrial co-operation missions of the socialist countries, and commercial missions or delegations which are of a diplomatic nature, etc.

(3) The sending and reception of special missions may — and most frequently does — occur between States which maintain regular diplomatic or consular relations with each other, but the existence of such relations is not an essential prerequisite. Where such relations do exist and the regular diplomatic mission is functioning, the special mission's particular task may be one which would have been within the competence of the ordinary mission if there had been no special mission. During the existence of the special mission, however, States are entitled to conduct through the special mission relations which are within the competence of the general mission. The Commission deemed it advisable to stress that the existence of diplomatic or consular relations between the States in question is not a prerequisite for the sending and reception of special missions. The Commission considered that special missions can be even more useful where such relations do not exist. The question whether special missions can be used between States or Governments which do not recognize each other was also raised. The Commission considered that, even in those cases, special missions could be helpful in improving relations between States, but it did not consider it necessary to add a clause to that effect to article 1.

(4) The manner in which the agreement for sending and receiving a special mission is concluded is a separate question. In practice, there are a number of ways of doing so, namely :

(a) An informal diplomatic agreement providing that a special mission will be sent and received ;

(b) A formal treaty providing that certain questions will be discussed and settled through a special mission ;

(c) An offer by one State to send a special mission for a specific purpose, and the acceptance, even tacit, of such a mission by the other State ;

(d) An invitation from one party to the other to send a special mission for a specific purpose, and the acceptance of the invitation by the other party.

(5) Where regular diplomatic relations are not in existence between the States concerned — whether because such relations have been broken off or because armed hostilities are in progress between the States — the sending and reception of special missions are subject to the same rules cited above. Experience shows that special missions are often used for the settlement of preliminary questions with a view to the establishment of regular diplomatic relations.

(6) The fact that a special mission is sent and received does not mean that both States must entrust the

settlement of the problem in question to special missions appointed by the two parties. Negotiations with a delegation sent by a State for a specific purpose may also be conducted by the regular organs of the receiving State without a special mission being appointed. Both these practices are considered to be usual, and in the second case the special mission acts on the one side and the Ministry (or some other permanent organ) on the other. The Commission did not deem it necessary to refer to this concept in the text.

(7) Cases also arise in practice in which a specific delegation, composed of the head or of members of the regular permanent diplomatic mission accredited to the country in which the negotiations are taking place, appears in the capacity of a special mission. Practice provides no clear-cut answer to the question whether this is a special mission in the proper sense or an activity of the permanent mission.

Article 2. The task of a special mission

The task of a special mission shall be specified by mutual consent of the sending State and of the receiving State.

Commentary

(1) The text of this article differs from the corresponding article (article 4) of the Vienna Convention on Diplomatic Relations.

(2) The scope and content of the task of a special mission are determined by mutual consent. Such consent may be expressed by any of the means indicated in paragraph (4) of the commentary on article 1. In practice, however, the agreement to the sending and reception of special missions is usually of an informal nature, often merely stating the purpose of the mission. In most cases, the exact scope of the task becomes clear only during the negotiations, and it frequently depends on the full powers or the authority conferred on the representatives of the negotiating parties.

(3) Diplomatic history records a number of cases where special missions have exceeded the task for which they were sent and received. The customary comment is that this is done to take advantage of the opportunity, and that any good diplomat makes use of such opportunities. There are also a number of cases showing that special missions for ceremonial and formal purposes have taken advantage of propitious circumstances to conduct negotiations on other matters. The limits of the capacity of a special mission to transact business are normally determined by full powers, given in good and due form, but in practice the legal validity of acts by special missions which exceed the missions' powers often depends upon their acceptance by the respective governments. Though the Commission considered this question to be of importance to the stability of relations between States, it did not deem it necessary to propose an article dealing with it and considered that its solution was closely related to section II (Conclusion of

treaties by States) of part I of the draft articles on the law of treaties.²⁰⁹

(4) The tasks of a special mission are sometimes determined by a prior treaty. In this case, the special mission's task and the extent of its powers depend on the treaty. This is so, for instance, in the case of commissions appointed to draw up trading plans for a specific period under a trade treaty. However, these cases must be regarded as exceptional. In most cases, on the contrary, the task is determined by informal, *ad hoc* mutual agreement.

(5) In connexion with the task and the extent of the powers of a special mission, the question also arises whether its existence encroaches upon the competence of the regular diplomatic mission of the sending State accredited to the other party. It is generally agreed that the permanent mission retains its competence, even during the existence of the special mission, to transmit to the other contracting party, to which it is accredited, communications from its Government concerning, *inter alia*, the limit of the special mission's powers and, if need be, the complete or partial revocation of the full powers given to it or the decision to break off or suspend the negotiations; but all such actions can apply only to future acts of the special mission. The question of the parallel existence of permanent and special missions, and the problem of overlapping authority, are of considerable importance for the validity of acts performed by special missions. Some members of the Commission held that, during the existence of the special mission, its task is assumed to be excluded from the competence of the permanent diplomatic mission. The Commission decided to draw the attention of Governments to this point and to ask them to decide whether or not a rule on the matter should be included in the final text of the articles, and if so to what effect.

(6) If the special mission's activity or existence comes to an end, the full competence of the permanent diplomatic mission is usually restored, even with respect to matters relating to the special mission's task, except in cases where special missions have been given exclusive competence, by treaty, to regulate relations in respect of certain matters between the States concerned.

Article 3. Appointment of the head and members of the special mission or of members of its staff

Except as otherwise agreed, the sending State may freely appoint the head of the special mission and its members as well as its staff. Such appointments do not require the prior consent of the receiving State.

Commentary

(1) In regard to the head of the special mission, the text of article 3 differs from the rule in article 4 of the Vienna Convention on Diplomatic Relations. Whereas the head of a permanent diplomatic mission must receive the *agrément* of the receiving State, as a general

rule no *agrément* is required for the appointment of the head of a special mission. In regard to the members and staff of the special mission, article 3 is based on the idea expressed in the first sentence of article 7 of the Vienna Convention on Diplomatic Relations: that the sending State may freely appoint them.

(2) The Commission notes that, in State practice, consent to the sending and receiving of a special mission does not ordinarily imply acceptance of its head, members or staff. The Commission does not share the view that the declaration of acceptance of the persons forming the special mission should be included in the actual agreement to receive the mission; it considered that consent to receive a special mission and consent to the persons forming it are two distinct matters.²¹⁰

(3) The proposition that no *agrément* or prior consent shall be required for the head, members or staff of a special mission in no way infringes the sovereign rights of the receiving State. Its sovereign rights and interests are safeguarded by article 4 (persons declared *non grata* or not acceptable).

(4) In practice, there are several ways in which, in the absence of prior agreement, the receiving State can limit the sending State's freedom of choice. The following instances may be quoted:

(a) Consent can be given in the form of a visa issued in response to a request from the sending State indicating the purpose of the journey, or in the form of acceptance of the notice of the arrival of a specific person on a special mission.

(b) The receiving State can express its wishes with regard to the level of the delegations.

(c) In practice the formal or informal agreement concerning the sending and reception of a special mission sometimes includes a clause specifically designating the person or persons who will form the special mission. In this case the sending State cannot make any changes in the composition of the special mission without the prior consent of the State to which it is being sent. In practice all that is done is to send notice of the change in good time, and in the absence of any reaction, the other party is presumed to have accepted the notice without any reservation.

(5) In some cases, although less frequently, it is stipulated in a prior agreement that the receiving State must give its consent. This occurs primarily where important and delicate subjects are to be dealt with through the special mission, and especially in cases where the head of the mission and its members must be eminent politicians.

(6) The question arises whether the receiving State is recognized as having the right to make acceptance of the person appointed conditional upon its own consent. In this case it sometimes happens that the State which raises the objection asks to be consulted on the selection of the person. Its refusal does not mean that it considers the person proposed *persona non grata*, being of an ob-

²⁰⁹ Yearbook of the International Law Commission, 1962, pp. 164-166, articles 4 and 5.

²¹⁰ For the contrary view, see Yearbook of the International Law Commission, 1960, vol. II, pp. 112-117.

jective and procedural rather than a personal nature, although it is difficult to separate these two aspects in practice. The Commission considers that this is not the general practice and that provision for such a situation should be made in a special agreement.

(7) The head of the special mission and its members are not in practice designated by name in the prior agreement, but in certain cases an indication is given of the qualifications they should possess. This applies either to meetings at a specific level (e.g., meetings of Ministers for Foreign Affairs or of other eminent persons) or to missions which must be composed of specially qualified experts (e.g., meetings of hydraulic engineers or other experts). In such cases, the special mission is regularly composed of its head and its members possess certain qualifications or hold certain posts, and thus the sending State is subject to certain restrictions with respect to the selection and the composition of its special mission. Even though this is a widespread practice, the Commission considered that there was no need to include a rule to that effect in article 3, but that the situation was already covered by the proviso "except as otherwise agreed".

(8) The Commission also took into consideration the practice whereby certain States (by analogy with the provision contained in the last sentence of article 7 of the Vienna Convention on Diplomatic Relations) require prior consent in the case of members of the armed forces and persons of similar standing. The Commission considers that this rule is out of date and not universally applied.

Article 4. *Persona 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 head or any other member of the special mission or a member of its staff is *persona non grata* or not acceptable.

2. In any such case, the sending State shall either recall the person concerned or terminate his functions with the special mission. If the sending State refuses to carry out this obligation, the receiving State may refuse to recognize the person concerned as the head or a member of the special mission or as a member of its staff.

Commentary

(1) The text of article 4 follows article 9 of the Vienna Convention on Diplomatic Relations.

(2) Whether or not the receiving State has accepted the mission, it unquestionably has the right to declare the head or a member of a special mission or a member of the mission's staff *persona non grata* or not acceptable at any time. It is not obliged to state its reasons for this decision.²¹¹

²¹¹ This was also the opinion of the International Law Commission in 1960. See *Yearbook of the International Law Commission, 1960*, vol. II, pp. 112-115 and p. 180.

(3) It may be added that, in practice, a person is seldom declared *persona non grata* or not acceptable if the receiving State has already signified its acceptance of a particular person; but the majority of the Commission takes the view that even in that case the receiving State is entitled to make such a declaration. Nevertheless, the receiving State very rarely takes advantage of this prerogative; but in practice it may sometimes inform the sending State, through the regular diplomatic channel, that the head or a certain member of the special mission, even though consent has already been given to his appointment, represents an obstacle to the fulfilment of the mission's task.

(4) In practice, the right of the receiving State to declare the head or a member of the special mission *persona non grata* or not acceptable is not often exercised inasmuch as such missions are of short duration and have specific tasks. Nevertheless, instances do occur. In one case, the head of a special mission sent the minister of the receiving State a letter considered offensive by that State, which therefore announced that it would have no further relations with the writer. As a result, the activities of the special mission were virtually paralysed, and the sending State was obliged to recall the head of the special mission and to replace him.

(5) Where the meetings with the special mission are to be held at a specific level, or where the head or the members of the mission are required to possess certain specific qualifications and no other person in the sending State possesses such qualifications, it must be presumed that in practice the person concerned cannot be declared *persona non grata* or not acceptable, and that the only course is to break off the conversations, since the sending State is not in a position to choose among several persons with the necessary qualifications. The receiving State cannot, for instance, ask the sending State to change its Minister for Foreign Affairs because he is regarded as *persona non grata*, for that would constitute interference in the domestic affairs of the sending State. Nevertheless, it is under no obligation to enter into contact with an undesirable person, if it considers that refusal to do so is more advantageous to it than the actual contact with the other State. This, however, is not a juridical question, and the Commission therefore decided not to deal with this situation or to regulate it in the text of the article.

Article 5. Sending the same special mission to more than one State

A State may send the same special mission to more than one State. In that case the sending State shall give the States concerned prior notice of the sending of that mission. Each of those States may refuse to receive such a mission.

Commentary

(1) There is no corresponding provision in the Vienna Convention on Diplomatic Relations.

(2) The International Law Commission scarcely considered this question in 1960, and it has been given

scant attention in the literature. At that time the majority of the Commission took the view that it was completely unnecessary to make provision for the matter, and the previous Special Rapporteur, Mr. Sandström, believed that the question did not arise at all.²¹² Mr. Jiménez de Aréchaga, however, expressed the view on that occasion that the situation envisaged was by no means unusual. He pointed out that special missions were sent to a number of neighbouring States when changes of government took place in the sending States and on ceremonial occasions.²¹³ Subsequently studies have shown that cases of special missions being sent to more than one State occur in practice.

(3) Observations of practice indicate that there are two cases in which the problem of the appointment of a special mission to more than one State clearly arises. They are the following:

(a) Where the same special mission, with the same membership and the same task, is sent to several States, which are usually neighbours or situated in the same geographical region. In the case of political missions (e.g., goodwill missions), there have been instances of States refusing to enter into contact with a mission appointed to several other States with which they did not enjoy good relations. Thus the question is not simply one of relations between the sending and receiving States, but also of relations between the States to which the special mission is sent. Although this raises a political issue, it is tantamount, from the juridical standpoint, to a proviso that where special missions are sent to more than one State, simultaneously or successively, consent must be obtained from each of the States concerned.

(b) Although, according to the strict rule, a special mission is appointed individually, either simultaneously or successively, to each of the States with which contacts are desired, certain exceptions arise in practice. One custom is that known as circular appointment, which — rightly, in the view of the Commission — is considered discourteous by experts in diplomatic protocol. In this case a special mission or an itinerant envoy is given full powers to visit more than one country, or a circular note is sent to more than one State informing them of the intention to send a special mission of this kind. If the special mission is an important one, the general practice is to lodge a protest against this breach of courtesy. If the special mission is sent to obtain information regarding future technical negotiations, the matter is usually overlooked, although it may be observed that such special missions are placed on the level of a commercial traveller with general powers of agency. A distinction must be made between this practice of so-called circular appointment and the case of a special mission authorized to conduct negotiations for the conclusion of a multilateral convention which is not of general concern. In this case its full powers may consist of a single document accrediting it to all the States with which the convention is to be concluded (e.g. the

Bulgarian-Greek-Yugoslav negotiations or a settlement of certain questions connected with their common frontier).

(4) It should also be mentioned that, in practice, a special mission of the kind referred to in paragraph 3 (a) above, having been accepted in principle, sometimes finds itself in the position of being requested, because of the position it has adopted during its contacts with the representatives of the first State visited, to make no contact with another specific State to which it is being sent. This occurs particularly in cases where it is announced that the special mission has granted the first State certain advantages which are contrary to the interests of the second State. The latter may consider that the matter to be dealt with has been prejudged, and may announce that the special mission which it had already accepted has become pointless. This is not the same as declaring the head and members of the mission *persona non grata*, since in this case the refusal to accept them is based not on their subjective qualities but on the objective political situation created by the special mission's actions and the position taken by the sending State. It is, as it were, a restriction of diplomatic relations expressed solely in the revocation of the consent of the receiving State to accept the special mission. This clearly demonstrates the delicacy of the situation created by the practice of sending the same special mission to more than one State.

(5) The Commission found that in this case the sending State is required to give prior notice to the States concerned of its intention to send such a special mission to more than one State. This prior notice is needed in order to inform the States concerned in due time not only of the task of a special mission but also of its itinerary. This information is deemed necessary in order to enable the States concerned to decide in advance whether they will receive the proposed special mission. The Commission stressed that it was essential that the States so notified should be entitled only to state their position on the receivability of the special mission, and not to request that such a mission should not be sent to another State as well.

Article 6. Composition of the special mission

1. The special mission may consist of a single representative or of a delegation composed of a head and other members.

2. The special mission may include diplomatic staff, administrative and technical staff and service staff.

3. In the absence of an express agreement as to the size of the staff of a special mission, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances, to the tasks and to the needs of the special mission.

Commentary

(1) The text of article 6, paragraphs (2) and (3), adopted by the Commission is based on article 1 (c) and article 11, paragraph 1, of the Vienna Convention

²¹² *Yearbook of the International Law Commission, 1960, vol. II, p. 109 and p. 180.*

²¹³ *Ibid.*, p. 116.

on Diplomatic Relations. The text of paragraph 1 of article 6 reflects the special features of the institution of special missions.

(2) In practice, a special mission may be composed of only one member or of several members. If the special mission is entrusted to only one member, the latter is then a special delegate, described by the Commission in article 6 as a "representative". If it has two members, the sending State decides which of the two will be the head or first delegate. If the special mission consists of three or more members, the rule observed in practice is that a head of the mission (chairman of the delegation) should be designated.

(3) Precedence within the delegation is fixed, according to general practice, by the sending State, and is communicated to the receiving State or published in the manner normally adopted with respect to multilateral meetings. Neither the rank of the delegates according to the protocol of the sending State nor the title or function of the individual delegates authorizes *ex jure* any automatic change in the order of precedence established in the list communicated, without subsequent communication of an official rectification to the receiving State. However, according to international custom, a member of the Government takes precedence over other officials, and the head of delegation must not have lower diplomatic rank than the members of the delegation; but, as this custom is not observed in all cases and is not regarded as obligatory, it is not reflected in the text.

(4) In practice a special mission may include, in addition to the head, his deputy, the other titular members and their deputies. The Commission considered that the composition of the special mission and the titles of its members were a matter exclusively within the competence of the sending State and that in the absence of an agreement on it by the parties it was not governed by any international rule. Accordingly, the Commission did not think it necessary to include a rule on it in the article.

(5) Whether a special mission is composed of a single representative or of a delegation, it may be accompanied by the necessary staff. The Commission accepted the designation of the staff set out in article 1 (c) of the Vienna Convention on Diplomatic Relations, but pointed out that the staff of special missions often includes specific categories such as advisers and experts. The Commission considered that these were included in the category of diplomatic staff.

(6) In practice, even in special missions the problem of limiting the size of the mission arises. The rule relating to permanent missions is contained in article 11 of the Vienna Convention on Diplomatic Relations and the text of article 6, paragraph 3, proposed by the Commission is based on that rule.

(7) With regard to the limitation of the size of the special mission, attention should be drawn not only to the general rule, but also to certain particular cases which occur in practice. On this point:

(a) It is customary for the receiving State to notify the sending State that it wishes the size of the mission

to be restricted because, for example, the housing, transport and other facilities it can offer are limited.

(b) Less frequently, in practice, the agreement on the establishment or reception of the special mission limits the size of the mission; in some cases the agreement specifies a minimum number of members (joint meetings) and even calls for a mission specifically composed of members having stated qualifications (generally according to the problems to be treated).

(c) With respect to the size of the mission, attention should also be drawn to the practice of "balancing rank". It is customary, during preliminary conversations and negotiations on the sending and receiving of a mission, to designate the rank and status of the head and members of the special mission, so that the other party may act accordingly and thus avoid any disparity, for if representatives were received by a person of lower rank than their own, it might be considered an affront to their country. This, however, is a question of protocol rather than of law.

Article 7. Authority to act on behalf of the special mission

1. The head of the special mission is normally the only person authorized to act on behalf of the special mission and to send communications to the receiving State. Similarly, the receiving State shall normally address its communications to the head of the mission.

2. A member of the mission may be authorized either by the sending State or by the head of the special mission to replace the head of the mission if the latter is unable to perform his functions, and to perform particular acts on behalf of the mission.

Commentary

(1) Article 7 is not derived directly from the Vienna Convention on Diplomatic Relations. Its text was drawn up on the basis of contemporary international practice.

(2) The main question from the legal point of view is to determine the rules concerning authority to act on behalf of the special mission. Only the head of the special mission is normally authorized to act on behalf of the special mission and to address communications to the receiving State. The Commission laid stress on the word "normally", as the parties may also make provision for other persons than its head to act on behalf of a special mission. These other possibilities are, however, exceptional.²¹⁴

(3) *Head of the special mission.* As explained in the commentary on the preceding article, if the mission is composed of three or more members, it must as a general rule have a head. If it is composed of only two members, the sending State decides whether one shall bear the title of first delegate or head of the special mission. Whether he is called first delegate or

²¹⁴ See paragraphs (4)-(11) of this commentary.

head of mission, he will be regarded as the head of the special mission by the receiving State, which will communicate with him and receive from him statements on behalf of the special mission. For this reason, the question of the existence of a head of mission is one of great importance, notwithstanding the fact that the International Law Commission did not deal with it in 1960. Mr. Jiménez de Aréchaga, on the other hand, considers that in practice a special mission has a head, but he does not go further into the question.²¹⁵ In the Commission's opinion, as expressed at its sixteenth session, the matter of the appointment of a head of the special mission is important from the legal standpoint.

(4) In article 7, paragraph 1, the Commission established a mere presumption that the head of the special mission is the person who gives any authorizations that may be required, but the sending State may in addition authorize the other members of the special mission to act on its behalf by giving them full powers. There are in practice instances of special missions whose members are delegates with equal rights under collective letters of credence for performing the tasks assigned to the special mission. Practice is not, however, uniform. Some States hold that the person mentioned first in the letters of credence issued to the special mission is its head. Others, particularly States which send delegations, claim equal rights for all members of such delegations. A common example is a mission composed of several members of a coalition government or of members of parliament representing various political groups. The advocates of the *in corpore* concept of equal rank argue that the composition of the delegation is a manifestation of the common outlook and the equal standing of the members of the delegation. The practice is not uniform.

(5) There are also instances in practice where the right to act on behalf of a special mission is held to vest only in some of its members who possess a collective authority (for the head and certain members of the mission to act collectively on its behalf) or a subsidiary authority (for a member of a mission to act on its behalf if the head of the mission is unable to perform his functions or if he authorizes him to do so). The Commission considers that these are exceptional cases falling outside normal practice and are determined by the practice of the sending State. It considered that there was no need to include rules covering such cases in the body of the article.

(6) The Commission did not cover in article 7, paragraph 1, the problem of the limits of the authority given to special missions. That is a question governed by the general rules.

(7) *Deputy head of special mission.* In speaking of the composition of the special mission, it was said that sometimes a deputy head of mission was also appointed. The deputy's function is indicated by the fact that he is designated by the organ of the sending State which also appointed the head of the special mission, and that as a general rule the deputy head (who in practice

is often called the vice-chairman of the delegation) acts without special appointment as head of the special mission whenever and wherever the head of mission is absent, unable to carry out his functions or recalled (in the last case, until the appointment of a new head has been notified to the other party). From the international standpoint, the rank of the deputy head in the special mission is considered to be next below that of the head of the mission. However, the deputy head does not take precedence of the members of the missions of other States with which his delegation enters into contact. His status as deputy head is effective only when he acts as head. The position of the deputy head of a special mission is referred to in article 7, paragraph 2.

(8) From the technical standpoint, a member of the special mission whom the head of the mission himself has designated as his deputy (i.e., the administrator of the mission) is not in practice regarded as the deputy head. The Commission did not, however, differentiate between these two classes of deputy head; it regarded them both as having the same status.

(9) *Chargé d'affaires ad interim of a special mission.* Very frequently the special mission arrives without its head or deputy head, that is to say, before them, since contact must be established and affairs conducted before their arrival. There may also be occasions when both its head and deputy head are absent during the course of its activities. In this case, a member of the mission provisionally assumes the duties of head of mission, acting on behalf of the head if the latter has so provided. The International Law Commission did not study this problem in 1960 and did not suggest that the rules of diplomatic law relating to *chargés d'affaires ad interim* should apply, in this connexion, to special missions.²¹⁶

(10) When a member of the mission is designated as *chargé d'affaires ad interim*, the rule in practice is for the appointment of the person to be entrusted with this function to be notified by the regular diplomatic mission of the sending State. This often occurs if the head of the mission is recalled "tacitly", if he leaves his post suddenly (as frequently happens when he returns to his country to get new instructions and remains there for some time) or if the mission arrives at its destination without its head and without his having given authorization in writing to the presumptive *chargé d'affaires*. The Commission regarded the position of such a person as comparable to that of an acting deputy and it provided that authority for him to carry out his duties could be given either by the sending State or by the head of the special mission.

(11) In the case of special missions dealing with a complex task, certain members of the special mission or of its staff are in practice given power to carry out specific acts on behalf of the special mission. The Commission considered this practice to be important from the legal point of view and it included a rule on the subject in the text (paragraph 2, *in fine*).

²¹⁵ *Yearbook of the International Law Commission, 1960*, vol. II, p. 116 and pp. 179-180.

²¹⁶ *Ibid.*, p. 110 and pp. 179-180. Mr. Sandström, the Special Rapporteur, was even of the opinion that this had no bearing on special missions.

(12) The Commission takes the view that the rules applicable to the head of the special mission also apply to a single delegate, described in the text of article 6 as the "representative".

Article 8. Notification

1. The sending State shall notify the receiving State of :

(a) **The composition of the special mission and of its staff, and any subsequent changes ;**

(b) **The arrival and final departure of such persons and the termination of their functions with the mission ;**

(c) **The arrival and final departure of any person accompanying the head or a member of the mission or a member of its staff ;**

(d) **The engagement and discharge of persons residing in the receiving State as members of the mission or as private servants of the head or of a member of the mission or of a member of the mission's staff.**

2. If the special mission has already commenced its functions, the notifications referred to in the preceding paragraph may be communicated by the head of the special mission or by a member of the mission or of its staff designated by the head of the special mission.

Commentary

(1) Article 8 is modelled on article 10, paragraph 1, of the Vienna Convention on Diplomatic Relations, with the changes required by the special features of the institution of special missions.

(2) In the case of special missions, too, the question arises to what extent the sending State is obliged to notify the composition of the special mission and the arrival and departure of its head, members and staff. As early as 1960, the International Law Commission adopted the position that in this respect the general rules on notification relating to permanent diplomatic missions are valid for special missions.²¹⁷

(3) In practice, however, the notification is not identical with that effected in the case of permanent diplomatic missions. In the first place, notification of the composition of a special mission usually takes place in two stages. The first is the preliminary notice, i.e., an announcement of arrival. This preliminary notice of the composition of the special mission should contain brief information concerning the persons arriving in the special mission and should be remitted in good time, so that the competent authorities of the receiving State (and the persons who, on its behalf, will maintain contact) are kept informed. The preliminary notice may in practice be remitted to the Ministry of Foreign Affairs of the receiving State or to its permanent diplomatic mission in the sending State. The second stage is the regular notification given through the diplomatic channel, i.e., through the permanent mission in the receiving State (in practice, the special mission itself

gives this notification directly only if the sending State has no permanent mission in the receiving State and there is no mission there of a third State to which the sending State has entrusted the protection of its interests). The Commission has not indicated these two stages of notification in the text, but has merely laid down the duty of the sending State to give the notification.

(4) Consequently, there are in practice certain special rules for notification of the composition and arrival of a special mission. They arise from the need to inform the receiving State in a manner different from that used for permanent missions. The International Law Commission did not refer to this fact in 1960.

(5) On the other hand, it is not customary to give separate notifications of the special mission's departure. It is presumed that the mission will leave the receiving State after its task has been fulfilled. However, it is customary for the head and members of the special mission to inform the representatives of the receiving State with whom they are in contact verbally, either during the course of their work or at the end of their mission, of the date and hour of their departure and the means of transport they propose to use. The Commission took the view that even in this case a regular notification should be given.

(6) A separate question is whether a head or member of a special mission who remains in the territory of the receiving State after his official mission has ended but while his visa is still valid should give notice of his extended stay. Opinion is divided on this question, and the answer depends on the receiving State's general laws governing aliens. If an extended stay of this kind does occur, however, it is an open question at what point of time the official stay becomes a private stay. Courtesy demands that the situation should be treated with some degree of tolerance. The Commission considers it unnecessary to include provisions governing this case in the text of the article.

(7) The right to recruit auxiliary staff for special missions locally is in practice limited to the recruitment of auxiliary staff without diplomatic rank or expert status, persons performing strictly technical functions (e.g., chauffeurs), and service staff. The rule observed in practice is that the receiving State should ensure the availability of such services, for the performance of the functions of the special mission is often dependent on them. In 1960 the International Law Commission inclined to the view that the availability of these services to special missions should be regarded as part of their general privileges. However, the receiving State is entitled to information on any local recruitment by special missions and, in the Commission's view, the latter must see that the authorities of the receiving State are kept regularly informed concerning the engagement and discharge of such staff, although all engagements of this kind, like the special mission itself, are of limited duration.

(8) In order to make notification easy and flexible in practice, the special mission, as soon as it begins to discharge its functions, effects notification direct, and not necessarily through the permanent diplomatic

²¹⁷ *Ibid.*, p. 113 and pp. 179-180.

mission. The Commission has found this a sensible custom and has included a rule to that effect in the text of article 8, paragraph 2.

Article 9. General rules concerning precedence

1. Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, precedence among the heads of the special missions shall be determined by alphabetical order of the names of the States.

2. The precedence of the members and the staff of the special mission shall be notified to the appropriate authority of the receiving State.

Commentary

(1) The question of precedence among the heads of special missions arises only when several special missions meet, or when two missions meet on the territory of a third State. In practice, the rules of precedence among the heads of permanent diplomatic missions are not applied. The Commission did not consider that precedence among the heads of special missions should be governed by the provisions of the Vienna Convention, which are based on the presentation of credentials or on the date of arrival and on classes of heads of permanent missions — institutions irrelevant to special missions.

(2) The question of rank does not arise when a special mission meets with a delegation or organ of the receiving State. In practice, the rules of courtesy apply. The organ or delegation of the receiving State pays its compliments to the foreign special mission and the mission pays its respects to its host, but there is no question of precedence, properly so-called. The Commission has not dealt with this situation in the text of the articles, since it considers the rules of courtesy sufficient.

(3) The Commission believes that it would be wrong to include a rule that the order of precedence of heads of special missions should be determined by the diplomatic rank to which their titles would assign them under the general rules on classes of heads of permanent missions.

(4) Of particular significance is the fact that many heads of special missions have no diplomatic rank, and that heads of special missions are often personalities standing above all diplomatic rank. Some States make provision for such cases in their domestic law and in their practice, and give precedence to ministers who are members of the cabinet and to certain other high officials.

(5) The Commission wishes to stress that the rules or article 9 are not valid with respect to special missions having ceremonial or formal functions. This question is dealt with in article 10.

(6) The Commission considers that the rank of heads of special missions should be determined on the basis of the following considerations. Although in the case of *ad hoc* ceremonial diplomacy the heads of special

missions are still divided into diplomatic classes (e.g., special ambassador, special envoy), the current practice is not to assign them any special diplomatic title. All heads of special missions represent their States and are equal among themselves in accordance with the principle of the equality of States.

(7) The International Law Commission did not take up this question in 1960. During the Commission's debates in 1960, however, Mr. Jiménez de Aréchaga expressed the view that the rules on classes of heads of missions applied equally to special missions, and he did not restrict that conclusion to ceremonial missions.²¹⁸

(8) The practice developed in relations between States since the formation of the United Nations ignores the division of heads of special missions into classes according to their ranks, except in the case of ceremonial missions.

(9) There are two views concerning precedence among heads of special missions. According to the first, the question of rank does not arise with special missions. This follows from the legal rule laid down by article 3 of the Regulation of Vienna of 19 March 1815. This provides that diplomatic agents on special mission shall not by this fact be entitled to any superiority of rank. Genet²¹⁹ deduces from this rule that they have no special rank by virtue of their mission, although they do have diplomatic status. However, Satow²²⁰ takes a different view. Although the heads of special missions are not ranked in the same order as the heads of the permanent diplomatic missions, there does exist an order by which their precedence can be established. This, says Satow, is an order *inter se*. It is based on their actual diplomatic rank; and where they perform identical functions, precedence among them is determined on the basis of the order of presentation of their credentials or full powers.

(10) In his 1960 proposal,²²¹ Mr. A. E. F. Sandström, Special Rapporteur of the International Law Commission, took the view that although, under the Regulation of Vienna, a special mission enjoys no superiority of rank, the heads of special missions, at least ceremonial missions, nevertheless rank among themselves according to the order of the presentation of their credentials. Yet while advancing this opinion in the preliminary part of his report, he limited himself in his operative proposal (alternative I, article 10, and alternative II, article 3) to inserting the negative provision that the head of a special mission should not, by such position only, be entitled to any superiority of rank.

(11) Mr. Sandström took as his starting point the idea that rank was defined by membership in the diplomatic service or by diplomatic category. He therefore

²¹⁸ *Ibid.*, p. 116.

²¹⁹ Raoul Genet, *Traité de diplomatie et de droit diplomatique*, Paris, 1931, vol. I, p. 86.

²²⁰ Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, London, 1957, p. 41.

²²¹ *Yearbook of the International Law Commission, 1960*, vol. II, p. 109.

made a distinction between diplomatic missions, missions regarded as being diplomatic, and technical missions, which are not of a diplomatic character.

(12) In the first place, the Commission, at its sixteenth session, held that it is not true that the person heading a special diplomatic mission of a political character will necessarily be a member of the diplomatic service and have diplomatic rank. Such missions may be headed by other persons, so that diplomatic rank is a very unreliable criterion. Why should a high official of the State (for example, a member of the Government) necessarily be ranked lower than a person bearing the title of ambassador? This would be incompatible with the current functional conception of diplomacy. On the other hand, it is considered that it would be erroneous to classify heads of mission having diplomatic rank according to their titles (for example, ambassador and minister plenipotentiary). They are all heads of diplomatic missions and have the same authority to represent their sovereign States, which, under Article 2 of the United Nations Charter, enjoy the right to sovereign equality. It follows that precedence *inter se* cannot be determined on the basis of diplomatic rank, at least in so far as juridical treatment is concerned (this does not affect the matter of courtesy towards the head of the special mission).

(13) Secondly, the Commission discarded the idea that different principles apply to so-called technical missions. Such missions are today usually headed by a career diplomat, and the task of every technical mission includes some political and representative elements.

(14) Again, precedence can hardly be established according to the order of the presentation of credentials by the heads of special missions. At most meetings of special missions the presumption, consistent with the facts, is that they arrive simultaneously,²²² and the individual and ceremonial presentation of credentials is a distinct rarity. For this reason, the date of presentation is without significance in practice.

(15) Precedence among heads of special missions, limited as it is in its effect to their relations *inter se*, is important only in the case of a multilateral meeting or of contacts among two or three States, not counting the receiving State. In contacts between the special mission and the representatives of the receiving State alone, the question of precedence does not arise: as a matter of courtesy the host treats its guest with high consideration, and the latter is obliged to act in the same manner towards its host.

(16) The Commission considers that as a result, first, of the change which has taken place in the conception of the character of diplomacy, especially the abandonment of the theory of the exclusively representative character of diplomacy and the adoption of the functional theory,²²³ and secondly, of the acceptance of the

principle of the sovereign equality of States, the legal rules relating to precedence among heads of special missions have undergone a complete transformation. The principles of the Regulation of Vienna (1815) are no longer applicable. No general principle can be inferred, on the basis of analogy, from the rules of precedence governing permanent missions. For this reason, more and more use is being made of an automatic method of determining the precedence of heads of special missions, namely, the classification of delegates and delegations according to the alphabetical order of the names of the participating States. In view of the linguistic differences in the names of States, the custom is also to state the language in which the classification will be made.²²⁴ This is the only procedure which offers an order capable of replacing that based on rank, while at the same time ensuring the application of the rules on the sovereign equality of States.²²⁵

(17) The International Law Commission did not go into the question of precedence within a special mission. It believes that each State must itself determine the internal order of precedence among the members of the special mission and that this is a matter of protocol only, the order of precedence being sent to the receiving State by the head of the special mission either direct or through the permanent diplomatic mission. This rule forms the subject of article 9, paragraph 2.

(18) The Commission also believes that there are no universal legal rules determining the order of precedence as between members of different special missions, or as between them and members of permanent diplomatic missions, or as between them and the administrative officials of the receiving State.

(19) It frequently happens that special missions meet in the territory of a third State which is not involved in their work. In this case it is important to the receiving State that the precedence of the heads of the special missions, or rather of the missions themselves, should be fixed, so that it does not, as host, run the risk of favouring one of them or of being guided by subjective considerations in determining their precedence.

(20) A brief comment must be made on the question of the use of the alphabetical order of names of States as a basis for determining the order of precedence of special missions. At the present time, the rule in the United Nations and in all the specialized agencies, in accordance with the principle of the sovereign equality of States, is to follow this method. While considering it to be the most correct one, the Commission concedes that the rule need not be strictly interpreted as requiring the use of the alphabetical order of the names of States

²²⁴ Mr. Sandström too used this method in his draft in dealing with the question of the participation of *ad hoc* diplomats in congresses and conferences (chap. II, art. 6).

²²⁵ In order to bring the practice further into line with the principle of equality, it is now customary for lots to be drawn, the initial letter of the name of the State thus chosen indicating the beginning of the *ad hoc* alphabetical order. At United Nations meetings and meetings organized by the United Nations, lots are drawn at the opening of the session, to assign seats to the participating States for the duration of the session and whenever a roll-call vote is taken.

²²² Thus, Jiménez de Aréchaga; see *Yearbook of the International Law Commission*, 1960, vol. II, p. 116, para. 13.

²²³ This cumulation of the functional and the representative character is confirmed by the fourth paragraph of the Preamble and by article 3 of the Vienna Convention on Diplomatic Relations.

in a specified language — English, for example. Some experts have drawn attention to the possibility of applying the same method but on the basis of the alphabetical order of names of States used in the official diplomatic list of the receiving State. The important thing is that the system applied should be objective and consistent with the principle of the sovereign equality of States. For this reason, the Commission adopted the principle of the alphabetical order of the names of States. The members of the Commission were divided on the question whether the order adopted should be that used by the United Nations or that used in the official diplomatic list of the receiving State.

(21) The Commission considers that everything stated in this article with regard to heads of special missions is also applicable to single representatives.

Article 10. Precedence among special ceremonial and formal missions

Precedence among two or more special missions which meet on a ceremonial or formal occasion shall be governed by the protocol in force in the receiving State.

Commentary

(1) The Vienna Convention on Diplomatic Relations confines itself to provisions concerning permanent diplomatic missions and does not take into account either special missions or diplomatic ceremonial and formal missions, which have continued to exist in practice even after the establishment of permanent resident diplomacy, and continue to exist to this day.

(2) The Commission observed that the rules governing special ceremonial and formal missions vary from State to State. The question arises whether a selection should be made among the different customs, or whether the rule universally observed in practice should be adopted, namely, that the receiving State is competent to settle the order of precedence among special missions meeting in its territory on the occasion of a ceremony or a formal manifestation. The Commission favoured the second proposal.

(3) The different customs found in practice include the following :

(a) On such occasions the representatives of States customarily bear the title of special ambassadors extraordinary. Even a regularly accredited ambassador, when assigned to represent his country on a ceremonial occasion, is given the title of *ad hoc* ambassador. This is regarded as a point of international courtesy.

(b) In accordance with the established interpretation of article 3 of the Regulation of Vienna of 1815, the *prior tempore* rule is held to apply even to these ambassadors, who should take precedence in the order of the time of presentation of the letters of credence issued for the *ad hoc* occasion. In practice, however, it has proved almost impossible to implement this rule. The funeral of King George VI of Great Britain was a case in point. A number of

special missions were unable, for lack of time, to present their letters of credence, or even copies of them, to the new Queen before the funeral ceremony. Moreover, several missions arrived in London simultaneously, so that the rule providing for the determination of precedence according to the order of arrival was also inapplicable. For this reason, it was maintained that it would be preferable to select another criterion, more objective and closer to the principle of the sovereign equality of States, while retaining the division of heads of special missions into classes.

(c) It is becoming an increasingly frequent practice to send special delegates of higher rank than ambassador to be present on ceremonial occasions. Some countries consider that to give them the title of *ad hoc* ambassador would be to lower their status, for it is increasingly recognized that Heads of Government and ministers rank above all officials, including ambassadors. In practice, the domestic laws of a number of countries give such persons absolute precedence over diplomats.

(d) However, persons who do not belong to the groups mentioned in sub-paragraph (a) above are also sent as special *ad hoc* ambassadors, but are not given diplomatic titles because they do not want them. Very often these are distinguished persons in their own right. In practice there has been some uncertainty as to the rules applicable to their situation. One school of thought opposes the idea that such persons also take precedence over *ad hoc* ambassadors ; and there are some who agree with the arguments in favour of this viewpoint, which are based on the fact that, if the State sending an emissary of this kind wishes to ensure that both the head of the special mission and itself are given preference, it should appoint him *ad hoc* ambassador. Any loss of precedence is the fault of the sending State.

(e) In such cases, the diplomatic status of the head of the special mission is determined *ad hoc*, irrespective of what is called (in the French texts) the *rang diplomatique réel*. The title of *ad hoc* ambassador is very often given, for a particular occasion, either to persons who do not belong to the diplomatic career service or to heads of permanent missions who belong to the second class. This fact should be explicitly mentioned in the special letters of credence for ceremonial or formal occasions.

(f) The issuance of special letters of credence covering a specific function of this kind is a customary practice. They should be in good and due form, like those of permanent ambassadors, but they differ from the latter in their terms, since the mission's task is strictly limited to a particular ceremonial or formal function. The issuance of such letters of credence is regarded as an international courtesy, and that is why heads of permanent diplomatic missions are expected to have such special letters of credence.

(g) Great difficulties are caused by the uncertainty of the rules of law concerning the relative rank of the head of a special mission for a ceremonial and formal function and the head of the mission regularly

accredited to the Government of the country in which the ceremonial occasion takes place. Under the protocol instructions of the Court of St. James, the heads of special missions have precedence, the heads of regularly accredited diplomatic missions occupying the rank immediately below them, unless they are themselves acting in both capacities on the specific occasion in question. This solution is manifestly correct and is dictated by the very nature of the function, since otherwise it would be utterly pointless to send a special mission.

(h) The situation of the members of a special mission of a ceremonial or formal nature in cases where the members are designated as equals and are given collective letters of credence for the performance of the ceremonial or formal function in question is not precisely known. As stated in paragraph (4) of the commentary on article 7, practice in this matter is not uniform.

(4) Some members of the Commission requested that, despite the Commission's unanimous decision to accept the rule incorporated in article 10, the Special Rapporteur's original text should also be included in the present report for purposes of information.²²⁶ This text is as follows :

" 1. Where two or more special missions meet on a formal or ceremonial occasion (for example, a marriage, christening, coronation, installation of Head of State, funeral, etc.), precedence among the heads of mission shall be determined in accordance with the class to which each head of mission belongs by virtue of his diplomatic title, and within each class in accordance with the alphabetical order of the names of the States.

" 2. Heads of State, members of ruling families, chairmen of councils and ministers who are members of the Government represent special classes having precedence over the class of ambassadors.

" 3. Heads of special missions who do not possess the diplomatic rank of ambassador or minister plenipotentiary and who do not belong to the groups specified in paragraph 2 of this article shall constitute, irrespective of the functions they perform, a special group next following that of heads of special missions having the rank of minister plenipotentiary.

" 4. The diplomatic title used in determining precedence for the purposes of this article, except in the case of persons mentioned in paragraph 2, shall be that indicated in the credentials issued for the performance of the ceremonial or protocol function.

" 5. Heads of regular diplomatic missions shall not be considered to be heads of special missions for ceremonial or formal functions unless they have presented credentials issued specially for this particular purpose.

" 6. The rank of the staff of special ceremonial and formal missions shall be determined in accordance with the rank of the heads of mission.

" 7. When they appear at the ceremony to which their formal or ceremonial function relates, heads of

special missions shall take precedence over the heads of regular diplomatic missions."

This text was communicated to the Commission, but the Commission did not consider it in detail because it had decided in principle to regulate the matter by reference rather than by substantive provisions.

Article 11. Commencement of the functions of a special mission

The functions of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving State. The commencement of its functions shall not depend upon presentation by the regular diplomatic mission or upon the submission of letters of credence or full powers.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no express provisions on the commencement of the functions of permanent diplomatic missions.

(2) The International Law Commission takes the view that, where the commencement of the functions of a special mission is concerned, the rules applicable to permanent diplomatic missions do not apply.²²⁷

(3) In practice, this matter is governed by a special usage. The functions of the special mission which have been the subject of prior notice and acknowledgement begin when the special mission arrives in the territory of the receiving State, unless it arrives prematurely — a situation which depends on the circumstances and on the notion of what constitutes a reasonable interval of time. If there has been no prior notice, the functions are deemed to begin when contact is made with the organs of the receiving State. A further point is that, in the case of special missions, the commencement of the function need not be deemed to take place only when copies of the letters of credence or full powers are presented, although this is taken into account in the case of *ad hoc* ambassadors. Heads of special missions in general, even in case where they must have full powers, do not now present either the original or a copy in advance, but only when the time comes to prove their authority to assume obligations on behalf of the sending State. Thus there is a legal difference with respect to determining when the function commences, as compared with the case of the heads of permanent missions.

(4) Almost all the instructions by States concerning the exercise of functions related to diplomatic protocol are found to contain more rules on the procedure for welcoming a ceremonial *ad hoc* mission when it arrives and escorting it when it leaves than on its reception, which consists of an audience with the Minister for Foreign Affairs to introduce the mission, or the presentation of letters of introduction or copies of credentials. There are even fewer rules on audiences by Heads of State for the presentation of letters of

²²⁶ *Vide supra*, p. 98, article 9.

²²⁷ *Yearbook of the International Law Commission, 1960*, vol. II, p. 116 and p. 180.

credence. Even if the head of a special mission arrives with special letters of credence addressed to the Head of State, the practice is to present them more expeditiously — i.e., though the Chief of Protocol — and the functions of the mission commence immediately. An example of this custom is the case of an *ad hoc* mission sent to present the condolences of its own Head of State to the Head of State of another country upon the death of his predecessor or of a member of the royal family. In such a case, formal receptions are hardly in order; besides, there is usually little time. Nevertheless, missions of special importance are treated according to the general rules of protocol, both on arrival and when they leave.

(5) Contacts between special missions appointed to conduct political negotiations also generally take place immediately following the so-called protocol visit to the competent official with whom the negotiations are to be held.

(6) In the case of special missions appointed to conduct technical negotiations, it is not the practice to have either a ceremonial reception or a ceremonial presentation of credentials. It is customary, however, to make an introductory visit or, if the parties already know each other, a visit for the purpose of establishing contact. There is a growing tendency to abandon the custom whereby the head of the special mission is accompanied on his first visit by the head of the diplomatic mission permanently accredited to the receiving State, or by some member of that mission, if the head of the special mission or his opposite number who is to receive him is of lower rank than the head of the permanent mission. In practice, however, this formality of introduction is becoming obsolete, and the Commission does not deem it essential.

(7) It should be noted that there is an essential difference between the reception of the head of a special mission and the presentation of his letters of credence or full powers on the one hand and the reception of the heads of permanent missions and the presentation of their credentials on the other. This difference relates, first of all, to the person from whom the full powers emanate, in cases other than that of a special ambassador or an *ad hoc* ceremonial mission. A special ambassador and the head of an *ad hoc* ceremonial mission receive their letters of credence from the Head of State, as do the regular heads of diplomatic missions of the first and second classes, and they are addressed to the Head of the State to which the persons concerned are being sent. This procedure is not necessarily followed in the case of other special missions. In accordance with a recently established custom, and by analogy to the rules concerning the regularity of credentials in the United Nations, full powers are issued either by the Head of State or of Government or by the Minister for Foreign Affairs, regardless of the rank of the delegate or of the head of the special mission.

(8) Again, this difference is seen in the fact that the letters of credence of the head of a permanent diplomatic mission are always in his name, while this is not so in the case of special missions, where even for a ceremonial mission, the letters of credence may

be collective, in the sense that not only the head of the mission but the other members also are appointed to exercise certain functions (a situation which could not occur in the case of regular missions, where there is no collective accreditation). Full powers may be either individual or collective, or possibly supplementary (granting authority only to the head of the mission, or stipulating that declarations on behalf of the State will be made by the head of the mission and by certain members or by one or more persons named in the full powers, irrespective of their position in the mission). It has recently become increasingly common to provide special missions with supplementary collective full powers for the head of the mission or a particular member. This is a practical solution (in case the head of the mission should be unable to be present throughout the negotiations).

(9) In practice, the members and staff of a special mission are deemed to commence their function at the same time as the head of the mission, provided that they arrived together when the mission began its activities. If they arrived later, their function is deemed to commence on the day of their arrival, duly notified to the receiving State.

(10) It is becoming increasingly rare to accord a formal welcome to special missions when they arrive at their destination, i.e., at the place where the negotiations are to be held. In the case of important political missions, however, the rules concerning reception are strictly observed but this is of significance only from the standpoint of formal courtesy and has no legal effect.

(11) Members of permanent diplomatic missions who become members of a special mission are considered, despite their work with the special mission, to retain their capacity as permanent diplomats; consequently, the question of the commencement of their functions in the special mission is of secondary importance.

(12) In practice, States complain of discrimination by the receiving State in the reception of special missions and the way in which they are permitted to begin to function even among special missions of the same character. The Commission believes that any such discrimination is contrary to the general principles governing international relations. It believes that the principle of non-discrimination should operate in this case too; and it requests Governments to advise it whether an appropriate rule should be included in the article. The reason why the Commission has refrained from drafting a provision on this subject is that very often differences in treatment are due to the varying degree or cordiality of relations between States.

Article 12. End of the functions of a special mission

The functions of a special mission shall come to an end, *inter alia*, upon:

- (a) The expiry of the duration assigned for the special mission;
- (b) The completion of the task of the special mission;

(c) Notification of the recall of the special mission by the sending State ;

(d) Notification by the receiving State that it considers the mission terminated.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no rules dealing directly with the end of the functions of permanent diplomatic missions. Its treatment of the subject is limited to one provision on the end of the function of a diplomatic agent (article 43) and the provision concerning the case of the breaking off of diplomatic relations or the recall of the mission (article 45).

(2) In its deliberations in 1960,²²⁸ the International Law Commission accepted the view that a special mission came to an end for the same reasons as those terminating the functions of diplomatic agents belonging to permanent missions. However, the accomplishment of a special mission's task was added as a special reason for the termination of its functions.²²⁹

(3) The Commission accepted the view of the majority of authors that the task of a special mission sent for a ceremony or for a formal occasion should be regarded as accomplished when the ceremony or occasion is over.

(4) In the first proposal he submitted in 1960 as the Commission's Special Rapporteur, Mr. Sandström expressed the opinion that it was desirable also to consider the functions of the special mission ended when the transactions which had been its aim were interrupted. A resumption of negotiations would then be regarded as the commencement of the functions of another special mission. Some authors adopt the same view and consider that in such cases it is unnecessary for the special mission to be formally recalled. The Commission regarded as well-founded the argument that the functions of a special mission are ended, to all practical purposes, by the interruption or suspension *sine die* of negotiations or other deliberations. It considered it preferable, however, to leave it to the sending and receiving States to decide whether they deemed it necessary in such cases to bring the mission to an end by application of the provisions of article 12 (c) and (d).

Article 13. Seat of the special mission

1. In the absence of prior agreement, a special mission shall have its seat at the place proposed by the receiving State and approved by the sending State.

2. If the special mission's tasks involve travel or are performed by different sections or groups, the special mission may have more than one seat.

Commentary

(1) The provision of article 13 is not identical to that contained in the Vienna Convention on Diplomatic

Relations (article 12). In the first place, permanent missions must have their seats in the same locality as the seat of the Government. The permanent mission is attached to the capital of the State to which it is accredited, whereas the special mission is usually sent to the locality in which it is to carry out its task. Only in exceptional cases does a permanent mission set up offices in another locality, whereas it frequently occurs that, for the performance of its task, a special mission has to move from place to place and its functions have to be carried out simultaneously by a number of groups or sections. Each group or section must have its own seat.

(2) Very little has been written on this question, and in 1960 the Commission did not consider it necessary to deal with it at length. Its basic thought was that the rules applicable to permanent missions in this connexion were not relevant to special missions and that no special rules on the subject were needed. Some members of the Commission did not entirely agree, however, because the absence of rules on the subject might encourage special missions to claim the right to choose their seat at will and to "open offices in any part of the territory of the receiving State".²³⁰

(3) In practice, special missions normally remain at the place designated by mutual agreement, which, in most cases, is not formally established by the sending State and the receiving State. Under that agreement the special mission generally establishes its offices near the locality where its functions are to be performed. If the place in question is the capital city of the receiving State and there are regular diplomatic relations between the two States, the official offices of the special mission are usually on the premises of the sending State's regular diplomatic mission, which (unless otherwise indicated) is its official address for communication purposes. Even in this case, however, the special mission may have a seat other than the embassy premises.

(4) It is very rare, in practice, for the seat of a special mission not to be chosen by prior agreement. In the exceptional case where the special mission's seat is not established, in advance by agreement between the States concerned, the practice is that the receiving State proposes a suitable locality for the special mission's seat, chosen in the light of all the circumstances affecting the mission's efficient functioning. Opinion is divided on whether the sending State is required to accept the place chosen by the receiving State. It has been held that such a requirement would conflict with the principle of the United Nations Charter concerning the sovereign equality of States if the receiving State were to impose the choice of the seat. The Commission has suggested a compromise, namely, that the receiving State should have the right to propose the locality, but that in order to become effective, that choice should be accepted by the sending State. That solution would have certain shortcomings in cases where the proposal was not accepted. The Commission has left the question open.

²²⁸ *Ibid.*, p. 179-180.

²²⁹ This addition was proposed by Mr. Jiménez de Aréchaga ; see *ibid.*, p. 115.

²³⁰ *Yearbook of the International Law Commission, 1960*, vol. II, p. 116 and pp. 179-180.

(5) The Commission did not go into the details of rules to determine the difference between the main seat and other seats where the special mission's task makes it necessary for it to have more than one seat. Usage varies in practice. One solution proposed to the Commission was that the main seat should be in the locality in which the seat of the Ministry of Foreign Affairs of the receiving State is situated, or in some other locality chosen by mutual agreement, and that the other seats should be established with a view to facilitating the work of the sections or teams. However, the Commission preferred to leave this question to be settled by agreement of the parties.

Article 14. Nationality of the head and the members of the special mission and of members of its staff

1. The head and members of a special mission and the members of its staff should in principle be of the nationality of the sending State.

2. Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 with regard to the nationals of a third State who are not also nationals of the sending State.

Commentary

(1) Article 14 corresponds to article 8 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the International Law Commission did not consider it necessary to express an opinion on the question whether the rules concerning the nationality of diplomatic agents of permanent missions should also apply to special missions. It even formulated the rule that the relevant article of its 1958 draft — article 7 — did not apply directly to special missions.²⁸¹

(3) The relevant literature, on the other hand, does not consider it impossible for nationals of a country to be admitted by that country as members of special missions, but stresses that the problem has been dealt with differently by various countries at various times.²⁸²

(4) In the Commission's view, there is no reason why nationals of the receiving State should not be employed as *ad hoc* diplomats of another State, but for that purpose the consent of the receiving State has to be obtained.

(5) Apart from the question whether a national of the receiving State can perform the functions of *ad hoc* diplomat of another State, the problem arises whether an *ad hoc* diplomat must possess the nationality of the State on whose behalf he carries out his mission. Here again, the International Law Commission ex-

pressed no opinion in 1960. Recent practice shows that nationals of third States, and even stateless persons, may act as *ad hoc* diplomats of a State, although some members of the Commission held it to be undesirable that they should do so. Practical reasons sometimes make it necessary to adopt this expedient and in practice it is for the receiving State alone to decide whether or not such persons should be recognized as *ad hoc* diplomats.

(6) The Commission has not specifically referred in the text to the possibility that the head of a special mission or one of its members of staff might have dual nationality. It believes that, in the case of a person who also possesses the nationality of the receiving State, that State has the right, in accordance with the existing rules on nationality in international law and with the practice of some countries, to consider such a person on the basis of the characterization theory, exclusively as one of its own nationals. In most States, the idea still prevails that nationality of the receiving State excludes any other nationality, and the argument that effective nationality excludes nominal nationality is not accepted in this case. The case of a person possessing more than one foreign nationality is juridically irrelevant, since it would be covered by paragraph 3 of this article.

(7) The Commission has also not considered whether persons possessing refugee status who are not natives of the receiving State can be employed, without the special approval of the receiving State, as heads or members of special missions or of their staffs.

(8) As regards nationals of the receiving State engaged locally by the special mission as auxiliary staff, and persons having a permanent domicile in its territory, the Special Rapporteur believes that they should not be subject to the provisions of this article, but rather to the régime applicable in this respect under the domestic law of the receiving State. The Commission did not deem it necessary to adopt a special rule on the subject.

(9) Nor did the Commission express any views on the question whether, in this respect, aliens and stateless persons having a permanent domicile in the territory of the receiving State should be treated in the same way as nationals of that State.

Article 15. Right of special missions to use the flag and emblem of the sending State

A special mission shall have the right to display the flag and emblem of the sending State on the premises of the mission, on the residence of the head of the mission and on the means of transport of the mission.

Commentary

(1) Article 15 is modelled on article 20 of the Vienna Convention on Diplomatic Relations.

(2) The Commission reserves the right to decide at a later stage whether article 15 should be placed in

²⁸¹ *Ibid.*, pp. 179-180.

²⁸² Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, London, 1957, pp. 138-141.

the section of the draft dealing with general matters or in the special section concerning facilities, privileges and immunities.

(3) In 1960, the International Law Commission recognized the right of special missions to use the national flag of the sending State upon the same conditions as permanent diplomatic missions.²³³ In practice, the conditions are not identical, but nevertheless there are some instances where this is possible. The Commission's Special Rapporteur, Mr. Sandström, cited the case of the flying of the flag on the motor vehicle of the head of a ceremonial mission. During the discussion which took place in the Commission in 1960, Mr. Jiménez de Aréchaga expressed the view that all special missions (and not only ceremonial missions) have the right to use such flags on the ceremonial occasions where their use would be particularly appropriate.²³⁴

(4) Current practice should be based on both a wider and a narrower approach: wider, because this right is not restricted to ceremonial missions but depends on the general circumstances (e.g., special missions of a technical nature moving in a frontier zone and all special missions on certain formal occasions); and narrower, because this usage is now limited in fact to the most formal occasions or to circumstances which warrant it, in the judgement of the mission. In practice, however, such cases are held within reasonable limits, and the tendency is towards restriction.

(5) All the rules applicable to the use of the national flag apply equally to the use of the national emblem, both in practice and in the opinion of the International Law Commission.

(6) In practice, some receiving States assert that they have the right to require that the flag of the sending State should be flown on all means of transport used by the special mission when it is travelling in a particular area. It is claimed in support of this requirement that measures to protect the special mission itself will be easier to carry out if the attention of the authorities of the receiving State is drawn by an external distinguishing mark, particularly in frontier security zones and military zones and in special circumstances. Some States, however, object to this practice on the grounds that it very often causes difficulties and exposes the special mission to discrimination. The Commission holds that this practice is not universally recognized and it has therefore not included a rule regarding it in the text of article 15.

Article 16. Activities of special missions in the territory of a third State

1. Special missions may not perform their functions in the territory of a third State without its consent.

2. The third State may impose conditions which must be observed by the sending State.

Commentary

(1) There is no corresponding rule in the Vienna Convention on Diplomatic Relations, but article 7 of the Vienna Convention on Consular Relations of 1963 provides that a consular post established in a particular State may not exercise consular functions in another State if the latter objects.

(2) Very often, special missions from different States meet and carry on their activities in the territory of a third State. This is a very ancient practice, particularly in the case of meetings between *ad hoc* missions or diplomats belonging to States which are in armed conflict. The International Law Commission did not take note of this circumstance in 1960; nor have writers paid much attention to it, but some of them mention it, particularly where the contact takes place through the third State. Whether or not the third State engages in mediation or extends its good offices, courtesy undoubtedly requires that it should be informed, and it is entitled to object to such meetings in its territory.

(3) Thus, the States concerned are not entitled to make arbitrary use of the territory of a third State for meetings of their special missions, if this is contrary to the wishes of that State. However, if the third State has been duly informed and does not express any objection (its formal consent is not necessary), it has a duty to treat special missions sent in these circumstances with every consideration, to assure them the necessary conditions to carry on their activities, and to offer them every facility, while the parties concerned, for their part, must refrain from any action which might harm the interests of the third State in whose territory they carry on their activities.

(4) In practice, the prior approval of the third State is often simply a matter of taking note of the intention to send a special mission to its territory (such intention may even be notified orally). If the third State makes no objection to the notification and allows the special mission to arrive in its territory, approval is considered to have been given.

(5) The Commission regards as correct the practice of some States — for example, Switzerland during the war — in imposing certain conditions which must be observed by parties sending special missions. The duty to comply with these conditions is without prejudice to the question whether, objectively, the missions' activities are considered to be prejudicial to the interests of the third State in whose territory they are carried on.

(6) A question which arises in practice is whether the third State must not only behave correctly and impartially towards the States whose missions meet in its territory by according them equal treatment, but must also respect any declarations it may itself have made in giving its prior approval. Since such approval can be given implicitly, it must be considered that a third State which goes even further by taking note, without objection, of a request for permission to use its territory is, in accordance with the theory of unilateral juridical acts in international law, bound by the request of the parties concerned, unless it has made certain reservations.

²³³ *Yearbook of the International Law Commission, 1960*, vol. II, p. 108, p. 180.

²³⁴ *Ibid.*, p. 116.

(7) Intercourse between a special mission of one State and the permanent diplomatic mission of another State accredited to the receiving State must be accorded the same treatment as the intercourse and activities of special missions in the territory of the third State. Such contacts are frequent, and they are referred to by legal writers as irregular means of diplomatic communication. They make direct intercourse possible between States which do not maintain mutual diplomatic relations, even when the States concerned are in armed conflict.

(8) The right of the third State, at any time and without being obliged to give any reason, to withdraw its hospitality from special missions in its territory and to prohibit them from engaging in any activity is recognized. In such cases, the sending States are obliged to recall their special missions immediately, and the missions themselves are required to cease their activities as soon as they learn that hospitality has been withdrawn. The exercise of this right by the third State does not mean that diplomatic relations with the States in question are broken off or that the head of the mission or its members are declared *persona non grata*. It merely means that the third State's consent to the activities of special missions in its territory has been revoked. The Commission held that article 16, paragraph 1, was sufficient and that the word "consent" means that the consent of the third State continues to be required throughout the period during which the activities of the special missions of the other States are taking place.

CHAPTER IV

Programme of Work and Organization of Future Sessions

36. After discussion at two private meetings held on 19 and 22 June 1964 and consideration by the officers of the Commission and the Special Rapporteurs, the Commission, at its 749th meeting, adopted its programme of work for 1965 and 1966. It decided to complete the study of the law of treaties and of special missions within that period. As to the other subjects on its agenda, the Commission decided to give priority to its work on relations between States and inter-governmental organizations. The questions of succession of States and Governments and State responsibility will be dealt with as soon as the subjects previously mentioned have been completed.

37. These decisions were taken having regard, in particular, to the fact that the term of office of the present members of the Commission expires at the end of 1966 and that it is desirable to complete, before that date, not only the study of the law of treaties, but also the study of special missions. That topic was chosen in preference to relations between States and inter-governmental organizations in the light of General Assembly resolution 1289 (XIII) of 5 December 1958, which provided that the question of relations between States and inter-governmental international organizations should be considered "at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad*

hoc diplomacy has been completed by the United Nations . . .". A draft on special missions had already been prepared, and several articles of that draft were discussed at the present session.

38. The need to complete the study of several topics before the end of 1966 led the Commission to raise the question of the duration of sessions. In order to complete its programme for 1964, the Commission decided to extend its present session by one week. It regretted the fact that, by reason of external circumstances such as the postponement of the dates of the nineteenth session of the General Assembly, it was not possible for the Commission to hold a supplementary winter session in 1965, as it had intended. The Commission believes, however, that it is essential to hold a four-week winter session in 1966, in order to have at its disposal the minimum time necessary for the completion of the heavy programme of work it has to complete before the end of the 1966 session.

39. The Commission intends in 1965, after considering the comments received from Governments, to conclude the second reading of the first part, and as many further articles as possible of the second part, of its draft on the law of treaties, in accordance with suggestions of the Special Rapporteur. At the same session, the Commission will continue its study of special missions and of relations between States and inter-governmental organizations. In 1966, the Commission will complete the remaining articles of its draft on the law of treaties and the draft on special missions. At the same time and within the limits of the time available, the Commission will also continue its study of relations between States and inter-governmental organizations and undertake further preparatory work on succession of States and Governments and State responsibility, which are to be the main subjects of its concern during sessions held after 1966.

40. It was therefore decided to ask the Secretariat to request Governments to submit their comments on the second part of the draft on the law of treaties by January 1965 at the latest, so that the Commission can consider them at its 1965 session; it was also decided to request Governments to submit their comments as soon as possible on the third part of the draft on the law of treaties completed in 1964 by the Commission, so that the whole of the work on the law of treaties could be completed before the end of 1966. The draft on special missions will be sent to Governments for comments when it is completed in 1965, and Governments will then be requested to submit their comments in time for the Commission to complete its work on the topic in 1966.

CHAPTER V

Other Decisions and Conclusions of the Commission

A. RELATIONS BETWEEN STATES AND INTER- GOVERNMENTAL ORGANIZATIONS

41. The Commission continued the discussion of the first report (A/CN.4/161 and Add.1) submitted

in 1963 by the Special Rapporteur, Mr. El-Erian.²⁸⁵ In conjunction therewith the Commission examined a list of questions suggested by the Special Rapporteur in a working paper (A/CN.4/L.104) as a basis of discussion for the definition of the scope and mode of treatment of the topic. The questions related to :

(a) The scope of the subject [interpretation of General Assembly resolution 1289 (XIII)] ;

(b) The approach to the subject (either as an independent subject or as collateral to the treatment of other topics) ;

(c) The mode of treatment (whether priority should be given to " diplomatic law " in its application to relations between States and international organizations) ;

(d) The order of priorities (whether the status of permanent missions accredited to international organizations and delegations to organs of and conferences convened by international organizations should be taken up before the status of international organizations and their agents) ;

(e) The question whether the Commission should concentrate in the first place on international organizations of a universal character or should deal also with regional organizations.

42. At its 755th to 757th meetings, the Commission discussed these questions, and certain other related questions that arose in connexion therewith. The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority. Other suggestions made by members of the Commission will be considered in the preparation of a second report by the Special Rapporteur.

B. CO-OPERATION WITH OTHER BODIES

43. At its 768th meeting, held on 17 July, the Commission considered the item concerning co-operation with other bodies.

44. It took note of the report by Mr. Eduardo Jiménez de Aréchaga (A/CN.4/172)²⁸⁶ on the work of the sixth session of the Asian-African Legal Consultative Committee, held at Cairo from 23 February to 6 March 1964, which he had attended as observer for the Commission.

45. The Asian-African Legal Consultative Committee was represented by Mr. Hafez Sabek, who addressed the Commission.

²⁸⁵ *Yearbook of the International Law Commission, 1963*, vol. II, pp. 159-185. The discussion of the report was begun at the fifteenth session of the Commission and a working paper (A/CN.4/L.103) (*ibid.*, p. 186) was submitted by the Special Rapporteur. It was intended to continue the discussion at a session in January 1964, which session, however, was not held.

²⁸⁶ *Vide supra*, pp. 119-124.

46. After considering the standing invitation addressed to it by the Secretary of the Asian-African Legal Consultative Committee to attend the Committee's sessions, the Commission requested its Chairman, Mr. Roberto Ago, to attend the next session of the Committee as an observer or, if he were unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission at that meeting. The next session of the Committee is to be held in Baghdad in February 1965.

47. No communication was received at the present session from the legal bodies of the Organization of American States regarding the next session of the Inter-American Council of Jurists.

48. The Commission considered a letter addressed to the Secretary of the Commission by Mr. F. Dumon, President of the International Union of Judges, requesting that the Union should be authorized to collaborate with the International Law Commission. As the Union's agenda does not for the time being include items similar to those studied by the Commission, the latter requested the Secretary to ask the Union to inform him when it proposed to study matters relating to those considered by the Commission, so that the Union's request to collaborate with the International Law Commission could then be resubmitted to the Commission.

49. At its 768th meeting, the Commission took note of the memorandum prepared by the Secretariat (A/CN.4/171) concerning the distribution of the documents of the Commission. This memorandum was submitted in response to the Commission's request, at its fifteenth session²⁸⁷ in connexion with its consideration of the item on co-operation with other bodies. After an exchange of views, the Commission considered the possibility of establishing at its next session a small committee to study the problems involved.

C. DATE AND PLACE OF THE NEXT SESSION

50. The Commission decided to hold its next session at the European Office of the United Nations from 3 May to 9 July 1965.

D. REPRESENTATION AT THE NINETEENTH SESSION OF THE GENERAL ASSEMBLY

51. The Commission decided that it would be represented at the nineteenth session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Roberto Ago.

E. TRIBUTE TO THE SECRETARY OF THE COMMISSION

52. At its 767th meeting, held on 16 July, the Commission paid tribute to Dr. Yuen-li Liang, Director, Codification Division, Office of Legal Affairs of the United Nations, who has acted with high distinction as Secretary of the Commission since 1949, and who will retire after the present session.

²⁸⁷ *Yearbook of the International Law Commission, 1963*, vol. II, p. 225, para. 70.