Document:-

A/CN.4/191

Report of the of the International Law Commission on the work of its Eighteenth Session, 4 May - 19 July 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1)

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1966，vol. II

REPORTS OF THE COMMISSION TO THE GENERAL ASSEMBLY

Document A/6309/Rev.1

Part I

Report of the International Law Commission on the work of the second part of its seventeenth session

Monaco, 3-28 January 1966

CONTENTS

A. Introduction

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 the second part of its seventeenth session at the Palais des Congrès, Principality of Monaco, from 3 to 28 January 1966.

2. At its sixteenth session, in 1964, and at the first part of its seventeenth session, in 1965, the Commission declared that it was essential to hold a four-week series of meetings at the beginning of 1966, in order to finish in the course of that year its draft articles on the law of treaties and on special missions before the end of the term of office of its present members.[1] The General Assembly, by resolution 2045 (XX) of 8 December 1965, approved the Commission's proposal to meet from 3 to 28 January 1966.

3. The Government of the Principality of Monaco invited the Commission to hold its meetings of January 1966 in Monaco, and undertook to defray the additional costs involved, in accordance with General Assembly resolution 1202 (XII) of 13 December 1957. The Commission decided, in pursuance of article 12 of its Statute and after consultation with the Secretary-General, to accept the invitation. The second part of the seventeenth session of the Commission was therefore held in Monaco.

B. Membership and attendance

4. The Commission consists of the following members:

Mr. Roberto AGO (Italy)
Mr. Gilberto AMADO (Brazil)
Mr. Milan BARTOŠ (Yugoslavia)
Mr. Mohammed BEDJAOUI (Algeria)
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. Manfred LACHS (Poland)
Mr. LIU Chieh (China)
Mr. Antonio DE LUNA (Spain)
Mr. Radhabinod PAL (India)
Mr. Angel M. PAREDES (Ecuador)
Mr. Obed PESSOU (Senegal)
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)

[1] *Official Records of the General Assembly, Nineteenth Session, Supplement No. 9* (A/5809), chapter IV, paras. 36-38; *ibid., Twentieth Session, Supplement No. 9* (A/6009), chapter IV, paras. 52-56, and chapter V, para. 65.

Mr. Alfred VERDROSS (Austria)
Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland)
Mr. Mustafa Kamil YASSEEN (Iraq)

5. Except for Mr. Abdullah El-Erian, Mr. Liu Chieh, Mr. Radhabinod Pal, Mr. Angel M. Paredes and Mr. Abdul Hakim Tabibi, who were unable to be present, all the members attended.

C. Officers

6. The officers elected during the first part of the session, at the 775th meeting held on 3 May 1965, remained in office during the second part. They were the following:

Chairman: Mr. Milan Bartoš
First Vice-Chairman: Mr. Eduardo Jiménez de Aréchaga
Second Vice-Chairman: Mr. Paul Reuter
Rapporteur: Mr. Taslim O. Elias

7. The Drafting Committee appointed at the first part of the session likewise remained in office. It was composed of the following:

Chairman: Mr. Eduardo Jiménez de Aréchaga
Members: Mr. Roberto Ago; Mr. Herbert W. Briggs; Mr. Taslim O. Elias; Mr. Manfred Lachs; Mr. Paul Reuter; Mr. Shabtai Rosenne; Mr. José María Ruda; Mr. Grigory I. Tunkin; Sir Humphrey Waldock; and Mr. Mustafa Kamil Yasseen. In addition the Commission requested Mr. Marcel Cadieux and Mr. Antonio de Luna to serve temporarily as members of the Committee.

8. Mr. Constantin A. Baguinian, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

D. Agenda and meetings

9. The agenda for the seventeenth session was adopted during the first part of the session, at the 775th meeting on 3 May 1965. In accordance with the Commission's decision taken in 1965, [2] the second part of the session was mainly devoted to the law of treaties. Consideration was also given to the organization and duration of the eighteenth session in 1966, to co-operation with other bodies, and to other business.

10. In the course of the second part of the seventeenth session the Commission held twenty-two public meetings. [3] In addition, the Drafting Committee held eight meetings.

E. Law of treaties

11. During its meetings in Monaco the Commission had before it, in connexion with the law of treaties, a portion of the fourth report (A/CN.4/177/Add.2) of Sir Humphrey Waldock, Special Rapporteur, which had not previously been examined; the fifth report of the Special Rapporteur (A/CN.4/183 and Add.1-4); part II of the draft articles on the law of treaties, adopted by the Commission at its fifteenth session in 1963; [4] and the comments of Governments on those draft articles (A/CN.4/175 and Add.1-4).

12. The Commission re-examined in the light of the comments of Governments articles 30-50 of the draft articles. It decided to defer a decision on article 40 until the eighteenth session, and at that session the Drafting Committee will report on articles 49 and 50, on which it was unable to complete its study in Monaco. The Commission, in all, adopted revised texts of nineteen articles. As explained in its last report, [5] these texts must still be treated as subject to review at the eighteenth session of the Commission, when its work on the draft articles on the law of treaties will be completed. As also explained in that report, the Commission preferred to postpone its consideration of all the commentaries until its eighteenth session when it would have before it the final text of all the articles to be included in the draft. The texts of articles 30-50 as finally adopted by the Commission, together with commentaries thereto, will be published as part of the complete draft on the law of treaties in the report of the Commission on the work of its eighteenth session.

F. Resolution of thanks to the Government of Monaco

13. At its 843rd meeting, on 27 January 1966, the Commission unanimously adopted the following resolution:

"*The International Law Commission,*

"*Having met* from 3 to 28 January 1966 in order to continue the work of its seventeenth session,

"*Expresses* its profound gratitude to the Government of H.S.H. Prince Rainier III and to the Principality of Monaco for having made it possible to hold the second part of the Commission's seventeenth session at Monaco, for their generous hospitality and for their contribution to the completion of its work."

G. Organization and duration of the eighteenth session

14. At its 843rd meeting, on 28 January 1966, the Commission decided that its eighteenth session would be mainly devoted to the law of treaties and to special missions, and that the law of treaties would be taken up at the beginning of the session. The Commission would also discuss at that session the organization of future work on the other topics on its agenda.

15. The Commission, during its meetings in 1965, [6] desired to reserve the possibility of a two-week extension of its eighteenth session in summer 1966, the question of the extension to be decided in January 1966 in the light of the progress made up to that time. The General Assembly, by resolution 2045 (XX) of 8 December 1965,

[2] *Official Records of the General Assembly, Twentieth Session, Supplement No. 9* (A/6009), chapter IV, para. 55.

[3] 822nd to 843rd meetings.

[4] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9* (A/5509), chapter II.

[5] *Official Records of the General Assembly, Twentieth Session, Supplement No. 9* (A/6009), chapter II, paras. 27 and 28.

[6] *Ibid.*, chapter IV, para. 54, and chapter V, para. 66.

noted that proposal with approval. At its 835th meeting, on 20 January 1966, the Commission unanimously decided in principle in favour of the two-week extension, subject to the possibility of earlier adjournment if the progress of work permitted. The dates envisaged for the eighteenth session are therefore from 4 May to 22 July 1966. It will be held at the Office of the United Nations at Geneva.

H. Co-operation with other bodies

European Committee on Legal Co-operation

16. At its 827th meeting, on 10 January 1966, the Commission considered a letter of 16 December 1965 from the Secretary-General of the Council of Europe, addressed to the Secretary-General of the United Nations, who had transmitted it to the Commission. The letter stated that the Council of Europe in 1963 had set up a special body, the European Committee on Legal Co-operation, for the purpose of dealing with co-operation of its member States in the legal field. The Committee, which was composed of delegations of eighteen States and of three delegates of the Consultative Assembly of the Council of Europe, had under consideration various items (including immunity of States, consular functions, and reservations to international treaties) which appeared to be connected with the work of the International Law Commission. It was proposed to establish a co-operative relationship of the Commission with the European Committee like those existing with the juridical bodies of the Organization of American States and with the Asian-African Legal Consultative Committee. The Commission decided at its 827th meeting to establish a relationship under article 26 of its Statute with the European Committee on Legal Co-operation.

17. The European Committee was represented at the Commission's meeting by Mr. H. Golsong, Director of Legal Affairs, Council of Europe, who addressed the Commission at its 830th meeting, on 13 January 1966, on the work of the Committee.

Inter-American Council of Jurists

18. The Inter-American Juridical Committee, the standing organ of the Inter-American Council of Jurists, was represented by Mr. José Joaquín Caicedo Castilla, who addressed the Commission at its 830th meeting, on 13 January 1966, on the legal work of the Organization of American States. He referred in particular to the meeting of the Inter-American Council of Jurists in San Salvador, [7] a meeting of the Inter-American Juridical Committee in Rio de Janeiro in July, August and September 1965, and an extraordinary Inter-American Conference in Rio de Janeiro in November 1965. The Juridical Committee had completed work on drafts concerning the breadth of the territorial sea, international responsibility of the State, industrial and agricultural utilization of international rivers and lakes, and differences between intervention and collective action. The Extraordinary Conference had, among other things, examined the opinion of the Juridical Committee on the last-mentioned subject.

[7] See report (A/CN.4/176) by Mr. Eduardo Jiménez de Aréchaga, in *Yearbook of the International Law Commission, 1965*, vol. II, p. 145.

I. Seminar on International Law

19. At its 831st meeting, on 14 January 1966, the Commission took note of the final preambular paragraphs and operative paragraph 4 of General Assembly resolution 2045 (XX) of 8 December 1965, by which the General Assembly noted with satisfaction that the Office of the United Nations at Geneva had organized, during the first part of the seventeenth session of the Commission, a seminar on international law, and expressed the wish that during future sessions other seminars would be held, with the participation of a reasonable number of nationals of the developing countries. At that meeting, explanations concerning the seminar to be held during the eighteenth session of the Commission were given on behalf of the United Nations Office at Geneva by Mr. Pierre Raton, the officer in charge of the organization of the seminar. It was explained that practical reasons made it necessary to hold the seminar to begin not later than the second or third week of the session. The second seminar would be of slightly longer duration than the first, in order to give the participants an opportunity to do research in the library of the Palais des Nations. The number of participants would be increased to a maximum of twenty or twenty-one, in order to help secure a better geographical distribution; but a further increase would risk impairing the possibilities for the participants to play an active part and to have personal contacts with members of the Commission. It was hoped that other Governments would follow the examples of the Governments of Israel and Sweden, which had generously agreed to provide one fellowship each to enable a national of a developing country to attend the seminar.

20. In the course of the discussion certain members of the Commission made observations about the seminar. One member suggested that a further attempt should be made to explore the possibilities of obtaining fellowships from Governments and private sources. Another suggested that it might be desirable for other members of the Commission in addition to the lecturer to attend the lectures, so that the debate could be broadened; that the maximum number of participants could be enlarged to thirty; and that one method of ensuring that the best candidates were chosen for fellowships would be to have them chosen by the universities in their countries of origin. The Commission decided to bring these comments to the attention of the Office of the United Nations at Geneva, for its consideration.

Part II

Report of the International Law Commission on the work of its eighteenth session

Geneva, 4 May - 19 July 1966

CONTENTS

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 eighteenth session at the United Nations Office at Geneva from 4 May to 19 July 1966. The Commission thus availed itself of the possibility of extending its session which was granted by the General Assembly at its twentieth session in the interest of allowing the Commission to complete as much work as possible during the term of office of the present members. The work of the Commission during this session is described in this report. Chapter II of the report, on the law of treaties, contains a description of the Commission's work on that topic, together with seventy-five draft articles and commentaries thereto, as finally approved by the Commission. Chapter III, relating to special missions, contains a description of the Commission's work on that topic. Chapter IV relates to the programme of work and organization of future sessions of the Commission, and to 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. Mohammed BEDJAOUI (Algeria)
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. Manfred LACHS (Poland)
Mr. LIU Chieh (China)
Mr. Antonio DE LUNA (Spain)
Mr. Radhabinod PAL (India)
Mr. Angel M. PAREDES (Ecuador)
Mr. Obed PESSOU (Togo)
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. Except for Mr. Mohammed Bedjaoui, Mr. Marcel Cadieux, Mr. Taslim O. Elias, Mr. Liu Chieh and Mr. Radhabinod Pal, who were unable to be present, all the members attended.

B. OFFICERS

4. At its 844th meeting, held on 4 May 1966, the Commission elected the following officers:

Chairman: Mr. Mustafa Kamil Yasseen
First Vice-Chairman: Mr. Herbert W. Briggs
Second Vice-Chairman: Mr. Manfred Lachs
Rapporteur: Mr. Antonio de Luna

5. At its 845th meeting, held on 5 May 1966, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Herbert W. Briggs

Members: Mr. Roberto Ago; Mr. Erik Castrén; Mr. Abdullah El-Erian; Mr. Eduardo Jiménez de Aréchaga; Mr. Manfred Lachs; Mr. Antonio de Luna; Mr. Paul Reuter; Mr. Shabtai Rosenne; Mr. Grigory I. Tunkin; Sir Humphrey Waldock.

6. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 878th, 879th and 880th meetings, held on 27, 28 and 29 June 1966 respectively, and represented the Secretary-General at those meetings. Mr. Constantin A. Baguinian, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission.

C. AGENDA

7. The Commission adopted an agenda for the eighteenth session, consisting of the following items:

1. Law of treaties
2. Special missions
3. Organization of future work
4. Date and place of the nineteenth session
5. Co-operation with other bodies
6. Other business.

8. In the course of the session, the Commission held fifty-one public meetings. In addition, the Drafting Committee held twenty-three meetings. The Commission considered all the items on its agenda. At the invitation of the Legal Counsel of the United Nations and in accordance with suggestions made in the Sixth Committee at the twentieth session of the General Assembly, the Commission discussed the procedural and organizational problems involved in a possible diplomatic conference on the law of treaties, and also the question of the responsibilities of United Nations organs in furthering co-operation in the development of the law of international trade and in promoting its progressive unification and harmonization.

CHAPTER II

Law of treaties

A. INTRODUCTION

1. *Summary of the Commission's proceedings*

9. At its first session in 1949, the International Law Commission at its sixth and seventh meetings placed the law of treaties amongst the topics listed in its report[1]

[1] *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), para. 16.

for that year as being suitable for codification, and at its 33rd meeting appointed Mr. J. L. Brierly as Special Rapporteur for the subject.

10. At its second session in 1950, the Commission devoted its 49th to 53rd and 78th meetings to a preliminary discussion of Mr. Brierly's first report, [2] which like his other reports envisaged that the Commission's work on the law of treaties would take the form of a draft convention. The Commission also had before it replies of Governments to a questionnaire addressed to them under article 19, paragraph 2, of its Statute. [3]

11. At its third session, in 1951, the Commission had before it two reports from Mr. Brierly, [4] one relating to the continuation of the Commission's general work on the law of treaties, and the other relating to reservations to multilateral conventions, a topic referred to the Commission by the General Assembly in its resolution 478 (V) of 16 November 1950, by which the Assembly also requested an advisory opinion from the International Court of Justice on the particular problem of reservations to the Genocide Convention. [5] The Commission considered the first report at its 84th to 88th, 98th to 100th, and 134th meetings, and the second report at its 100th to 106th, 125th to 129th, and 133rd meetings. The conclusions of the Commission regarding reservations to multilateral conventions were given in chapter II of its report. [6]

12. At its fourth session, in 1952, the Commission had before it a third report on the law of treaties prepared by Mr. Brierly, [7] but as Mr. Brierly had meanwhile resigned his membership of the Commission, the Commission did not think it advisable to discuss that report in the absence of the author, and after a discussion at its 178th and 179th meetings, appointed Mr. (later Sir Hersch) Lauterpacht as Special Rapporteur. In 1952 the Secretariat published a volume in the United Nations Legislative Series [8] entitled "Laws and Practices concerning the Conclusion of Treaties".

13. At the fifth session, in 1953, and the sixth session, in 1954, the Commission received two reports [9] by Sir Hersch Lauterpacht, but was unable to discuss them. Since meanwhile Sir Hersch Lauterpacht had resigned from the Commission upon his election as a judge of the International Court of Justice, the Commission at its seventh session, in 1955 (296th meeting), appointed Sir Gerald Fitzmaurice as Special Rapporteur in his place.

14. At the next five sessions of the Commission, from 1956 to 1960, Sir Gerald Fitzmaurice presented five successive reports [10] covering respectively: (*a*) the framing, conclusion and entry into force of treaties, (*b*) the termination of treaties, (*c*) essential and substantial validity of treaties, (*d*) effects of treaties as between the parties (operation, execution and enforcement), and (*e*) treaties and third States. Although taking full account of the reports of his predecessors, Sir Gerald Fitzmaurice prepared his drafts *de novo* and framed them in the form of an expository code rather than of a convention. During this period the Commission's time was largely taken up with other topics so that apart from a brief discussion of certain general questions of treaty law at the 368th-370th meetings of the eighth session, in 1956, it was able to concentrate upon the law of treaties only at its eleventh session, in 1959. At that session it devoted twenty-six meetings (480th-496th, 500th-504th and 519th-522nd meetings) to a discussion of Sir Gerald Fitzmaurice's first report, and provisionally adopted the texts of fourteen articles, together with their commentaries. However, the time available was not sufficient to enable the Commission to complete its series of draft articles on that part of the law of treaties. In its report for 1959 [11] the Commission, in addition to setting out the text of those articles, explained the reasons why, without prejudice to any eventual decision it might take, it had been envisaging its work on the law of treaties as taking the form of "a code of a general character", rather than of one or more international conventions. This question is discussed in the next section below.

15. The twelfth session, in 1960, was entirely taken up with drafts on other topics, so that no further progress was made with the law of treaties at that session. Sir Gerald Fitzmaurice then resigned from the Commission after his election as a judge of the International Court of Justice, and at the thirteenth session, in 1961, the Commission appointed Sir Humphrey Waldock to succeed him as Special Rapporteur on the law of treaties. At the same session the Commission decided, [12] after discussion at the 620th and 621st meetings, that its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention (see the next section below). The General Assembly, in its resolution 1686 (XVI) of 18 December 1961, taking note of the Commission's decision, recommended that the Commission continue its work on the law of treaties.

16. At its fourteenth session, in 1962, the Commission, at its 637th-670th and 672nd meetings, considered the

[2] *Yearbook of the International Law Commission, 1950*, vol. II, p. 223.

[3] *Ibid.*, p. 196.

[4] *Yearbook of the International Law Commission, 1951*, vol. II, pp. 1 and 70.

[5] *I.C.J. Reports 1951*, p. 15.

[6] *Yearbook of the International Law Commission, 1951*, vol. II, pp. 125-131.

[7] *Yearbook of the International Law Commission, 1952*, vol. II, p. 50.

[8] ST/LEG/SER.B/3 (United Nations publication, Sales No.: 1952. V. 4).

[9] *Yearbook of the International Law Commission, 1953*, vol. II, p. 90, and *1954*, vol. II, p. 123.

[10] *Yearbook of the International Law Commission, 1956*, vol. II, p. 104; *1957*, vol. II, p. 16; *1958*, vol. II, p. 20; *1959*, vol. II, p. 37; and *1960*, vol. II, p. 69. In 1957 the Secretariat published a "Handbook of Final Clauses" (ST/LEG/6). In addition, at the eleventh session, in 1959, the Secretariat submitted a note on its practice in relation to certain questions; *Yearbook of the International Law Commission, 1959*, vol. II, p. 82. In the same year the Secretariat published a "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7).

[11] *Yearbook of the International Law Commission, 1959*, p. 88.

[12] *Yearbook of the International Law Commission, 1961*, vol. II, p. 128, para. 39.

first report of Sir Humphrey Waldock,[13] adopted a provisional draft of twenty-nine articles on the conclusion, entry into force and registration of treaties,[14] and decided to transmit its draft, through the Secretary-General, to Governments for their comments. The General Assembly, in its resolution 1765 (XVII) of 20 November 1962, recommended that the Commission continue the work of codification and progressive development of the law of treaties, taking into account the views expressed in the Assembly and the comments submitted by Governments.

17. At its fifteenth session, in 1963, the Commission, at its 673rd-685th, 687th-711th, 714th, 716th-721st meetings, considered the second report of Sir Humphrey Waldock,[15] adopted a provisional draft of twenty-four further articles on the invalidity, termination and suspension of treaties,[16] and likewise decided to transmit them to Governments for their comments. At the same session, the Commission studied the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, which had been referred to it by General Assembly resolution 1766 (XVII) of 20 November 1962. On this question the Commission, at its 712th and 713th meetings, considered a special report[17] by Sir Humphrey Waldock, and submitted its conclusions in its report to the General Assembly.[18] The General Assembly, in resolution 1902 (XVIII) of 18 November 1963, made a recommendation concerning the Commission's work on the law of treaties which was similar to that in resolution 1765 (XVII), referred to in the preceding paragraph.

18. At its sixteenth session, in 1964, the Commission, at its 726th-755th, 759th-760th, 764th-767th, 769th and 770th-774th meetings, considered the third report of Sir Humphrey Waldock,[19] and adopted a provisional draft of nineteen further articles on the application, effects, revision and interpretation of treaties, thus completing a provisional draft on the topic. The third part of the draft articles was also transmitted to Governments for their comments.

19. The comments of Governments on the provisional draft were published for the use of the Commission in documents A/CN.4/175 and Add.1-5 and A/CN.4/182 and Add.1-3. Part II of each of those documents reproduced article by article extracts from the summary records of the Sixth Committee containing the views expressed on the articles in that Committee. The comments submitted in writing by Governments, which were published in part I of those documents, are also published in the annex to the present report.

20. At the first part of its seventeenth session, from May to July 1965, the Commission, at its 776th-803rd, 810th-816th, 819th and 820th meetings, began the revision of the draft articles in the light of the comments of Governments. It had before it the fourth report of Sir Humphrey Waldock,[20] which summarized the written comments of Governments and also those made orally by delegations in the General Assembly, and made proposals for the revision of the articles. The Commission also had before it a report (A/5687) on "Depositary Practice in Relation to Reservations", submitted by the Secretary-General to the General Assembly in accordance with resolution 1452 B (XIV), and certain further information on depositary practice and reservations submitted by the Secretary-General at the request of the Commission.[21] The Commission in 1965 re-examined the first twenty-nine articles of the draft, but, as the draft articles were still considered as subject to review, the Commission did not consider that it would be useful to adopt commentaries to those articles. The General Assembly, in resolution 2045 (XX) of 8 December 1965, again made a recommendation concerning the Commission's work on the law of treaties which was like those in resolutions 1765 (XVII) and 1902 (XVIII), referred to above.

21. For the purpose of finishing the draft articles before the end of the term of office of its present members, the Commission proposed to hold the second part of its seventeenth session for four weeks in January 1966, and the General Assembly, by resolution 2045 (XX), approved that proposal. Those four weeks of meetings, consisting of the 822nd-843rd meetings, were held in Monaco by invitation of the Government of the Principality, and the law of treaties was discussed at all of them. The Commission had before it the fifth report of Sir Humphrey Waldock,[22] and re-examined twenty-one further articles, but again did not adopt commentaries on those articles.

22. At the eighteenth session the Commission has had before it the sixth report of Sir Humphrey Waldock,[23] and also a memorandum by the Secretariat entitled "Preparation of Multilingual Treaties" (A/CN.4/187). At its 845th-876th, 879th-880th and 883rd-894th meetings, the Commission re-examined the remainder of the draft articles, revised certain earlier articles, decided upon the order of all the articles, dealt with some general questions of terminology, adopted the commentaries to all articles, and also, in accordance with suggestions made by representatives in the Sixth Committee at the twentieth session of the General Assembly, considered the procedural and organizational problems involved in a possible conference on the law of treaties. The Commission has adopted the final text of its draft articles on the law of

[13] *Yearbook of the International Law Commission, 1962*, vol. II, p. 27.

[14] *Ibid.*, p. 161.

[15] *Yearbook of the International Law Commission, 1963*, vol. II, p. 36. At that session the Secretariat submitted a memorandum (A/CN.4/154) on resolutions of the General Assembly concerning the law of treaties.

[16] *Ibid.*, p. 189.

[17] A/CN.4/162.

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

[19] *Yearbook of the International Law Commission, 1964*, vol. II, p. 5.

[20] *Yearbook of the International Law Commission, 1965*, vol. II (A/CN.4/177 and Add.1-2).

[21] *Ibid.*, vol. I, 791st meeting, para. 61, and 801st meeting, paras. 17-20.

[22] See p. 1 above. (A/CN.4/183 and Add.1-4).

[23] See p. 51 above. (A/CN.4/186 and Add.1-7).

treaties in English, French and Spanish, and, in accordance with its Statute, submits them herewith to the General Assembly, together with the recommendations contained in paragraphs 36 and 37 below.

2. *Form of the draft articles*

23. The first two Special Rapporteurs of the Commission on the law of treaties envisaged that the Commission's work on the topic would take the form of a draft convention. The third Special Rapporteur, Sir Gerald Fitzmaurice, however, drafted his reports in the form of an expository code. At its thirteenth session, in 1961, the Commission, in appointing Sir Humphrey Waldock as its fourth Special Rapporteur on the topic, decided "that its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention". [24] Thus the Commission changed the scheme of its work from a mere expository statement of the law to the preparation of draft articles capable of serving as a basis for an instrument intended to become legally binding.

24. This decision was explained as follows by the Commission in its report on its fourteenth session in 1962: [25]

> "First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations."

25. At the first part of its seventeenth session, in 1965, the Commission re-examined the question in the light of the comments of certain Governments on the question of the form ultimately to be given to the draft articles, and of the view of two Governments that the form should be that of a code rather than a convention. The Commission adhered to the views it had expressed in 1961 and 1962 in favour of a convention, and gave the same explanation as has been quoted in the preceding paragraph. [26] The Commission also:

> "...recalled that at the seventeenth session of the General Assembly the Sixth Committee had stated in its report that the great majority of representatives had approved the Commission's decision to give the codification of the law of treaties the form of a convention. The Commission, moreover, felt it to be its duty to aim at achieving the maximum results from the prolonged work done by it on the codification of the law of treaties. Accordingly, it reaffirmed its decision of 1961 to prepare draft articles 'intended to serve as the basis for a convention'."

26. In submitting the final text of the draft articles on the law of treaties in the present report, the Commission maintains the view which it accepted at the outset of its work on the topic and which it has expressed in its reports since 1961. A corresponding recommendation is made in paragraph 36 below.

27. The Commission also maintains the view that the draft articles should be cast in the form of a single draft convention rather than that of a series of related conventions. As stated in its report for 1965: [27]

> "...the Commission concluded that the legal rules set out in the different parts are so far interrelated that it is desirable that they should be codified in a single convention. It considered that, while certain topics on the law of treaties may be susceptible of being dealt with separately, the proper co-ordination of the rules governing the several topics is likely to be achieved only by incorporating them in a single, closely integrated set of articles. Accordingly, it decided that in the course of their revision the draft articles should be rearranged in the form of a single convention."

3. *Scope of the draft articles*

28. During the course of the preparation of its draft articles on the law of treaties, the Commission frequently had occasion to consider the scope of application of those articles. It decided to limit that scope to treaties concluded between States, to the exclusion of treaties between States and other subjects of international law and treaties between such other subjects of international law, and it also decided not to deal with international agreements not in written form. These decisions are explained in the commentaries to articles 1, 2 and 3 below. Apart from these matters, however, there are certain others which require explanation in this section.

29. At its fifteenth session, in 1963, the Commission concluded that the draft articles should not contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic might raise problems both of the termination of treaties and of the suspension of their operation. It was explained in the report for 1963 [28] that:

> "The Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties."

---

[24] *Yearbook of the International Law Commission, 1961*, vol. II, p. 128, para. 39.

[25] *Yearbook of the International Law Commission, 1962*, vol. II, p. 160, para. 17.

[26] *Official Records of the General Assembly, Twentieth Session, Supplement No. 9* (A/6009), chapter II, para. 16.

[27] *Ibid.*, para. 18.

[28] *Yearbook of the International Law Commission, 1963*, vol. II, p. 189, para. 14.

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

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

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

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

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

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

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

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

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

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

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

C. Resolution adopted by the Commission

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

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

Draft articles on the law of treaties

Part I.—Introduction

Article 1. The scope of the present articles

The present articles relate to treaties concluded between States.

[29] *Ibid.*

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

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

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

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

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

Article 2. Use of terms

1. For the purposes of the present articles:

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

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

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

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

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

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

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

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

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

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

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

The fact that the present articles do not relate:

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

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

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

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

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

Part II.—Conclusion and entry into force of treaties

Section 1: Conclusion of treaties

Article 5. Capacity of States to conclude treaties

1. Every State possesses capacity to conclude treaties.

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

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

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

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

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

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

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

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

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

Article 7. Subsequent confirmation of an act performed without authority

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

Article 8. Adoption of the text

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

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

Article 9. Authentication of the text

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

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

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

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

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

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

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

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

2. For the purposes of paragraph 1:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 2: Reservations to multilateral treaties

Article 16. Formulation of reservations

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

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

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

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

Article 17. Acceptance of and objection to reservations

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

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

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

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

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

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

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

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

Article 18. Procedure regarding reservations

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

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

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

Article 19. Legal effects of reservations

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

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

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

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

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

Article 20. Withdrawal of reservations

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

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

Section 3: Entry into force of treaties

Article 21. Entry into force

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

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

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

Article 22. Entry into force provisionally

1. A treaty may enter into force provisionally if:

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

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

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

Part III.—Observance, application and interpretation of treaties

Section 1: Observance of treaties

Article 23. *Pacta sunt servanda*

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

Section 2: Application of treaties

Article 24. Non-retroactivity of treaties

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

Article 25. Application of treaties to territory

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

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

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

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

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

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

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

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

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

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

Section 3: Interpretation of treaties

Article 27. General rule of interpretation

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

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

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

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

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

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

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

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

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

Article 28. Supplementary means of interpretation

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

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

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

Article 29. Interpretation of treaties in two or more languages

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

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

3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

Section 4: Treaties and third States

Article 30. General rule regarding third States

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

Article 31. Treaties providing for obligations for third States

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

Article 32. Treaties providing for rights for third States

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

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

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

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

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

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

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

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

Part IV.—Amendment and modification of treaties

Article 35. General rule regarding the amendment of treaties

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

Article 36. Amendment of multilateral treaties

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

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

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

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

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

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

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

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

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

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

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

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

(*b*) The modification in question:

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

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

(iii) is not prohibited by the treaty.

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

Article 38. Modification of treaties by subsequent practice

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

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

Section 1: General provisions

Article 39. Validity and continuance in force of treaties

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

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

Article 40. Obligations under other rules of international law

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

Article 41. Separability of treaty provisions

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

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

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

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

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

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

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

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

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

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

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

Section 2: Invalidity of treaties

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

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

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

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

Article 45. Error

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

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

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

Article 46. Fraud

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

Article 47. Corruption of a representative of the State

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

Article 48. Coercion of a representative of the State

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

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

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

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

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

Section 3: Termination and suspension of the operation of treaties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) as between all the parties;

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

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

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

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

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

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

Article 58. Supervening impossibility of performance

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

Article 59. Fundamental change of circumstances

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

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

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

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

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

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

Article 60. Severance of diplomatic relations

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

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

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

Section 4: Procedure

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

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

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

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

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

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

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

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

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

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

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

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

Article 65. Consequences of the invalidity of a treaty

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

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

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

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

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

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

Article 66. Consequences of the termination of a treaty

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

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

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

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

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

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

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

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

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

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

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

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

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

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

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

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

Part VI.—Miscellaneous provisions

Article 69. Cases of State succession and State responsibility

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

Article 70. Case of an aggressor State

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

Part VII.—Depositaries, notifications, corrections and registration

Article 71. Depositaries of treaties

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

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

Article 72. Functions of depositaries

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

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

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

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

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

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

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

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

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

Article 73. Notifications and communications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 75. Registration and publication of treaties

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

Draft articles on the law of treaties with commentaries

Part I.—Introduction

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

The present articles relate to treaties concluded between States.

Commentary

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

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

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

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

Article 2.[36] Use of terms

1. For the purposes of the present articles:

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

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

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

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

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

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

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

[35] 1965 draft, article 0.

[36] 1962 and 1965 drafts, article 1.

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The fact that the present articles do not relate:

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

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

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

Commentary

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

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

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

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

[40] 1962 and 1965 drafts, article 2.

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

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

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

Commentary

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

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

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

Part II.—Conclusion and entry into force of treaties

Section 1: Conclusion of treaties

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

1. Every State possesses capacity to conclude treaties.

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

Commentary

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

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

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

[42] 1962 and 1965 drafts, article 3.

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

[43] 1962 and 1965 drafts, article 4.

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

Article 8. [47] Adoption of the text

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

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

Commentary

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

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

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

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

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

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

[47] 1962 and 1965 drafts, article 6.

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

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

Article 9.[48] Authentication of the text

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

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

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

Commentary

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

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

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

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

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

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

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

[48] 1962 and 1965 drafts, article 7.

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

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

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

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

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

2. For the purposes of paragraph 1:

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

---

[56] 1962 draft, article 13.

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

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

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

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

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

Question of participation in a treaty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

Section 2: Reservations to multilateral treaties

Article 16.[71] Formulation of reservations

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

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

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

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

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

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

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

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

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

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

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

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

[69] 1962 and 1965 drafts, article 17.

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

[71] 1962 and 1965 drafts, article 18.

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

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

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

Commentary

Introduction

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

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

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

"On Question I:

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

"On Question II:

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

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

"On Question III:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary to article 16

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

Commentary to article 17

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

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

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

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

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

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

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

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

Article 18.[84] Procedure regarding reservations

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

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

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

Commentary

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

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

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

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

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

Article 19.[85] Legal effects of reservations

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

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

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

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

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

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

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

[85] 1962 and 1965 drafts, article 21.

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

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

Commentary

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

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

Article 20.[86] Withdrawal of reservations

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

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

Commentary

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

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

Section 3: Entry into force of treaties

Article 21.[87] Entry into force

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

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

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

Commentary

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

[86] 1962 and 1965 drafts, article 22.

[87] 1962 and 1965 drafts, article 23.

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

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

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

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

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

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

Article 22.[89] Entry into force provisionally

1. A treaty may enter into force provisionally if:

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

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

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

Commentary

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

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

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

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

Part III.—Observance, application and interpretation of treaties

Section 1: Observance of treaties

Article 23.[90] *Pacta sunt servanda*

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

[89] 1962 and 1965 drafts, article 24.

[90] 1964 draft, article 55.

Commentary

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

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

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

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

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

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

Section 2: Application of treaties

Article 24.[94] Non-retroactivity of treaties

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

Commentary

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

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

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

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

[94] 1964 draft, article 56.

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

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

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

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

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

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

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

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

(3) If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date. Thus, while the European Commission of Human Rights has not considered itself competent to inquire into the propriety of legislative, administrative or judicial acts completed and made final before the entry into force of the European Convention, it has assumed jurisdiction where there were fresh proceedings or recurring applications of those acts after the Convention was in force.[99]

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

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

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

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

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

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

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

Article 25.[100] Application of treaties to territory

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

Commentary

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

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

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

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

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

[100] 1964 draft, article 57.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

[105] 1964 draft, article 63.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 3: Interpretation of treaties

Article 27.[121] General rule of interpretation

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

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

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

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

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

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

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

[121] 1964 draft, article 69.

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

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

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

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

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

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

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

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

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

Commentary

Introduction

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

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

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

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

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

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

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

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

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

[122] 1964 draft, article 71.

[123] 1964 draft, article 70.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary to article 27

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary to article 28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

Commentary

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

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

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

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

[146] 1964 draft, articles 72 and 73.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

pretation in the case of an ambiguity in plurilingual texts.

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

Section 4: Treaties and third States

Article 30.[157] General rule regarding third States

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

Commentary

(1) A third State, as defined in article 2(1)(*h*), is any State not a party to the treaty, and there appears to be almost universal agreement that in principle a treaty creates neither obligations nor rights for third States without their consent. The rule underlying the present article appears originally to have been derived from Roman law in the form of the well-known maxim *pacta tertiis nec nocent nec prosunt*—agreements neither impose obligations nor confer rights upon third parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States. There is abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists.

(2) *Obligations.* International tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose any obligation on States which are not parties to them nor modify in any way their legal rights without their consent. In the *Island of Palmas* case,[158] for example, dealing with a supposed recognition of Spain's title to the island in treaties concluded by that country with other States, Judge Huber said: "It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the 'Philippines' could not be binding upon the Netherlands...".[159] In another passage he said:[160] "...whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers"; and in a third passage[161] he emphasized that "...the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers". In short, treaties concluded by Spain with other States were *res inter alios acta* which could not, as treaties, be in any way binding upon the Netherlands. In the case of the *Free Zones of Upper Savoy and the District of Gex*[162] it was a major multilateral treaty—the Versailles Peace Treaty—which was in question, and the Permanent Court held that article 435 of the Treaty was "not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it". Similarly, in the *Territorial Jurisdiction of the International Commission of the River Oder* case[163] the Permanent Court declined to regard a general multilateral treaty—the Barcelona Convention of 1921 on the Régime of Navigable Waterways of International Concern—as binding upon Poland, who was not a party to the treaty. Nor in the *Status of Eastern Carelia* case[164] did the Permanent Court take any different position with regard to the Covenant of the League of Nations.

(3) *Rights.* Examples of the application of the underlying rule to rights can also be found in the decisions of arbitral tribunals, which show that a right cannot arise for a third State from a treaty which makes no provision for such a right; and that in these cases only parties may invoke a right under the treaty. In the *Clipperton Island*[165] arbitration the arbitrator held that Mexico was not entitled to invoke against France the provision of the Act of Berlin of 1885 requiring notification of occupations of territory, *inter alia*, on the ground that Mexico was not a signatory to that Act. In the *Forests of Central Rhodopia* case[166] the arbitrator, whilst upholding Greece's claim on the basis of a provision in the Treaty of Neuilly, went on to say:"... until the entry into force of the Treaty of Neuilly, the Greek Government, not being a signatory of the Treaty of Constantinople, had no legal grounds to set up a claim based upon the relevant stipulations of that Treaty".[167]

(4) The question whether the rule *pacta tertiis nec nocent nec prosunt* admits of any actual exceptions in international law is a controversial one which divided the Commission. There was complete agreement amongst the members that there is no exception in the case of obligations; a treaty never by its own force alone creates obligations for non-parties. The division of opinion related to the question whether a treaty may of its own force confer rights upon a non-party. One group of members considered that, if the parties so intend, a treaty may have this effect, although the non-party is not, of course, obliged to accept or exercise the right. Another group of members considered that no actual right exists in favour of the

[157] 1964 draft, article 58.

[158] (1928) *Reports of International Arbitral Awards*, vol. II, p. 831.

[159] *Ibid.*, p. 850.

[160] *Ibid.*, p. 842.

[161] *Ibid.*, p. 870.

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

[163] *Ibid.* (1929), Series A, No. 23, pp. 19-22.

[164] *Ibid.* (1923), Series B, No. 5, pp. 27 and 28; cf. the somewhat special case of the *Aerial Incident of 27 July 1955*, *I.C.J. Reports 1959*, p. 138.

[165] *Reports of International Arbitral Awards*, vol. II, p. 1105.

[166] *Ibid.*, vol. III, p. 1405.

[167] English translation from *Annual Digest and Reports of International Law Cases*, 1933-34, case No. 39, p. 92.

non-party unless and until it is accepted by the non-party. This matter is discussed more fully in the commentary to article 32.

(5) The title of the article, as provisionally adopted in 1964, was "General rule limiting the effects of treaties to the parties". As this title gave rise to a misconception on the part of at least one Government that the article purports to deal generally with the question of the "effects of treaties on third States", the Commission decided to change it to "General rule regarding third States". For the same reason and in order not to appear to prejudge in any way the question of the application of treaties with respect to individuals, it deleted the first limb of the article "A treaty *applies only between the parties and*" etc. It thus confined the article to the short and simple statement: "A treaty does not create either obligations or rights for a third State without its consent". The formulation of both the title and the text were designed to be as neutral as possible so as to maintain a certain equilibrium between the respective doctrinal points of view of members of the Commission.

Article 31. [168] Treaties providing for obligations for third States

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be a means of establishing the obligation and the third State has expressly accepted that obligation.

Commentary

(1) The primary rule, formulated in the previous article, is that the parties to a treaty cannot impose an obligation on a third State without its consent. That rule is one of the bulwarks of the independence and equality of States. The present article also underlines that the consent of a State is always necessary if it is to be bound by a provision contained in a treaty to which it is not a party. Under it two conditions have to be fulfilled before a non-party can become bound: first, the parties to the treaty must have intended the provision in question to be the means of establishing an obligation for the State not a party to the treaty; and secondly, the third State must have expressly agreed to be bound by the obligation. The Commission appreciated that when these conditions are fulfilled there is, in effect, a second collateral agreement between the parties to the treaty, on the one hand, and the third State on the other; and that the juridical basis of the latter's obligation is not the treaty itself but the collateral agreement. However, even if the matter is viewed in this way, the case remains one where a provision of a treaty concluded between certain States becomes directly binding upon another State which is not and does not become a party to the treaty.

(2) The operation of the rule in this article is illustrated by the Permanent Court's approach to article 435 of the Treaty of Versailles in the *Free Zones* case. [169] Switzerland was not a party to the Treaty of Versailles, but the text of the article had been referred to her prior to the conclusion of the treaty. The Swiss Federal Council had further addressed a note [170] to the French Government informing it that Switzerland found it possible to "acquiesce" in article 435, but only on certain conditions. One of those conditions was that the Federal Council made the most express reservations as to the statement that the provisions of the old treaties, conventions, etc., were no longer consistent with present conditions, and said that it would not wish its acceptance of the article to lead to the conclusion that it would agree to the suppression of the régime of the free zones. France contended before the Court that the provisions of the old treaties, conventions, etc., concerning the free zones had been abrogated by article 435. In rejecting this contention, the Court pointed out that Switzerland had not accepted that part of article 435 which asserted the obsolescence and abrogation of the free zones:

> "Whereas, in any event, Article 435 of the Treaty of Versailles is not binding on Switzerland, which is not a Party to this Treaty, except to the extent to which that country has itself accepted it; as this extent is determined by the note of the Swiss Federal Council of May 5th, 1919, an extract from which constitutes Annex I to this article; as it is by this action and by this action alone that the Swiss Government has 'acquiesced' in the 'provisions of Article 435', namely 'under the conditions and reservations' which are set out in the said note."

(3) Some Governments in their comments referred to treaty provisions imposed upon an aggressor State and raised the question of the application of the present article to such provisions. The Commission recognized that such cases would fall outside the principle laid down in this article, provided that the action taken was in conformity with the Charter. At the same time, it noted that article 49, which provides for the nullity of any treaty procured by the threat or use of force, is confined to cases where the threat or use of force is "in violation of the principles of the Charter of the United Nations". A treaty provision imposed upon an aggressor State in conformity with the Charter would not run counter to the principle in article 49 of the present articles. The Commission decided by a majority vote to include in the draft a separate article containing a general reservation in regard to any obligation in relation to a treaty which arises for an aggressor State in consequence of measures taken in conformity with the Charter. The text of this reservation is in article 70.

Article 32. [171] Treaties providing for rights for third States

1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and

[168] 1964 draft, article 59.

[169] *P.C.I.J.* (1929), Series A, No. 22, pp. 17 and 18; *ibid.* (1932), Series A/B, No. 46, p. 141.

[170] The text of the relevant part of this note was annexed to article 435 of the Treaty of Versailles.

[171] 1964 draft, article 60.

the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Commentary

(1) This article deals with the conditions under which a State may be entitled to invoke a right under a treaty to which it is not a party. The case of rights is more controversial than that of obligations, because the question of the need for the consent of the third State presents itself in a somewhat different light. The parties to a treaty cannot, in the nature of things, effectively *impose* a right on a third State because a right may always be disclaimed or waived. Consequently, under the present article the question is simply whether the third State's "acceptance" of the provision is or is not legally necessary for the creation of the right, or whether the treaty of its own force creates the right.

(2) The Commission noted that treaty practice shows a not inconsiderable number of treaties containing stipulations in favour of third States. In some instances, the stipulation is in favour of individual States as, for example, provisions in the Treaty of Versailles in favour of Denmark[172] and Switzerland.[173] In some instances, it is in favour of a group of States, as in the case of the provisions in the Peace Treaties after the two world wars which stipulated that the defeated States should waive any claims arising out of the war in favour of certain States not parties to the treaties. A further case is Article 35 of the Charter, which stipulates that non-members have a right to bring disputes before the Security Council or General Assembly. Again, the Mandate and Trusteeship Agreements contain provisions stipulating for certain rights in favour respectively of members of the League and of the United Nations, though in these cases the stipulations are of a special character as being by one member of an international organization in favour of the rest.[174] In other instances, the stipulation is in favour of States generally, as in the case of provisions concerning freedom of navigation in certain international rivers, and through certain maritime canals and straits.

(3) Some jurists maintain that, while a treaty may certainly confer, either by design or by its incidental effects, a *benefit* on a third State, the latter can only acquire an actual right through some form of collateral agreement between it and the parties to the treaty. In other words, as with the case of an obligation they hold that a right will be created only when the treaty provision is intended to constitute an offer of a right to the third State which the latter has accepted. They take the position that neither State practice nor the pronouncements of the Permanent Court in the *Free Zones* case[175] furnish any clear evidence of the recognition of the institution of *stipulation pour autrui* in international law.

(4) Other jurists,[176] who include all the four Special Rapporteurs on the law of treaties, take a different position. Broadly, their view is that there is nothing in international law to prevent two or more States from effectively creating a right in favour of another State by treaty, if they so intend; and that it is always a question of the intention of the parties in concluding the particular treaty. According to them, a distinction has to be drawn between a treaty in which the intention of the parties is merely to confer a benefit on the other State and one in which their intention is to invest it with an actual right. In the latter case they hold that the other State acquires a legal right to invoke directly and on its own account the provision conferring the benefit, and does not need to enlist the aid of one of the parties to the treaty in order to obtain the execution of the provision. This right is not, in their opinion, conditional upon any specific act of acceptance by the other State or any collateral agreement between it and the parties to the treaty. These writers maintain that State practice confirms this view and that authority for it is also to be found in the report of the Committee of Jurists to the Council of the League on the Aaland Islands question,[177] and more especially in the judgment of the Permanent Court in 1932 in the *Free Zones* case where it said:

> "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such."[178]

(5) In 1964, some members of the Commission shared the view of the first group of jurists set out in paragraph (3) above, while other members in general shared the view of the second group set out in paragraph (4). The Commission, however, concluded that this division of opinion amongst its members was primarily of a doctrinal character and that the two opposing doctrines did not differ very substantially in their practical effects. Both groups considered that a treaty provision may be a means of establishing a right in favour of a third State, and that the third State is free to accept or reject the right as it

[172] Article 109 of the Treaty of Versailles.

[173] Articles 358 and 374 of the Treaty of Versailles.

[174] See the *South-West Africa* cases, *I.C.J. Reports 1962*, pp. 329-331 and p. 410; the *Northern Cameroons* case, *I.C.J. Reports 1963*, p. 29.

[175] *P.C.I.J.* (1932), Series A/B, No. 46, p. 147.

[176] E.g., Sir G. Fitzmaurice, fifth report on the law of treaties, *Yearbook of the International Law Commission, 1960*, vol. II, pp. 81 and 102-104.

[177] League of Nations, *Official Journal*, Special Supplement No. 3 (October 1920), p. 18.

[178] *P.C.I.J.* (1932), Series A/B, No. 46, pp. 147 and 148; in the course of that case, however, three judges expressly dissented from the view that a stipulation in favour of a State not a party to the treaty may of itself confer an actual right upon that State.

thinks fit. The difference was that according to one group the treaty provision constitutes no more than the offer of a right until the beneficiary State has in some manner manifested its acceptance of the right, whereas according to the other group the right arises at once and exists unless and until disclaimed by the beneficiary State. The first group, on the other hand, conceded that acceptance of a right by a third State, unlike acceptance of an obligation, need not be express but may take the form of a simple exercise of the right offered in the treaty. Moreover, the second group, for its part, conceded that a disclaimer of what they considered to be an already existing right need not be express but may in certain cases occur tacitly through failure to exercise it. Consequently, it seemed to the Commission that in practice the two doctrines would be likely to give much the same results in almost every case. Nor did the Commission consider that the difference in doctrine necessarily led to different conclusions in regard to the right of the parties to the treaty to revoke or amend the provisions relating to the right. On the contrary, it was unanimous in thinking that until the beneficiary State had manifested its assent to the grant of the right, the parties should remain free to revoke or amend the provision without its consent; and that afterwards its consent should always be required if it was established that the right was intended not to be revocable or subject to modification without the third State's consent. Being of the opinion that the two doctrines would be likely to produce different results only in very exceptional circumstances,[179] the Commission decided to frame the article in a form which, while meeting the requirements of State practice, would not prejudge the doctrinal basis of the rule.

(6) Governments in their comments showed no inclination to take up a position on the doctrinal point and, in general, appeared to endorse the rule proposed in the article. Certain Governments, if from somewhat divergent points of view, raised a query in regard to the second condition contained in paragraph 1(*b*) of the text provisionally adopted in 1964, namely "and the State *expressly or impliedly* assents thereto". As a result of these comments and in order to improve the formulation of the rule with reference to cases where the intention is to dedicate a right, such as a right of navigation, to States generally, the Commission modified the drafting of paragraph 1 of the article on this point. It deleted the words "expressly or impliedly" and at the same time added a provision that the assent of the third State was to be presumed so long as the contrary was not indicated. This modification, it noted, would still further diminish any practical significance there might be between the two doctrinal points of view as to the legal effect of a treaty provision purporting to confer a right on a third State.

(7) *Paragraph 1* lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question, or to a group of States to which it belongs, or to States generally. The intention to accord the right is of cardinal importance, since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision. Examples of stipulations in favour of individual States, groups of States or States generally have already been mentioned in paragraph (2). The second condition is the assent of the beneficiary State. The formulation of this condition in the present tense "and the State assents thereto" leaves open the question whether juridically the right is created by the treaty or by the beneficiary State's act of acceptance. In one view, as already explained, the assent of the intended beneficiary, even although it may merely be implied from the exercise of the right, constitutes an "acceptance" of an offer made by the parties; in the other view the assent is only significant as an indication that the right is not disclaimed by the beneficiary. The second sentence of the paragraph then provides that the assent of the State is to be presumed so long as the contrary is not indicated. This provision the Commission considered desirable in order to give the necessary flexibility to the operation of the rule in cases where the right is expressed to be in favour of States generally or of a large group of States. The provision, as previously mentioned, also has the effect of further narrowing the gap between the two theories as to the source of the right arising from the treaty.

(8) *Paragraph 2* specifies that in exercising the right a beneficiary State must comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. The words "or established in conformity with the treaty" take account of the fact that not infrequently conditions for the exercise of the right may be laid down in a supplementary instrument or in some cases unilaterally by one of the parties. For example, in the case of a provision allowing freedom of navigation in an international river or maritime waterway, the territorial State has the right in virtue of its sovereignty to lay down relevant conditions for the exercise of the right provided, of course, that they are in conformity with its obligations under the treaty. One Government expressed the fear that this paragraph might be open to the interpretation that it restricts the power of the parties to the treaty to amend the right conferred on third States. In the Commission's opinion, such an interpretation would be wholly inadmissible since the paragraph manifestly deals only with the obligation of the third State to comply with the conditions applicable to the exercise of the right. The question of the power of the parties to modify the right is certainly an important one, but it arises under article 33, not under paragraph 2 of the present article.

Article 33.[180] Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 31, the obligation may be revoked or modified only with the mutual consent of the parties

[179] For example, in the controversy between the United States Treasury and the State Department as to whether the Finnish Peace Treaty had actually vested a right in the United States to avail itself or not to avail itself of a waiver of Finland's claims.

[180] 1964 draft, article 61.

to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 32, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Commentary

(1) Article 33 deals with the position of the parties to a treaty in regard to the revocation or modification of an obligation or of a right which has arisen for a third State under article 31 or 32. The text of the article, as provisionally adopted in 1964, contained a single rule covering both obligations and rights and laying down that neither could be revoked or modified by the parties without the consent of the third State unless it appeared from the treaty that the provision giving rise to them was intended to be revocable. The formulation of this rule was criticized in some respects by certain Governments in their comments, and certain others expressed the view that the article went too far in protecting the right of the third State. The Commission, while not fully in accord with the particular criticisms, agreed that the rule proposed in 1964 was not altogether satisfactory and that the article needed to be reformulated in a slightly different way.

(2) The Commission considered that, although analogous, the considerations affecting revocation or modification of an obligation are not identical with those applicable in the case of a right. Indeed, the respective positions of the parties and of the third State are reversed in the two cases. It also considered that regard must be had to the possibility that the initiative for revoking or modifying an obligation might well come from the third State rather than from the parties; and that in such a case the third State, having accepted the obligation, could not revoke or modify it without the consent of the parties unless they had otherwise agreed. Accordingly, it decided to reformulate the article in two paragraphs, one covering the case of an obligation and the other the case of a right. The Commission also decided that the article should refer to the revocation or modification of the third State's obligation or right rather than of the provision of the treaty giving rise to the obligation or right; for the revocation or modification of the provision as such is a matter which concerns the parties alone and it is the mutual relations between the parties and the third State which are in question in the present article.

(3) *Paragraph 1* lays down that the obligation of a third State may be revoked or modified only with the mutual consent of the parties and of the third State, unless it is established that they had otherwise agreed. As noted in the previous paragraph, this rule is clearly correct if it is the third State which seeks to revoke or modify the obligation. When it is the parties who seek the revocation or modification, the position is less simple. In a case where the parties were simply renouncing their right to call for the performance of the obligation, it might be urged that the consent of the third State would be superfluous; and in such a case it is certainly very improbable that any difficulty would arise. But the Commission felt that in international relations such simple cases are likely to be rare, and that in most cases a third State's obligation is likely to involve a more complex relation which would make it desirable that any change in the obligation should be a matter of mutual consent. Accordingly it concluded that the general rule stated in the paragraph should require the mutual consent of the parties and of the third State, unless it was established that they had otherwise agreed.

(4) *Paragraph 2*, for the reason indicated above, deals only with the revocation or modification of a third State's right *by the parties to the treaty*. The Commission took note of the view of some Governments that the 1964 text went too far in restricting the power of the parties to revoke or modify a stipulation in favour of the third State and in giving the latter a veto over any modification of the treaty provision. It considered, however, that there are conflicting considerations to be taken into account. No doubt, it was desirable that States should not be discouraged from creating rights in favour of third States, especially in such matters as navigation in international waterways, by the fear that they might be hampering their freedom of action in the future. But it was no less important that such rights should have a measure of solidity and firmness. Furthermore, there was force in the argument that, if the parties wished the third State's rights to be revocable, they could so specify in the treaty or in negotiations with the third State. Taking account of these conflicting considerations and of the above-mentioned view expressed by certain Governments, the Commission reformulated the rule in paragraph 2 so as to provide that a third State's right may not be revoked if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State. The irrevocable character of the right would normally be established either from the terms or nature of the treaty provision giving rise to the right or from an agreement or understanding arrived at between the parties and the third State.

Article 34.[181] Rules in a treaty becoming binding through international custom

Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.

Commentary

(1) The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime régime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom,

[181] 1964 draft, article 62.

as for example the Hague Conventions regarding the rules of land warfare,[182] the agreements for the neutralization of Switzerland, and various treaties regarding international riverways and maritime waterways. So too a codifying convention purporting to state existing rules of customary law may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the convention.

(2) In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law. In short, for these States the source of the binding force of the rules is custom, not the treaty. For this reason the Commission did not think that this process should be included in the draft articles as a case of a treaty having legal effects for third States. It did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 30 to 33, it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from becoming binding on non-parties as customary rules of international law.

(3) The Commission desired to emphasize that the provision in the present article is purely and simply a reservation designed to negative any possible implication from articles 30 to 33 that the draft articles reject the legitimacy of the above-mentioned process. In order to make it absolutely plain that this is the sole purpose of the present article, the Commission slightly modified the wording of the text provisionally adopted in 1964.

(4) The Commission considered whether treaties creating so-called "objective régimes", that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case.[183] Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes*, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article. Since to lay down a rule recognizing the possibility of the creation of objective régimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. It considered that the provision in article 32, regarding treaties intended to create rights in favour of States generally, together with the process mentioned in the present article, furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which goes as far as is at present possible. Accordingly, it decided not to propose any special provision on treaties creating so-called objective régimes.

[182] Held by the International Military Tribunal at Nuremberg to enunciate rules which had become generally binding rules of customary law.

[183] See generally Sir G. Fitzmaurice's fifth report on the law of treaties, *Yearbook of the International Law Commission, 1960*, vol. II, pp. 69-107; and Sir H. Waldock's third report, A/CN.4/167, article 63 and commentary, *Yearbook of the International Law Commission, 1964*, vol. II, pp. 26-34.

Part IV.—Amendment and modification of treaties

Article 35.[184] General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in part II apply to such agreement except in so far as the treaty may otherwise provide.

Article 36.[185] Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to every party, each one of which shall have the right to take part in:

(*a*) The decision as to the action to be taken in regard to such proposal;

(*b*) The negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4(*b*) applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) Be considered as a party to the treaty as amended; and

(*b*) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Commentary

Introduction

(1) The development of international organization and the tremendous increase in multilateral treaty-making

[184] 1964 draft, article 65.

[185] 1964 draft, article 66.

have made a considerable impact on the process of amending treaties. In the first place, the amendment of many multilateral treaties is now a matter which concerns an international organization. This is clearly the case where the treaty is the constituent instrument of an organization or where the treaty, like international labour conventions, is drawn up within an organization. But it is also to some extent the case where the treaty is concluded under the auspices of an organization and the Secretariat of the organization is made the depositary for executing its procedural provisions. In all these cases the drawing up of an amending instrument is caught up in the machinery of the organization or in the functions of the depositary. As a result, the right of each party to be consulted with regard to the amendment or revision of the treaty is largely safeguarded. In the second place, the proliferation of multilateral treaties has led to an increased awareness of the importance of making provision in advance, in the treaty itself, for the possibility of its future amendment. In the third place, the growth of multilateral treaties having a very large number of parties has made it virtually impossible to limit the amending process to amendments brought into force by an agreement entered into by all the parties to the original treaty; and has led to an increasing practice of bringing amending agreements into force as between those States willing to accept the amendment, while at the same time leaving the existing treaty in force with respect to the other parties to the earlier treaty. Thus, in 1906 the Geneva Convention of 1864 for the Amelioration of the Condition of Wounded in Armies in the Field was revised by a new Convention which expressly provided that, when duly ratified, it should supersede the 1864 Convention in the relations between the contracting States, but that the 1864 Convention should remain in force in the relations of parties to that Convention who did not ratify the new Convention. A similar provision was inserted in the Hague Convention of 1907 on the Laws and Customs of War on Land, which revised the earlier Convention of 1899. There are numerous later examples of the same technique, notably the United Nations protocols revising certain League of Nations conventions.

(2) Amendment clauses found in multilateral treaties take a great variety of forms, as appears from the examples given in the *Handbook of Final Clauses*.[186] Despite their variety, many amendment clauses are far from dealing comprehensively with the legal aspects of amendment. Some, for example, merely specify the conditions under which a proposal for amendment may be put forward, without providing for the procedure for considering it. Others, while also specifying the procedure for considering a proposal, do not deal with the conditions under which an amendment may be adopted and come into force, or do not define the exact effect on the parties to the existing treaty. As to clauses regarding the adoption and entry into force of an amendment, some require its acceptance by all the parties to the treaty, but many admit some form of qualified majority as sufficient. In general, the variety of the clauses makes it difficult to deduce from the treaty practice the development of detailed customary rules regarding the amendment of multilateral treaties; and the Commission did not therefore think that it would be appropriate for it to try to frame a comprehensive code of rules regarding the amendment of treaties. On the other hand, it seemed to the Commission desirable that the draft articles should include a formulation of the basic rules concerning the process of amendment.

(3) Some treaties use the term "amendment" in relation to individual provisions of the treaty and the term "revision" for a general review of the whole treaty.[187] If this phraseology has a certain convenience, it is not one which is found uniformly in State practice, and there does not appear to be any difference in the legal process. The Commission therefore considered it sufficient in the present articles to speak of "amendment" as being a term which covers both the amendment of particular provisions and a general review of the whole treaty.[188] As to the term "revision", the Commission recognized that it is frequently found in State practice and that it is also used in some treaties. Nevertheless, having regard to the nuances that became attached to the phrase "revision of treaties" in the period preceding the Second World War, the Commission preferred the term "amendment". This term is here used to denote a *formal* amendment of a treaty intended to alter its provisions with respect to all the parties. The more general term "modification" is used in article 37 in connexion with an *inter se* agreement concluded between certain of the parties only, and intended to vary provisions of the treaty between themselves alone, and also in connexion with a variation of the provisions of a treaty resulting from the practice of the parties in applying it.

Commentary to article 35

(4) Article 35 provides that a treaty may be amended by agreement between the parties, and that the rules laid down in part II apply to it except in so far as the treaty may otherwise provide. Having regard to the modern practice of amending multilateral treaties by another multilateral treaty which comes into force only for those States which become bound by it, the Commission did not specify that the agreement must be that of all the parties, as in the case of termination of a treaty under article 51. It felt that the procedure for the adoption of the text and the entry into force of the amending agreement should simply be governed by articles 8, 21 and 22 of part II. On the other hand, it sought in article 36 to lay down strict rules guaranteeing the right of each party to participate in the process of amendment. The amendment of a treaty is normally effected through the conclusion of another treaty in written form and this is reflected in the provision that the rules of part II are to apply to the amending agreement. However, as explained in paragraph (3) of its commentary to article 51, the Commission did not consider that the theory of the "*acte contraire*" has any place in international law. An amend-

[186] ST/LEG/6, pp. 130-152.

[187] Articles 108 and 109 of the Charter; see also *Handbook of Final Clauses* (ST/LEG/6), pp. 130 and 150.

[188] Thus, while Chapter XVIII of the Charter is entitled "Amendments", Article 109 speaks of "reviewing" the Charter.

ing agreement may take whatever form the parties to the original treaty may choose. Indeed, the Commission recognized that a treaty may sometimes be modified even by an oral agreement or by a tacit agreement evidenced by the conduct of the parties in the application of the treaty. Accordingly, in stating that the rules of part II regarding the conclusion and entry into force of treaties apply to amending agreements, the Commission did not mean to imply that the modification of a treaty by an oral or tacit agreement is inadmissible. On the contrary, it noted that the legal force of an oral agreement modifying a treaty would be preserved by the provision in article 3, sub-paragraph (*b*), and it made express provision in article 38 for the modification of a treaty by the subsequent practice of the parties in its application.

Commentary to article 36

(5) This article deals with the complex process of the amendment of multilateral treaties. The Commission considered whether to formulate any rule specifically for bilateral treaties, but concluded that it would not serve any useful purpose. Where only two parties are involved, the question is essentially one of negotiation and agreement between them, and the rules contained in part II suffice to regulate the procedure and to protect the positions of the individual parties. Moreover, although the Commission was of the opinion that a party is under a certain obligation of good faith to give due consideration to a proposal from the other party for the amendment of a treaty, it felt that such a principle would be difficult to formulate as a legal rule without opening the door to arbitrary denunciations of treaties on the pretended ground that the other party had not given serious attention to a proposal for amendment.

(6) Article 36 is concerned only with the amendment *stricto sensu* of a multilateral treaty, that is, where the intention is to draw up a formal agreement between the parties generally for modifying the treaty between them all, and not to draw up an agreement between certain parties only for the purpose of modifying the treaty between themselves alone. The Commission recognized that an amending agreement drawn up between the parties generally may not infrequently come into force only with respect to some of them owing to the failure of the others to proceed to ratification, acceptance or approval of the agreement. Nevertheless, it considered that there is an essential difference between amending agreements designed to amend a treaty between the parties generally and agreements designed *ab initio* to modify the operation of the treaty as between certain of the parties only. Although an amending instrument may equally turn out to operate only between certain of the parties, the Commission considered that a clear-cut distinction must be made between the amendment process *stricto sensu* and *inter se* agreements modifying the operation of the treaty between a restricted circle of the parties. For this reason, *inter se* agreements are dealt with separately in article 37 while the opening phrase of paragraph 2 of the present article underlines that it is concerned only with proposals to amend the treaty as between *all* the parties.

(7) *Paragraph 1* merely emphasizes that the rules stated in the article are residuary rules in the sense that they apply only in the absence of a specific provision in the treaty laying down a different rule. Modern multilateral treaties, as indicated in paragraph (3) of this commentary, not infrequently contain some provisions regarding their amendment and the rules contained in the present articles must clearly be subject to any such specific provisions in the treaty.

(8) *Paragraph 2* provides that any proposal to amend a multilateral treaty as between all the parties must be notified to every party and that each party has the right to take part in the decision as to the action, if any, to be taken in regard to the proposal and to take part in the negotiation and conclusion of any agreement designed to amend the treaty. Treaties have often in the past been amended or revised by certain of the parties without consultation with the others. This has led some jurists to conclude that there is no general rule entitling every party to a multilateral treaty to take part in any negotiations for the amendment of the treaty and that, correspondingly, parties to a multilateral treaty are under no legal obligation to invite all the original parties to participate in such negotiations. Although recognizing that instances have been common enough in which individual parties to a treaty have not been consulted in regard to its revision, the Commission does not think that State practice leads to that conclusion or that such a view should be the one adopted by the Commission.

(9) If a group of parties has sometimes succeeded in effecting an amendment of a treaty régime without consulting the other parties, equally States left out of such a transaction have from time to time reacted against the failure to bring them into consultation as a violation of their rights as parties. Moreover, there are also numerous cases where the parties have, as a matter of course, all been consulted. The Commission, however, considers that the very nature of the legal relation established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty. The fact that this has not always happened in the past is not a sufficient reason for setting aside a principle which seems to flow directly from the obligation assumed by the parties to perform the treaty in good faith. There may be special circumstances when it is justifiable not to bring a particular party into consultation, as in the case of an aggressor. But the general rule is believed to be that every party is entitled to be brought into consultation with regard to an amendment of the treaty; and paragraph 2 of article 36 so states the law.

(10) *Paragraph 3*, which was added to the article at the present session, provides that every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended. This rule recognizes that States entitled to become parties to a treaty, and notably those which took part in its drawing up but have not yet established their consent to be bound by it, have a definite interest in the amendment of the treaty. The Commission considered whether this interest should be expressed in the form of an actual right to take part in the negotiation and conclusion of

the amending agreement, or whether it should be limited to a right to become a party to the amending agreement. The problem, in its view, was to strike a balance between the right of the parties to adapt the treaty to meet requirements which experience of the working of the treaty had revealed, and the right of the States which had participated in drawing up the text to become parties to the treaty which they had helped to fashion. The Commission appreciated that in practice the parties would very often think it desirable to associate States entitled to become parties with the negotiation and conclusion of an amending agreement in order to encourage the widest possible participation in the treaty as amended. But it concluded that the right of those which had committed themselves to be bound by the treaty to proceed alone, if they thought fit, to embody desired improvements in an amending agreement should be recognized. It therefore decided that paragraph 3 should not go beyond conferring on the States entitled to become parties to the treaty a right to become parties to it as modified by the amending agreement; in other words, the paragraph should give them a right to become parties simultaneously to the treaty and to the amending agreement.

(11) *Paragraph 4* provides that an amending agreement does not bind a party to the treaty which does not become a party to the amending agreement. And, by its reference to article 26, paragraph 4(*b*), it further provides that as between such a party to the treaty and one which has become bound by the amending agreement, it is the unamended treaty which governs their mutual rights and obligations. This paragraph is, of course, no more than an application, in the case of amending agreements, of the general rule in article 30 that a treaty does not impose any obligation upon a State not a party to it. Nevertheless, without this paragraph the question might be thought to be left open whether by its very nature an instrument amending a prior treaty necessarily has legal effects for parties to the treaty. In some modern treaties the general rule in this paragraph is indeed displaced by a different provision laid down in the original treaty or by a contrary rule applied to treaties concluded within a particular international organization.[189] Article 3 of the Geneva Convention on Road Traffic (1949), for example, provides that any amendment adopted by a two-thirds majority of a conference shall come into force for all parties except those which make a declaration that they do not adopt the amendment. Article 16 of the International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail provides for amendments to come into force for all parties unless it is objected to by at least one-third.

(12) *Paragraph 5*, which has also been added at the present session, deals with the rather more complex case of a State which becomes a party to the treaty after the amending agreement has come into force between at least some of the parties to the treaty. As previously indicated, it is in practice very common that an amending agreement is ratified only by some of the parties to the original treaty. As a result two categories of parties to the treaty come into being: (*a*) those States which are parties only to the unamended treaty, and (*b*) those which are parties both to the treaty and to the amending agreement. Yet all are, in a general sense, parties to the treaty and have mutual relations under the treaty. Any State party only to the unamended treaty is bound by the treaty alone in its relations both with any other such State and with any State which is a party both to the treaty and to the amending agreement; for that is the effect of the rule in paragraph 4. On the other hand, as between any two States which are parties both to the treaty and the amending agreement it is the treaty as amended which applies. The problem then is what is to be the position of a State which only becomes a party to the original treaty after the amending agreement is already in force. This problem raises two basic questions. (1) Must the new party become or, in the absence of a contrary expression of intention, be presumed to become, a party both to the treaty and the amending agreement? (2) Must the new party become or, in the absence of a contrary expression of intention, be presumed to become a party to the unamended treaty vis-à-vis any State party to the treaty but not party to the amending agreement? These questions are far from being theoretical since they are apt to arise in practice whenever a general multilateral treaty is amended. Moreover, the Commission was informed by the Secretariat that it is by no means uncommon for a State to ratify or otherwise establish its consent to the treaty without giving any indication as to its intentions regarding the amending agreement; and that in these cases the instrument of ratification, acceptance, etc. is presumed by the Secretary-General in his capacity as a depositary to cover the treaty with its amendments.

(13) Some modern treaties foresee and determine the matter by a specific provision but the majority of treaties do not. The Commission accordingly thought it necessary that the present article should lay down a general rule to apply in the absence of any expression of intention in the treaty or by the State concerned. It considered that this rule should be based on two principles: (*a*) the right of the State, on becoming a party to the treaty, to decide whether to become a party to the treaty alone, to the treaty plus the amending agreement or to the amended treaty alone; (*b*) in the absence of any indication by the State, it is desirable to adopt a solution which will bring the maximum number of States into mutual relations under the treaty. Paragraph 5 therefore provides that, failing an expression of a different intention, a State which becomes a party after the amending agreement has come into force is to be considered as: (*a*) a party to the treaty as amended, and (*b*) a party also to the unamended treaty in its relations with any party to the treaty which is not bound by the amending agreement.

(14) The text of the article provisionally adopted by the Commission in 1964 contained a provision (paragraph 3 of the 1964 text) applying the principle *nemo potest venire contra factum proprium* to States which participate in the drawing up of an amending agreement but after-

[189] See the *Handbook of Final Clauses* (ST/LEG/6) pp. 135-148.

wards fail to become parties to it. The effect of the provision was to preclude them from objecting to the amending agreement's being brought into force between those States which did become parties to it. On re-examining this provision in the light of the comments of Governments the Commission concluded that it should be dispensed with. While recognizing that it would be very unusual for States which participate in the drawing up of an amending agreement to complain of the putting into force of the agreement as a breach of their rights under the original treaty, the Commission felt that it might be going too far to lay down an absolute rule in the sense of paragraph 3 of the 1964 text, applicable for every case.

Article 37.[190] Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole; and

(iii) is not prohibited by the treaty.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications to the treaty for which it provides.

Commentary

(1) This article, as already explained in the commentary to articles 35 and 36, deals not with "amendment" of a treaty but with an "*inter se* agreement" for its "modification"; that is, with an agreement entered into by some only of the parties to a multilateral treaty and intended to modify it between themselves alone. Clearly, a transaction in which two or a small group of parties set out to modify the treaty between themselves alone without giving the other parties the option of participating in it is on a different footing from an amending agreement drawn up between the parties generally, even if ultimately they do not all ratify it. For an *inter se* agreement is more likely to have an aim and effect incompatible with the object and purpose of the treaty. History furnishes a number of instances of *inter se* agreements which substantially changed the régime of the treaty and which overrode the objections of interested States. Nor can there be any doubt that the application, and even the conclusion, of an *inter se* agreement incompatible with the object and purpose of the treaty may raise a question of State responsibility. Under the present article, therefore, the main issue is the conditions under which *inter se* agreements may be regarded as permissible.

(2) *Paragraph 1*(a) necessarily recognizes that an *inter se* agreement is permissible if the possibility of such an agreement was provided for in the treaty: in other words, if "contracting out" was contemplated in the treaty. *Paragraph 1*(b) states that *inter se* agreements are to be permissible in other cases only if three conditions are fulfilled. First, the modification must not affect the enjoyment of the rights or the performance of the obligations of the other parties; that is, it must not prejudice their rights or add to their burdens. Secondly, it must not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty; for example, an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty would be incompatible with its object and purpose and not permissible under the present article. Thirdly, the modification must not be one prohibited by the treaty, as for example the prohibition on contracting out contained in article 20 of the Berlin Convention of 1908 for the Protection of Literary Property. These conditions are not alternative, but cumulative. The second and third conditions, it is true, overlap to some extent since an *inter se* agreement incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty. Nevertheless, the Commission thought it desirable for the principle contained in the second condition to be stated separately; and it is always possible that the parties might explicitly forbid any *inter se* modifications, thus excluding even minor modifications not caught by the second condition.

(3) *Paragraph 2* seeks to add a further protection to the parties against illegitimate modifications of the treaty by some of the parties through an *inter se* agreement by requiring them to notify the other parties in advance of their intention to conclude the agreement and of the modifications for which it provides. The text of this paragraph, as provisionally adopted in 1964, would have required them to notify the other parties only of the actual *conclusion* of the *inter se* agreement. On re-examining the paragraph in the light of the comments of Governments, however, the Commission concluded at the present session that the rule should require the notice to be given in advance of the conclusion of the agreement. The Commission considered that it is unnecessary and even inadvisable to require notice to be given while a proposal is merely germinating and still at an exploratory stage. It therefore expressed the requirement in terms of notifying their "intention to conclude the agreement and... the modifications to the treaty for which it provides" in order to indicate that it is only when a negotiation of an *inter se* agreement has reached a mature stage that notification need be given to the other parties. The Commission also concluded at the present session that, when a treaty contemplates the possibility of *inter se* agreements, it is desirable that the intention to conclude one should be notified to the other parties, unless the treaty itself dispenses with the need for notification. Even in such cases, it thought, the other parties ought

[190] 1964 draft, article 67.

to have a reasonable opportunity of satisfying themselves that the *inter se* agreement does not exceed what is contemplated by the treaty.

Article 38.[191] Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

Commentary

(1) This article covers cases where the parties by common consent in fact apply the treaty in a manner which its provisions do not envisage. Subsequent practice in the application of a treaty, as stated in article 27, paragraph 3(*b*), is authoritative evidence as to its interpretation when the practice is consistent, and establishes their understanding regarding the meaning of the provisions of the treaty. Equally, a consistent practice, establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions, may have the effect of modifying the treaty. In a recent arbitration between France and the United States regarding the interpretation of a bilateral air transport services agreement the tribunal, speaking of the subsequent practice of the parties, said:

> "This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could properly claim." [192]

And the tribunal in fact found that the agreement had been modified in a certain respect by the subsequent practice. Although the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice, legally the processes are distinct. Accordingly, the effect of subsequent practice in amending a treaty is dealt with in the present article as a case of modification of treaties.

(2) The article thus provides that a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions. In formulating the rule in this way the Commission intended to indicate that the subsequent practice, even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question.

(3) The text of the article, as provisionally adopted in 1964, contained two other paragraphs recognizing that a treaty may be modified:

(i) by a subsequent treaty between the parties relating to the same subject-matter, to the extent that their provisions are incompatible; and

(ii) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.

However, after re-examining these paragraphs in the light of the comments of Governments, the Commission decided to dispense with them. It considered that the case of a modification effected through the conclusion of a subsequent treaty relating to the same subject-matter is sufficiently covered by the provisions of article 26, paragraphs 3 and 4. As to the case of modification through the emergence of a new rule of customary law, it concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties to the treaty. It further considered that the question formed part of the general topic of the relation between customary norms and treaty norms which is too complex for it to be safe to deal only with one aspect of it in the present article.

Part V.—Invalidity, termination and suspension of the operation of treaties

Section 1: General provisions

Article 39.[193] Validity and continuance in force of treaties

1. The validity of a treaty may be impeached only through the application of the present articles. A treaty the invalidity of which is established under the present articles is void.

2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Commentary

(1) The substantive provisions of the present part of the draft articles concern a series of grounds upon which the question of the invalidity or termination of a treaty or of the withdrawal of a party from a treaty or the suspension of its operation may be raised. The Commission accordingly considered it desirable, as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles.

(2) *Paragraph 1* thus provides that the validity of a treaty may be impeached only through the application of the present articles.

(3) *Paragraph 2* is necessarily a little different in its wording since a treaty not infrequently contains specific provisions regarding its termination or denunciation, the withdrawal of parties or the suspension of the opera-

[191] 1964 draft, article 68.

[192] Decided at Geneva on 22 December 1963, the arbitrators being R. Ago (President), P. Reuter and H. P. de Vries. (Mimeographed text of decision of the Tribunal, pp. 104 and 105.)

[193] 1963 draft, article 30.

tion of its provisions. This paragraph consequently provides that a treaty may be terminated or denounced or withdrawn from or its operation suspended only as a result of the application *of the terms of the treaty or of the present articles.*

(4) The phrase "application of the present articles" used in both paragraphs refers, it needs to be stressed, to the draft articles as a whole and not merely to the particular article dealing with the particular ground of invalidity or termination in question in any given case. In other words, it refers not merely to the article dealing with the ground of invalidity or termination relevant in the case but also to other articles governing the conditions for putting that article into effect; for example, article 4 (treaties which are constituent instruments of international organizations), article 41 (separability of treaty provisions), article 42 (loss of a right to invoke a ground for invalidating, terminating, etc.) and, notably, articles 62 (procedure to be followed) and 63 (instruments to be used).

(5) The words "only through the application of the present articles" and "only as a result of the application of the present articles" used respectively in the two paragraphs are also intended to indicate that the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles are exhaustive of all such grounds, apart from any special cases expressly provided for in the treaty itself. In this connexion, the Commission considered whether "obsolescence" or "desuetude" should be recognized as a distinct ground of termination of treaties. But it concluded that, while "obsolescence" or "desuetude" may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty. In the Commission's view, therefore, cases of "obsolescence" or "desuetude" may be considered as covered by article 51, paragraph (*b*), under which a treaty may be terminated "at any time by consent of all the parties". Again, although a change in the legal personality of a party resulting in its disappearance as a separate international person may be a factual cause of the termination of a bilateral treaty, this does not appear to be a distinct legal ground for terminating a treaty requiring to be covered in the present articles. A bilateral treaty, lacking two parties, may simply cease any longer to exist, while a multilateral treaty in such circumstances may simply lose a party. The Commission also considered the questions whether account should be taken of the possible implications of a succession of States or of the international responsibility of a State in regard to the termination of treaties. However, without adopting any position on the substance of these questions, the Commission decided that cases of a succession of States and of the international responsibility of a State, both of which topics it has under separate study, should be left aside from the present articles on the law of treaties. Since these cases may possibly have implications in other parts of the law of treaties, the Commission further decided to make in article 69 a general reservation regarding them covering the draft articles as a whole.

Article 40.[194] Obligations under other rules of international law

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present articles or of the terms of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law.

Commentary

(1) This article did not appear, in its present general form, among the articles of part II transmitted to Governments in 1963. A similar provision was included in paragraph 4 of article 53 but was there confined to cases of "termination". In that context the Commission considered that although the point might be regarded as axiomatic, it was desirable to underline that the termination of a treaty would not release the parties from obligations embodied in the treaty to which they were also subject under any other rule of international law. In re-examining the articles on invalidity and suspension of operation of treaties at the second part of its seventeenth session[195] the Commission concluded that it was no less desirable to underline the point in these contexts. Accordingly, it decided to delete paragraph 4 from article 53 of the 1963 draft and to replace it with a general article at the beginning of this part applying the rule in every case where a treaty is invalidated, terminated or denounced or its operation suspended.

Article 41.[196] Separability of treaty provisions

1. A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may only be invoked with respect to the whole treaty except as provided in the following paragraphs or in article 57.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:

(*a*) The said clauses are separable from the remainder of the treaty with regard to their application; and

(*b*) Acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

4. Subject to paragraph 3, in cases falling under articles 46 and 47 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or to the particular clauses alone.

[194] New article. A similar provision was included in article 53, paragraph 4, of the 1963 draft, but was there confined to cases of termination.

[195] See 842nd meeting.

[196] 1963 draft, article 46.

5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted.

Commentary

(1) The separability of treaty provisions was until comparatively recently considered almost exclusively in connexion with the right to terminate a treaty on the ground of a breach of the other party. Certain modern authorities, however, have advocated recognition of the principle of separability in cases of invalidity and in determining the effect of war upon treaties. They have urged that in some cases one provision of a treaty may be struck out or suspended without necessarily disturbing the balance of the rights and obligations established by the other provisions of the treaty. These authorities cite in support of their contentions certain pronouncements of the Permanent Court of International Justice in regard to the interpretation of self-contained parts of treaties.[197] The question of the separability of treaty provisions for the purposes of interpretation raises quite different issues from the application of the principle of separability to the invalidity or termination of treaties. However, if the jurisprudence of the two Courts does not throw much light on these latter questions, it is clear that certain judges in separate opinions in the *Norwegian Loans*[198] and *Interhandel*[199] cases accepted the applicability of the principle of separating treaty provisions in the case of the alleged nullity of a unilateral declaration under the Optional Clause, by reason of a reservation the validity of which was contested.

(2) In these circumstances, the Commission decided that it should examine *de novo* the appropriateness and utility of recognizing the principle of separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties. It further decided that in order to determine the appropriateness of applying the principle in these contexts each article should be examined in turn, since different considerations might well apply in the various articles. The Commission concluded that, subject to certain exceptions, it was desirable to admit the relevance of the principle of separability in the application of grounds of invalidity, termination and suspension. In general, it seemed to the Commission inappropriate that treaties between sovereign States should be capable of being invalidated, terminated or suspended in operation in their entirety even in cases where the ground of invalidity, termination or suspension may relate to quite secondary provisions in the treaty. It also seemed to the Commission that it would sometimes be possible in such cases to eliminate those provisions without materially upsetting the balance of the interests of the parties under the treaty. On the other hand, the Commission recognized that the consensual character of all treaties, whether contractual or law-making, requires that the principle of separability should not be applied in such a way as materially to alter the basis of obligation upon which the consents to the treaty were given. Accordingly, it sought to find a solution which would respect the original basis of the treaty and which would also prevent the treaty from being brought to nothing on grounds relating to provisions which were not an essential basis of the consent.

(3) The Commission did not consider that the principle of separability should be made applicable to a right of denunciation, termination, etc. provided for in the treaty. In the case of a right provided for in the treaty, it is for the parties to lay down the conditions for the exercise of the right; and, if they have not specifically contemplated a right to denounce, terminate, etc. parts only of the treaty, the presumption is that they intended the right to relate to the whole treaty. *Paragraph 1* of the article accordingly provides that a right provided for in the treaty is exercisable only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

(4) The Commission, while favouring the recognition of the principle of separability in connexion with the application of grounds of invalidity, termination, etc., considered it desirable to underline that the integrity of the provisions of the treaty is the primary rule. Accordingly, *paragraph 2* of the article lays down that a ground of invalidity, termination, etc. may be invoked only with respect to the whole treaty except in the cases provided for in the later paragraphs and in cases of breach of the treaty.

(5) *Paragraph 3* then lays down that, if a ground relates to particular clauses alone which are clearly separable from the remainder of the treaty in regard to their application and the acceptance of which was not an essential basis of the consent of the other party or parties to the treaty as a whole, the ground may only be invoked with respect to those clauses. Thus, if these conditions are satisfied, the paragraph requires the separation of the invalid, terminated, denounced or suspended clauses from the remainder of the treaty and the maintenance of the remainder in force. The question whether the condition in sub-paragraph (*b*)—whether acceptance of the clause was not an essential basis of the consent to the treaty as a whole—was met would necessarily be a matter to be established by reference to the subject-matter of the clauses, their relation to the other clauses, to the *travaux préparatoires* and to the circumstances of the conclusion of the treaty.

(6) *Paragraph 4*, while still making the question of the separability of the clauses subject to the conditions contained in paragraph 3, lays down a different rule for cases of fraud (article 46) and corruption (article 47). In these cases the ground of invalidity may, of course, be invoked only by the State which was the victim of the fraud or corruption, and the Commission considered that it should have the option either to invalidate the whole treaty or the particular clauses to which the fraud or corruption related.

(7) *Paragraph 5* excepts altogether from the principle of separability cases of coercion of a representative (article 48) and coercion of a State (article 49). The Com-

[197] E.g. the *Free Zones* case, Series A/B, No. 46, p. 140; the s.s. *Wimbledon* case, Series A, No. 1, p. 24.

[198] *I.C.J. Reports 1957*, pp. 55-59.

[199] *I.C.J. Reports 1959*, pp. 57, 77, 78, 116 and 117.

mission considered that where a treaty has been procured by the coercion either of the State or of its representative, there were imperative reasons for regarding it as absolutely void in all its parts. Only thus, in the opinion of the Commission, would it be possible to ensure that the coerced State, when deciding upon its future treaty relations with the State which had coerced it, would be able to do so in a position of full freedom from the coercion.

(8) Paragraph 5 also excepts altogether from the principle of separability the case of a treaty which, when concluded, conflicts with a rule of *jus cogens* (article 50). Some members were of the opinion that it was undesirable to prescribe that the whole treaty should be brought to the ground in cases where only one part—and that a small part—of the treaty was in conflict with a rule of *jus cogens*. The Commission, however, took the view that rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid. In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction.

Article 42.[200] Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 inclusive or articles 57 to 59 inclusive if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(*b*) It must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation.

Commentary

(1) The foundation of the principle that a party is not permitted to benefit from its own inconsistencies is essentially good faith and fair dealing (*allegans contraria non audiendus est*). The relevance of this principle in international law is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases.[201]

(2) The principle[202] has a particular importance in the law of treaties. As already mentioned in previous commentaries, the grounds upon which treaties may be invalidated, terminated or suspended in operation involve certain risks of abuse. Another risk is that a State, after becoming aware of an essential error in the conclusion of the treaty, an excess of authority committed by its representative, a breach by the other party, etc., may continue with the treaty as if nothing had happened, and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. The principle now under consideration places a limit upon the cases in which such claims can be asserted with any appearance of legitimacy. Such was the role played by the principle in the *Temple* case and in the case of the *Arbitral Award of the King of Spain*. Accordingly, while recognizing the general character of the principle, the Commission considered that its importance in the sphere of the invalidity and termination of treaties called for its particular mention in this part of the law of treaties.

(3) The most obvious instance is where after becoming aware of a possible ground of invalidity, termination, withdrawal or suspension the party concerned has expressly agreed that the treaty is, as the case may be, valid, in force or in operation. Clearly, in those circumstances the State must be considered to have given up once and for all its right to invoke the particular ground of invalidity, termination, withdrawal or suspension in question; and sub-paragraph (*a*) of the article so provides.

(4) Sub-paragraph (*b*) provides that a right to invoke a ground of invalidity, termination, etc. shall also be no longer exercisable if after becoming aware of the facts a State's conduct has been such that it must be considered as having acquiesced, as the case may be, in the validity of the treaty or its maintenance in force or in operation. In such a case the State is not permitted to take up a legal position which is in contradiction with the position which its own previous conduct must have led the other parties to suppose that it had taken up with respect to the validity, maintenance in force or maintenance in operation of the treaty. The Commission noted that in municipal systems of law this principle has its own particular manifestations reflecting technical features of the particular system. It felt that these technical features of the principle in municipal law might not necessarily be appropriate for the application of the principle in international law. For this reason, it preferred to avoid the use of such municipal law terms as "estoppel".

(5) The Commission considered that the application of the rule in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith. This being so, the principle would not operate if the State in question had not been aware of the facts giving rise to the right or had not been in a position freely to exercise its right to invoke the nullity of the treaty. For the latter reason the Commission did not think that the principle should be applicable at all in cases of coercion of a representative under article 48 or coercion of the State itself under article 49. The effects and the implications of coercion in international relations are of such gravity that the Commission felt that a consent so obtained must be treated as absolutely void in order to ensure that the victim of the coercion should afterwards be in a position freely to determine its future relations with the State which coerced it. To admit the

[200] 1963 draft, article 47.

[201] *The Arbitral Award made by the King of Spain, I.C.J. Reports 1960*, pp. 213 and 214; *The Temple of Preah Vihear, I.C.J. Reports 1962*, pp. 23-32.

[202] See opinion of Judges Alfaro and Fitzmaurice in *The Temple of Preah Vihear, I.C.J. Reports 1962*, pp. 39-51, 62-65.

application of the present article in cases of coercion might, in its view, weaken the protection given by articles 48 and 49 to the victims of coercion. The Commission also considered it inappropriate that the principle should be admitted in cases of *jus cogens* or of supervening *jus cogens*; and, clearly, it would not be applicable to termination under a right conferred by the treaty or to termination by agreement. Consequently, it confined the operation of the rule to articles 43-47 and 57-59.

Section 2: Invalidity of treaties

Article 43.[203] Provisions of internal law regarding competence to conclude a treaty

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest.

Commentary

(1) Constitutional limitations affecting the exercise of the treaty-making power take various forms.[204] Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the State unless "approved" or confirmed in some manner by a legislative organ; others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties. Legally, a distinction can be drawn under internal law between those types of provision which place constitutional limits upon the power of a government to enter into treaties and those which merely limit the power of a government to enforce a treaty within the State's internal law without some form of endorsement of the treaty by the legislature. The former can be said to affect the actual power of the executive to conclude a treaty, the latter merely the power to implement a treaty when concluded. The question which arises under this article is how far any of these constitutional limitations may affect the validity under international law of a consent to a treaty given by a State agent ostensibly authorized to declare that consent; and on this question opinion has been divided.

(2) Some jurists maintain that international law leaves it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty shall be formed and expressed; and that constitutional laws governing the formation and expression of a State's consent to a treaty have always to be taken into account in considering whether an international act of signature, ratification, acceptance, approval or accession is effective to bind the State. On this view, internal laws limiting the power of State organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the State in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty. If this view were to be accepted, it would follow that other States would not be entitled to rely on the authority to commit the State ostensibly possessed by a Head of State, Prime Minister, Foreign Minister, etc., under article 6; they would have to satisfy themselves in each case that the provisions of the State's constitution are not infringed or take the risk of subsequently finding the treaty void.

(3) In 1951 the Commission itself adopted an article based upon this view.[205] Some members, however, were strongly critical of the thesis that constitutional limitations are incorporated into international law, while the Assistant Secretary-General for Legal Affairs expressed misgivings as to the difficulties with which it might confront depositaries. During the discussion at that session it was said that the Commission's decision had been based less on legal principles than on a belief that States would not accept any other rule.

(4) Other jurists, while basing themselves on the incorporation of constitutional limitations into international law, recognize that some qualification of that doctrine is essential if it is not to undermine the security of treaties. According to them, good faith requires that only notorious constitutional limitations with which other States can reasonably be expected to acquaint themselves should be taken into account. On this view, a State contesting the validity of a treaty on constitutional grounds may invoke only those provisions of the constitution which are notorious. A compromise solution based upon the initial hypothesis of the invalidity in international law of an unconstitutional signature, ratification, etc., of a treaty presents certain difficulties. If a limitation laid down in the internal law of a State is to be regarded as effective in international law to curtail the authority of a Head of State or other State agent to declare the State's consent to a treaty, it is not clear upon what principle a "notorious" limitation is effective for that purpose but a "non-notorious" one is not. Under the State's internal law both kinds of limitation are legally effective to curtail the agent's authority to enter into the treaty. The practical difficulties are even greater, because in many cases it is quite impossible to make a clear-cut distinction between notorious and non-notorious limitations. Some constitutional provisions are capable of subjective interpretation, such as a requirement that "political" treaties or treaties of "special importance" should be submitted to the legislature; some laws do not make it clear on their face whether the limitation refers to the power to conclude the treaty or to its effectiveness within domestic law. But even when the provisions are

[203] 1963 draft, article 31.

[204] See *United Nations Legislative Series, Laws and Practices concerning the Conclusions of Treaties* (ST/LEG/SER.B/3).

[205] Article 2: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." (*Yearbook of the International Law Commission, 1951*, vol. II, p. 73.)

apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive. Where the constitution itself contains apparently strict and precise limitations it has usually been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in internal law; and this use of the treaty-making power is reconciled with the letter of the law either by a process of interpretation or by the development of political understandings. Furthermore, the constitutional practice in regard to treaties in simplified form tends to be somewhat flexible; and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judgment of the executive, whose decision may afterwards be challenged in the legislature or in the courts. Accordingly, in many cases it may be difficult to say with any certainty whether, if contested, a given treaty would be held under national law to fall within an internal limitation, or whether an international tribunal would hold the internal provision to be one that is "notorious" and "clear" for the purposes of international law.

(5) A third group of jurists considers that international law leaves to each State the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. According to this view, international law determines the procedures and conditions under which States express their consent to treaties on the international plane; and it also regulates the conditions under which the various categories of State organs and agents will be recognized as competent to carry out such procedures on behalf of their State. In consequence, if an agent, competent under international law to commit the State, expresscs the consent of the State to a treaty through one of the established procedures, the State is held bound by the treaty in international law. Under this view, failure to comply with internal requirements may entail the invalidity of the treaty as domestic law, and may also render the agent liable to legal consequences under domestic law; but it does not affect the validity of the treaty in international law so long as the agent acted within the scope of his authority under international law. Some of these writers [206] modify the stringency of the rule in cases where the other State is actually aware of the failure to comply with internal law or where the lack of constitutional authority is so manifest that the other State must be deemed to have been aware of it. As the basic principle, according to the third group, is that a State is entitled to assume the regularity of what is done within the authority possessed by an agent under international law, it is logical enough that the State should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.

(6) The decisions of international tribunals and State practice, if they are not conclusive, appear to support a solution based upon the position taken by the third group. The international jurisprudence is admittedly not very extensive. The *Cleveland* award [207] (1888) and the *George Pinson* case [208] (1928), although not involving actual decisions on the point, contain observations favouring the relevance of constitutional provisions to the international validity of treaties. On the other hand, the *Franco-Swiss Custom* case [209] (1912) and the *Rio Martin* case [210] (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the *Metzger* case [211] contains an observation in the same sense. Furthermore, pronouncements in the *Eastern Greenland* [212] and *Free Zones* [213] cases, while not directly in point, seem to indicate that international tribunals will not readily go behind the ostensible authority under international law of a State agent—a Foreign Minister and an Agent in international proceedings in the cases mentioned—to commit his State.

(7) State practice furnishes examples of claims that treaties were invalid on constitutional grounds, but in none of them was that claim admitted by the other party to the dispute. Moreover, in three instances—the admission of Luxembourg to the League, the Politis incident and the membership of Argentina—the League of Nations seems to have acted upon the principle that a consent given on the international plane by an ostensibly competent State agent is not invalidated by the subsequent disclosure that the agent lacked constitutional authority to commit his State. Again, in one case a depositary, the United States Government, seems to have assumed that an ostensibly regular notice of adherence to an agreement could not be withdrawn on a plea of lack of constitutional authority except with the consent of the other parties. Nor is it the practice of State agents, when concluding treaties, to cross-examine each other as to their constitutional authority to affix their signatures to a treaty or to deposit an instrument of ratification, acceptance, etc.

(8) The view that a failure to comply with constitutional provisions should not normally be regarded as vitiating a consent given in due form by an organ or agent ostensibly competent to give it, appears to derive support from two further considerations. The first is that international law has devised a number of treaty-making procedures—ratification, acceptance, approval and accession—specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the State should become a party to it, and also of enabling them to take account of any domestic constitutional requirements. When a treaty has been made subject to ratification, acceptance or approval, the negotiating States would seem to have done all that

[206] UNESCO, "*Survey on the Ways in which States interpret their International Obligations*", p. 8.

[207] Moore, *International Arbitrations*, vol. 2, p. 1946.

[208] *Reports of International Arbitral Awards*, vol. V, p. 327.

[209] *Ibid.*, vol. XI, p. 411.

[210] *Ibid.*, vol. II, p. 724.

[211] *Foreign Relations of the United States*, 1901, p. 262.

[212] *P.C.I.J.*, Series A/B, No. 53, pp. 56-71 and p. 91.

[213] *P.C.I.J.*, Series A/B, No. 46, p. 170.

can reasonably be demanded of them in the way of taking account of each other's constitutional requirements. It would scarcely be reasonable to expect each Government subsequently to follow the internal handling of the treaty by each of the other Governments, while any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. The same considerations apply in cases of accession where the Government has the fullest opportunity to study the treaty and give effect to constitutional requirements before taking any action on the international plane to declare the State's accession to the treaty. Again, in the case of a treaty binding upon signature it is the Government which authorizes the use of this procedure; the Government is aware of the object of the treaty before the negotiations begin and, with modern methods of communication, it normally has knowledge of the exact contents of the treaty before its representative proceeds to the act of signature; moreover, if necessary, its representative can be instructed to sign *ad referendum*. Admittedly, in the case of treaties binding upon signature, and more especially those in simplified form, there may be a slightly greater risk of a constitutional provision being overlooked. But even in those cases the Government had the necessary means of controlling the acts of its representative and of giving effect to any constitutional requirements. In other words, in every case any failure to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the Government of the State concerned.

(9) The second consideration is that the majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. Confronted with a challenge under national law of the constitutional validity of a treaty, a Government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere.

(10) At the fifteenth session some members of the Commission expressed the opinion that international law has to take account of internal law to the extent of recognizing that internal law determines the organ or organs competent in the State to exercise the treaty-making power. On this view, any treaty concluded by an organ or representative not competent to do so under internal law would be invalidated by reason of the lack of authority under internal law to give the State's consent to the treaty. The majority, however, considered that the complexity and uncertain application of provisions of internal law regarding the conclusion of treaties creates too large a risk to the security of treaties. They considered that the basic principle of the present article should be that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a State organ or agent competent under international law to give that consent. Some members, indeed, took the view that it was undesirable to weaken this basic principle in any way by admitting any exception to it. Other members, however, considered that it would be admissible to allow an exception in cases where the violation of the internal law regarding competence to enter into treaties was absolutely manifest. They had in mind cases, such as have occurred in the past, where a Head of State enters into a treaty on his own responsibility in contravention of an unequivocal provision of the constitution. They did not feel that to allow this exception would compromise the basic principle, since the other State could not legitimately claim to have relied upon a consent given in such circumstances. This view prevailed in the Commission.

(11) The great majority of the Governments which have commented on this article have indicated their approval of the position taken up by the Commission on this problem: namely, that a violation of a provision of internal law regarding competence to conclude treaties may not be invoked as invalidating consent unless that violation was manifest. Some Governments suggested that the text should indicate, on the one hand, to whom the violation must be "manifest" for the purpose of bringing the exception into play and, on the other, what constitutes a "manifest violation". The Commission considered, however, that it is unnecessary to specify further to whom the violation must be manifest. The rule embodied in the article is that, when the violation of internal law regarding competence to conclude treaties would be *objectively evident to any State dealing with the matter normally and in good faith*, the consent to the treaty purported to be given on behalf of the State may be repudiated. In the Commission's view, the word "manifest" according to its ordinary meaning is sufficient to indicate the objective character of the criterion to be applied. It was also of the opinion that it would be impracticable and inadvisable to try to specify in advance the cases in which a violation of internal law may be held to be "manifest", since the question must depend to a large extent on the particular circumstances of each case.

(12) In order to emphasize the exceptional character of the cases in which this ground of invalidity may be invoked, the Commission decided that the rule should be stated in negative form. The article thus provides that "A State may *not* invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent *unless* that violation of its internal law was manifest".

Article 44.[214] Specific restrictions on authority to express the consent of the State

If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a

[214] 1963 draft, article 32, para. 2.

consent expressed by him unless the restriction was brought to the knowledge of the other negotiating States prior to his expressing such consent.

Commentary

(1) This article covers cases where a representative has purported to execute an act binding his State but in fact lacked authority to do so, because in the particular case his authority was made subject to specific restrictions which he omitted to observe.

(2) Where a treaty is not to become binding without subsequent ratification, acceptance or approval, any excess of authority committed by a representative in establishing the text of the treaty will automatically be dealt with at the subsequent stage of ratification, acceptance or approval. The State in question will then have the clear choice either of repudiating the text established by its representative or of ratifying, accepting or approving the treaty; and if it does the latter, it will necessarily be held to have endorsed the unauthorized act of its representative and, by doing so, to have cured the original defect of authority. Accordingly, the article is confined to cases in which the defect of authority relates to the execution of an act by which a representative purports *finally* to establish his State's consent to be bound. In other words, it is confined to cases where a representative authorized, subject to specific conditions, reservations or limitations, to express the consent of his State to be bound by a particular treaty exceeds his authority by omitting to observe those restrictions upon it.

(3) The Commission considered that in order to safeguard the security of international transactions, the rule must be that specific instructions given by a State to its representative are only effective to limit his authority vis-à-vis other States if they are made known to them in some appropriate manner before the State in question concludes the treaty. That this is the rule acted on by States is suggested by the rarity of cases in which a State has sought to disavow the act of its representative by reference to undisclosed limitations upon his authority. The article accordingly provides that specific restrictions on a representative's authority are not to affect a consent to a treaty expressed by him unless they had been brought to the notice of the other negotiating States prior to his expressing that consent.

Article 45.[215] Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error, or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 74 then applies.

[215] 1963 draft, article 34.

Commentary

(1) In municipal law error occupies a comparatively large place as a factor which vitiates consent to a contract. Some types of error found in municipal law are, however, unlikely to arise in international law. Moreover, treaty-making processes are such as to reduce to a minimum the risk of errors on material points of substance. In consequence, the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent. Almost all the recorded instances concern geographical errors, and most of them concern errors in maps. In some instances, the difficulty was disposed of by a further treaty; in others the error was treated more as affecting the application of the treaty than its validity and the point was settled by arbitration.

(2) The effect of error was discussed in the *Legal Status of Eastern Greenland* case before the Permanent Court of International Justice, and again in the *Temple of Preah Vihear* case before the present Court. In the former case[216] the Court contented itself with saying that the Norwegian Foreign Minister's reply had been definitive and unconditional and appears not to have considered that there was any relevant error in the case. Judge Anzilotti, while also considering that there was no error, said: "But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty..."[217]

(3) In the first stage of the *Temple* case[218] the Court said: "Any error of this kind would evidently have been an error of law, but in any event the Court does not consider that the issue in the present case is really one of error. Furthermore, the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given." A plea of error was also raised in the second stage of the case on the merits; and the error, which was geographical, arose in somewhat special circumstances. There was no error in the conclusion of the original treaty, in which the parties were agreed that the boundary in a particular area should be the line of a certain watershed; the error concerned the subsequent acceptance of the delimitation of the boundary on a map. As to this error, the Court said: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."[219]

[216] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 71 and 91.

[217] *Ibid.*, p. 92.

[218] *I.C.J. Reports 1961*, p. 30.

[219] *I.C.J. Reports 1962*, p. 26. See also the individual opinion of Sir G. Fitzmaurice (*Ibid.*, p. 57).

(4) The *Eastern Greenland* and *Temple* cases throw light on the conditions under which error will *not* vitiate consent rather than on those under which it will do so. However, in the *Readaptation of the Mavrommatis Jerusalem Concessions* case, [220] which concerned a concession not a treaty, the Court held that an error in regard to a matter not constituting a *condition* of the agreement would not suffice to invalidate the consent; and it seems to be generally agreed that, to vitiate the consent of a State to a treaty, an error must relate to a matter constituting an essential basis of its consent to the treaty.

(5) The Commission recognized that some systems of law distinguish between mutual and unilateral error; but it did not consider that it would be appropriate to make this distinction in international law. Accordingly, the present article applies to an error made by only one party no less than to a mutual error made by both or all the parties.

(6) *Paragraph 1* formulates the general rule that an error in a treaty may be invoked by a party as vitiating its consent where the error related to a fact or situation assumed by that party to exist at the time that the treaty was concluded and constituting an essential basis of its consent to the treaty. The Commission appreciated that an error in a treaty may sometimes involve mixed questions of fact and of law and that the line between an error of fact and of law may not always be an easy one to draw. Nevertheless, it considered that to introduce into the article a provision appearing to admit an error of law as in itself a ground for invalidating consent would dangerously weaken the stability of treaties. Accordingly, the paragraph speaks only of errors relating to a "fact" or "situation".

(7) Under paragraph 1 error affects consent only if it was an essential error in the sense of an error as to a matter which formed an essential basis of the consent given to the treaty. Furthermore, such an error does not make the treaty automatically void, but gives a right to the party whose consent to the treaty was caused by the error to invoke the error as invalidating its consent. On the other hand, if the invalidity of the treaty is established in accordance with the present articles, the effect will be to make the treaty void *ab initio*.

(8) *Paragraph 2* excepts from the rule cases where the mistaken party in some degree brought the error upon itself. The terms in which the exception is formulated are drawn from those used by the Court in the sentence from its judgment in the *Temple* case which is cited at the end of paragraph (3) above. The Commission felt, however, that there is substance in the view that the Court's formulation of the exception "if the party contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error" is so wide as to leave little room for the operation of the rule. This applies particularly to the words "or could have avoided it". Accordingly, without questioning the Court's formulation of the exception in the context of the particular case, the Commission concluded that, in codifying the general rule regarding the effect of error in the law of treaties, those words should be omitted.

(9) *Paragraph 3*, in order to prevent any misunderstanding, distinguishes errors in the *wording* of the text from errors in the treaty. The paragraph merely underlines that such an error does not affect the validity of the consent and falls under the provisions of article 74 relating to the correction of errors in the texts of treaties.

Article 46. [221] Fraud

A State which has been induced to conclude a treaty by the fraudulent conduct of another negotiating State may invoke the fraud as invalidating its consent to be bound by the treaty.

Commentary

(1) Clearly, cases in which Governments resort to deliberate fraud in order to procure the conclusion of a treaty are likely to be rare, while any fraudulent misrepresentation of a material fact inducing an essential error would be caught by the provisions of the preceding article dealing with error; the question therefore arises whether it is necessary to have a separate article dealing specifically with fraud. On balance the Commission considered that it was advisable to keep fraud and error distinct in separate articles. Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely affect the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties.

(2) Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. In international law, the paucity of precedents means that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept. In these circumstances, the Commission considered whether it should attempt to define fraud in the law of treaties. The Commission concluded, however, that it would suffice to formulate the general concept of fraud applicable in the law of treaties and to leave its precise scope to be worked out in practice and in the decisions of international tribunals.

(3) The article uses the English word "fraud", the French word "*dol*" and the Spanish word "*dolo*" as the nearest terms available in those languages for identifying the concept with which the article is concerned. These words are not intended to convey that all the detailed connotations given to them in internal law are necessarily applicable in international law. It is the broad concept comprised in each of these words, rather than its detailed applications in internal law, that is dealt with in the present article. The word used in each of the three texts is accordingly intended to have the same meaning and

[220] *P.C.I.J.*, Series A, No. 11.

[221] 1963 draft, article 33.

scope in international law. The Commission sought to find a non-technical expression of as nearly equivalent meaning as possible: fraudulent conduct, *conduite frauduleuse* and *conducta fraudulenta*. This expression is designed to include any false statements, misrepresentations or other deceitful proceedings by which a State is induced to give a consent to a treaty which it would not otherwise have given.

(4) The effect of fraud, the Commission considers, is not to render the treaty *ipso facto* void but to entitle the injured party, if it wishes, to invoke the fraud as invalidating its consent; the article accordingly so provides.

Article 47.[222] Corruption of a representative of the State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Commentary

(1) The draft articles on the invalidity of treaties provisionally adopted by the Commission in 1963 and transmitted to Governments for their observations did not contain any provision dealing specifically with the corruption of a State's representative by another negotiating State. The only provision of the 1963 text under which the corruption of a representative might be subsumed was article 33 dealing with fraud. At the second part of the seventeenth session, however, in connexion with its re-examination of article 35 (personal coercion of a representative)—now article 48—some members of the Commission expressed doubts as to whether corruption of a representative can properly be regarded as a case of fraud. The Commission therefore decided to reconsider the question at the present session with a view to the possible addition of a specific provision concerning corruption in either former article 33 or 35.

(2) At the present session certain members of the Commission were opposed to the inclusion in the draft articles of any specific provision regarding "corruption". These members considered such a provision to be unnecessary especially since the use of corruption, if it occurred, would in their view fall under the present article 46 as a case of fraud. Corruption, they maintained, is not an independent cause of defective consent but merely one of the possible means of securing consent through "fraud" or "*dol*". It would thus be covered by the expression "fraudulent conduct" (*conduite frauduleuse, conducta fraudulenta*) in article 46.

(3) The majority of the Commission, however, considered that the corruption of a representative by another negotiating State undermines the consent which the representative purports to express on behalf of his State in a quite special manner which differentiates the case from one of fraud. Again, although the corruption of a representative may in some degree be analogous to his coercion by acts directed against him personally, the Commission considered that cases of threat or use of force against a representative are of such particular gravity as to make it desirable to treat the two grounds of invalidity in separate articles. Nor did it think that "corruption" could be left aside altogether from the draft articles. It felt that in practice attempts to corrupt are more likely than attempts to coerce a representative; and that, having regard to the great volume of treaties concluded to-day and the great variety of the methods of concluding them, a specific provision on the subject is desirable. Accordingly, it decided to cover "corruption" in a new article inserted between the article dealing with "fraud" and that dealing with "coercion of a representative of a State".

(4) The strong term "corruption" is used in the article expressly in order to indicate that only acts calculated to exercise a substantial influence on the disposition of the representative to conclude the treaty may be invoked as invalidating the expression of consent which he has purported to give on behalf of his State. The Commission did not mean to imply that under the present article a small courtesy or favour shown to a representative in connexion with the conclusion of a treaty may be invoked as a pretext for invalidating the treaty.

(5) Similarly, the phrase "directly or indirectly by another negotiating State" is used in the article in order to make it plain that the mere fact of the representative's having been corrupted is not enough. The Commission appreciated that corruption by another negotiating State, if it occurs, is unlikely to be overt. But it considered that, in order to be a ground for invalidating the treaty, the corrupt acts must be shown to be directly or indirectly imputable to the other negotiating State.

(6) The Commission was further of the opinion that in regard to its legal incidents "corruption" should be assimilated to "fraud" rather than to "coercion of a representative". Accordingly, for the purposes of article 41, paragraph 4, concerning the separability of treaty provisions, article 42, concerning loss of a right to invoke a ground of invalidity, and article 65, paragraph 3, concerning the consequences of the invalidity of a treaty, cases of corruption are placed on the same footing as cases of fraud.

Article 48.[223] Coercion of a representative of the State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

Commentary

(1) There is general agreement that acts of coercion or threats applied to individuals *with respect to their own persons or in their personal capacity* in order to procure the signature, ratification, acceptance or approval of a

[222] New article.

[223] 1963 draft, article 35.

treaty will unquestionably invalidate the consent so procured. History provides a number of instances of the employment of coercion against not only negotiators but also members of legislatures in order to procure the signature or ratification of a treaty. It is true that in some instances it may not be possible to distinguish completely between coercion of a Head of State or Minister as a means of coercing the State itself and coercion of them in their personal capacities. For example, something like third-degree methods of pressure were employed in 1939 for the purpose of extracting the signatures of President Hacha and the Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, as well as the gravest threats against their State. Nevertheless, the two forms of coercion, although they may sometimes be combined, are, from a legal point of view, somewhat different; the Commission has accordingly placed them in separate articles.

(2) The present article deals with the coercion of the individual representatives "through acts or threats directed against him personally". This phrase is intended to cover any form of constraint of or threat against a representative affecting him as an individual and not as an organ of his State. It would therefore include not only a threat to his person, but a threat to ruin his career by exposing a private indiscretion, as also a threat to injure a member of the representative's family with a view to coercing the representative.

(3) The Commission gave consideration to the question whether coercion of a representative, as distinct from coercion of the State, should render the treaty *ipso facto* void or whether it should merely entitle it to invoke the coercion of its representative as invalidating its consent to the treaty. It concluded that the use of coercion against the representative of a State for the purpose of procuring the conclusion of a treaty would be a matter of such gravity that the article should provide for the absolute nullity of a consent to a treaty so obtained.

Article 49.[224] Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.

Commentary

(1) The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which held that such treaties should no longer be recognized as legally valid. The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2(4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law. The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of to-day.

(2) Some jurists, it is true, while not disputing the moral value of the principle, have hesitated to accept it as a legal rule. They fear that to recognize the principle as a legal rule may open the door to the evasion of treaties by encouraging unfounded assertions of coercion, and that the rule will be ineffective because the same threat or compulsion that procured the conclusion of the treaty will also procure its execution, whether the law regards it as valid or invalid. These objections do not appear to the Commission to be of such a kind as to call for the omission from the present articles of a ground of invalidity springing from the most fundamental provisions of the Charter, the relevance of which in the law of treaties as in other branches of international law cannot to-day be regarded as open to question.

(3) If the notion of coercion is confined, as the Commission thinks it must be, to a threat or use of force in violation of the principles of the Charter, this ground of invalidity would not appear to be any more open to the possibility of illegitimate attempts to evade treaty obligations than other grounds. Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter", and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

(4) Again, even if sometimes a State should initially be successful in achieving its objects by a threat or use of force, it cannot be assumed in the circumstances of to-day that a rule nullifying a treaty procured by such unlawful means would not prove meaningful and effective. The existence, universal character and effective functioning of the United Nations in themselves provide for the necessary framework for the operation of the rule formulated in the present article.

(5) The Commission considered that the rule should be stated in as simple and categorical terms as possible. The article therefore provides that "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations". The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are to-day of universal application. It accordingly appears to be both legitimate and appropriate to frame

[224] 1963 draft, article 36.

the article in terms of the principles of the Charter. At the same time, the phrase "violation of the principles of the Charter" has been chosen rather than "violation of the Charter", in order that the article should not appear to be confined in its application to Members of the United Nations. Clearly the same rule would apply in the event of an individual State's being coerced into expressing its consent to be bound by a multilateral treaty. The Commission discussed whether it should add a second paragraph to the article specifically applying the rule to such a case, but concluded that this was unnecessary, since the nullity of the consent so procured is beyond question implicit in the general rule stated in the article.

(6) The Commission further considered that a treaty procured by a threat or use of force in violation of the principles of the Charter must be characterized as void, rather than as voidable at the instance of the injured party. The prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State. Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void *ab initio*. This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State. If, therefore, the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations.

(7) The question of the time element in the application of the article was raised in the comments of Governments from two points of view: (*a*) the undesirability of allowing the rule contained in the article to operate retroactively upon treaties concluded prior to the establishment of the modern law regarding recourse to the threat or use of force; and (*b*) the date from which that law should be considered as having been in operation. The Commission considered that there is no question of the article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law.[225] "A juridical fact must be appreciated in the light of the law contemporary with it."[226] The present article concerns the conditions for the valid conclusion of a treaty—the conditions, that is, for the *creation* of a legal relation by treaty. An evolution of the law governing the conditions for the carrying out of a legal act does not operate to deprive of validity a legal act already accomplished in conformity with the law previously in force. The rule codified in the present article cannot therefore be properly understood as depriving of validity *ab initio* a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force.

[225] See also paragraph (6) of the commentary on article 50.

[226] *Island of Palmas* arbitration, *Reports of International Arbitral Awards*, vol. II, p. 845.

(8) As to the date from which the modern law should be considered as in force for the purposes of the present article, the Commission considered that it would be illogical and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties. As pointed out in paragraph (1) above, the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata*. Moreover, whatever differences of opinion there may be about the state of the law prior to the establishment of the United Nations, the great majority of international lawyers to-day unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force. The present article, by its formulation, recognizes by implication that the rule which it lays down is applicable at any rate to all treaties concluded since the entry into force of the Charter. On the other hand, the Commission did not think that it was part of its function, in codifying the modern law of treaties, to specify on what precise date in the past an existing general rule in another branch of international law came to be established as such. Accordingly, it did not feel that it should go beyond the temporal indication given by the reference in the article to "the principles of the Charter of the United Nations".

Article 50.[227] Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

(1) The view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain, although some jurists deny the existence of any rules of *jus cogens* in international law, since in their view even the most general rules still fall short of being universal. The Commission pointed out that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*. Moreover, if some Governments in their comments have expressed doubts as to the advisability of this article unless it is accompanied by provision for independent adjudication, only one questioned the existence of rules of *jus cogens* in the international law of to-day. Accordingly, the Commission concluded that in codifying the law of treaties it must start from the basis that to-day there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character.

(2) The formulation of the article is not free from difficulty, since there is no simple criterion by which to

[227] 1963 draft, article 37.

identify a general rule of international law as having the character of *jus cogens*. Moreover, the majority of the general rules of international law do not have that character, and States may contract out of them by treaty. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law. Nor would it be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void. Such a stipulation may be inserted in any treaty with respect to any subject-matter for any reasons which may seem good to the parties. The conclusion by a party of a later treaty derogating from such a stipulation may, of course, engage its responsibility for a breach of the earlier treaty. But the breach of the stipulation does not, simply as such, render the treaty void (see article 26). It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.

(3) The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals. Some members of the Commission felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested included (*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples. The Commission decided against including any examples of rules of *jus cogens* in the article for two reasons. First, the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.

(4) Accordingly, the article simply provides that a treaty is void "if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". This provision makes it plain that nullity attaches to a treaty under the article only if the rule with which it conflicts is a peremptory norm of general international law from which no derogation is permitted, even by agreement between particular States. On the other hand, it would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As a modification of a rule of *jus cogens* would to-day most probably be effected through a general multilateral treaty, the Commission thought it desirable to indicate that such a treaty would fall outside the scope of the article. The article, therefore defines rules of *jus cogens* as peremptory norms of general international law from which no derogation is permitted "and which can be modified only by a subsequent norm of general international law having the same character".

(5) The Commission thinks it desirable to state its point of view with regard to two matters raised in the comments of Governments. The first, already mentioned above, concerns the difficulty of applying the article in a satisfactory manner unless it is accompanied by a system of independent adjudication or by some provision for an authoritative determination of the rules which are rules of *jus cogens*. The Commission considered that the question of the means of resolving a dispute regarding the invalidity of a treaty, if it may have particular importance in connexion with the present article, is a general one affecting the application of all the articles on the invalidity, termination and suspension of the operation of treaties. It has sought, so far as is practicable in the present state of international opinion regarding acceptance of compulsory means of pacific settlement, to cover the question by the procedural safeguards laid down in article 62. This article is designed to exclude the arbitrary determination of the invalidity, termination or suspension of a treaty by an individual State such as has happened not infrequently in the past and to ensure that recourse shall be had to the means of peaceful settlement indicated in Article 33 of the Charter. In the Commission's view, the position is essentially the same in the cases of an alleged conflict with a rule of *jus cogens* as in the case of other grounds of invalidity alleged by a State.

(6) The second matter is the non-retroactive character of the rule in the present article. The article has to be read in conjunction with article 61 (Emergence of a new rule of *jus cogens*), and in the view of the Commission, there is no question of the present article having retroactive effects. It concerns cases where a treaty is void *at the time of its conclusion* by reason of the fact that its provisions are in conflict with an already existing rule of *jus cogens*. The treaty is wholly void because its actual conclusion conflicts with a peremptory norm of general international law from which no States may derogate even by mutual consent. Article 61, on the other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by reason of the subsequent establishment of a new rule of *jus cogens* with which its provisions are in conflict. The words "*becomes* void and *termi-*

nates" make it quite clear, the Commission considered, that the emergence of a new rule of *jus cogens* is not to have retroactive effects on the validity of a treaty. The invalidity is to attach only as from the time of the establishment of the new rule of *jus cogens*. The non-retroactive character of the rules in articles 50 and 61 is further underlined in article 67, paragraph 2 of which provides in the most express manner that the *termination* of a treaty as a result of the emergence of a new rule of *jus cogens* is not to have retroactive effects.

Section 3: Termination and suspension of the operation of treaties

Article 51.[228] Termination of or withdrawal from a treaty by consent of the parties

A treaty may be terminated or a party may withdraw from a treaty:

(*a*) In conformity with a provision of the treaty allowing such termination or withdrawal; or

(*b*) At any time by consent of all the parties.

Commentary

(1) The majority of modern treaties contain clauses fixing their duration or the date of their termination or a condition or event which is to bring about their termination, or providing for a right to denounce or withdraw from the treaty. In these cases the termination of the treaty is brought about by the provisions of the treaty itself, and how and when this is to happen is essentially a question of interpreting and applying the treaty. The present article sets out the basic rules governing the termination of a treaty through the application of its own provisions.

(2) The treaty clauses are very varied.[229] Many treaties provide that they are to remain in force for a specified period of years or until a particular date or event; others provide for the termination of the treaty through the operation of a resolutory condition. Specific periods fixed by individual treaties may be of very different lengths, periods between one and twelve years being usual but longer periods up to twenty, fifty and even ninety-nine years being sometimes found. More common in modern practice are treaties which fix a comparatively short initial period for their duration, such as five or ten years, but at the same time provide for their continuance in force after the expiry of the period subject to a right of denunciation or withdrawal. These provisions normally take the form either of an indefinite continuance in force of the treaty subject to a right of denunciation on six or twelve months' notice, or of a renewal of the treaty for successive periods of years subject to a right of denunciation or withdrawal on giving notice to that effect six months before the expiry of each period. Some treaties fix no period for their duration and simply provide for a right to denounce or withdraw from the treaty, either with or without a period of notice. Occasionally, a treaty which fixes a single specific period, such as five or ten years, for its duration allows a right of denunciation or withdrawal even during the currency of the period.

(3) The Commission considered that, whatever may be the provisions of a treaty regarding its own termination, it is always possible for all the parties to agree together to put an end to the treaty. It also considered that the particular form which such an agreement may take is a matter for the parties themselves to decide in each case. The theory has sometimes been advanced that an agreement terminating a treaty must be cast in the same form as the treaty which is to be terminated or at least constitute a treaty form of equal weight. The Commission, however, concluded that this theory reflects the constitutional practice of particular States[230] and not a rule of international law. In its opinion, international law does not accept the theory of the "*acte contraire*". The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination. At the same time, the Commission considered it important to underline that, when a treaty is terminated otherwise than under its provisions, the consent of *all* the parties is necessary. The termination, unlike the amendment, of a treaty necessarily deprives all the parties of all their rights and, in consequence, the consent of all of them is necessary.

(4) The Commission gave careful consideration to the question whether, at any rate for a certain period of time after the adoption of the text of a treaty, the consent even of all the *parties* should not be regarded as sufficient for its termination. It appreciated that the other States still entitled to become parties to the treaty have a certain interest in the matter; and it examined the possibility of providing that until the expiry of a specified period of years the consent of not less than two-thirds of all the States which adopted the text should be necessary. Such a provision might, it was suggested, be particularly needed in the case of treaties brought into force on the deposit only of very few instruments of ratification, etc. Although the comments of some Governments appeared not to be unfavourable to the inclusion of such a provision, the Commission concluded that it might introduce an undesirable complication into the operation of the rule regarding termination by consent of the parties. Nor did it understand this question ever to have given rise to difficulties in practice. Accordingly, it decided not to insert any provision on the point in the article.

(5) The article is thus confined to two clear and simple rules. A treaty may be terminated or a party may terminate its own participation in a treaty by agreement in two ways: (*a*) in conformity with the treaty, and (*b*) at any time by consent of all the parties.

---

[228] 1963 draft, article 38.

[229] See *Handbook of Final Clauses* (ST/LEG/6), pp. 54-73.

[230] See an observation of the United States representative at the 49th meeting of the Social Committee of the Economic and Social Council (E/AC.7/SR.49, p. 8) to which Sir G. Fitzmaurice drew attention.

Article 52.[231] Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Commentary

(1) A multilateral treaty which is subject to denunciation or withdrawal sometimes provides for termination of the treaty itself, if denunciations or withdrawals should reduce the number of parties below a certain figure. For example, the Convention on the Political Rights of Women[232] states that it "shall cease to be in force as from the date when the denunciation which reduces the number of parties to less than six becomes effective". In some cases the minimum number of surviving parties required to keep the treaty alive is even smaller, e.g. five in the case of the Customs Convention on the Temporary Importation of Commercial Road Vehicles[233] and three in the case of the Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation.[234] In other cases a larger number of parties is required. Clearly, provisions of this kind establish a resolutory condition and the termination of the treaty, should it occur, falls under article 51, sub-paragraph (*a*).

(2) A further point arises, however, as to whether a multilateral treaty, the entry into force of which was made dependent upon its ratification, acceptance, etc. by a given minimum number of States, automatically ceases to be in force, should the parties afterwards fall below that number as a result of denunciations or withdrawals. The Commission considers that this is not a necessary effect of a drop in the number of the parties below that fixed for the treaty's entry into force. The treaty provisions in question relate exclusively to the conditions for the entry into force of the treaty and, if the negotiating States had intended the minimum number of parties fixed for that purpose to be a continuing condition for the maintenance in force of the treaty, it would have been both easy and natural for them so to provide. In some cases, it is true, a treaty which fixes a low minimum number of parties for entry into force prescribes the same number for the cessation of the treaty. But there is no general practice to that effect, and the fact that this has not been a regular practice in cases where a larger minimum number, such as ten or twenty, has been fixed for entry into force seems significant. At any rate, when the number for entry into force is of that order of magnitude, it does not seem desirable that the application of the treaty should be dependent on the number of parties not falling below that number. The remaining parties, if unwilling to continue to operate the treaty with the reduced number, may themselves either join together to terminate it or separately exercise their own right of denunciation or withdrawal.

(3) More often than not multilateral treaties fail to cover the point mentioned in the previous paragraph, thereby leaving the question of the continuance of the treaty in doubt. The Commission accordingly considered it desirable that the draft articles should contain a general provision on the point. The present article, for the reasons given above, lays down as the general rule that unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Article 53.[235] Denunciation of a treaty containing no provision regarding termination

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article.

Commentary

(1) Article 53 covers the termination of treaties which neither contain any provision regarding their duration or termination nor mention any right for the parties to denounce or withdraw from them. Such treaties are not uncommon, recent examples being the four Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations. The question is whether they are to be regarded as terminable only by unanimous agreement or whether individual parties are under any conditions to be considered as having an implied right to withdraw from the treaty upon giving reasonable notice to that effect.

(2) In principle, the answer to the question must depend on the intention of the parties in each case, and the very character of some treaties excludes the possibility that the contracting States intended them to be open to unilateral denunciation or withdrawal at the will of an individual party. Treaties of peace and treaties fixing a territorial boundary are examples of such treaties. Many treaties, however, are not of a kind with regard to which it can be said that to allow a unilateral right of denunciation or withdrawal would be inconsistent with the character of the treaty. No doubt, one possible point of view might be that, since the parties in many cases do provide expressly for a unilateral right of denunciation or withdrawal, their silence on the point in other cases must be interpreted as excluding such a right. Some jurists, basing themselves on the Declaration of London of 1871 and certain State practice, take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is

[231] 1963 draft, article 38, para. 3(*b*).

[232] United Nations *Treaty Series*, vol. 193, p. 135, art. 8.

[233] *Handbook of Final Clauses* (ST/LEG/6), p. 58.

[234] *Ibid.*, pp. 72 and 73.

[235] 1963 draft, article 39.

provided for in the treaty or consented to by all the other parties. A number of other jurists,[236] however, take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties.

(3) The difficulty of the problem is well illustrated by the discussions which took place at the Geneva Conference on the Law of the Sea concerning the insertion of denunciation clauses in the four conventions drawn up at that conference.[237] None of the conventions contains a denunciation clause. They provide only that after five years from the date of their entry into force any party may at any time request the revision of the Convention, and that it will be for the General Assembly to decide upon the steps, if any, to be taken in respect of the request. The Drafting Committee, in putting forward this revision clause, observed that its inclusion "made unnecessary any clause on denunciation". Proposals had previously been made for the inclusion of a denunciation clause and these were renewed in the plenary meeting, notwithstanding the view of the Drafting Committee. Some delegates thought it wholly inconsistent with the nature of codifying conventions to allow denunciation; some thought that a right of denunciation existed anyhow under customary law; others considered it desirable to provide expressly for denunciation in order to take account of possible changes of circumstances. The proposal to include the clause in the "codifying" conventions was rejected by 32 votes to 12, with 23 abstentions. A similar proposal was also made with reference to the Convention on Fishing and Conservation of the Living Resources of the High Seas, which formulated entirely new law. Here, opponents of the clause argued that a right of denunciation would be out of place in a convention which created new law and was the result of negotiation. Advocates of the clause, on the other hand, regarded the very fact that the convention created new law as justifying and indeed requiring the inclusion of a right of denunciation. Again, the proposal was rejected, by 25 votes to 6, with no less than 35 abstentions. As already mentioned, no clause of denunciation or withdrawal was inserted in these conventions and at the subsequent Vienna Conferences on Diplomatic and Consular Relations, the omission of the clause from the conventions on those subjects was accepted without discussion. However, any temptation to generalize from these Conferences as to the intentions of the parties in regard to the denunciation of "law-making" treaties is discouraged by the fact that other conventions, such as the Genocide Convention and the Geneva Conventions of 1949 for the Protection of War Victims, expressly provide for a right of denunciation.

(4) Some members of the Commission considered that in certain types of treaty, such as treaties of alliance, a right of denunciation or withdrawal after reasonable notice should be implied in the treaty unless there are indications of a contrary intention. Other members took the view that, while the omission of any provision for it in the treaty does not exclude the possibility of implying a right of denunciation or withdrawal, the existence of such a right is not to be implied from the character of the treaty alone. According to these members, the intention of the parties is essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case. This view prevailed in the Commission.

(5) The article states that a treaty not making any provision for its termination or for denunciation or withdrawal is not subject to denunciation or withdrawal unless "it is established that the parties intended to admit the possibility of denunciation or withdrawal". Under this rule, the character of the treaty is only one of the elements to be taken into account, and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal.

(6) The Commission considered it essential that any implied right to denounce or withdraw from a treaty should be subject to the giving of a reasonable period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where the treaty is of the renewable type and is open to denunciation by a notice given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually twelve months, though admittedly in some cases no period of notice is required. In formulating a general rule, the Commission considered it to be desirable to lay down a longer rather than a shorter period in order to give adequate protection to the interests of the other parties to the treaty. Accordingly, it preferred in paragraph 2 to specify that not less than twelve months' notice must be given of an intention to denounce or withdraw from a treaty under the present article.

Article 54.[238] Suspension of the operation of a treaty by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) In conformity with a provision of the treaty allowing such suspension;

(*b*) At any time by consent of all the parties.

Commentary

(1) This article parallels for the suspension of the operation of a treaty the provisions of article 51 relating to the termination of a treaty. Treaties sometimes specify that in certain circumstances or under certain conditions the operation of a treaty or of some of its provisions may be suspended. Whether or not a treaty contains such a clause, it is clear that the operation of the treaty or of some of its provisions may be suspended at any time by

[236] Sir G. Fitzmaurice, second report on the law of treaties, *Yearbook of the International Law Commission, 1957*, vol. II, p. 22.

[237] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, pp. 19, 56 and 58.

[238] 1963 draft, article 40.

consent of *all* the parties. Similarly, it is equally possible by consent of *all* the parties to suspend the operation of the treaty in regard only to a particular party (or group of parties) which finds itself in temporary difficulties concerning the performance of its obligations under the treaty.

(2) The question, on the other hand, whether a multilateral treaty may be suspended by agreement of only some of the parties raises the quite different problem of the conditions under which suspension of the operation of the treaty *inter se* two parties or a group of parties is admissible. This question, which is a delicate one, is covered in the next article.

(3) The present article accordingly provides that the operation of a treaty in regard to all the parties or to a particular party may be suspended either in conformity with the treaty or at any time by consent of all the parties.

Article 55.[239] Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only

When a multilateral treaty contains no provision regarding the suspension of its operation, two or more parties may conclude an agreement to suspend the operation of provisions of the treaty temporarily and as between themselves alone if such suspension:

(*a*) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and

(*b*) Is not incompatible with the effective execution as between the parties as a whole of the object and purpose of the treaty.

Commentary

(1) In re-examining article 40[240] of the 1963 draft at the second part of its seventeenth session in January 1966, the Commission concluded that, whereas the *termination* of a treaty must, on principle, require the consent of *all* the parties, this might not necessarily be so in the case of the suspension of a treaty's operation. Since many multilateral treaties function primarily in the bilateral relations of the parties, it seemed to the Commission that the possibility of *inter se* suspension of the operation of a multilateral treaty in certain cases called for further investigation.[241] At the present session the Commission considered that the question is analogous to that raised by the *inter se* modification of multilateral treaties but that, as the situation is not identical in the two cases, the *inter se* suspension of the operation of a treaty could not be completely equated with its *inter se* modification. The Commission decided that it was desirable to deal with it in the present article and to attach to it the safeguards necessary to protect the position of other parties.

(2) The present article accordingly provides that, in the absence of any specific provision in the treaty on the subject, two or more parties may agree to suspend the operation of provisions of the treaty temporarily and as between themselves alone under two conditions. The first is that the suspension does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations. The second is that the suspension is not incompatible with the effective execution as between the parties as a whole of the object and purpose of the treaty. Article 37, dealing with the modification of a treaty as between certain parties only, prescribes a third condition, namely, that formal notice of the intended modification should be given in advance. Although the Commission did not think that this requirement should be made a specific condition for a temporary suspension of the operation of a treaty, its omission from the present article is not to be understood as implying that the parties in question may not have a certain general obligation to inform the other parties of their *inter se* suspension of the operation of the treaty.

Article 56.[242] Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a further treaty relating to the same subject-matter and:

(*a*) It appears from the treaty or is otherwise established that the parties intended that the matter should thenceforth be governed by the later treaty, or

(*b*) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the treaty or is otherwise established that such was the intention of the parties when concluding the later treaty.

Commentary

(1) The present article deals with cases where the parties, without expressly terminating or modifying the first treaty, enter into another treaty which is so far incompatible with the earlier one that they must be considered to have intended to abrogate it. Where the parties to the two treaties are identical, there can be no doubt that, in concluding the second treaty, they are competent to abrogate the earlier one; for that is the very core of the rule contained in article 51. Even where the parties to the two treaties are not identical, the position is clearly the same if the parties to the later treaty include all the parties to the earlier one; for what the parties to the earlier treaty are competent to do together, they are competent to do in conjunction with other States. The sole question therefore is whether and under what conditions the conclusion of the further incompatible treaty must be held by implication to have terminated the earlier one. This question is essentially one of the construction of the two treaties in order to determine

[239] New article.

[240] Article 40 then covered "termination or suspension of the operation of treaties by agreement".

[241] See 829th and 841st meetings.

[242] 1963 draft, article 41.

the intentions of the parties with respect to the maintenance in force of the earlier one.

(2) *Paragraph 1* therefore seeks to formulate the conditions under which the parties to a treaty are to be understood as having intended to terminate it by concluding a later treaty conflicting with it. The wording of the two clauses in paragraph 1 is based upon the language used by Judge Anzilotti in his separate opinion in the *Electricity Company of Sofia and Bulgaria* case,[243] where he said:

> "There was no express abrogation. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions."

That case, it is true, concerned a possible conflict between unilateral declarations under the Optional Clause and a treaty, and the Court itself did not accept Judge Anzilotti's view that there was any incompatibility between the two instruments. Nevertheless, the two tests put forward by Judge Anzilotti for determining whether a tacit abrogation had taken place appeared to the majority of the Commission to contain the essence of the matter.

(3) *Paragraph 2* provides that the earlier treaty shall not be considered to have been terminated where it appears from the circumstances that a later treaty was intended only to suspend the operation of the earlier one. Judge Anzilotti, it is true, in the above-mentioned opinion considered that the declarations under the Optional Clause, although in his view incompatible with the earlier treaty, had not abrogated it because of the fact that the treaty was of indefinite duration whereas the declarations were for limited terms. But it could not be said to be a general principle that a later treaty for a fixed term does not abrogate an earlier treaty expressed to have a longer or indefinite duration. It would depend entirely upon the intention of the States in concluding the second treaty, and in most cases it is probable that their intention would have been to cancel rather than suspend the earlier treaty.

(4) Article 26 also concerns the relation between successive treaties relating to the same subject-matter, paragraphs 3 and 4(*a*) of that article stating that the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. The practical effect of those paragraphs, no doubt, is temporarily to negative and in that way suspend the operation of the incompatible provisions of the earlier treaty so long as the later treaty is in force. But article 26 deals only with the *priority* of inconsistent obligations of treaties both of which are to be considered as in force and in operation. That article does not apply to cases where it is clear that the parties intended the earlier treaty to be abrogated or its operation to be wholly suspended by the conclusion of the later treaty; for then there are not two sets of incompatible treaty provisions in force and in operation, but only those of the later treaty. In other words, article 26 comes into play only *after it has been determined under the present article that the parties did not intend to abrogate, or wholly to suspend the operation of, the earlier treaty.* The present article, for its part, is not concerned with the *priority* of treaty provisions which are incompatible, but with cases where it clearly appears that the intention of the parties in concluding the latcr treaty was either definitively or temporarily to supersede the régime of the earlier treaty by that of the later one. In these cases the present article terminates or suspends the operation of the earlier treaty altogether, so that it is either no longer in force or no longer in operation. In short, the present article is confined to cases of termination or of the suspension of the operation of a treaty implied from entering into a subsequent treaty.

Article 57.[244] Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) The other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(*b*) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present articles; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

Commentary

(1) The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. A violation of a treaty obligation, as of any other obligation,

[243] *P.C.I.J.* (1939), Series A/B, No. 77, p. 92.

[244] 1963 draft, article 42.

may give rise to a right in the other party to take non-forcible reprisals, and these reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of the right to abrogate the treaty and the conditions under which it may be exercised. Some jurists, in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. They tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach. Other jurists are more impressed with the risk that a State may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing. These jurists tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.

(2) State practice does not give great assistance in determining the true extent of this right or the proper conditions for its exercise. In many cases, the denouncing State has decided for quite other reasons to put an end to the treaty and, having alleged the violation primarily to provide a pretext for its action, has not been prepared to enter into a serious discussion of the legal principles involved. The other party has usually contested the denunciation primarily on the basis of the facts; and, if it has sometimes used language appearing to deny that *unilateral* denunciation is ever justified, this has usually appeared rather to be a protest against the one-sided and arbitrary pronouncements of the denouncing State than a rejection of the right to denounce when serious violations are established.

(3) Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty, and they have not found it necessary to examine the conditions for the application of the principle at all closely. [245]

(4) In the case of the *Diversion of Water from the Meuse*,[246] Belgium contended that, by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against it. Belgium did not claim to denounce the treaty, but it did assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision, although it pleaded its claim rather as an application of the principle *inadimplenti non est adimplendum*. The Court, having found that Holland had not violated the treaty, did not pronounce upon the Belgian contention. In a dissenting opinion, however, Judge Anzilotti expressed the view [247] that the principle underlying the Belgian contention is "so just, so equitable, so universally recognized that it must be applied in international relations also". The only other case that seems to be of much significance is the *Tacna-Arica* arbitration [248] There Peru contended that by preventing the performance of article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from her obligations under that article. The Arbitrator, [249] after examining the evidence, rejected the Peruvian contention, saying:

> "It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown."

This pronouncement seems to assume that only a "fundamental" breach of article 3 by Chile could have justified Peru in claiming to be released from its provisions.

(5) The Commission was agreed that a breach of a treaty, however serious, does not *ipso facto* put an end to the treaty, and also that it is not open to a State simply to allege a violation of the treaty and pronounce the treaty at an end. On the other hand, it considered that within certain limits and subject to certain safeguards the right of a party to invoke the breach of a treaty as a ground for terminating it or suspending its operation must be recognized. Some members considered that it would be dangerous for the Commission to endorse such a right, unless its exercise were to be made subject to control by compulsory reference to the International Court of Justice. The Commission, while recognizing the importance of providing proper safeguards against arbitrary denunciation of a treaty on the ground of an alleged breach, concluded that the question of providing safeguards against arbitrary action was a general one which affected several articles. It, therefore, decided to formulate in the present article the substantive conditions under which a treaty may be terminated or its operation suspended in consequence of a breach, and to deal with the question of the procedural safeguards in article 62.

(6) *Paragraph 1* provides that a "material" breach of a bilateral treaty by one party entitles the other to *invoke* the breach as a ground for terminating the treaty or suspending its operation in whole or in part. The formula "invoke as a ground" is intended to underline that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated. If the other party contests the breach or its character as a "material" breach, there will be a "difference" between the parties with regard to which the normal obligations incumbent upon the parties under the Charter and under general international law to seek a solution of the question

[245] E.g. *Ware* v. *Hylton* (1796), 3 Dallas 261; *Charlton* v. *Kelly*, 229 U.S.447; *Lepeschkin* v. *Gosweiler et Cie.*, *Journal du droit international* (1924) vol. 51, p. 1136; *In re Tatarko*, *Annual Digest and Reports of Public International Law Cases*, 1949, No. 110, p. 314.

[246] *P.C.I.J.* (1937), Series A/B, No. 70.

[247] *Ibid.*, p. 50; cf. Judge Hudson, pp. 76 and 77.

[248] *Reports of International Arbitral Awards*, vol. II, pp. 929, 943 and 944.

[249] President Coolidge.

through pacific means will apply. The Commission considered that the action open to the other party in the case of a material breach is to invoke either the termination or the suspension of the operation of the treaty, in whole or in part. The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil its obligations under a treaty when the other party fails to fulfil those which it undertook under the same treaty. This right would, of course, be without prejudice to the injured party's right to present an international claim for reparation on the basis of the other party's responsibility with respect to the breach.

(7) *Paragraph 2* deals with a material breach of a multilateral treaty, and here the Commission considered it necessary to distinguish between the right of the other parties to react jointly to the breach and the right of an individual party specially affected by the breach to react alone. Sub-paragraph (*a*) provides that the other parties may, by a unanimous agreement, suspend the operation of the treaty or terminate it and may do so either only in their relations with the defaulting State or altogether as between all the parties. When an individual party reacts alone the Commission considered that its position is similar to that in the case of a bilateral treaty, but that its right should be limited to suspending the operation of the treaty in whole or in part as between itself and the defaulting State. In the case of a multilateral treaty the interests of the other parties have to be taken into account and a right of suspension normally provides adequate protection to the State specially affected by the breach. Moreover, the limitation of the right of the individual party to a right of suspension seemed to the Commission to be particularly necessary in the case of general multilateral treaties of a law-making character. Indeed, a question was raised as to whether even suspension would be admissible in the case of law-making treaties. The Commission felt, however, that it would be inequitable to allow a defaulting State to continue to enforce the treaty against the injured party, whilst itself violating its obligations towards that State under the treaty. Moreover, even such treaties as the Genocide Convention and the Geneva Conventions on the treatment of prisoners of war, sick and wounded allowed an express right of denunciation independently of any breach of the convention. The Commission concluded that general law-making treaties should not, simply as such, be dealt with differently from other multilateral treaties in the present connexion. Accordingly, sub-paragraph (*b*) lays down that on a material breach of a multilateral treaty any party specially affected by the breach may *invoke* it as a *ground* for suspending the operation of the treaty in whole or in part *in the relations between itself and the defaulting State.*

(8) Paragraph 2(*c*) is designed to deal with the problem raised in the comments of Governments of special types of treaty, e.g. disarmament treaties, where a breach by one party tends to undermine the whole régime of the treaty as between all the parties. In the case of a material breach of such a treaty the interests of an individual party may not be adequately protected by the rules contained in paragraphs 2(*a*) and (*b*). It could not suspend the performance of its own obligations under the treaty vis-à-vis the defaulting State without at the same time violating its obligations to the other parties. Yet, unless it does so, it may be unable to protect itself against the threat resulting from the arming of the defaulting State. In these cases, where a material breach of the treaty by one party radically changes the position of every party with respect to the further performance of its obligations, the Commission considered that any party must be permitted without first obtaining the agreement of the other parties to suspend the operation of the treaty with respect to itself generally in its relations with all the other parties. Paragraph 2(*c*) accordingly so provides.

(9) *Paragraph 3* defines the kind of breach which may give rise to a right to terminate or suspend the treaty. Some authorities have in the past seemed to assume that any breach of any provision would suffice to justify the denunciation of the treaty. The Commission, however, was unanimous that the right to terminate or suspend must be limited to cases where the breach is of a serious character. It preferred the term "material" to "fundamental" to express the kind of breach which is required. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching the *central* purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character. Clearly, an unjustified repudiation of the treaty—a repudiation not sanctioned by any of the provisions of the present articles—would automatically constitute a material breach of the treaty; and this is provided for in sub-paragraph (*a*) of the definition. The other and more general form of material breach is that in sub-paragraph (*b*), and is there defined as a violation of a provision essential to the accomplishment of any object or purpose of the treaty.

(10) *Paragraph 4* merely reserves the rights of the parties under any specific provisions of the treaty applicable in the event of a breach.

Article 58.[250] Supervening impossibility of performance

A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

Commentary

(1) The present article concerns the termination of a treaty or the suspension of its operation in consequence of the permanent or temporary total disappearance or destruction of an object indispensable for its execution. The next article concerns the termination of a treaty in

[250] 1963 draft, article 43.

consequence of a fundamental change in the circumstances existing at the time when it was entered into. Cases of supervening impossibility of performance are *ex hypothesi* cases where there has been a fundamental change in the circumstances existing at the time when the treaty was entered into. Some members of the Commission felt that it was not easy to draw a clear distinction between the types of cases dealt with in the two articles and were in favour of amalgamating them. The Commission, however, considered that juridically "impossibility of performance" and "fundamental change of circumstances" are distinct grounds for regarding a treaty as having been terminated, and should be kept separate. Although there might be borderline cases in which the two articles tended to overlap, the criteria to be employed in applying the articles were not the same, and to combine them might lead to misunderstanding.

(2) The article provides that the permanent disappearance or destruction of an object indispensable for the execution of the treaty may be invoked as a ground for putting an end to the treaty. State practice furnishes few examples of the termination of a treaty on this ground. But the type of cases envisaged by the article is the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty.

(3) The article further provides that, if the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty. The Commission appreciated that such cases might be regarded simply as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But it considered that, when there is a continuing impossibility of performing recurring obligations of a treaty, it is desirable to recognize, *as part of the law of treaties*, that the operation of a treaty may be suspended temporarily.

(4) The fact that the article deals first with cases of termination is not meant to imply that termination is to be regarded as the normal result in such cases or that there is any presumption that the disappearance or destruction of an object indispensable to the execution of the treaty will be permanent. On the contrary, the Commission considered it essential to underline that, unless it is clear that the impossibility will be permanent, the right of the party must be limited to invoking it as a ground for suspending the operation of the treaty. In other words, it regarded "suspension of the operation of the treaty" rather than "termination" as the desirable course of action, not *vice versa*.

(5) The Commission appreciated that in cases under this article, unlike cases of breach, the ground of termination, when established, might be said to have automatic effects on the validity of the treaty. But it felt bound to state the rule in the form not of a provision automatically terminating the treaty but one entitling the parties to invoke the impossibility of performance as a ground for terminating the treaty. The point is that disputes may arise as to whether a total disappearance or destruction of the subject-matter of the treaty has in fact occurred, and in the absence of compulsory adjudication it would be inadvisable to adopt, without any qualification, a rule bringing about the automatic abrogation of the treaty by operation of law. Otherwise, there would be a risk of arbitrary assertions of a supposed impossibility of performance as a mere pretext for repudiating a treaty. For this reason, the Commission formulated the article in terms of a right to *invoke* the impossibility of performance as a ground for terminating the treaty and made this right subject to the procedural requirements of article 62.

(6) The Commission appreciated that the total extinction of the international personality of one of the parties to a bilateral treaty is often cited as an instance of impossibility of performance, but decided against including it in the present article for two reasons. First, it would be misleading to formulate a provision concerning the extinction of the international personality of a party without at the same time dealing with, or at least reserving, the question of the succession of States to treaty rights and obligations. The subject of succession is a complex one which is already under separate study in the Commission and it would be undesirable to prejudge the outcome of that study. Accordingly, the Commission did not think that it should deal with this subject in the present article, and, as already mentioned in paragraph (5) of the commentary to article 39, it decided to reserve the question in a general provision in article 69.

(7) Certain Governments in their comments raised the question whether, in connexion with both the present article and article 59 (fundamental change of circumstances), special provision should be made for cases where the treaty has been partly performed and benefits obtained by one party before the cause of termination supervenes. The Commission, while recognizing that problems of equitable adjustment may arise in such cases, doubted the advisability of trying to regulate them by a general provision in articles 58 and 59. It did not seem to the Commission possible to go beyond the provisions of article 66 and 67, paragraph 2, dealing with the consequences of the termination of a treaty.

Article 59.[251] Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

(*a*) As a ground for terminating or withdrawing from a treaty establishing a boundary;

[251] 1963 draft, article 44.

(*b*) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

Commentary

(1) Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*. Just as many systems of municipal law recognize that, quite apart from any actual *impossibility* of performance, contracts may become inapplicable through a fundamental change of circumstances, so also treaties may become inapplicable for the same reason. Most jurists, however, at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are obvious. The circumstances of international life are always changing and it is easy to allege that the changes render the treaty inapplicable.

(2) The evidence of the principle in customary law is considerable, but the International Court has not yet committed itself on the point. In the *Free Zones* case,[252] having held that the facts did not in any event justify the application of the principle, the Permanent Court expressly reserved its position. It observed that it became unnecessary for it to consider "any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the methods by which effect can be given to the theory, if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816".

(3) Municipal courts, on the other hand, have not infrequently recognized the relevance of the principle in international law, though for one reason or another they have always ended by rejecting the application of it in the particular circumstances of the case before them.[253] These cases contain the propositions that the principle is limited to changes in circumstances the continuance of which, having regard to the evident intention of the parties at the time, was regarded as a tacit condition of the agreement,[254] that the treaty is not dissolved automatically by law upon the occurrence of the change but only if the doctrine is invoked by one of the parties,[255] and that the doctrine must be invoked within a reasonable time after the change in the circumstances was first perceived.[256] Moreover, in *Bremen* v. *Prussia*[257] the German *Reichsgericht*, while not disputing the general relevance of the doctrine, considered it altogether inapplicable to a case where one party was seeking to release itself not from the whole treaty but only from certain restrictive clauses which had formed an essential part of an agreement for an exchange of territory.

(4) The principle of *rebus sic stantibus* has not infrequently been invoked in State practice either *eo nomine* or in the form of a reference to a general principle claimed to justify the termination or modification of treaty obligations by reason of changed circumstances. Detailed examination of this State practice is not possible in the present report. Broadly speaking, it shows a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground. The most illuminating indications as to the attitude of States regarding the principle are perhaps statements submitted to the Court in the cases where the doctrine has been invoked. In the *Nationality Decrees* case the French Government contended that "perpetual" treaties are always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over Morocco had for that reason had the effect of extinguishing certain Anglo-French treaties.[258] The British Government, while contesting the French Government's view of the facts, observed that the most forceful argument advanced by France was that of *rebus sic stantibus*.[259] In the case concerning *The Denunciation of the Sino-Belgian Treaty of 1865*, China invoked, in general terms, changes of circumstances as a justification of her denunciation of a sixty-year-old treaty, and supported her contention with a reference to Article 19 of the Covenant of the League of Nations.[260] The article, however, provided that the Assembly of the League should "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable", and the Belgian Government replied that neither Article 19 nor the doctrine of *rebus sic stantibus* contemplated the unilateral denunciation of treaties. It further maintained that there could be no question of China's denouncing the treaty because of a change of circumstances unless she had at least tried to obtain its revision through Article 19; that where both parties were subject to the Court's jurisdiction, the natural course for China, in case of dispute, was to obtain a ruling

[252] *P.C.I.J.* (1932), Series A/B, No. 46, pp. 156-158.

[253] E.g. *Hooper* v. *United States*, Hudson, *Cases on International Law*, second edition, p. 930; *Lucerne* v. *Aargau* (1888), *Arrêts du Tribunal Fédéral Suisse*, vol. 8, p. 57; *In re Lepeschkin*, *Annual Digest of Public International Law Cases*, 1923-24, Case No. 189; *Bremen* v. *Prussia*, *ibid.*, 1925-26, Case No. 266; *Rothschild and Sons* v. *Egyptian Government*, *ibid.*, 1925-26, Case No. 14; *Canton of Thurgau* v. *Canton of St. Gallen*, *ibid.*, 1927-28, Case No. 289; *Bertaco* v. *Bancel*, *ibid.*, 1935-37, Case No. 201; *Stransky* v. *Zivnostenska Bank*, *International Law Reports*, 1955, pp. 424-427.

[254] *Lucerne* v. *Aargau*; *Canton of Thurgau* v. *Canton of St. Gallen*; *Hooper* v. *United States*.

[255] *In re Lepeschkin*; *Stransky* v. *Zivnostenska Bank*.

[256] *Canton of Thurgau* v. *Canton of St. Gallen*.

[257] *Annual Digest of Public International Law Cases*, 1925-26, Case No. 266.

[258] *P.C.I.J.*, Series C, No. 2, pp. 187 and 188.

[259] *Ibid.*, pp. 208 and 209.

[260] *Ibid.*, No. 16, I. p. 52.

from the Court; and that if she did not, she could not denounce the treaty without Belgium's consent.[261] In the *Free Zones* case[262] the French Government, the Government invoking the *rebus sic stantibus* principle, itself emphasized that the principle does not allow unilateral denunciation of a treaty claimed to be out of date. It argued that the doctrine would cause a treaty to lapse only "*lorsque le changement de circonstances aura été reconnu par un acte faisant droit entre les deux Etats intéressés*"; and it further said: "*cet acte faisant droit entre les deux Etats intéressés peut être soit un accord, lequel accord sera une reconnaissance du changement des circonstances et de son effet sur le traité, soit une sentence du juge international compétent s'il y en a un*".[263] Switzerland, emphasizing the differences of opinion amongst jurists in regard to the principle, disputed the existence in international law of any such *right* to the termination of a treaty because of changed circumstances enforceable through the decision of a competent tribunal. But she rested her case primarily on three contentions: (*a*) the circumstances alleged to have changed were not circumstances on the basis of whose continuance the parties could be said to have entered into the treaty; (*b*) in any event, the doctrine does not apply to treaties creating *territorial* rights; and (*c*) France had delayed unreasonably long after the alleged changes of circumstances had manifested themselves.[264] France does not appear to have disputed that the doctrine is inapplicable to territorial rights; instead, she drew a distinction between territorial rights and "personal" rights created on the occasion of a territorial settlement.[265] The Court upheld the Swiss Government's contentions on points (*a*) and (*c*), but did not pronounce on the application of the *rebus sic stantibus* principle to treaties creating territorial rights.

(5) The principle has also been invoked in debates in political organs of the United Nations, either expressly or by implication. In these debates, the existence of the principle has not usually been disputed, though emphasis has been placed on the conditions restricting its application. The Secretary-General also, in a study of the validity of the minorities treaties concluded during the League of Nations era, while fully accepting the existence of the principle in international law, emphasized the exceptional and limited character of its application.[266] In their comments some Governments expressed doubts as to how far the principle could be regarded as an already accepted rule of international law; and others emphasized the dangers which the principle involved for the security of treaties unless the conditions for its application were closely defined and adequate safeguards were provided against its arbitrary application.

(6) The Commission concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty may remain in force for a long time and its stipulations come to place an undue burden on one of the parties as a result of a fundamental change of circumstances. Then, if the other party were obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties might impose a serious strain on the relations between the States concerned; and the dissatisfied State might ultimately be driven to take action outside the law. The number of cases calling for the application of the rule is likely to be comparatively small. As pointed out in the commentary to article 51, the majority of modern treaties are expressed to be of short duration, or are entered into for recurrent terms of years with a right to denounce the treaty at the end of each term, or are expressly or implicitly terminable upon notice. In all these cases either the treaty expires automatically or each party, having the power to terminate the treaty, has the power also to apply pressure upon the other party to revise its provisions. Nevertheless, there may remain a residue of cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It is in these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties.

(7) In the past the principle has almost always been presented in the guise of a tacit condition implied in every "perpetual" treaty that would dissolve it in the event of a fundamental change of circumstances. The Commission noted, however, that the tendency to-day was to regard the implied term as only a fiction by which it was attempted to reconcile the principle of the dissolution of treaties in consequence of a fundamental change of circumstances with the rule *pacta sunt servanda*. In most cases the parties gave no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner. Furthermore, the Commission considered the fiction to be an undesirable one since it increased the risk of subjective interpretations and abuse. For this reason, the Commission was agreed that the theory of an implied term must be rejected and the doctrine formulated as an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty. It further decided that, in order to emphasize the objective character of the rule, it would be better not to use the term "*rebus sic stantibus*" either in the text of the article or even in the title, and so avoid the doctrinal implication of that term.

---

[261] *Ibid.*, pp. 22-23; the case was ultimately settled by the conclusion of a new treaty.

[262] *Ibid.*, Series A/B, No. 46.

[263] *Ibid.*, Series C, No. 58, pp. 578-579, 109-146, and 405-415; see also Series C, No. 17, I, pp. 89, 250, 256, 283-284.

[264] *Ibid.*, Series C, No. 58, pp. 463-476.

[265] *Ibid.*, pp. 136-143.

[266] E/CN.4/367, p. 37, see also E/CN.4/367/Add.1.

(8) The Commission also recognized that jurists have in the past often limited the application of the principle to so-called perpetual treaties, that is, to treaties not making any provision for their termination. The reasoning by which this limitation of the principle was supported by these authorities did not, however, appear to the Commission to be convincing. When a treaty had been given a duration of ten, twenty, fifty or ninety-nine years, it could not be excluded that a fundamental change of circumstances might occur which radically affected the basis of the treaty. The cataclysmic events of the present century showed how fundamentally circumstances may change within a period of only ten or twenty years. If the doctrine were regarded as an objective rule of law founded upon the equity and justice of the matter, there did not seem to be any reason to draw a distinction between "perpetual" and "long term" treaties. Moreover, practice did not altogether support the view that the principle was confined to "perpetual" treaties. Some treaties of limited duration actually contained what were equivalent to *rebus sic stantibus* provisions.[267] The principle had also been invoked sometimes in regard to limited treaties, as for instance, in the resolution of the French Chamber of Deputies of 14 December 1932, expressly invoking the principle of *rebus sic stantibus* with reference to the Franco-American war debts agreement of 1926.[268] The Commission accordingly decided that the rule should not be limited to treaties containing no provision regarding their termination, though for obvious reasons it would seldom or never have relevance for treaties of limited duration or which are terminable upon notice.

(9) *Paragraph 1* defines the conditions under which a change of circumstances may be invoked as a ground for terminating a treaty or for withdrawing from a multilateral treaty. This definition contains a series of limiting conditions: (1) the change must be of circumstances existing at the time of the conclusion of the treaty; (2) that change must be a fundamental one; (3) it must also be one not foreseen by the parties; (4) the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and (5) the effect of the change must be radically to transform the scope of obligations still to be performed under the treaty. The Commission attached great importance to the strict formulation of these conditions. In addition, it decided to emphasize the exceptional character of this ground of termination or withdrawal by framing the article in negative form: "a fundamental change of circumstances...may *not* be invoked as a ground for terminating or withdrawing from a treaty *unless* etc.".

(10) The question was raised in the Commission whether general changes of circumstances quite outside the treaty might not sometimes bring the principle of fundamental change of circumstances into operation. But the Commission considered that such general changes could properly be invoked as a ground for terminating or withdrawing from a treaty only if their effect was to alter a circumstance constituting an essential basis of the consent of the parties to the treaty. Some members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a Government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty. They represented that, if this were not the case, the security of treaties might be prejudiced by recognition of the principle in the present article. Other members, while not dissenting from the view that mere changes of policy on the part of a Government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that a change of policy could never in any circumstances be invoked as a ground for terminating a treaty. They instanced a treaty of alliance as a possible case where a radical change of political alignment by the Government of a country might make it unacceptable, *from the point of view of both parties*, to continue with the treaty. The Commission considered that the definition of a "fundamental change of circumstances" in paragraph 1 should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change of policy, and that it was unnecessary to go further into the matter in formulating the article.

(11) *Paragraph 2* excepts from the operation of the article two cases. The first concerns treaties establishing a boundary, a case which both States concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most jurists. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed. The expression "treaty *establishing* a boundary" was substituted for "treaty fixing a boundary" by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties.

(12) The second exception, dealt with in paragraph 2(*b*), provides that a fundamental change may not be invoked if it has been brought about by a breach of the treaty by the party invoking it or by that party's breach of

[267] E.g., article 21 of the Treaty on Limitation of Naval Armament, signed at Washington, 6 February 1922 (Hudson, *International Legislation*, vol. II, p. 820); article 26 of the Treaty for the Limitation of Naval Armament, signed at London, 25 March 1936 (*Ibid.*, vol. VII, p. 280); and Convention regarding the régime of the Straits, signed at Montreux, 20 July 1936 (*L.N.T.S.*, vol. 173, p. 229).

[268] For the text of the resolution, see A.-C. Kiss, *Répertoire français de droit international*, vol. 5, pp. 384-385.

other international obligations owed to the parties to the treaty. This rule is, of course, simply an application of the general principle of law that a party cannot take advantage of its own wrong (*Factory at Chorzow* case, *P.C.I.J.* (1927), Series A, No. 9 at page 31). As such it is clearly applicable in any case arising under any of the articles. Nevertheless, having regard to the particular risk that a fundamental change of circumstances may result from a breach, or series of breaches, of a treaty, the Commission thought it desirable specifically to exclude from the operation of the present article a fundamental change of circumstances so brought about.

(13) Certain Governments in their comments emphasized the dangers which this article may have for the security of treaties unless it is made subject to some form of independent adjudication. Many members of the Commission also stressed the importance which they attached to the provision of adequate procedural safeguards against arbitrary application of the principle of fundamental change of circumstances as an essential condition of the acceptability of the article. In general, however, the Commission did not consider the risks to the security of treaties involved in the present article to be different in kind or degree from those involved in the articles dealing with the various grounds of invalidity or in articles 57, 58 and 61. It did not think that a principle, valid in itself, could or should be rejected because of a risk that a State acting in bad faith might seek to abuse the principle. The proper function of codification, it believed, was to minimize those risks by strictly defining and circumscribing the conditions under which recourse may properly be had to the principle; and this it has sought to do in the present article. In addition, having regard to the extreme importance of the stability of treaties to the security of international relations, it has attached to the present article, as to all the articles dealing with grounds of invalidity or termination, the specific procedural safeguards set out in article 62.

Article 60.[269] Severance of diplomatic relations

The severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations established between them by the treaty.

Commentary

(1) This article contemplates only the situation which arises when diplomatic relations are severed between two parties to a treaty, whether bilateral or multilateral, between which normal diplomatic relations had previously subsisted. For the reasons stated in paragraph 29 of this report the question of the effect upon treaties of the outbreak of hostilities—which may obviously be a case when diplomatic relations are severed—is not dealt with in the present articles. Similarly, any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments, which is excluded from the present discussion for the reasons indicated in paragraph 30 of the Introduction to this chapter, or recognition of States and Governments, which the Commission in 1949 decided to include in its provisional list of topics selected for codification.[270]

(2) There is wide support for the general proposition that the severance of diplomatic relations does not in itself lead to the termination of treaty relationships between the States concerned.[271] Indeed, many jurists do not include the severance of diplomatic relations in their discussion of the grounds for the termination or suspension of the operation of treaties. That the breaking off of diplomatic relations does not as such affect the operation of the rules of law dealing with other aspects of international intercourse is indeed recognized in article 2(3) of the Vienna Convention on Consular Relations of 1963[272] which provides: "The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations"; while the Vienna Convention on Diplomatic Relations of 1961 contains an article—article 45—dealing specifically with the rights and obligations of the parties in the event that diplomatic relations are broken off. It therefore seems correct to state that in principle the mere breaking off of diplomatic relations does not of itself affect the continuance in force of the treaty, or the continuance of the obligation of the parties to apply it in accordance with the rule *pacta sunt servanda.*

(3) The text of the article provisionally adopted in 1964 contained a second paragraph which expressly provided that severance of diplomatic relations may be invoked as a ground for suspending the operation of a treaty: "if it results in the disappearance of the means necessary for the application of the treaty". In other words, an exception was admitted to the general rule in the event that the severance of relations resulted in something akin to a temporary impossibility of performing the treaty through a failure of a necessary means. Certain Governments in their comments expressed anxiety lest this exception, unless it was more narrowly defined, might allow the severance of diplomatic relations to be used as a pretext for evading treaty obligations. In the light of these comments the Commission examined the question *de novo*. It noted that the text of article 58 dealing with supervening impossibility of performance, as revised at the second part of its seventeenth session, contemplates the suspension of the operation of a treaty on the ground of impossibility of performance only in case of the temporary "disappearance or destruction of an *object indispensable for the execution of the treaty*"; and that the severance of diplomatic relations relates to "means" rather than to an "object".

[269] 1964 draft, article 64.

[270] *Yearbook of the International Law Commission*, 1949, p. 281.

[271] Cf. Sir G. Fitzmaurice, second report on the law of treaties (A/CN.4/107), article 5 (iii) and paragraph 34 of the commentary, *ibid.*, *1957*, vol. II, p. 42; and fourth report on the law of treaties (A/CN.4/120), article 4, *ibid.*, *1959*, vol. II, p. 54.

[272] United Nations Conference on Consular Relations, *Official Records*, vol. II, p. 175.

(4) Furthermore, the Commission revised its opinion on the question of admitting the interruption of the normal diplomatic channels as a case of the disappearance of means indispensable for the execution of a treaty. It considered that to-day the use of third States and even of direct channels as means for making necessary communications in case of severance of diplomatic relations are so common that the absence of the normal channels ought not to be recognized as a disappearance of a "means" or of an "object" indispensable for the execution of a treaty. It appreciated that, as some members pointed out, the severance of diplomatic relations might be incompatible with implementation of certain kinds of political treaty such as treaties of alliance. But it concluded that any question of the termination or suspension of the operation of such treaties in consequence of the severance of diplomatic relations should be left to be governed by the general provisions of the present articles regarding termination, denunciation, withdrawal from and suspension of the operation of treaties. It therefore decided to confine the present article to the general proposition that severance of diplomatic relations does not in itself affect the legal relations established by a treaty, and to leave any special case to be governed by the other articles.

(5) The article accordingly provides simply that the severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations between them established by the treaty. The expression "*severance of diplomatic relations*", which appears in Article 41 of the Charter and in article 2, paragraph 3, of the Vienna Convention of 1963 on Consular Relations, is used in preference to the expression "breaking off of diplomatic relations" found in article 45 of the Vienna Convention of 1961 on Diplomatic Relations.

Article 61.[273] Emergence of a new peremptory norm of general international law

If a new peremptory norm of general international law of the kind referred to in article 50 is established, any existing treaty which is in conflict with that norm becomes void and terminates.

Commentary

(1) The rule formulated in this article is the logical corollary of the rule in article 50 under which a treaty is void if it conflicts with a "peremptory norm of general international law from which no derogation is permitted". Article 50, as explained in the commentary to it, is based upon the hypothesis that in international law to-day there are a certain number of fundamental rules of international public order from which no State may derogate even by agreement with another State. Manifestly, if a new rule of that character—a new rule of *jus cogens*—emerges, its effect must be to render void not only future but existing treaties. This follows from the fact that a rule of *jus cogens* is an over-riding rule depriving any act or situation which is in conflict with it of legality. An example would be former treaties regulating the slave trade, the performance of which later ceased to be compatible with international law owing to the general recognition of the total illegality of all forms of slavery.

(2) The Commission discussed whether to make this rule part of article 50, but decided that it should be placed among the articles concerning the termination of treaties. Although the rule operates to deprive the treaty of validity, its effect is not to render it void *ab initio*, but only from the date when the new rule of *jus cogens* is established; in other words it does not annul the treaty, it forbids its further existence and performance. It is for this reason that the article provides that "If a new peremptory norm of general international law...is established", a treaty becomes void and terminates.

(3) Similarly, although the Commission did not think that the principle of separability is appropriate when a treaty is void *ab initio* under article 50 by reason of an existing rule of *jus cogens*, it felt that different considerations apply in the case of a treaty which was entirely valid when concluded but is now found with respect to some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions can properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid.

(4) In paragraph (6) of its commentary to article 50 the Commission has already emphasized that a rule of *jus cogens* does not have retroactive effects and does not deprive any existing treaty of its validity prior to the establishment of that rule as a rule of *jus cogens*. The present article underlines that point since it deals with the effect of the emergence of a new rule of *jus cogens* on the validity of a treaty as a case of the termination of the treaty. The point is further underlined by article 67 which limits the consequences of the termination of a treaty by reason of invalidity attaching to it under the present article to the period *after* the establishment of the new rule of *jus cogens*.

Section 4: Procedure

Article 62.[274] Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

[273] 1963 draft, article 45.

[274] 1963 draft, article 51.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Commentary

(1) Many members of the Commission regarded the present article as a key article for the application of the provisions of the present part dealing with the invalidity, termination or suspension of the operation of treaties. They thought that some of the grounds upon which treaties may be considered invalid or terminated or suspended under those sections, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real dangers for the security of treaties. These dangers were, they felt, particularly serious in regard to claims to denounce or withdraw from a treaty by reason of an alleged breach by the other party or by reason of a fundamental change of circumstances. In order to minimize these dangers the Commission has sought to define as precisely and as objectively as possible the conditions under which the various grounds may be invoked. But whenever a party to a treaty invokes one of these grounds, the question whether or not its claim is justified will nearly always turn upon facts the determination or appreciation of which may be controversial. Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation.

(2) States in the course of disputes have not infrequently used language in which they appeared to maintain that the nullity or termination of a treaty could not be established except by consent of both parties. This presentation of the matter, however, subordinates the application of the principles governing the invalidity, termination and suspension of the operation of treaties to the will of the objecting State no less than the arbitrary assertion of the nullity, termination or suspension of a treaty subordinates their application to the will of the claimant State. The problem is the familiar one of the settlement of differences between States. In the case of treaties, however, there is the special consideration that the parties by negotiating and concluding the treaty have brought themselves into a relationship in which there are particular obligations of good faith.

(3) In 1963, some members of the Commission were strongly in favour of recommending that the application of the present articles should be made subject to compulsory judicial settlement by the International Court of Justice, if the parties did not agree upon another means of settlement. Other members, however, pointed out that the Geneva Conventions on the Law of the Sea and the two Vienna Conventions respectively on Diplomatic and on Consular Relations did not provide for compulsory jurisdiction. While not disputing the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles, these members expressed the view that in the present state of international practice it would not be realistic for the Commission to put forward this solution of the procedural problem. After giving prolonged consideration to the question, the Commission concluded that its appropriate course was, first, to provide a procedure requiring a party which invoked the nullity of a treaty or a ground for terminating it to notify the other parties and give them a proper opportunity to state their views, and then, in the event of an objection being raised by the other party, to provide that the solution of the question should be sought through the means indicated in Article 33 of the Charter. In other words, the Commission considered that in dealing with this problem it should take as its basis the general obligation of States under international law to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" which is enshrined in Article 2, paragraph 3 of the Charter, and the means for the fulfilment of which are indicated in Article 33 of the Charter.

(4) Governments in their comments appeared to be at one in endorsing the general object of the article, namely, the surrounding of the various grounds of invalidity, termination and suspension with procedural safeguards against their arbitrary application for the purpose of getting rid of inconvenient treaty obligations. A number of Governments took the position that paragraphs 1 to 3 of the article did not go far enough in their statement of the procedural safeguards and that specific provisions, including independent adjudication, should be made for cases where the parties are unable to reach agreement. Others, on the other hand, expressed the view that these paragraphs carry the safeguards as far as it is proper to go in the present state of international opinion in regard to acceptance of compulsory jurisdiction. The Commission re-examined the question in the light of these comments and in the light also of the discussions regarding the principle that States "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered", which have taken place in the two Special Committees on Principles of International Law concerning Friendly Relations and Co-operation between States. [275] It further took into account other evidence of recent State practice, including the Charter and Protocol of the Organization of African Unity. The Commission concluded that the article, as provisionally adopted in 1963, represented the highest measure of common ground that could be found among Governments as well as in the Commission on this question. In consequence,

[275] Report of the 1964 Special Committee (A/5746), chapter IV; report of the 1966 Special Committee (A/6230), chapter III.

it decided to maintain the rules set out in the 1963 text of the article, subject only to certain drafting changes.

(5) *Paragraph 1* provides that a party claiming the nullity of the treaty or alleging a ground for terminating it or withdrawing from it or suspending its operation shall put in motion a regular procedure under which it must first notify the other parties of its claim. In doing so it must indicate the measure which it proposes to take with respect to the treaty, i.e. denunciation, termination, suspension, etc. and its grounds for taking that measure. Then by *paragraph 2* it must give the other parties a reasonable period within which to reply. Except in cases of special urgency, the period must not be less than three months. The second stage of the procedure depends on whether or not objection is raised by any party. If there is none or there is no reply before the expiry of the period, the party may take the measure proposed in the manner provided in article 63, i.e. by an instrument duly executed and communicated to the other parties. If, on the other hand, objection is raised, the parties are required by *paragraph 3*, to seek a solution to the question through the means indicated in Article 33 of the Charter. The Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution to the question at issue between the parties. If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands. There would also remain the right of every State, whether or not a Member of the United Nations, under certain conditions, to refer the dispute to the competent organ of the United Nations.

(6) Even if, for the reasons previously mentioned in this commentary, the Commission felt obliged not to go beyond Article 33 of the Charter in providing for procedural checks upon arbitrary action, it considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties would be a valuable step forward. The express subordination of the substantive rights arising under the provisions of the various articles to the procedure prescribed in the present article and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty.

(7) *Paragraph 4* merely provided that nothing in the article is to affect the position of the parties under any provisions regarding the settlement of disputes in force between the parties.

(8) *Paragraph 5* reserves the right of any party to make the notification provided in paragraph 1 by way of answer to a demand for its performance or to a complaint in regard to its violation, even though it may not previously have initiated the procedure laid down in the article. In cases of error, impossibility of performance or change of circumstances, for example, a State might well not have invoked the ground in question before being confronted with a complaint—perhaps even before a tribunal. Subject to the provisions of article 42 concerning the effect of inaction in debarring a State from invoking a ground of nullity, termination or suspension, it would seem right that a mere failure to have made a prior notification should not prevent a party from making it in answer to a demand for performance of the treaty or to a complaint alleging its violation.

Article 63.[276] Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 62 shall be carried out through an instrument communicated to the other parties.

2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Commentary

(1) This article and article 64 replace, with considerable modifications, articles 49 and 50 of the draft provisionally adopted in 1963.

(2) Article 50 of the 1963 draft dealt only with the procedure governing notices of termination, withdrawal or suspension under a right provided for in the treaty. In re-examining the article, the Commission noted that the procedure governing the *giving* of notices of termination under a treaty would be adequately covered by the general article on notifications and communications—now article 73—which it had decided to introduce into the draft articles. In other words, it came to the conclusion that the new article made paragraph 1 of article 50 of the 1963 draft otiose. At the same time, it decided that a general provision was required dealing with the instruments by which, either under the terms of the treaty or pursuant to paragraphs 2 and 3 of article 51 (present article 62), an act declaring invalid, terminating or withdrawing from or suspending the operation of a treaty may be carried out. This provision is contained in paragraph 1 of the present article, which the Commission considered should logically be placed after article 62, since the provision in paragraph 1 would necessarily operate only after the application of the procedures in article 62.

(3) Paragraph 2 of the present article replaces article 49 of the 1963 draft, which was entitled "authority to denounce, terminate, etc." and which in effect would have made the rules relating to "full powers" to represent the State in the *conclusion* of a treaty equally applicable in all stages of the procedure for denouncing, terminating, withdrawing from or suspending the operation of a treaty.

[276] 1963 draft, articles 49 and 50, para. 1.

One Government in its comments questioned whether the matter could be disposed of satisfactorily by a simple cross reference to the article concerning "full powers". Meanwhile the Commission had itself considerably revised the formulation of the article concerning "full powers". Accordingly, it re-examined the whole question of evidence of authority to denounce, terminate, withdraw from or suspend the operation of a treaty dealt with in article 49 of the 1963 draft. It concluded that in the case of the denunciation, termination, etc. of a treaty there was no need to lay down rules governing evidence of authority in regard to the notification and negotiation stages contemplated in paragraphs 1-3 of article 51 of the 1963 draft, since the matter could be left to the ordinary workings of diplomatic practice. In consequence it decided to confine paragraph 2 of the present article to the question of evidence of authority to execute the final act purporting to declare the invalidity, termination, etc. of a treaty. The Commission considered that the rule concerning evidence of authority to denounce, terminate, etc., should be analogous to that governing "full powers" to express the consent of a State to be bound by a treaty. Paragraph 2 therefore provides that "If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers".

(4) The importance of the present article, in the view of the Commission, is that it calls for the observance of a measure of formality in bringing about the invalidation, termination, etc. of a treaty, and thereby furnishes a certain additional safeguard for the security of treaties. In moments of tension the denunciation or threat to denounce a treaty has sometimes been made the subject of a public utterance not addressed directly to the other State concerned. But it is clearly essential that any such declaration purporting to put an end to or to suspend the operation of a treaty, at whatever level it is made, should not be a substitute for the formal act which diplomatic propriety and legal regularity would seem to require.

Article 64.[277] Revocation of notifications and instruments provided for in articles 62 and 63

A notification or instrument provided for in articles 62 and 63 may be revoked at any time before it takes effect.

Commentary

(1) The present article replaces and reproduces the substance of paragraph 2 of article 50 of the 1963 draft.

(2) The Commission appreciated that in their comments certain Governments had questioned the desirability of stating the rule in a form which admitted a complete liberty to revoke a notice of denunciation, termination, withdrawal or suspension prior to the moment of its taking effect. It also recognized that one of the purposes of treaty provisions requiring a period of notice is to enable the other parties to take any necessary steps in advance to adjust themselves to the situation created by the termination of the treaty or the withdrawal of a party. But, after carefully re-examining the question, it concluded that the considerations militating in favour of encouraging the revocation of notices and instruments of denunciation, termination, etc. are so strong that the general rule should admit a general freedom to do so prior to the taking effect of the notice or instrument. The Commission also felt that the right to revoke the notice is really implicit in the fact that it is not to become effective until a certain date and that it should be left to the parties to lay down a different rule in the treaty in any case where the particular subject-matter of the treaty appeared to render this necessary. Moreover, if the other parties were aware that the notice was not to become definitive until after the expiry of a given period, they would, no doubt, take that fact into account in any preparations which they might make. The rule stated in the present article accordingly provides that a notice or instrument of denunciation, termination, etc. may be revoked at any time unless the treaty otherwise provides.

Section 5: Consequences of the invalidity, termination or suspension of the operation of a treaty

Article 65.[278] Consequences of the invalidity of a treaty

1. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) Acts performed in good faith before the nullity was invoked are not rendered unlawful by reason only of the nullity of the treaty.

3. In cases falling under articles 46, 47, 48 or 49, paragraph 2 does not apply with respect to the party to which the fraud, coercion or corrupt act is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Commentary

(1) This article deals only with the legal effects of the invalidity of a treaty. It does not deal with any questions of responsibility or of redress arising from acts which are the cause of the invalidity of a treaty. Fraud and coercion, for example, may raise questions of responsibility and redress as well as of nullity. But those questions are excluded from the scope of the present articles by the general provision in article 69.

(2) The Commission considered that the establishment of the nullity of a treaty on any of the grounds set forth in section 2 of part V would mean that the treaty was void *ab initio* and not merely from the date when the

[277] 1963 draft, article 50, para. 2.

[278] 1963 draft, article 52.

ground was invoked. Only in the case of the treaty's becoming void and terminating under article 61 of section 3 of that part would the treaty not be invalid as from the very moment of its purported conclusion. Paragraph 1 of this article, in order to leave no doubt upon this point, states simply that the provisions of a void treaty have no legal force.

(3) Although the nullity attaches to the treaty *ab initio*, the ground of invalidity may, for unimpeachable reasons, have not been invoked until after the parties have for some period acted in reliance on the treaty in good faith as if it were entirely valid. In such cases the question arises as to what should be their legal positions in regard to those acts. The Commission considered that where neither party was to be regarded as a wrong-doer in relation to the cause of nullity (i.e. where no fraud, corruption or coercion was imputable to either party), the legal position should be determined on the basis of taking account both of the invalidity of the treaty *ab initio* and of the good faith of the parties. Paragraph 2(*a*) accordingly provides that each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed. It recognizes that in principle the invalidation of the treaty as from the date of its conclusion is to have its full effects and that any party may therefore call for the establishment, so far as possible, of the *status quo ante*. Paragraph 2(*b*), however, protects the parties from having acts performed in good faith in reliance on the treaty converted into wrongful acts simply by reason of the fact that the treaty has turned out to be invalid. The phrase "by reason only of the nullity of the treaty" was intended by the Commission to make it clear that, if the act in question were unlawful for any other reason independent of the nullity of the treaty, this paragraph would not suffice to render it lawful.

(4) Paragraph 3, for obvious reasons, excepts from the benefits of paragraph 2 a party whose fraud, coercion or corrupt act has been the cause of the nullity of the treaty. The case of a treaty void under article 50 by reason of its conflict with a rule of *jus cogens* is not mentioned in paragraph 3 because it is the subject of a special provision in article 67.

(5) Paragraph 4 applies the provisions of the previous paragraphs also in the case of the nullity of the consent of an individual State to be bound by a multilateral treaty. In that case they naturally operate only in the relations between that State and the parties to the treaty.

Article 66.[279] Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Commentary

(1) Article 66, like the previous article, does not deal with any question of responsibility or redress that may arise from acts which are the cause of the termination of a treaty, such as breaches of the treaty by one of the parties; questions of State responsibility are excluded from the draft by article 69.

(2) Some treaties contain express provisions regarding consequences which follow upon their termination or upon the withdrawal of a party. Article XIX of the Convention on the Liability of Operators of Nuclear Ships,[280] for example, provides that even after the termination of the Convention, liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the Convention. Again some treaties, for example, the European Convention on Human Rights and Fundamental Freedoms,[281] expressly provide that the denunciation of the treaty shall not release the State from its obligations with respect to acts done during the currency of the Convention. Similarly, when a treaty is about to terminate or a party proposes to withdraw, the parties may consult together and agree upon conditions to regulate the termination or withdrawal. Clearly, any such conditions provided for in the treaty or agreed upon by the parties must prevail, and the opening words of paragraph 1 of the article (which are also made applicable to paragraph 2) so provide.

(3) Subject to any conditions contained in the treaty or agreed between the parties, paragraph 1 provides, first, that the termination of a treaty releases the parties from any obligation further to perform it. Secondly, it provides that the treaty's termination does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. The Commission appreciated that different opinions are expressed concerning the exact legal basis, after a treaty has been terminated, of rights, obligations or situations resulting from executed provisions of the treaty, but did not find it necessary to take a position on this theoretical point for the purpose of formulating the rule in paragraph 1(*a*). On the other hand, by the words "any right, obligation or legal situation of the parties created through the execution of the treaty", the Commission wished to make it clear that paragraph 1(*b*) relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the "vested interests" of individuals.

[279] 1963 draft, article 53.

[280] Signed at Brussels on 25 May 1962.

[281] Article 65; United Nations *Treaty Series*, vol. 213, p. 252.

(4) The Commission appreciated that in connexion with article 58 (supervening impossibility of performance) certain Governments raised the question of equitable adjustment in the case of a treaty which has been partially executed by one party only. The Commission, though not in disagreement with the concept behind the suggestions of these Governments, felt that the equitable adjustment demanded by each case would necessarily depend on its particular circumstances. It further considered that, having regard to the complexity of the relations between sovereign States, it would be difficult to formulate in advance a rule which would operate satisfactorily in each case. Accordingly, it concluded that the matter should be left to the application of the principle of good faith in the application of the treaties demanded of the parties by the rule *pacta sunt servanda.*

(5) Paragraph 2 applies the same rules to the case of an individual State's denunciation of or withdrawal from a multilateral treaty in the relation between that State and each of the other parties to the treaty.

(6) The present article has to be read in the light of article 67, paragraph 2 of which lays down a special rule for the case of a treaty which becomes void and terminates under article 61 by reason of the establishment of a new rule of *jus cogens* with which its provisions are in conflict.

(7) The article also has to be read in conjunction with article 40 which provides, *inter alia*, that the termination or denunciation of a treaty or the withdrawal of a party from it is not in any way to impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law. This provision is likely to be of particular importance in cases of termination, denunciation or withdrawal. Moreover, although a few treaties, such as the Geneva Conventions of 1949 for the humanizing of warfare, expressly lay down that denunciation does not impair the obligations of the parties under general international law, the majority do not.

Article 67.[282] Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law

1. In the case of a treaty void under article 50 the parties shall:

(*a*) Eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) Bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 61, the termination of the treaty:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Commentary

(1) The nullity of a treaty *ab initio* by reason of its conflict with a rule of *jus cogens* in force at the time of its conclusion is a special case of nullity. The question which arises in consequence of the invalidity is not so much one of the adjustment of the position of the parties in relation to each other as of the obligation of each of them to bring its position into conformity with the rule of *jus cogens*. Similarly, the termination of a treaty which becomes void and terminates under article 61 by reason of its conflict with a new rule of *jus cogens* is a special case of termination (and indeed also a special case of invalidity, since the invalidity does not operate *ab initio*). Although the rules laid down in article 66, paragraph 1, regarding the consequences of termination are applicable in principle, account has to be taken of the new rule of *jus cogens* in considering the extent to which any right, obligation or legal situation of the parties created through the previous execution of the treaty may still be maintained.

(2) The consequences of the nullity of a treaty under article 50 and of the termination of a treaty under article 61 both being special cases arising out of the application of a rule of *jus cogens*, the Commission decided to group them together in the present article. Another consideration leading the Commission to place these cases in the same article was that their juxtaposition would serve to give added emphasis to the distinction between the original nullity of a treaty under article 50 and the subsequent annulment of a treaty under article 61 as from the time of the establishment of the new rule of *jus cogens*. Having regard to the misconceptions apparent in the comments of certain Governments regarding the possibility of the retroactive operation of these articles, this additional emphasis on the distinction between the nullifying effect of article 50 and the terminating effect of article 61 seemed to the Commission to be desirable.

(3) *Paragraph 1* requires the parties to a treaty void *ab initio* under article 50 first to eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with the rule of *jus cogens*, and secondly, to bring their mutual relations into conformity with that rule. The Commission did not consider that in these cases the paragraph should concern itself with the mutual adjustment of their interests as such. It considered that the paragraph should concern itself solely with ensuring that the parties restored themselves to a position which was in full conformity with the rule of *jus cogens*.

(4) *Paragraph 2* applies to cases under article 61 and the rules regarding the consequences of the termination of a treaty set out in paragraph 1 of article 66 with the addition of one important proviso. Any right, obligation or legal situation of the parties created through the execution of the treaty may afterwards be maintained

[282] New article.

only to the extent that its maintenance is not in itself in conflict with the new rule of *jus cogens*. In other words, a right, obligation or legal situation valid when it arose is not to be made retroactively invalid; but its *further* maintenance after the establishment of the new rule of *jus cogens* is admissible only to the extent that such further maintenance is not in itself in conflict with that rule.

Article 68.[283] Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(*a*) Relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(*b*) Does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to render the resumption of the operation of the treaty impossible.

Commentary

(1) This article, like articles 65 and 66, does not touch the question of responsibility, which is reserved by article 69, but concerns only the direct consequences of the suspension of the operation of the treaty.

(2) Since a treaty may sometimes provide for, or the parties agree upon, the conditions which are to apply during the suspension of a treaty's operation, the rule contained in paragraph 1 is subject to any such provision or agreement. This rule states in paragraph (*a*) that the suspension of the operation of a treaty relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension. The sub-paragraph speaks of relieving "the parties between which the operation of the treaty is suspended" because in certain cases the suspension may occur between only some of the parties to a multilateral treaty, for example, under article 55 (*inter se* agreement to suspend) and article 57, paragraph 2 (suspension in case of breach).

(3) Paragraph 1(*b*), however, emphasizes that the suspension of a treaty's operation "does not otherwise affect the legal relations between the parties established by the treaty". This provision is intended to make it clear that the legal nexus between the parties established by the treaty remains intact and that it is only the operation of its provisions which is suspended.

(4) This point is carried further in paragraph 2, which specifically requires the parties, during the period of the suspension, to refrain from acts calculated to render the operation of the treaty impossible as soon as the ground or cause of suspension ceases. The Commission considered this obligation to be implicit in the very concept of "suspension", and to be imposed on the parties by their obligation under the *pacta sunt servanda* rule (article 23) to perform the treaty in good faith.

[283] 1963 draft, article 54.

Part VI.—Miscellaneous provisions

Article 69.[284] Cases of State succession and State responsibility

The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State.

Commentary

(1) The Commission, for the reasons explained in paragraphs 29-31 of the Introduction to the present chapter of this Report, decided not to include in the draft articles any provisions relating (1) to the effect of the outbreak of hostilities upon treaties, (2) to the succession of States with respect to treaties, and (3) to the application of the law of State responsibility in case of a breach of an obligation undertaken in a treaty. In reviewing the final draft, and more especially its provisions concerning the termination and suspension of the operation of treaties, the Commission concluded that it would not be adequate simply to leave the exclusion from the draft articles of provisions connected with the second and third topics for explanation in the introduction to this chapter. It decided that an express reservation in regard to the possible impact of a succession of States or of the international responsibility of a State on the application of the present articles was desirable in order to prevent any misconceptions from arising as to the interrelation between the rules governing those matters and the law of treaties. Both these matters may have an impact on the operation of certain parts of the law of treaties in conditions of entirely normal international relations, and the Commission felt that considerations of logic and of the completeness of the draft articles indicated the desirability of inserting a general reservation covering cases of succession and cases of State responsibility.

(2) Different considerations appeared to the Commission to apply to the case of an outbreak of hostilities between parties to a treaty. It recognized that the state of facts resulting from an outbreak of hostilities may have the practical effect of preventing the application of the treaty in the circumstances prevailing. It also recognized that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties. But it considered that in the international law of to-day the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. Thus, the Geneva Conventions codifying the law of the sea contain no reservation in

[284] New article.

regard to the case of an outbreak of hostilities notwithstanding the obvious impact which such an event may have on the application of many provisions of those Conventions; nor do they purport in any way to regulate the consequences of such an event. It is true that one article in the Vienna Convention on Diplomatic Relations (article 44) and a similar article in the Convention on Consular Relations (article 26) contain a reference to cases of "armed conflict". Very special considerations, however, dictated the mention of cases of armed conflict in those articles and then only to underline that the rules laid down in the articles hold good even in such cases. The Vienna Conventions do not otherwise purport to regulate the consequences of an outbreak of hostilities; nor do they contain any general reservation with regard to the effect of that event on the application of their provisions. Accordingly, the Commission concluded that it was justified in considering the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles.

(3) The reservation regarding cases of a succession of States and of international responsibility is formulated in the present article in entirely general terms. The reason is that the Commission considered it essential that the reservation should not appear to prejudge any of the questions of principle arising in connexion with these topics, the codification of both of which the Commission already has in hand.

Article 70.[285] Case of an aggressor State

The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Commentary

(1) In its commentary on article 31, which specifies that an obligation arises for a third State from a provision in a treaty only with its consent, the Commission noted that the case of an aggressor State would fall outside the principle laid down in the article. At the same time, it observes that article 49 prescribes the nullity of a treaty procured by the coercion of a State by the threat or use of force "in violation of the principles of the Charter of the United Nations", and that a treaty provision imposed on an aggressor State would not therefore infringe article 49. Certain Governments also made this point in their comments on article 59 of the 1964 draft (present article 31), and suggested that a reservation covering the case of an aggressor should be inserted in the article. In examining this suggestion at the present session, the Commission concluded that, if such a reservation were to be formulated, a more general reservation with respect to the case of an aggressor State applicable to the draft articles as a whole might be preferable. It felt that there might be other articles, for example, those on termination and suspension of the operation of treaties, where measures taken against an aggressor State might have implications.

(2) Two main points were made in the Commission in this connexion. First, if a general reservation were to be introduced covering the draft articles as a whole, some members stressed that it would be essential to avoid giving the impression that an aggressor State is to be considered as completely *exlex* with respect to the law of treaties. Otherwise, this might impede the process of bringing the aggressor State back into a condition of normal relations with the rest of the international community.

(3) Secondly, members stressed the possible danger of one party unilaterally characterizing another as an aggressor for the purpose of terminating inconvenient treaties; and the need, in consequence, to limit any reservation relating to the case of an aggressor State to measures taken against it in conformity with the Charter.

(4) Some members questioned the need to include a reservation of the kind proposed in a general convention on the law of treaties. They considered that the case of an aggressor State belonged to a quite distinct part of international law, the possible impact of which on the operation of the law of treaties in particular circumstances could be assumed and need not be provided for in the draft articles. The Commission, however, concluded that, having regard to the nature of the above-mentioned provisions of articles 49 and 31, a general reservation in regard to the case of an aggressor State would serve a useful purpose. At the same time, it concluded that the reservation, if it was to be acceptable, must be framed in terms which would avoid the difficulties referred to in paragraphs (2) and (3) above.

(5) Accordingly, the Commission decided to insert in the present article a reservation formulated in entirely general terms and stating that the present articles on the law of treaties are "without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression".

Part VII.—Depositaries, notifications, corrections and registration

Article 71.[286] Depositaries of treaties

1. The depositary of a treaty, which may be a State or an international organization, shall be designated by the negotiating States in the treaty or in some other manner.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

[285] New article.

[286] 1962 draft, articles 28 and 29, para, 1, and 1965 draft, article 28.

Commentary

(1) The depositary of a treaty, whose principal functions are set out in the next article, plays an essential procedural role in the smooth operation of a multilateral treaty. A multilateral treaty normally designates a particular State or international organization as depositary. In the case of a treaty adopted within an international organization or at a conference convened under its auspices, the usual practice is to designate the competent organ of the organization as depositary, and in other cases the State in whose territory the conference is convened. The text of this article, as provisionally adopted in 1962, gave expression to this practice in the form of residuary rules which would govern the appointment of the depositary of a multilateral treaty in the absence of any nomination in the treaty itself. No Government raised any objection to those residuary rules, but in re-examining the article at its seventeenth session, the Commission revised its opinion as to the utility of the rules and concluded that the matter should be left to the States which drew up the treaty to decide. Paragraph 1 of the article, as finally adopted, therefore simply provides that "The depositary of a treaty, which may be a State or an international organization, shall be designated by the negotiating States in the treaty or in some other manner".

(2) At its seventeenth session the Commission also decided to transfer to the present article the substance of what had appeared in its 1962 draft as paragraph 1 of article 29. This paragraph stressed the representative character of the depositary's functions and its duty to act impartially in their performance. In revising the provision the Commission decided that it was preferable to speak of a depositary's functions being *international* in character. Accordingly, paragraph 2 of the present article now states that "The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance". When the depositary is a State, in its capacity as a party it may of course express its own policies; but as depositary it must be objective and perform its functions impartially.

Article 72.[287] Functions of depositaries

1. The functions of a depositary, unless the treaty otherwise provides, comprise in particular:

(*a*) Keeping the custody of the original text of the treaty, if entrusted to it;

(*b*) Preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty and transmitting them to the States entitled to become parties to the treaty;

(*c*) Receiving any signatures to the treaty and any instruments and notifications relating to it;

(*d*) Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;

(*e*) Informing the States entitled to become parties to the treaty of acts, communications and notifications relating to the treaty;

(*f*) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty has been received or deposited;

(*g*) Performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the other States entitled to become parties to the treaty or, where appropriate, of the competent organ of the organization concerned.

Commentary

(1) Mention is made of the depositary in various provisions of the present articles and the Commission considered it desirable to state in a single article the principal functions of a depositary. In doing so, it gave particular attention to the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements.*[288] Paragraph 1, therefore, without being exhaustive, specifies the principal functions of a depositary. The statement of these functions in the text of an article provisionally adopted in 1962 has been shortened and modified in the light of the comments of Governments.

(2) *Paragraph 1*(a) speaks of the depositary's function of "keeping the custody of the original text of the treaty, *if entrusted to it*". This is because sometimes, for example, the original text is permanently or temporarily deposited with the host State of a conference while an international organization acts as the depositary, as in the case of the Vienna Conventions on Diplomatic and Consular Relations.

(3) *Paragraph 1*(b) needs no comment other than to mention that the requirement for the preparation of texts in additional languages may possibly arise from the rules of an international organization, in which case the matter is covered by article 4. *Paragraph 1*(c) needs no comment.

(4) *Paragraph 1*(d) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary's duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation. If an instrument or reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity

[287] 1962 and 1965 drafts, article 29.

[288] ST/LEG/7.

to their attention in accordance with paragraph 2 of the present article.

(5) *Paragraph 1*(e) needs no comment except to recall the significance of article 73 in this connexion and to underline the obvious desirability of the prompt performance of this function by a depositary.

(6) *Paragraph 1*(f) notes the duty of the depositary to inform the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, etc. required for the entry into force of the treaty have been received or deposited. The question whether the required number has been reached may sometimes pose a problem, as when questionable reservations have been made. In this connexion, as in others, although the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other States concerned. However normal it may be for States to accept the depositary's appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged by another State and that then it would be the duty of the depositary to consult all the other interested States as provided in paragraph 2 of the present article.

(7) *Paragraph 1*(g) needs no comment.

(8) *Paragraph 2* lays down the general principle that in the event of any differences appearing between any State and the depositary as to the performance of the latter's functions, the proper course and the duty of the depositary is to bring the question to the attention of the other negotiating States or, where appropriate, of the competent organ of the organization concerned. This principle really follows from the fact that, as indicated above, the depositary is not invested with any competence to adjudicate upon or to determine matters arising in connexion with the performance of its functions.

Article 73.[289] Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State under the present articles shall:

(*a*) If there is no depositary, be transmitted directly to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only upon the latter State's having been informed by the depositary in accordance with article 72, paragraph 1(*e*).

Commentary

(1) The drafts provisionally adopted by the Commission at its fourteenth, fifteenth and sixteenth sessions contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter. Article 29 of the 1962 draft also contained provisions regarding the duty of a depositary to transmit such notifications or communications to the interested States. In re-examining certain of these provisions at its seventeenth session the Commission concluded that it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications.

(2) If the treaty itself contains provisions regulating the making of notifications or communications required under its clauses, they necessarily prevail, as the opening phrase of the article recognizes. But the general rule contained in sub-paragraph (*a*), which reflects the existing practice, is that if there is no depositary, a notification or communication is to be transmitted directly to the State for which it is intended, whereas if there is a depositary it is to be transmitted to the latter, whose function it will be under article 72 to inform the other States of the notification or communication. Such is, therefore, the rule given in sub-paragraph (*a*) of this article. This rule relates essentially to notifications and communications relating to the "life" of the treaty—acts establishing consent, reservations, objections, notices regarding invalidity, termination, etc. Treaties which have depositaries, such as the Vienna Conventions on Diplomatic and Consular Relations, may contain provisions relating to substantive matters which require notifications. Normally, the context in which they occur will make it plain that the notifications are to be made directly to the State for which they are intended; and in any event the Commission considered that in such cases the procedure to be followed would be a matter of the interpretation of the treaty.

(3) The problem which principally occupied the Commission related to the legal questions as to the points of time at which a notification or communication was to be regarded as having been accomplished by the State making it, and as operative with respect to the State for which it was intended. Sub-paragraphs (*b*) and (*c*) express the Commission's conclusions on these questions. The Commission did not consider that there was any difficulty when the notification or communication was transmitted directly to the State for which it was intended. In these cases, in its opinion, the rule must be that a notification or communication is not to be considered as "made" by the State transmitting it until it has been received by the State for which it is intended. Equally, of course, it is not to be considered as received by, and legally in operation with respect to, the latter State until that moment. Such is the rule laid down in paragraph (*b*) for these cases.

(4) The main problem is the respective positions of the transmitting State and of the other States when a notification or communication is sent by the former to the depositary of the treaty. In these cases, there must in the nature of things be some interval of time before the notification is received by the State for which it is intended.

[289] 1965 draft, article 29(*bis*).

Inevitably, the working of the administrative processes of the depositary and the act of retransmission will entail some delay. Moreover, the Commission was informed that in practice cases are known to occur where the delay is a matter of weeks rather than of days. The question of principle at issue is whether the depositary is to be considered the agent of each party so that receipt of a notification or communication by a depositary must be treated as the equivalent of receipt by the State for which it was intended. On this question the majority of the Commission concluded that the depositary is to be considered as no more than a convenient mechanism for the accomplishment of certain acts relating to a treaty and for the transmission of notifications and communications to the States parties to or entitled to become parties to the treaty. Consequently, in its view the depositary should not be regarded as the general agent of each party, and receipt by the depositary of a notification or communication should not be regarded as automatically constituting a receipt also by every State for which it is intended. If the contrary view were to be adopted, the operation of various forms of time-limits provided for in the present articles or specified in treaties might be materially affected by any lack of diligence on the part of a depositary, to the serious prejudice of the intended recipient of a notification or communication, for example, under article 17, paragraphs 4 and 5, relating to objections to reservations, and article 62, paragraphs 1 and 2, relating to notification of a claim to invalidate, terminate, etc. a treaty. Equally, the intended recipient, still unaware of a notification or communication, might in all innocence commit an act which infringed the legal rights of the State making it.

(5) The Commission recognized that, owing to the time-lag which may occur between transmission by the sending State to the depositary and receipt of the information by the intended addressee from the depositary, delicate questions of the respective rights and obligations of the two States vis-à-vis each other may arise in theory and occasionally in practice. It did not, however, think that it should attempt to solve all such questions in advance by a general rule applicable in all cases and to every type of notification or communication. It considered that they should be left to be governed by the principle of good faith in the performance of treaties in the light of the particular circumstances of each case. The Commission therefore decided to confine itself, in cases where there is a depositary, to stating two basic procedural rules regarding (*a*) the making of a notification or communication by the sending State and (*b*) its receipt by the State for which it is intended.

(6) Accordingly, paragraph (*b*) provides that, so far as the sending State is concerned, the State will be considered as having *made* a notification or communication on its receipt by the depositary; a sending State will thus be considered as having, for example, made a notice of objection to a reservation or a notice of termination when it has reached the depositary. Paragraph (*b*), on the other hand, provides that a notification or communication shall be considered as received by the State for which it is intended only upon this State's having been informed of it by the depositary. Thus, the commencing date of any time-limit fixed in the present articles would be the date of receipt of the information by the State for which the notification or communication was intended.

(7) The rules set out in paragraphs (*a*), (*b*) and (*c*) of the article are prefaced by the words "Except as the treaty or the present articles may otherwise provide". Clearly, if the treaty, as not infrequently happens, contains any specific provisions regarding notification or communication, these will prevail. The exception in regard to the "present articles" is stressed in the opening phrase primarily in order to prevent any misconception as to the relation between the present article and articles 13 (exchange or deposit of instruments of ratification, acceptance, etc.) and 21 (entry into force of treaties). As already explained in the commentary to article 13, what is involved in sub-paragraphs (*b*) and (*c*) of that article is only the performance of an act required by the treaty to establish the consent of a State to be bound. The parties have accepted that the act of deposit will be sufficient by itself to establish a legal nexus between the depositing State and any other State which has expressed its consent to be bound by the treaty. The depositary has the duty to inform the other States of the deposit but the notification, under existing practice, is not a substantive part of the transaction by which the depositing State establishes legal relations with them under the treaty. Some conventions, such as the Vienna Conventions on Diplomatic and Consular Relations, for that very reason provide that a short interval of time shall elapse before the act of ratification, etc. comes into force for the other contracting States. But unless the treaty otherwise states, "notification" is not, as such, an integral part of the process of establishing the legal nexus between the depositing State and the other contracting States. Similarly, in the case of entry into force, notification is not, unless the treaty so stipulates, an integral element in the process of entry into force. In consequence, it is not considered that there is, in truth, any contradiction between articles 13 and 21 and the present article. But in any event, the specific provisions of those articles prevail.

(8) The scope of the article is limited to notifications and communications "to be made...under the present articles". As already mentioned in paragraph (2) of this commentary, the notifications and communications requiring to be made under treaties are of different kinds. As the rules set out in the present article would be inappropriate in some cases, the Commission decided to limit the operation of the article to notices and communications to be made under any of the present articles.

Article 74.[290] Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected:

(*a*) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

[290] 1962 draft, articles 26 and 27, and 1965 draft, article 26.

(*b*) By executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter:

(*a*) Shall notify the contracting States of the error and of the proposal to correct it if no objection is raised within a specified time-limit;

(*b*) If on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the contracting States;

(*c*) If an objection has been raised to the proposed correction, shall communicate the objection to the other contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the contracting States agree should be corrected.

4. (*a*) The corrected text replaces the defective text *ab initio*, unless the contracting States otherwise decide;

(*b*) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy to the contracting States.

Commentary

(1) Errors and inconsistencies are sometimes found in the texts of treaties and the Commission considered it desirable to include provisions in the draft articles concerning methods of rectifying them. The error or inconsistency may be due to a typographical mistake or to a misdescription or mis-statement due to a misunderstanding and the correction may affect the substantive meaning of the text as authenticated. If there is a dispute as to whether or not the alleged error or inconsistency is in fact such, the question is not one simply of correction of the text but becomes a problem of mistake which falls under article 45. The present article only concerns cases where there is no dispute as to the existence of the error or inconsistency.

(2) As the methods of correction differ somewhat according to whether there is or is not a depositary, the draft provisionally adopted in 1962 dealt with the two cases in separate articles.[291] This involved some repetition, and at its seventeenth session the Commission decided to combine the two articles. At the same time, in the light of the comments of Governments, it streamlined their provisions. The present article thus contains in shortened form the substance of the two articles adopted in 1962.

[291] Articles 26 and 27.

(3) *Paragraph 1* covers the correction of the text when there is no depositary. Both the decision whether to proceed to a formal correction of the text and the method of correction to be adopted are essentially matters for the States in question. The rule stated in paragraph 1 is, therefore, purely residuary and its object is to indicate the appropriate method of proceeding in the event of the discovery of an error in a text. It provides that the text should be corrected by one of three regular techniques.[292] The normal methods in use are those in sub-paragraphs (*a*) and (*b*). Only in the extreme case of a whole series of errors would there be occasion for starting afresh with a new revised text as contemplated in sub-paragraph (*c*).[293]

(4) *Paragraph 2* covers the cases where the treaty is a multilateral treaty for which there is a depositary. Here the process of obtaining the agreement of the interested States to the correction or rectification of the text is affected by the number of States, and the technique used hinges upon the depositary. In formulating the paragraph the Commission based itself upon the information contained in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.[294] The technique is for the depositary to notify all the interested States of the error or inconsistency and of the proposal to correct the text, while at the same time specifying an appropriate time-limit within which any objection must be raised. Then, if no objection is raised, the depositary, as the instrument of the interested States, proceeds to make the correction, draw up a *procès-verbal* recording the fact and circulate a copy of the *procès-verbal* to the States concerned. The precedent on page 9 of the *Summary of Practice* perhaps suggests that the Secretary-General considers it enough, in the case of a typographical error, to obtain the consent of those States which have already signed the offending text). In laying down a general rule, however, it seems safer to say that notification should be sent to all the contracting States, since it is conceivable that arguments might arise as to whether the text did or did not contain a typographical error, e.g. in the case of punctuation that may affect the meaning.

(5) *Paragraph 3* applies the techniques of paragraphs 1 and 2 also to cases where there is a discordance between two or more authentic language versions one of which it is agreed should be corrected. The Commission noted that the question may also arise of correcting not the authentic text but versions of it prepared in other languages; in other words, of correcting errors of translation. As, however, this is not a matter of altering an authentic text of the treaty, the Commission did not think it necessary that the article should cover the point. In these cases, it would be open to the contracting States to modify the translation by mutual agreement without any special formality. Accordingly, the Commission

[292] See *Hackworth's Digest of International Law*, vol. 5, pp. 93-101, for instances in practice.

[293] For an example, see *Hackworth's Digest of International Law*, *loc. cit.*

[294] See pages 8-10, 12, 19-20, 39 (footnote), and annexes 1 and 2.

thought it sufficient to mention the point in the commentary.

(6) *Paragraph 4*(a), in order to remove any possible doubts, provides that the corrected text replaces the defective text *ab initio* unless it is otherwise agreed. Since what is involved is merely the correction or rectification of an already accepted text, it seems clear that, unless the contracting States otherwise agree, the corrected or rectified text should be deemed to operate from the date when the original text came into force.

(7) The rules contained in the article contemplate that in cases where there is a depositary it will be necessary to seek the assent of the "contracting States" to the making of the correction. The Commission appreciated that "negotiating States" which have not yet established their consent to be bound by the treaty also have a certain interest in any correction of the text, and that in practice a depositary will normally notify the "negotiating" as well as the "contracting" States of any proposal to make a correction to the text. Indeed, the Commission considered whether, at any rate for a certain period after the adoption of the text, the article should specifically require the depositary to notify all "negotiating States" as well as "contracting States". However, it concluded that to do this would make the article unduly complicated and that, placing the matter on the plane of a right rather than simply of diplomacy, only "contracting States" should be considered as having an actual *legal right* to a voice in any decision regarding a correction. Accordingly, it decided to confine the obligation of a depositary to notifying and seeking the assent of "contracting States". At the same time, it emphasized that the restriction of the provisions of the article to "contracting States" was not to be understood as in any way denying the desirability, on the diplomatic plane, of the depositary's also notifying all the "negotiating States", especially if no long period of time has elapsed since the adoption of the text of the treaty.

(8) *Paragraph 4*(b) provides that the correction of a text that has been registered shall be notified to the Secretariat of the United Nations. Its registration with the Secretary-General would clearly be in accordance with the spirit of article 2 of the General Assembly's Regulations concerning the Registration and Publication of Treaties and International Agreements, [295] and appeared to the Commission to be desirable.

(9) Certified copies of the text are of considerable importance in the operation of multilateral treaties, since it is the certified copy which represents a text of the treaty in the hands of the individual State. Since there exists a correct authentic text and it is only a question of making the copy accord with the correct text, the detailed procedure laid down in paragraph 2 for correcting an authentic text is unnecessary. *Paragraph 5*, therefore, provides for an appropriate *procès-verbal* to be executed and communicated to the contracting States.

Article 75. [296] Registration and publication of treaties

Treaties entered into by parties to the present articles shall as soon as possible be registered with the Secretariat of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations.

Commentary

(1) Article 102 of the Charter, repeating in somewhat different terms an analogous provision in Article 18 of the Covenant of the League of Nations, provides in paragraph 1 that every treaty and every international agreement entered into by any Member of the United Nations after the Charter came into force shall "as soon as possible be registered with the Secretariat and published by it". Although the Charter obligation is limited to Member States, non-member States have in practice "registered" their treaties habitually with the Secretariat of the United Nations. Under article 10 of the Regulations concerning the Registration and Publication of Treaties and International Agreements adopted by the General Assembly, the term used instead of "registration" when no Member of the United Nations is party to the agreement is "filing and recording", but in substance this is a form of voluntary registration. The Commission considered that it would be appropriate that all States becoming parties to a convention on the law of treaties should undertake a positive obligation to register treaties with the Secretariat of the United Nations. The Commission appreciated that certain other international organizations have systems of registration for treaties connected with the organization. But these special systems of registration do not affect the obligation laid down in the Charter to register treaties and international agreements with the Secretariat of the United Nations nor, in the Commission's view, the desirability of generalizing this obligation so as to make the central system of registration with the United Nations as complete as possible.

(2) The present article accordingly provides that "treaties entered into by *parties to the present articles* shall as soon as possible be registered with the Secretariat of the United Nations". The term "registration" is used in its general sense to cover both "registration" and "filing and recording" within the meaning of those terms in the regulations of the General Assembly. Whether the term "filing and recording" should continue to be used, rather than "registration", would be a matter for the General Assembly and the Secretary-General to decide. The Commission hesitated to propose that the sanction applicable under Article 102 of the Charter should also be specifically applied to non-members. But since it is a matter which touches the procedures of organs of the United Nations it thought that breach of such an obligation accepted by non-members in a general Con-

[295] Article 2 reads : "When a treaty or international agreement has been registered with the Secretariat, a certified statement regarding any subsequent action which effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat".

[296] 1962 and 1965 drafts, article 25.

vention could logically be regarded in practice as attracting that sanction.

(3) The second sentence of the article provides that the registration and publication are to be governed by the regulations adopted by the General Assembly. The Commission considered whether it should incorporate in the draft articles the provisions of the General Assembly's Regulations adopted in its resolution 97 (I) of 14 December 1946 (as amended by its resolutions 364B (IV) of 1 December 1949 and 482 (V) of 12 December 1950). These regulations are important as they define the conditions for the application of Article 102 of the Charter. However, having regard to the administrative character of these regulations and to the fact that they are subject to amendment by the General Assembly, the Commission concluded that it should limit itself to incorporating the regulations in article 75 by reference to them in general terms.

CHAPTER III

Special missions

A. HISTORICAL BACKGROUND

39. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft dealt only with permanent diplomatic missions. Diplomatic relations between States also assumed other forms that might be placed under the heading of "*ad hoc* diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session.[297] The Commission decided at its eleventh session (1959) to place the question of *ad hoc* diplomacy as a special topic on the agenda for its twelfth session (1960).

40. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report[298] to the twelfth session, and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions.[299] The Commission's draft was very brief. It was based on the idea that the rules on diplomatic intercourse and immunities in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed that it had not been able to give this draft the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.[300]

41. At its 943rd plenary meeting on 12 December 1960, the General Assembly decided, on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities.[301] The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee to study it.[302]

42. The Sub-Committee noted that the draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted. For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study of the topic, i.e., that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At its fourth plenary meeting, on 10 April 1961, the Conference adopted the Sub-Committee's recommendation.[303]

43. The matter was again submitted to the General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1687 (XVI), in which it requested the International Law Commission to study the subject further and to report thereon to the General Assembly.

44. In pursuance of that resolution, the question was referred back to the International Law Commission, which decided, at its 669th meeting, on 27 June 1962, to place it on the agenda for its fifteenth session. The Commission also requested the Secretariat to prepare a working paper on the subject.

45. During its fifteenth session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.

46. On that occasion, the Commission took the following decision:

> "With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by

[297] *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, para. 51.

[298] *Op. cit., 1960*, vol. II, p. 108, document A/CN.4/129.

[299] *Ibid.*, pp. 179 and 180.

[300] *Ibid.*, p. 179.

[301] Resolution 1504 (XV).

[302] The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, the USSR, the United Kingdom, the United States of America and Yugoslavia.

[303] *Yearbook of the International Law Commission, 1963*, vol. II, p. 157, document A/CN.4/155, paras. 44 and 45.

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." [304]

47. In addition, the Commission considered again whether the topic of special missions should also cover the status of government delegates to congresses and conferences. In this connexion, at its fifteenth session, the Commission inserted the following paragraph in its annual report to the 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. [305] At that session the Commission had also decided [306] 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." [307]

48. The Special Rapporteur submitted his report, [308] which was placed on the agenda for the Commission's sixteenth session.

49. 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 for continuing his study and submitting the continuation 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 sixteen articles subject to their being supplemented, if necessary, during its seventeenth session. These articles were submitted to the General Assembly and to the Governments of Member States for information.

50. Owing to the circumstances prevailing at the time of its regular session in 1964, the General Assembly did not discuss the report and consequently did not express its opinion to the Commission. Accordingly, the Commission had to resume its work on the topic at the point it had reached at its sixteenth session in 1964. The Special Rapporteur expressed the hope that the reports on this topic submitted at the 1964 and 1965 sessions would be consolidated in a single report.

51. The topic of special missions was placed on the agenda for the Commission's seventeenth session, at which the Special Rapporteur submitted his second report. [309] The Commission considered that report at its 804th-809th, 817th, 819th and 820th meetings.

52. The Commission considered all the articles proposed in the Special Rapporteur's second report. It adopted 28 articles of the draft, which follow on from the 16 articles adopted at the sixteenth session. The Commission requested that the General Assembly should consider all the articles adopted at the sixteenth and seventeenth sessions as a single draft.

53. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

54. In conformity with Articles 16 and 21 of its Statute, the Commission decided to communicate its draft articles on special missions to Governments through the Secretary-General, inviting their comments. The Governments were asked to submit their comments by 1 May 1966. This short time-limit was regarded as essential if the Commission was to be able to complete its final draft on special missions with its present membership.

55. The Commission decided to submit to the General Assembly and to the Governments of Member States, in addition to the draft articles in section B of the report, certain other decisions, suggestions and observations set forth in section C, on which the Commission requested any comments likely to facilitate its subsequent work.

56. The General Assembly discussed the draft articles, which were transmitted to the Governments of Member States for comment. By the opening of the Commission's eighteenth session, however, only a limited number of States had submitted their comments.

B. Summary of the Commission's discussions at its eighteenth session

57. At its seventeenth session, the Commission decided to devote its next session to the consideration of the law of treaties and to the draft articles on special missions. At the beginning of its eighteenth session, it became apparent that the law of treaties alone would take up almost the whole of that session. As the Commission was anxious to complete its study of the draft articles on that topic during its eighteenth session, it decided to give priority to that topic and to devote only a limited amount of time to consideration of the draft articles on special missions.

58. The Special Rapporteur submitted his third report [310] to the Commission, which also had before it the comments received from Governments on the draft articles on special missions. [311]

[304] *Ibid.*, p. 225, para. 64.

[305] *Op. cit., 1960*, vol. I, p. 260, para. 26.

[306] *Ibid.*, para. 25.

[307] *Op. cit., 1963*, vol. II, p. 225, para. 63.

[308] *Op. cit., 1964*, vol. II, p. 67, document A/CN.4/166.

[309] *Op. cit., 1965*, vol. II, document A/CN.4/179.

[310] Document A/CN.4/189 and Add.1 and 2.

[311] Document A/CN.4/188 and Add. 1-3.

59. The Commission considered the item at its 877th, 878th and 881st-883rd meetings, between 24 June and 4 July 1966. It examined certain questions of a general nature affecting special missions which had arisen out of the comments by Governments and which it was important to settle as a preliminary to the later work on the draft articles on the topic. Those general questions, which had been put by the Special Rapporteur, were as follows.

(a) *Nature of the provisions relating to special missions*

60. After examining the comments by Governments on this point, the Commission decided to ask the Special Rapporteur to base his draft on the view that the provisions of the draft articles on special missions could not in principle constitute rules from which the parties would be unable to derogate by mutual agreement. The Special Rapporteur was asked to submit to the Commission a draft article which would convey that view and indicate specifically which of the provisions, if any, should in his opinion be excepted from this principle.

(b) *Distinction between the different kinds of special missions*

61. The Commission gave attention to the comments by Governments on this point and in particular to the possibility of distinguishing between special missions of a political character and those which were of a purely technical character. The question thus arose whether it was not desirable to distinguish between special missions in respect of the privileges and immunities of members of missions of a technical character. The Commission reaffirmed its view that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. On the other hand, the Commission concluded that there was some justification for the proposal by Governments that the extent of certain privileges and immunities should be limited in the case of particular categories of special missions. The Commission requested the Special Rapporteur to re-examine the problem, more particularly the question of applying the functional theory and the question of limiting the extent of certain privileges and immunities in the case of particular categories of special missions. The Commission instructed the Special Rapporteur to submit to it a draft provision on the subject which would provide *inter alia* that any limitation of that nature should be regulated by agreement between the States concerned.

(c) *Question of introducing into the draft articles a provision prohibiting discrimination*

62. After reviewing the comments by Governments and their opinions on the question raised by the Commission in paragraph 49 of its report on the work of the first part of its seventeenth session (1965), the Commission reconsidered its previous decision on the point and requested the Special Rapporteur to submit a draft article prohibiting discrimination, based on article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations. The article would, however, have to allow for the diversity of the nature and tasks of special missions and for the fact that circumstances might lead to distinctions being made in practice.

(d) *Reciprocity in the application of the draft*

63. The Commission took note of one Government's opinion that there should be a provision on reciprocity in the draft article on special missions. The Commission, however, endorsed the Special Rapporteur's opinion that reciprocity was a condition underlying the provisions of any treaty; it was therefore unnecessary to include in the draft articles on special missions an explicit provision to the effect that the principle of reciprocity must be observed.

(e) *Relationship with other international agreements*

64. In paragraph 50 of its report on the work of the first part of its seventeenth session (1965), the Commission referred to the question whether the draft articles on special missions should include a provision on the relationship between the articles and other international agreements, corresponding to article 73 of the Vienna Convention on Consular Relations. After considering the comments by Governments and the Special Rapporteur's views on the point, the Commission asked the Special Rapporteur to submit a draft article on the subject based on the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

(f) *Form of the instrument relating to special missions*

65. During its fifteenth session, at the 712th meeting, the Commission expressed the opinion 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 1961 Vienna Convention, or should be embodied in a separate Convention or put in any other appropriate form; it decided to await the Special Rapporteur's recommendations on that subject. During the discussion by the Sixth Committee of the General Assembly of the reports of the International Law Commission on its sixteenth and seventeenth sessions, several delegations stated their views on this question. In the light of those opinions and of the written comments by Governments, the Commission requested the Special Rapporteur to continue his work on the draft articles on special missions on the assumption that the draft would be in the form of a separate instrument, though keeping as closely as possible to the structure of the Vienna Convention on Diplomatic Relations.

(g) *Adoption of the instrument relating to special missions*

66. Although the Commission did not ask Governments how, in their opinion, the text of the instrument relating to special missions should be adopted, several Governments expressed their views on this question, either in the Sixth Committee of the General Assembly or in their written comments. The Commission deferred its decision on this question until its next session.

(h) *Preamble*

67. Although it is not current practice for the Commission to prepare preambles to the drafts which it submits to the General Assembly, one Government, in its written comments, expressed the view that the preamble to the convention on special missions should give a definition of a special mission and emphasize the differences between special missions and permanent diplomatic missions. After discussing the matter, the Commission instructed the Special Rapporteur to draft a preamble and submit it to the Commission.

(i) *Arrangement of the articles*

68. The Commission had intended to rearrange the articles on special missions when they had been put into final form. Several Governments too, both in their written comments and in the discussions in the Sixth Committee of the General Assembly, suggested that the Commission should rearrange the articles when it finally adopted them. In accordance with the views of the Special Rapporteur, the Commission decided that it would be premature to undertake such a rearrangement at the present stage. However, it requested the Special Rapporteur to prepare a draft rearrangement of the articles and to submit it to the Drafting Committee of the Commission when the articles had been finally adopted.

(j) *Draft provisions concerning so-called high-level special missions*

69. At its sixteenth session, the International Law Commission decided to ask the Special Rapporteur to submit at its next session articles dealing with the legal status of so-called high-level special missions, in particular special missions led by Heads of States, Heads of Governments, Ministers for Foreign Affairs, and Cabinet Ministers. In his second report (A/CN.4/179), the Special Rapporteur submitted to the seventeenth session of the Commission a set of draft provisions concerning so-called high-level special missions. The Commission did not discuss this draft at its seventeenth session, but considered whether special rules of law should or should not be drafted for so-called high-level special missions, whose heads hold high office in their States. It said that it would appreciate the opinion of Governments on this matter, and hoped that their suggestions would be as specific as possible. After noting the opinions of Governments, the Commission recommended the Special Rapporteur not to prepare draft provisions concerning so-called high-level special missions, to include in part II of the draft articles a provision concerning the status of the Head of State as head of a special mission, and to consider whether it was desirable to mention the particular situation of this category of special missions in the provisions dealing with certain immunities. The Special Rapporteur was, accordingly, instructed to undertake the necessary studies on this subject and to submit appropriate conclusions to the Commission.

(k) *Introductory article*

70. In paragraph 46 of its report on the work of its seventeenth session (1965), the Commission instructed the Special Rapporteur to prepare and submit to the Commission an introductory article on the use of terms in the draft, in order that the text might be simplified and condensed. This idea met with general approval, both in the discussion in the Sixth Committee of the General Assembly and in the written comments of Governments. In pursuance of the Commission's decision and in the light of the opinions expressed by Governments, the Special Rapporteur submitted to the Commission at its eighteenth session a draft introductory article defining the terms and concepts used in several articles of the draft on special missions. This draft introductory article gives definitions for a number of the following terms: special mission, permanent diplomatic mission, consular post, head of a special mission, representative, delegation, members of a special mission, members and staff of the special mission, members of the staff of the special mission, members of diplomatic staff, members of the administrative and technical staff, members of the service staff, private staff, sending State, receiving State, third State, task of a special mission, and premises of the special mission. The Commission recognized the usefulness of an article of this kind which, if it were adopted, would help to shorten the text of a number of articles. The Commission decided to defer consideration of the introductory article, and instructed the Special Rapporteur to consider this new article again and, if necessary, to revise it, and to submit it to the Commission.

C. Other decision of the Commission

71. As the Commission did not have time to consider the comments of Governments on the draft articles on special missions, and as a limited number of Governments had communicated their comments, the Commission decided to request States Members to forward their comments on the subject as soon as possible and, in any case, before 1 March 1967.

Chapter IV

Other decisions and conclusions of the Commission

A. Organization of future work

72. The Commission noted that the terms of office of its present members will expire on 31 December 1966, and that an election for all seats will be held during the twenty-first session of the General Assembly. The Commission, while not wishing to prejudice the freedom of action of its membership in 1967, nevertheless recognizes that it is a permanent body, and it must make arrangements to ensure the continuation of work on the topics selected for codification and progressive development.

73. Accordingly, the Commission recalls and reaffirms its decision recorded in its 1953 report[312] that a Special Rapporteur who is re-elected as a member should continue his work on his topic, if not yet finally disposed of by the Commission, unless and until the Commission as newly constituted decides otherwise.

[312] *Yearbook of the International Law Commission, 1953*, vol. II, p. 231, para. 172.

74. The Commission is also in agreement that the provisional agenda of the nineteenth session in 1967 should include items on special missions, on relations between States and inter-governmental organizations, on State responsibility and on succession of States and Governments. Even if the Special Rapporteur on one or more of these topics should not be re-elected, with the result either that there would be no report on a topic or that there would be difficulties in discussing a report in the absence of its author, inclusion of all the above-mentioned items in the provisional agenda would give the newly reconstituted Commission the opportunity of reviewing the instructions and guidelines heretofore laid down by the Commission for previous Special Rapporteurs.

B. Date and place of the nineteenth session

75. The Commission decided to hold its next session at the Office of the United Nations at Geneva for ten weeks from 8 May to 14 July 1967.

C. Co-operation with other bodies

Asian-African Legal Consultative Committee

76. The Asian-African Legal Consultative Committee was represented by Mr. R. C. S. Koelmeyer.

77. At its 856th meeting on 23 May 1966 the Commission considered the standing invitation which had been extended to it to send an observer to the sessions of the Asian-African Legal Consultative Committee. The eighth session of the Committee is to be held in Bangkok from 1 to 10 August 1966. The Commission requested its Chairman, Mr. Mustafa Kamil Yasseen, to attend the session, or if he were unable to do so, to appoint another member of the Commission for the purpose.

European Committee on Legal Co-operation

78. The European Committee on Legal Co-operation was represented by Mr. H. Golsong. At the 880th meeting on 29 June 1966 Mr. Golsong informed the Commission that the European Committee had decided, at its fifth session held in Strasbourg from 20 to 24 June 1966, to establish working relations with the Commission, and that the Commission would be invited to future meetings of the European Committee to attend discussions on questions coming within the competence of both bodies.

Inter-American Council of Jurists

79. The Inter-American Juridical Committee, the standing organ of the Inter-American Council of Jurists, was represented by Dr. José Joaquín Caicedo Castilla.

D. Representation at the twenty-first session of the General Assembly

80. The Commission decided that it would be represented at the twenty-first session of the General Assembly by its Chairman, Mr. Mustafa Kamil Yasseen.

E. Seminar on International Law

81. In pursuance of General Assembly resolution 2045 (XX) of 8 December 1965, the United Nations Office at Geneva organized a second session of the Seminar on International Law for advanced students on the subject and young government officials responsible in their respective countries for dealing with questions of international law, to take place during the present session of the Commission. The Seminar, which held eleven meetings between 9 and 27 May 1966, was attended by twenty-two students from twenty-one different countries. Participants also attended meetings of the Commission during that period. They heard lectures by seven members of the Commission, two members of the Secretariat and one professor from Geneva University. The general subject of the discussions was the law of treaties, but lectures were also given on the question of special missions and on the relations between States and inter-governmental organizations. The Seminar was held without cost to the United Nations, which undertook no responsibility for the travel or living expenses of the participants.

82. The Governments of Israel and Sweden offered scholarships for participants from developing countries. Four candidates were chosen to be beneficiaries of the scholarships; due to unforeseen circumstances, two of the beneficiaries had to renounce the scholarships just before the opening of the session of the Seminar and only part of the funds offered could be used.

83. Due consideration was paid to remarks made by members of the International Law Commission at the preceding session and by representatives in the Sixth Committee of the General Assembly and that part of General Assembly resolution 2045 (XX) calling for the participation of a reasonable number of nationals from the developing countries. Special efforts were made with a view to admitting a fairly large number of nationals from those countries.

84. On behalf of the Commission, the Chairman expressed appreciation of the organization of the Seminar, which proved to be a useful experience for those who attended it. It helped to strengthen the ties between the Commission and the world of international law as a whole at both the theoretical and the practical level. The Commission recommends that further Seminars should be held in conjunction with its sessions.

ANNEX

Comments by Governments[1] on parts I, II and III of the draft articles on the law of treaties drawn up by the Commission at its fourteenth, fifteenth and sixteenth sessions

CONTENTS

1. Afghanistan

[parts I and II]

Transmitted by a note verbale *of 5 August 1964 from the Permanent Mission to the United Nations*

[*Original: English*]

...The Government of Afghanistan wishes to extend its congratulations to the International Law Commission for the preparation of the first draft of parts I and II of the draft articles on the law of treaties. In the view of the Government of Afghanistan, both parts I and II are generally acceptable. The Afghan Government will prepare its detailed comments and observations when the preparation of part III of the draft articles on the law of treaties is completed by the Commission. Since the whole draft on the law of treaties and its various articles need rearrangement, the Afghan Government will reserve its observations for the final position in the light of the second reading by the International Law Commission.

The Government of Afghanistan looks forward to the completion of the codification of this important field which is the cornerstone of international law whose conclusion and acceptance will serve the cause of peace and understanding between nations...

2. Australia

[parts I and II]

Transmitted by a note verbale *of 12 February 1965 from the Permanent Representative to the United Nations*

[*Original: English*]

[Part I]

Article 1

Definition of "treaty". This is of course a problem of long standing and complexity. It is considered that the present definition may embrace a great quantity of informal understandings reached by exchange of notes, understandings between States which are not intended to give rise to legal rights and whose registration with the United Nations might cause the system of registration to break down. It may be thought that the phrase "governed by international law" restricts the scope of the definition; but the commentary gives a limiting explanation of this phrase, and it is considered that the definition should also include a reference to the intention of the parties to create legal obligations between themselves.

Article 9

The wording of paragraphs 1 and 2 is rather obscure, but it is understood that these two paragraphs are intended to be mutually exclusive. The expression "a small group of States" is particularly vague. It is not clear, for example, whether regional collective defence treaties would be included in paragraph 1 or paragraph 2; such treaties, by their nature, must be entitled to restrict their membership narrowly if they so wish. Accordingly, it is considered undesirable that paragraph 1 should apply to many multilateral treaties which seem to be included in its scope, and that paragraph 1 would be better restricted to general multilateral treaties only.

In paragraphs 1 and 2, the number of years is left blank. It is considered that this number should be high, perhaps 25.

Paragraph 3(*a*) might be better worded, since it is presumed paragraphs 1 and 2 are mutually exclusive. Paragraph 3 also raises the difficulty for the depositary of determining what is a "State". This might be avoided (at some theoretical inconvenience) by substituting some other wording in the second line.

Paragraph 4 is inadequate on two grounds: (*a*) such a notification might be considered to have the effect of recognition, and notification to the depositary should be an alternative; and (*b*) this provision should apply also to article 8, paragraph 1.

Article 17

The Commission states in effect that it is extending an existing principle in this matter, to include States which participate in treaty-making even if they do not sign the treaty. This seems to go too far: if a State leaves a conference or votes against adoption, for example, it can have no moral obligation for the outcome. It is considered that the words "negotiation, drawing up or adoption of a treaty or which" should be deleted from paragraph 1.

Article 19

Paragraph 3 may in practice be unworkable. A non-party to the treaty should not be obliged to formulate objections within twelve months of the making of a reservation if the reservation is made before the treaty is in force; indeed it is considered no State should be obliged to make a reservation before it becomes a party itself. Nor is it State practice to do so. The proposal might lead to many "interim" objections, put in to safeguard a State while its final position is determined. It is considered that paragraph 3 as it stands should apply to existing parties only; any other States should be regarded as accepting a reservation if they do not object, either on becoming parties or within some reasonable time thereafter.

Paragraph 4 seems undesirable. There are a number of reasons why a State might delay its own ratification, and its objection should still be enforceable at whatever later date it acts. It is true that delay in ratification would cause difficulty with treaties under article 20, paragraph 3 (or if the majority system were used, which the Commission does not propose); it is considered that article 19, paragraph 4 should be moved to be article 20, paragraph 3(*c*) with consequential amendment; alternatively, our suggested amendments to paragraph 3 would make paragraph 4 unnecessary altogether, and this seems much the preferable solution.

Article 20

There seem to be two problems here. Paragraph 2(*a*) appears to make the reserving State a party vis-à-vis an accepting State at

[1] Originally circulated as documents A/CN.4/175 and Add. 1-5; A/CN.4/182 and Add.1-3.

a stage when the reserving State may not be a party generally, because a reservation can be made at time of signature. Moreover, on its face, paragraph 2(*a*) means that failure to object to a reservation by an unrecognized State would specifically create a bilateral treaty relationship with that State. We wonder if the paragraph might read: "constitutes the reservation a part of the treaty in its application between the reserving State and the accepting State", or some similar wording. Finally, it might be desirable, in this article or in some other article, to make some reference to the effect of a reservation on the status of the reserving State as a party to the treaty, both before and after acceptance of the reservation.

Paragraph 2(*b*) appears to exclude any effect for an objection to a reservation which the objecting State does not consider "incompatible with the object and purpose of the treaty" but which is still objectionable. If the intention is that such an objection should be ineffective, this seems unacceptable in principle. Furthermore, it leads to a conflict with article 18, paragraph 1(*d*), because (assuming good faith) any reservation which is "incompatible with the object and purpose" is excluded from the beginning and paragraph 2(*b*), if limited to such reservations, should therefore have no effect. It is not understood why a State should be forced to accept any reservation which falls short of such incompatibility: such a rule appears to put the reserving State in a more advantageous position than the objecting State. Moreover, it seems undesirable to drive an objecting State into declaring a reservation to be incompatible so that its objection can be sustained. Finally, the 1951 decision of the International Court of Justice appears to refer to the status of a reserving State as a party to the treaty, and not to its treaty relationship with an individual objecting State. It is considered that the qualifying words "which considers it...purpose of the treaty" should be deleted.

[Part II]

Article 40

It is considered that twenty-five years would again be a suitable period: there are a number of cases of multilateral treaties which for years have languished with few parties, and have then proved more popular.

Article 42

Paragraph 2(*b*)(ii) seems to give a very large power, which might be out of proportion to the breach; the commentary mentions the case only of a treaty which provides for termination. It might be better to use a longer form of words, which would circumscribe the right more precisely; but if by "common" is meant "unanimous" this should be a sufficient safeguard. It is considered the clearer word should preferably be used.

Article 44

It is considered that paragraph 3(*a*) should at least extend also to any other determination of territorial sovereignty: all such territorial determinations need to be final, and not boundary determinations alone. It might also be worth discussing whether in paragraph 2(*b*) a word such as "continuing" might be added before "obligations", on the ground that if a treaty has been carried out completely on both sides, so that no obligations under it remain, it would be contrary both to common sense and to the need for stability and certainty if an attempt could be made to bring such a treaty within article 44.

3. Austria

[Part I]

Transmitted by a note verbale *of 11 November 1963 from the Permanent Representative to the United Nat ons*

[*Original: English*]

The views of Austria on the draft articles on the law of treaties, prepared by the International Law Commission at its fourteenth session, are as follows:

1. *General principles*

The Austrian Government fully appreciates the work done by the International Law Commission.

The work of the Commission in the field of the law of treaties has led to the proposal of concrete articles and provisions. This result was possible only because of the extensive preparatory work and exhaustive discussions in the Commission. In fact, the law of treaties is complex and not easy to codify, despite the uniformity of the underlying legal concepts and the relative clarity of the existing norms of customary law. A special difficulty is that these are not problems of substantive law, but problems of adjective law, since the norms to be codified will govern the establishment of a rule of international law, or in other words, will define the procedure by which a rule of international law is legally created.

The particularly detailed preparatory work of the Commission, which has been dealing with the law of treaties since 1949, is commensurate with the breadth and importance of the subject. Four Special Rapporteurs have devoted their learning and experience to a number of reports, the importance of which to international law itself and to the knowledge of international law is beyond question.

However, the very importance of the subject-matter makes it necessary to raise the question of the form of codification. On this question of external form, the Commission decided at its thirteenth session in 1961 "that its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention"; but only two years earlier, the Commission, endorsing the well-founded opinion of Sir Gerald Fitzmaurice, summed up their reply to the same question in the statement that "it seems inappropriate that a code on the law of treaties should itself take the form of a treaty". In the view of Austria, the latter opinion should prevail.

It must be borne in mind, in connexion with the codification of the law of treaties, that the task is to codify adjective law of a universal character. The norms of the law of treaties need to be codified, clarified, elucidated and progressively developed, but not to be enshrined in a treaty. A code on the law of treaties would be a kind of constitutional norm, laying down for the future the procedure for the creation of a norm—in other words, a norm ranking above others, or at least taking precedence over norms of equal rank. A code on the law of treaties in the form of a convention would, however, be concluded in the same manner as any other multilateral treaty. There is no way of distinguishing it from the other law-making treaties, to which, nevertheless, it will always thereafter be applicable.

In addition, a problem which will be difficult to solve would arise at the time of concluding such a convention on the law of treaties. As the Commission points out in paragraph 22 of the introduction, the draft articles on the law of treaties contain some "elements of progressive development". Wherever, therefore, the draft articles deviate in the direction of progressive development—which Austria welcomes—from the currently valid rules of customary law, the question will arise, when concluding a convention on the law of treaties, whether the rules of customary law valid at the time of concluding the convention or the new rules created by the convention itself should apply to it.

Other difficulties might arise in cases where, after the conclusion of such a convention on the law of treaties, States which have accepted the convention conclude treaties with States which have not accepted it. There is no possibility in law of giving precedence to such a convention and, as it were, forcing its provisions upon third States which have not accepted the convention by inducing them to observe the rules laid down in the convention when concluding treaties. Thus, such cases must again give rise to the question which law is to apply to specific treaties concluded in the future—the rules of customary law in that field, or the norms of the convention. In either case one of the contracting parties will be prevented from applying the norms (of the convention or of customary law) which it considers valid.

Finally—and this, in the view of Austria, appears to be a weighty argument against the conclusion of a convention on the law of treaties—such a convention, in all probability, will for a long time lack the universality which must be inherent in the "law of treaties" as the norm governing the creation of norms and which is needed in this field of law as in no other. Indeed, it is questionable, whether such a convention can ever achieve true universality. Even if all subjects of international law eventually accede to the convention, they will almost certainly do so only with a variety of overlapping reservations. The consequence would be that the conclusion of treaties on a bilateral or multilateral basis between subjects of international law would become considerably more difficult than it is now, when the norms of the existing customary law in this field have the sanction of the whole international community.

Austria wished to point out these difficulties, which are mentioned to some extent in the introduction to the report (A/5209, chap. II, para. 16). Austria considers a code on the law of treaties, perhaps in the form of a General Assembly resolution, more beneficial than the conclusion of a convention on the subject.

2. *Definitions*

In the view of Austria, the definition of "treaty" given in article 1, paragraph 1(*a*), is not complete, in that it omits an essential characteristic, namely, the intention to create between the contracting parties rights and obligations under international law, and the fact that such rights and obligations are indeed created by a treaty.

This significant point is mentioned in, for instance, article 2, paragraph 1, of the text of articles of code (*Yearbook of the International Law Commission, 1956*, vol. II, p. 107) prepared by Sir Gerald Fitzmaurice, where the definition states, *inter alia*, that a "treaty" is "intended to create rights and obligations, or to establish relationships, governed by international law". Sir Hersch Lauterpacht puts it even more precisely when he defines treaties as "agreements between States, including organizations of States, intended to create legal rights and obligations of the parties". (Article 1 of the text of articles, *Yearbook of the International Law Commission, 1953*, vol. II, p. 93).

Some such terminology should be added to the definition of "treaty" in article 1, paragraph 1 of the International Law Commission's latest draft.

Furthermore, there seems to be no real definition of "treaties in simplified form" ("*accords en forme simplifiée*"). The definition given in article 1, paragraph 1(*b*), does not differ in content from the definition of "treaty" in paragraph 1(*a*). The list of the ways of concluding a treaty ("exchange of notes...agreed minute", etc.) appears in paragraph 1(*a*) also. It is difficult to see what constitutes the difference between the two kinds of treaties. The commentary (paragraph (11)) begs the question by stating, in the French version: "*La Commission a défini cette forme de traités* (i.e., '*en forme simplifiée*') *en prenant pour critère sa forme simplifiée.*"

Austria would suggest that "*accord en forme simplifiée*" should be defined by saying that this group of agreements between States does not require ratification. The requirement of ratification is, in fact, the essential characteristic which distinguishes the "*traité*" from the "*accord en forme simplifiée*".

The definition of "general multilateral treaty" in article 1, paragraph 1(*c*), seems to refer to rather indefinite characteristics, such as "matters of general interest to States as a whole". Here it might be wise to consider taking as the sole criterion the establishment of general norms by the treaty (law-making treaty).

Finally, it might be useful also to define the terms "signature", "ratification", "accession", "acceptance" and "approval", listed baldly in article 1, paragraph 1(*d*).

3. *Capacity to conclude treaties*

Article 3, paragraph 1, correctly points out that capacity to conclude treaties under international law is possessed by States and by other subjects of international law. The commentary explains that the phrase "other subjects of international law" is primarily intended to cover international organizations and the Holy See but also includes other legal persons regarded by traditional doctrine as subjects of international law. In the view of Austria, this provision is fully in accord with existing international law.

Paragraph 3 of this article, however, contains a restriction with respect to international organizations, stating that "in the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned".

In the view of Austria, this restriction does not appear absolutely necessary. Rather, the starting point might well be that capacity to conclude treaties must be an inherent right of any international organization, if it is at the same time a subject of international law. Indeed, capacity to conclude treaties even appears to be the essential criterion of the status of a subject of international law. An international organization lacking the *capacity* to include treaties would not be a subject of international law.

As may be seen in practice, the constitutions of many international organizations do not mention the question of the capacity of the organization in question to conclude treaties. In most of these cases, however, the organs of the organization in question have considered themselves competent to conclude treaties on behalf of the organization, either with other international organizations or with States. If, on the other hand, the constitutions do contain provisions concerning the conclusion of treaties, they either relate to the question which organs are competent for the purpose—in which case they are of a procedural nature—or limit the extent of *freedom* to conclude treaties, which in principle is all-embracing, by stipulating that only treaties on certain subjects are permitted. Constitutional restrictions do not, however, affect in principle the capacity to conclude treaties as such.

In the view of Austria, it would not be correct if the capacity to conclude treaties, as such, of an international organization were to be derived solely from the constitution of the organization. If the constitution does not contain any provisions concerning capacity to conclude treaties, it would have to be assumed, from the existing text of paragraph 3, that the organization would not possess the capacity to conclude treaties. Without such capacity, however, the organization would not be a subject of international law.

The judgments of the International Court of Justice dealing with the structure of international organizations, and in particular the opinions in the "reparation case" (*I.C.J. Reports, 1949*, pp. 174 *et seq.*) and the "expenses case" (*I.C.J. Reports, 1962*, pp. 151 *et seq.*), do not conflict with this interpretation if they concede to an international organization the competence which, though not provided for in the constituent treaty, is essential to the performance of its functions. According to the constitution of an international organization, such a reference to those functions of the organization which are mentioned in the constitution means primarily that the organization's *freedom* to conclude treaties is constitutionally limited by its prescribed field of activities. The Commission is therefore correct when it says, in the commentary to article 3, paragraph 3, that the provisions of the constituent treaty of an organization determine "the proper limits of its treaty-making activity", whereas the statement that "it is the constitution as a whole...that determines the capacity of an international organization to conclude treaties" appears to be inadequate, in that organizations lacking the capacity to conclude treaties cannot be regarded as subjects of international law and are therefore not covered by article 3.

It is therefore suggested that article 3, paragraph 3, might be deleted altogether; at the very least, the wording "depends on the constitution" should be changed in such a way as to indicate that the constitution can only contain restrictions on the *freedom* to conclude treaties.

4. *Organs competent to conclude treaties*

In the view of Austria, article 4 raises an important problem.

For the most part, international law ascribes the question of the competence to conclude international treaties to domestic law. Thus, international treaties are created by organs authorized under domestic law and subject to constitutional provisions. "It is clear," says Charles Rousseau (*Droit International Public, 1953*, p. 21) "that, international law being silent on the subject the conditions for the exercise of competence to conclude treaties are determined, at discretion, by the domestic law of each State. Constitutional prescripts are decisive in this respect."

This principle—namely, that the determination of the organs competent to conclude treaties is ascribed to domestic law—is not mentioned at all in the existing text of article 4. Reference is made to it only in the commentary. In the view of Austria, a corresponding general reference should be included in the text of article 4 also.

The Commission previously took this into account in the text of articles tentatively adopted by the Commission at its third session, which included the following provision: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose" (*Yearbook of the International Law Commission, 1951*, vol. II, p. 73, article 2; *Yearbook of the International Law Commission, 1952*, vol. II, p. 51, article 4).

Perhaps, therefore, it would be appropriate, in article 4, to refer to a legal presumption that the organs mentioned there are duly authorized representatives. However, this legal presumption would have to be a *praesumptio juris* and not a *praesumptio juris ac de jure*, thus allowing for the possibility of a disclaimer. Guggenheim, for example, says: "There is a *refutable* presumption of competence to conclude international treaties in the case of Heads of State and Foreign Ministers" (*Lehrbuch des Völkerrechtes*, 1948, p. 61).

5. *Subsequent opening of treaties*

Austria whole-heartedly welcomes the opening of multilateral treaties to as many States as possible, as their acceptance strengthens the legal community and leads to a wider application of international law. In the view of Austria, article 8 is in this respect fully in accord with the present situation in international law and the present practice of States. In particular, it seems proper that multilateral treaties, unless the treaties provide otherwise, should be open to accession by all States.

Article 9, on the other hand, contains some formulae which deviate greatly from the prevailing concept of international law. If a multilateral treaty includes precise provisions on the question which States may accede to it, a more extensive opening of this treaty—outside the group of States to which the treaty was open from the beginning—means an amendment of the treaty. If, however, the treaty does not contain an amendment clause, so that no special procedure is laid down for possible amendments, the consent of *all* the contracting parties is needed for any legally valid amendment of the treaty. In the case of treaties concluded between a small group of States, the present draft explicitly recognizes the principle that the consent of all the parties is required (para. 2). Where other multilateral treaties are concerned, however, paragraph 1(*a*) makes it possible for other States to accede against the will of some of the contracting States and contrary to the explicit wording of the treaty (which expressly restricts the right of accession).

This provision seems to go too far, because it violates the principles of sovereignty. Paragraph 1(*a*) should therefore be amended, if not entirely deleted.

It may be emphasized in this connexion that the problem under consideration will not arise if the treaty contains an amendment clause along the lines of Article 108 of the United Nations Charter, providing that any amendment—including an extension of the right of accession—would be subject to the consent of a two-thirds majority. In such cases, the treaty can be opened to other States simply with the consent of two-thirds of the contracting States.

6. *Ratification*

Austria fully agrees that, as stated in article 12, treaties in principle require ratification. It is true that Sir Gerald Fitzmaurice thought otherwise (article 32 of articles of code, *Yearbook of the International Law Commission, 1956*, vol. II, p. 113), but the two earlier Rapporteurs supported the principle now advocated by the Commission.

It is unfortunate that the term "ratification" (cf. article 1, paragraph 1(*d*) of the draft, and para. 2 of these comments) is not defined. In the view of Austria, such a definition, which should be included in article 1, could easily be based on the wording of article 6, paragraph 1, of the text of articles prepared by Sir Hersch Lauterpacht (*Yearbook of the International Law Commission, 1953*, vol. II, p. 112).

7. *Reservations*

The question of reservations raises difficult legal problems. The Austrian Government particularly appreciates the fact that the Commission, in codifying this part of the law of treaties was guided by the idea of progressive development, although admittedly the traditional concept that reservations should, in principle, be restricted still enjoys wide support. The Commission accepted, by and large, the system recognized by the International Court of Justice in its opinion concerning the Genocide Convention.

The question may arise whether it is in keeping with the basic ideas of the law of treaties that very far-reaching reservations to multilateral treaties should be permitted and made possible, since the integrity of the text of the treaty in question may thereby be impaired, which is certainly not desirable. In addition, acceptance of and objections to reservations by individual States create relations of constantly different content and different scope between the States parties to one and the same multilateral treaty.

A flexible attitude towards reservations may perhaps result in the accession to multilateral treaties of a maximum number of States. Whether the practice of recent years justfiies any encouraging conclusions in this respect is open to question.

Austria, therefore, fully shares the view of those members of the Commission who argued that, while an objection by a single State to a reservation could not prevent the accession of the reserving State, reservations objected to by a larger number of States—perhaps even the majority—were not admissible, and accession would not be possible unless the reservations were withdrawn (cf. commentary to articles 18-20, para. (11)). If the majority of the contracting States insists on the integrity of the text of the treaty, the reservation cannot be accepted.

In addition, Austria would consider it necessary to make it clear, in connexion with the provisions on reservations, in article 20 in particular, that even where a State accepts, explicitly or otherwise, a reservation by another State, the consequence is that the treaty comes into force as between the two States in question, but not in respect of those provisions to which the reservation related. The present wording leaves some room for doubt as to whether, in such a treaty relationship between two States, those provisions of the treaty to which the reservation relates would apply to the State that has accepted the text of the treaty in its entirety but not, because of the reservation, to the other party to the treaty. This should be clarified by means of a reference to the principle of reciprocity.

4. Burma

[PART I]

Transmitted by a letter of 29 March 1963 from the Permanent Mission to the United Nations

[*Original: English*]

The Revolutionary Government of the Union of Burma consider, as a matter of principle, that the draft articles on the law of treaties drawn up by the International Law Commission should be acceptable, as codification of international law in the form of multilateral treaty is a major step towards greater understanding of international law and fulfilment of the object of assuring the coexistence of different interests which are worthy of legal protection.

The Revolutionary Government of the Union of Burma, however, reserve their position as to the actual contents of the draft articles till the time they become a signatory to the Convention of the said articles.

[PART II]

Transmitted by a note verbale *of 28 May 1964 from the Permanent Mission to the United Nations*

[*Original: English*]

The Government of the Union of Burma is in general agreement that the principles embodied in the draft articles reflect prevailing international law and practice on the subject. While reserving the right to make further remarks when the draft articles come up for fuller discussion, the Government would, at this stage, offer the following suggestions.

While the commentary following draft article 31 is illuminating and persuasive, the principle of the article may need further consideration. Treaties, as well as international law itself, draw their force and strength from free consent and the validity of a treaty must be derived from that consent given by the competent sources within a State in due and proper form. The contracting parties should perhaps use the usual gap between signature of a draft or preliminary agreement and its ratification to examine carefully and assure themselves that the conditions are satisfied. The draft article may, as it now stands, give the parties a feeling of false security in entering into treaties, in the belief that the burden of showing "manifest" lack of competence or defect in procedure would fall on the party which wishes to withdraw.

It may also be useful to consider whether the doctrine of *rebus sic stantibus* should not be included in an additional clause to draft article 38. This doctrine, clear enough in theory, has often given rise to difficulties of interpretation in international relations.

[PART III]

Transmitted by a note verbale *of 22 April 1965 from the Permanent Representative to the United Nations*

[*Original: English*]

The Government of the Union of Burma agree in general to the principles embodied in the draft articles as the said principles reflect the current international law and practice relating to application, effects, modification and interpretation of treaties.

The Government of the Union of Burma, however, reserve the right to make further comments when the said draft articles are deliberated on a wider scale.

5. Cambodia

[PART III]

Transmitted by a letter of 12 February 1966 from the Minister of Foreign Affairs

[*Original: French*]

In article 64, paragraph 1 states the principle that "the severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty"; paragraphs 2 and 3, however, provide for the temporary suspension of all or some of the clauses of the treaty when the severance of diplomatic relations results in "the disappearance of the means necessary for the application of the treaty".

The looseness and vagueness of the text are obvious. It is left to each party to determine to what extent the severance of diplomatic relations permits the continued application of a treaty. It is therefore to be feared that a State might resort to severing diplomatic relations in order to evade the obligations of a treaty and might claim impossibility of performance as a consequence of the situation resulting from the severance. The text opens the door to bad faith and represents a dangerous departure from the rule *pacta sunt servanda.*

The Royal Government accordingly considers it essential that paragraphs 2 and 3 of article 64 should be deleted.

6. Canada

[PART I]

Transmitted by a letter of 26 November 1963 from the Under-Secretary of State for External Affairs

[*Original: English*]

1. In its commentary on article 4, paragraph 6, the Commission has expressed the desire to have information from Governments as to their practice with regard to instruments of full powers. In Canadian practice, the Prime Minister and the Secretary of State for External Affairs are considered to have general authority to bind the Government and full powers are therefore not issued for them. If full powers are requested and the representative of Canada is other than the Prime Minister or the Secretary of State for External Affairs, particular full powers are issued by the Secretary of State for External Affairs. While it has not been Canadian practice to issue general full powers, it is realized that circumstances might arise in which it would be advantageous to do so and accordingly, the Canadian Government favours a provision recognizing such powers.

2. It is noted that in paragraph (7) of the commentary on article 4, it is stated that instruments of ratification, accession, acceptance and approval "are normally signed by Heads of State, though in modern practice this is sometimes done by Heads of Government or by Foreign Ministers". The Commission might wish to be apprised that the usual Canadian practice in this regard is for such instruments to be executed by the Secretary of State for External Affairs.

3. It is noted that in article 8 the Commission has recommended that where a general multilateral treaty as defined in article 1, paragraph 1(*c*), is silent concerning participation, it is to be assumed that the parties intended the treaty to be open to participation by all States. It is noted that the Commission is not recommending a derogation of the fundamental principle of international law that contracting parties are free to determine for themselves the extent to which they are prepared to enter into treaty relations with one another. It is observed that the current practice with regard to treaties concluded under the auspices of the United Nations, as well as many other multilateral treaties, is to open them to participation by Members of the United Nations, the specialized agencies, parties to the Statute of the International Court of Justice and frequently, to such other States as may be invited by the General Assembly. In article 8 the Commission is recommending the establishment of a presumption of intention on the part of contracting States that the treaty is to be open to all States in a limited and very clearly defined case, namely where the parties to certain types of treaties have not expressed themselves on the question of participation. It is assumed that the new rule is not to have retroactive effect.

4. It is noted that in article 9, paragraph 3(*b*) and in article 19, paragraph 3, the Commission has proposed that silence should constitute a presumption of a State's consent after the expiry of a given period. The arguments against such a presumption of consent are well known as is the very real difficulty that occasionally exists at present of eliciting any expression of opinion from States. It is

observed that under the rule formulated by the Commission, were a non-recognized State to enter a reservation, the consent of a non-recognizing contracting State to the reservation would be implied by the latter's silence. If the non-recognizing State were to object to the reservation, its position on recognition would seem to be jeopardized but it would presumably be open to the State to preface its objections with a denial of intent to recognize. In the course of the Commission's review of article 19, it might however wish to consider excluding from that article the presumption of a State's consent to reservations entered by States it does not recognize.

5. It is noted that under the rule set out in article 17 concerning obligations prior to the entry into force of a treaty, a State which has taken any part in the drafting process is obliged to refrain from acts calculated to frustrate the treaty. The Commission might wish to consider whether it is appropriate that this rule should be so broad as to cover States which, although participating in the negotiation of a treaty, have done so reluctantly expressing the strongest reservations about it.

6. It is noted that in articles 18, 19 and 20 concerning reservations, the Commission has adopted the so-called flexible approach by which reservations to multilateral treaties are admissible providing they are compatible with the object and purpose of the treaty. A reservation is to be regarded as accepted by a contracting State if the latter has raised no objection to it within twelve months. It is noted however that as phrased at present, some question might arise as to whether compatibility with the object and purpose of the treaty is to be the basis on which a State may *make* a reservation (article 18, paragraph 1(*d*)) or the basis on which a State may *object* to a reservation (article 20, paragraph 2(*b*)). If the former, it would seem to be still open to contracting States to object to reservations on other grounds. However, it seems to be the Commission's intention to make compatibility with the object and purpose of the treaty a prerequisite for the admissibility of reservations as well as the only grounds on which an objection can be taken to a reservation. The Commission might find it desirable to state this intention unequivocally in order to remove any basis for an argument that States may still object to reservations on other grounds. It is also noted that the Commission is recommending the establishment of this rule concerning the compatibility of the reservation with the object and purpose of the treaty, only where the treaty is silent on the question of reservations (article 18, paragraph 1(*d*)). Treaties which permit reservations to some or all of their articles do not generally indicate standards of admissibility, and the effect of the Commission's recommendations would therefore seem to be the creation of separate criteria for the admissibility of reservations in the case of a treaty which is silent in this regard, and in the case of a treaty which permits them. The Commission might accordingly wish to consider the desirability of extending the standard of admissibility it has formulated to reservations made pursuant to express treaty provisions.

[PART II]

Transmitted by a letter of 7 April 1965 from the Under-Secretary of State for External Affairs

[*Original: English*]

Article 40: Termination or suspension of the operation of treaties by agreement.

Comment: In clause 2 of this article the period of time set out in the second to last line has been left open to further consideration. Since it is not clear from the present text from when this period of time should run, it is suggested that as in article 9, it be from the date of adoption, (i.e. that it be from the time the treaty in question has been opened for signature).

It is to be noted that in article 9 of part I of the draft law of treaties, drawn up at the fourteenth session of the International Law Commission, in clause 1(*a*) and clause 2 there also exist similar as yet unspecified time periods. Consideration might be given to having the same period of time apply in all three cases. In his commentary on clause 2 of article 40 the Special Rapporteur, Sir Humphrey Waldock, envisaged a period of ten years.[2] This would seem a reasonable choice.

Article 42: Termination or suspension of the operation of a treaty as a consequence of its breach.

Comment: Article 42, in its present version, does not provide for a right, where there is a material breach of a treaty, of another party unilaterally (and not merely by common and perhaps even unanimous agreement with the other parties) to withdraw from the treaty in question. Instead it would appear, from the Commission's commentary on the provision in question, that the members considered that a right of suspension provided adequate protection to a State directly affected by such a breach.

The implication of the present draft rule, set out in article 42.2(*a*), as regards multilateral treaties of a sort under which the States parties agree to refrain from some action or other, is that in the case of a flagrant violation by one party no other party would have any recourse on its own. That is because it could not suspend its obligations vis-à-vis the violator (by doing whatever it had agreed to refrain from doing) without violating its own obligations to the other parties.

Since it would appear desirable that the provisions of the draft law of treaties be of such a nature that they not only attract the widest possible support but are also as widely observed as possible, consideration might be given to amending article 42 in such a way that, where there has been a violation of a treaty of the sort discussed above, the legitimate right of suspension of an individual party need not depend on a consensus but may be exercised *erga omnes*.

Both the present Rapporteur, Sir Humphrey Waldock, and the previous Rapporteur, Sir Gerald Fitzmaurice, in their draft articles on this matter, provided that in the case where one party were to commit a general breach of such a treaty, it would be open to individual States unilaterally to withdraw from it. Sir Gerald Fitzmaurice recommended that "if a party commits a general breach of the entire treaty in such a way as to be tantamount to a repudiation, the other parties may treat it as being at an end, or any one of them may withdraw from further participation".[3]

Sir Humphrey Waldock, in his commentary on his draft article 20.4(*b*), mentioned that its intention was to cover "cases such as these, where the defaults of a key State or of a number of States go far to undermine the whole treaty régime and it seems desirable that individual parties should also have the right, not merely of terminating their treaty relation with the defaulting State but of withdrawing altogether from the treaty".[4]

In the draft amendment which Mr. Erik Castrén proposed to the present Rapporteur's draft of this article, at the fifteenth session of the Commission, he too provided for a right of unilateral withdrawal, under certain circumstances, on the following terms:

> "2(*b*) in the relations between itself and the other parties, withdraw from the treaty, if the breach is of such a kind as to frustrate the object and purpose of the treaty".[5]

Article 44: Rebus sic stantibus. Fundamental change of circumstances.

Comment: The exclusion established under section 3(*a*) of this article, whereby a fundamental change in circumstances would not affect a treaty fixing a boundary, would appear to have been formu-

---

[2] *Yearbook of the International Law Commission, 1963*, vol. II, p. 71, para. 3 of commentary on draft article 18.

[3] *Yearbook of the International Law Commission, 1957*, vol. II, p. 31, draft article 19.1 (iii).

[4] *Op. cit., 1963*, vol. II, p. 77, para. 17.

[5] 691st meeting, para. 67; *Yearbook of the International Law Commission, 1963*, vol. I, p. 120.

lated without the Commission having taken into consideration such treaties (if any) under which a boundary has been established by reference to a *thalweg*. Since it is conceivable that such boundary treaty provisions do exist and that a fundamental change in circumstances could indeed radically affect the boundary in question (to an extent not contemplated when it was originally delineated), it is at least arguable that article 44 (3)(*a*) should be modified to cover such a case.

The modification might be along the following lines:

"To a treaty fixing a boundary, *except if such a boundary is based directly on a thalweg or other natural phenomenon the physical location of which is subsequently significantly altered as the result of a natural occurrence;* or".

7. Cyprus

[part III]

Transmitted by a note verbale *of 26 October 1965 from the Ministry of Foreign Affairs*

[*Original: English*]

The Government of the Republic of Cyprus welcomes the completion of the draft law of treaties (part III), covering the broad topics of the application, effects, modification and interpretation of treaties and expresses the hope that, once it is finally formulated it will, together with the two earlier drafts (law of treaties (parts I and II)), be considered in its final form as the basis for a multilateral convention to be arrived at in due course at the appropriate diplomatic conference of plenipotentiaries. As the Commission has rightly concluded, this process would give the opportunity to all the new States to participate directly in the formulation of the law, if they so wished, and this would—in the words of the Commission—"be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations".

The Government of the Republic of Cyprus will not enter upon any detailed observations on individual draft articles, but will simply make some remarks of general nature on certain of these draft articles.

The Government of the Republic of Cyprus would add in this connexion—and hopes that many countries that do not at present have a fully staffed legal section to deal with international law questions bears it out—that there may be many reasons, apart from lack of interest or reservations, to explain the fact that a given Government does not furnish promptly and regularly the comments requested. Consequently, the Government of the Republic of Cyprus thinks that there is much substance in the statement made by Professor Bartoš to the effect that, in cases where Governments had refrained from commenting, an inquiry had revealed agreement rather than disagreement with the Commission's formulation.

As regards draft article 55, the Government of the Republic of Cyprus finds itself in agreement with the way in which the International Law Commission gave expression to the fundamental rule of the law of treaties to the effect that *pacta sunt servanda*. Indeed, "a treaty in force is binding upon the parties to it and must be performed by them in good faith". The Commission very wisely took the view that what appears to be a clear-cut rule in the Latin maxim, just quoted, would be erroneous and misleading if stated without qualification and therefore limited the application of this article to treaties "in force". Consequently, the rule in draft article 55 must be read subject to the considerable number of draft articles which may militate against a given treaty being "in force", such as those dealing with the entry into force, provisional entry into force, obligations resting upon the contracting States prior to entry into force and—more significantly—the articles dealing with the invalidity and the termination of treaties.

When compared with the wording of the Charter principle contained in Article 2, paragraph 2, of the Charter, which deals with the obligations arising under the Charter itself, it appears that the limiting qualification to the *pacta sunt servanda* rule, contained in draft article 55, is even wider than that in Article 2(2). In the case of Article 2(2), the express qualification is that the obligations assumed must be "in accordance with the present Charter". In the case of draft article 55 the qualification is that the treaty in question must be "in force"—in which case a number of reasons and not just one, as stated earlier, may have a bearing on the treaty being "not in force". It would seem, however, that this distinction is more apparent than real and that, by necessary implication, all the factors that would make an ordinary treaty "not in force" would also be relevant *mutatis mutandis* to the rule stated in Article 2(2) of the Charter.

Under either rule and apart from the lack of any formal requirements, there exist a number of situations where clearly a treaty is not "in force" for the purposes of draft article 55. One such situation is where a treaty was enforced upon a State without its free consent, contrary to the spirit of the Charter and of its fundamental principles. In such a case—as provided in draft article 36 read in conjunction with draft article 46 of part II of the law of treaties, the treaty as a whole is *ab initio* null and void. Consequently it would be for the State concerned to take its free decision in regard to the maintenance or not of the treaty in question, once it found itself in a position of complete equality with all other States. This observation could be even more pertinent if such a treaty was imposed in circumstances precluding free choice upon a people prior to, and as a condition for, such a people acceding to independence.

Another such situation arises where, to use the wording of draft article 37, a treaty conflicts "with a peremptory norm of international law from which no derogation is permitted..." as e.g. a treaty which contains provisions which contemplate the unlawful use of force by one State against another in violation of the rule expressed by Article 2(4) of the Charter, or containing provisions purporting to deprive one State of the substance of its sovereignty and independence in violation of Article 2(1) of the Charter. Such treaties bring into play Article 103 of the Charter, and as provided in draft article 46—referred to above—the nullity extends to the whole transaction and not merely the offending clauses themselves.

Likewise a treaty is not "in force" for the purpose of draft article 55 if it has been duly and properly terminated by one party on the ground that its provisions were substantially violated by the other party. No State can be in substantial breach of its obligations under a treaty and at the same time claim the benefits to itself deriving from such a treaty.

Turning now to draft article 58, which gives expression to the maxim *pacta tertiis nec nocent nec prosunt*, and to draft article 59, the Government of the Republic of Cyprus finds itself in basic agreement with the wording used, on the clear understanding, to use the words of the Commission in its commentary on the latter draft article, that the "primary rule...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".

The Government of the Republic of Cyprus feels that it should simply add to what the commentary of the Commission so clearly states, that the notion of duress and undue influence, and the doctrine of unequal, inequitable and unjust treaties also applies to the case where a State finds itself having no free choice and is forced to undertake an obligation as a result of an agreement to which it was not a party. This holds even more true when the third party had not yet reached the stage of statehood but was still under colonial domination.

As regards draft article 63, dealing with the application of treaties having incompatible provisions, the Government of the Republic of Cyprus fully shares the view of those of the members of the Commission who insisted that the overriding character of Article 103 of

the Charter should find expression in the draft article in question. At the same time recognizing that it is logical to argue that, if a treaty were void under the operation of draft articles 37 or 45, such a treaty would not be a treaty in force and therefore there can be no question of its application. Such is the importance which the Government of the Republic of Cyprus attributes to Article 103, that it agrees emphatically to the present wording of the article in question. Moreover, in the opinion of the Government of the Republic of Cyprus, whenever circumstances warrant it, the competent organs of the United Nations should be guided by and apply Article 103 unreservedly.

Likewise, the Government of the Republic of Cyprus notes carefully draft articles 65, 66, 67 and 68, as well as the commentaries attached to each and reserves the right to make detailed comments thereon through the appropriate channel. The same applies to the three articles (69, 70 and 71) dealing with the interpretation of treaties. However, the Government of the Republic of Cyprus takes the opportunity to remark in this respect that it might have been preferable if more weight were to be attached to the principle contained in the maxim *ut res magis valeat quam pereat* through its express mention.

8. Czechoslovakia

[PART II]

Transmitted by a note verbale *of 23 September 1964 from the Permanent Representative to the United Nations*

[*Original: English*]

...The Government of the Czechoslovak Socialist Republic has closely followed and supported the activities of the United Nations International Law Commission in the field of the codification and progressive development of international law, which significantly contribute to the promotion of peaceful coexistence among States with different social and economic systems. The Czechoslovak Government appreciates the progress achieved by the Commission in the codification of the law of treaties, and as far as part II of the draft articles on the law of treaties is concerned, it associates itself in principle with the approach of the Commission to the solution of the question of invalidity and termination of international treaties.

The Czechoslovak Government agrees with the ideas underlying *article 31* concerning provisions of international law regarding competence to enter into treaties, which reflect the appropriate and just balance between internal and international laws and ensure both respect for the sovereignty of a State and the right of nations to self-determination as well as the necessary legal security in treaty relations.

The Czechoslovak Government devotes special attention to *articles 35, 36 and 37* and notes with satisfaction that those draft articles—in conformity with justice and international legality—declare to be null and void, *ab initio*, international treaties concluded through personal coercion of representatives of States or through coercion of a State by the threat or use of force, and treaties which are contrary to peremptory norms of international law.

In connexion with draft *article 37* and draft *article 45*, which supplements the former, the Czechoslovak Government shares fully the view of the Commission contained in the commentary to article 45 that "there are a certain number of fundamental rules of international public order from which no State may derogate even by agreement with another State". The Czechoslovak Government believes that the codification of legal principles of peaceful coexistence which has been taken up by the United Nations General Assembly during the consideration of principles of international law pertaining to friendly relations and co-operation among States in accordance with the Charter of the United Nations will contribute to the stipulation of those rules which must be considered as peremptory norms of general international law.

The Czechoslovak Government does not doubt that the rules contained in *articles 36 and 37* also declare the invalidity of unequal treaties which, as one of the instruments of modern colonialism, constitute a serious obstacle for the attainment of complete independence and sovereignty of a number of developing countries and a source of conflicts and situations endangering international peace and security.

Furthermore, the Czechoslovak Government is of the opinion that the final formulation of *article 36* should also contain explicitly the principle of invalidity of international treaties imposed by such forms of coercion as, for example, economic pressure.

The Czechoslovak Government reserves the right to submit more detailed observations to the draft articles on the law of treaties during their final consideration.

[PART III]

Transmitted by a note verbale *of 4 October 1965 from the Permanent Representative to the United Nations*

[*Original: English*]

1. The Government of the Czechoslovak Socialist Republic has attentively and with great interest followed the work done for the last few years by the International Law Commission in the field of codification and progressive development of the law of treaties. It greatly appreciates the results achieved in these efforts thus far, which undoubtedly contribute to a further development of international law as a useful instrument of peaceful coexistence and co-operation among all States of the world. The last, third, part of the draft articles on the law of treaties successfully evolves from the preceding two parts and regulates the complicated questions of the application, effects, modification and interpretation of international treaties in a progressive spirit with due regard to the established practice of States and to the opinions of the doctrine of international law. Therefore, as well as in the case of the first and second parts of the draft, the Czechoslovak Government in principle agrees with the proposed formulations of the articles and commentaries attached to this part of the draft. In view of the fact that this is the first version of the draft articles and that at a later stage opportunities will present themselves for expressing views on the definitive version, the Czechoslovak Government has adopted a position with regard to only some of the main questions.

2. In principle, the Czechoslovak Government agrees with draft article 55, containing the fundamental principle of the law of treaties, that of "*pacta sunt servanda*", according to which the treaties in force are binding upon the parties and must be performed by them in good faith. Consistent and faithful observance of obligations emanating from international treaties is of considerable significance for the strengthening of peaceful coexistence among States as well as for the development of fruitful and mutually advantageous international co-operation in the field of economic, technical, social and cultural co-operation. The Czechoslovak Government submits for consideration whether, in view of the tremendous practical and political purport of this principle, it would not be convenient to extend article 55 in such a way as to clarify in the text or at least in the commentary that the term "treaty in force" means an international treaty concluded freely and on the basis of equality, in accordance with international law. Czechoslovakia expounded this interpretation of the principle in 1962 in its Draft Declaration of the Principles of Peaceful Coexistence: "Every State shall fulfil, in good faith, obligations ensuing for it from international treaties concluded by it freely and on the basis of equality, as well as obligations ensuing from international customary law" (document A/C.6/L.505). It is also believed that in drafting the final text of this provision, regard should be given to the results of the discussion in the General Assembly in connexion with the codification of the legal principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter, which should take place within the framework of the

debate on the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations (see item 90 of the Agenda of the twentieth session of the General Assembly of the United Nations).

3. The Czechoslovak Government agrees with draft article 57 concerning the territorial scope of a treaty, according to which "the scope of application extends to the entire territory of each party". It considers this formulation to be more correct and more precise than the wording often used in the past, "all the territory or territories for which the parties are internationally responsible". The principle thus formulated was contrary to the requirement of a speedy liquidation of colonialism in all its forms and manifestations, and was more than once misused by the colonial powers for temporary exclusion of the territories administered by them from the benefits and rights ensuing particularly from general international treaties of a humanitarian character. In modern international treaties there is no place for either the so-called colonial clause or for any other form of discrimination aiming at a limitation of the validity of a treaty only to certain parts of the territory of a State. In the opinion of the Czechoslovak Government, the exception contained in the draft article ("unless the contrary appears from the treaty") may only be applied to bilateral or multilateral treaties governing specific interests of the contracting parties within a limited territorial scope; in no way, however, may it be applied to a legal régime of a general contractual nature which the contracting parties are bound to observe and give effect to throughout their respective territories and with regard to all persons living therein.

4. The Czechoslovak Government also agrees with the formulation in article 58 of the draft, according to which a treaty applies only between the parties. In this way, the draft strictly respects the key principle of contemporary international law, that of the sovereign equality of States. Any transfer of obligations or rights to a third State requires, *eo ipso*, its consent. Without the free consent of a State not party to a treaty, it is impossible either to oblige or to authorize it by virtue of a treaty *inter alios acta.*

5. Ultimately, the Czechoslovak Government shares the view of the Commission that the proposed article 69 containing a general rule of interpretation should proceed from the assumption that the text of the treaty is an authentic expression of the intention of the contracting parties and that the text itself should be the basis from which any interpretation should proceed. However, unlike the International Law Commission which mentioned this assumption only in the commentary, the Czechoslovak Government deems it correct to include it expressly in the wording of draft article 69, paragraph 1, so that it would read as follows: "A treaty, whose text is presumed to be the authentic expression of the intentions of the parties, shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term".

In conclusion, the Czechoslovak Government reserves its right to put forward detailed comments and proposals to the final text of the draft codification of the law of treaties at the international conference of plenipotentiaries which in its opinion, and in the sense of the preliminary recommendation of the International Law Commission, should be convened for the purpose of preparing a Convention on the Law of Treaties.

9. Denmark

[Parts I and II]

Transmitted by a note verbale *of 2 March 1964 from the Permanent Representative to the United Nations*

[Original: English]

[Part I]

Article 4

Article 4, paragraph 3, provides that a representative of a State other than the Head of State, Head of Government, Foreign Minister and the accredited head of a diplomatic mission, shall produce written credentials of his authority to negotiate, draw up and authenticate a treaty.

In the opinion of the Danish Government, this text does not correspond to general practice, nor does it seem adequate as a new rule of international law. In cases where two Governments wish to conclude a treaty on a given subject, the normal procedure is that they agree, through diplomatic channels, to open negotiations. The time and place of such negotiations are likewise agreed upon, and the parties inform each other of the names of the officials designated to represent them in the negotiations. This is considered to be a sufficient introduction of the representatives of the respective Governments, and the question of credentials does not arise until the treaty is to be signed, and sometimes not even then.

With the possible exclusion of treaties drawn up at general international conferences, it is therefore suggested that the article should be modified so as not to require credentials for the negotiation, drawing up and authentication of a treaty.

As to the authority to sign a treaty, whether or not subject to ratification, the Danish Government agrees that Heads of State or Government and Foreign Ministers shall never be required to produce full powers (article 4, paragraph 1). It is also accepted that full powers shall not be required, even of other representatives, in cases of treaties in simplified form, unless called for by the other negotiating State (paragraph 4(*b*)), and that full powers shall be produced in other cases (paragraph 4(*a*)). The question is, however, whether the definition of "treaties in simplified form" as contained in article 1, paragraph 1(*b*), is adequate for the purpose. After enumerating certain examples, this definition refers to the procedure ("other instrument concluded by any similar procedure"). In current practice an essential part of the simplified procedure is the omission of full powers. This obviously leads into circular reasoning: full powers are not required for treaties in simplified form; treaties in simplified form are those for which no full powers are required.

It would appear to be in better conformity with current practice and more consistent with the requirements of logic to adopt a rule which would not provide for the production of full powers to sign a treaty, except where the other party so requires. A practical indication of such a requirement would be to insert in the text the classical clause about full powers having been produced and found to be in good and proper form.

Articles 8 and 9

The Danish Government shares the unanimous view of the International Law Commission to the effect that general multilateral treaties should be open to participation on as wide a basis as possible.

With regard to other treaties, the Danish Government is inclined to think that the proposals of the Commission go too far towards opening such treaties to the participation of other States than the original parties. In some cases where treaties are concluded by a small group of States, or between States belonging to a particular region, other States should not be allowed to become parties except *by invitation* of the original parties. In such cases, it should not be open to an outside State to present a request which would have the effect that the consent of the original parties would become automatic after the expiry of a certain period. A non-participating State should not be able to intrude, and possibly bring pressure to bear on the original parties to refrain from objecting. The initiative should belong to the original parties, and article 9, paragraph 3, should consequently not apply to such cases.

In general, article 9 should not apply to treaties which are the constituent instruments of international organizations. It should not be possible under the procedure laid down in article 9 to modify or circumvent the provisions concerning the admission of a new member to an international organization.

Article 11

The legal effects which under paragraph 2 are attributed to signature subject to ratification have no significance *per se*. In most cases the signature of a treaty subject to ratification is a formality

which unduly complicates the treaty-making procedure and which has little rational justification in modern international relations. The necessary authentication of the text may well take place in other ways, as proposed in article 7, paragraph 1. The Danish Government recognizes, however, that the formal signature is so deeply embedded in international practice that proposals for a reform would have little chance of being accepted.

Article 12

In the opinion of the Danish Government, this article, which requires ratification of a treaty unless an exception is made, is not in conformity with international practice. Moreover, the article is drafted in unduly complicated terms. The article should be simplified by reversing the presumption on which it is based.

It should be presumed that a treaty which has been duly signed by representatives of States should need no ratification. In other words, ratification should be required only if the necessity appears from the text, from the full powers issued to representatives of the signatory States, from statements made in the course of the negotiations, or from other circumstances evidencing an intention to that effect. The constitutional necessity or ratification may be included in such circumstances.

This reversal of the basic principle would bring the article in line with international practice as understood and followed by the Danish Government.

Furthermore, it is submitted that the question whether or not ratification is required should not necessarily be answered in the same way with respect to both parties. In the practice followed by the Danish Government for the conclusion of bilateral treaties it has occurred that the signature of one party has been considered to be immediately binding, while the signature of the other party has been subject to ratification (acceptance or approval). This procedure may have practical advantages in certain cases, and it should not be precluded by the wording of the article.

Articles 18-20

The Danish Government welcomes the constructive proposals of the International Law Commission for the solution of this intricate problem which has caused so many difficulties and so great uncertainty in recent years. Without committing itself definitely to the solution proposed, the Danish Government is ready to examine the proposals as a possible basis for achieving that general agreement on the subject which is so urgently needed.

Experience seems to suggest that no short and simple formula can solve the problem. The Commission has therefore chosen the right approach in distinguishing between different aspects of the problem and between different situations in which the problem arises. It is only on the basis of such a differentiation that realistic proposals can be drafted. But this approach has the inevitable consequence that the proposed rules will be lacking in that simplicity and clarity which should be aimed at in the process of codifying international law.

While thus admitting that the nature of the problem justifies complicated formulas, it may be asked whether the drafting methods chosen by the Commission—proposing separate articles concerning the conditions under which reservations are permissible (article 18) and the effect of reservations (article 20)—have not unduly complicated the wording of the articles. Before going further into this question, the Danish Government wishes to make a few comments on the text as it stands.

In article 18, paragraph 1, the words "when signing, ratifying, acceding to, accepting or approving a treaty" seem to be redundant, as they are spelled out by paragraph 2 of the same article.

As stated by the Commission in the commentary to article 20, paragraph 1(*d*) of article 18 implies a subjective appreciation of the compatibility of a reservation with the object and purpose of the treaty. As this question may therefore be subject to divergent interpretations, it does not seem appropriate to deal with it as a case of inadmissibility of reservations. As the rule now stands, it may cause difficulties for the depositary who would not be under a strict obligation to communicate a reservation which is clearly inadmissible under the rule, although it is not the function of the depositary to adjudicate upon the validity of a reservation (commentary to article 29, paragraph 5).

Article 19 concerning acceptance of or objection to reservations may, on the face of it, give the impression that it applies to any reservation, even reservations which are inadmissible. It seems evident, however, that in cases where a reservation is prohibited, explicitly or implicitly, it cannot be accepted by any other party, and an objection is not required to prevent the reservation from becoming effective in relation to another State.

The provisions of article 19, paragraph 2, seem to be self-evident, and may be omitted if a simplification of the article is attempted.

Article 20, paragraph 2(*a*), deals with acceptance of reservations and paragraph 2(*b*) with objections to reservations on the ground of alleged incompatibility with the object and purpose of the treaty. It leaves open the question what will be the effect of an objection to a reservation which is not considered to be incompatible with the object and purpose of the treaty, but which is objected to on another ground, in particular the importance attached by the objecting State to the provision to which the reservation relates. In its introductory commentary, paragraph (13), the Commission mentions a well-established rule to the effect "that a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State". It would seem preferable to include this rule in the draft articles.

Furthermore, article 20, paragraph 2, deals with the question whether or not the reserving State becomes a party to the treaty in relation to other States which either accept or object to the reservation. The question whether or not the reserving State is a party to the treaty may, however, present itself in a more general and objective manner. Is its ratification to be included in the number of ratifications required for the treaty to enter into force? Is the reserving State entitled to ask for revision of the treaty, if such right is granted to any contracting party or to a specified number of contracting parties? The answer to these and other similar questions should presumably be in the affirmative, provided that the reservation has not been objected to by all other contracting parties. It would be preferable, however, to insert provisions dealing explicitly with this question.

Article 20, paragraph 3, concerning treaties between a small group of States does not distinguish between express and implied acceptance. The considerations expressed in the commentary seem to warrant the conclusion that an express acceptance should be required in these particular cases.

Article 20, paragraph 4, deals with constituent instruments of international organizations. In its commentary, the Commission rightly attaches decisive weight to the integrity of such instruments. This would imply that the reservation should be submitted to the competent organ for decision in all cases—not only when an objection has been raised. In other words, the possibility of an implied or tacit acceptance of the reservation should not be left open in these cases.

In the light of the preceding observations and in an attempt to simplify the general structure and economy of the articles, the following redraft is offered for consideration:

Redraft	*Corresponding provision in the ILC draft*
Article A	
1. In cases where the terms of a treaty or the established rules of an international organization prohibit the making of a reservation, no such reservation shall be admissible. No act or instrument—signature, ratification, accession, acceptance or approval—to which such a reservation is attached shall have legal effect.	Article 18, paras. 1(*a*) and (*b*)
2. In the case where a treaty expressly authorizes the making of a specified category of reservations, any other reservation shall be excluded.	Article 18, para. 1(*c*)
Article B	
In the case where a reservation is made to the constituent instrument of an international organization, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty provides otherwise.	Article 20, para. 4
Article C	
Where a reservation is expressly or impliedly permitted by the terms of the treaty, the reservation shall be admissible and the act or instrument to which it is attached shall have its usual legal effects, as limited or modified by the terms of the reservation.	Article 20, para. 1(*a*)
Article D	
1. Where the treaty is silent in regard to the making of reservations, a reservation shall not be considered inadmissible, but other States may object to the reservation, either because they consider it to be incompatible with the object and purpose of the treaty, or for any other reason. Any such objection precludes the entry into force of the treaty between the objecting and the reserving States, unless a contrary intention shall have been expressed by the objecting State.	Article 18, para. 1(*d*)
2. Objection to a reservation may be raised by any State which is, or to which it is open to become, a party to the treaty. An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.	Article 19, para. 4
3. An objection to a reservation shall be formulated in writing and shall be notified: (*a*) In the case of a treaty for which there is no depositary, to the reserving State and to every other State party to the treaty or to which it is open to become a party; and (*b*) In other cases, to the depositary.	Article 19, para. 5
4. The right to object to a reservation shall be precluded by expressed or implied acceptance. A State shall be considered as having accepted a reservation implicitly if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.	Article 19, para. 3
5. Acceptance of a reservation by a State which is bound by the treaty shall constitute the reserving State a party to the treaty in relation to such State as well as for general purposes not connected with the relations to any other particular State. The same applies to an acceptance by a State to which it is open to become a party to the treaty as soon as the treaty has entered into force with respect to such State.	
Article E	
Notwithstanding the preceding article, a reservation to a treaty, which has been concluded between a small number of States, shall be conditional upon the express acceptance by all the States concerned, unless:	Article 20, para. 3

Redraft	*Corresponding provision in the ILC draft*
(*a*) The treaty otherwise provides; or (*b*) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.	
Article F	
1. Reservations which are not inadmissible under the preceding articles must be in writing and may be formulated: (*i*) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty; (*ii*) Upon signing the treaty at a subsequent date; or (*iii*) Upon the occasion of the exchange or deposit of its instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it. (*b*) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving State, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation. 2. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated: (*a*) In the case of a treaty for which there is no depositary, to every other State party to the treaty or to which it is open to become a party to the treaty; and (*b*) In other cases, to the depositary which shall transmit the text of the reservation to every such State.	Article 18, paras. 2 and 3

Article 25

The wording of this article does not seem entirely satisfactory. Treaties between a Member of the United Nations and a non-member State are covered both by paragraph 1 and paragraph 2.

It would seem preferable to provide that any Member of the United Nations shall register treaties which it concludes, in conformity with Article 102 of the Charter, and that any non-member State party to the present articles shall be under a similar obligation.

It might be added that the parties may, in conformity with current practice, agree between themselves that registration shall be effected by one of them, or by the Secretariat of an international organization under whose auspices the treaty is concluded.

[Part II]

Article 31

In paragraph (1) of the commentary to this article it is pointed out that constitutional limitations upon the treaty-making power may take various forms. One group of provisions relates to the power of a Government to enter into treaties, while another group of provisions merely limits the power to enforce a treaty within the internal law of the State.

In the opinion of the Danish Government, this latter group of provisions does not raise any special problem distinct from the general problem of giving effect to a treaty in national law. Whether the treaty requires amendment of administrative decrees, statutory acts or constitutional provisions, the problem is essentially the same from the point of view of international law. If its consent has been validity expressed, a State cannot rely on its internal law, not even its constitution, as an excuse for not giving effect to a treaty. Consequently, the second group of provisions should not be given special consideration in this context. The wording of article 31 seems to be entirely compatible with this point of view in so far as it refers to provisions of the internal law regarding "competence to enter into treaties".

The main problem dealt with in this article is one of considerable theoretical and dogmatic interest. As pointed out in the commentary, however, experience seems to indicate that the practical importance is less significant.

Although it is felt desirable, in States having a system of government based upon principles of parliamentary democracy, to safeguard the powers of representative bodies against encroachments by the executive, there is an equally strong and legitimate interest in being able to rely on the consent given in due form by a foreign Government. The point of balance between these conflicting interests is difficult to determine exactly.

The Danish Government has previously had an occasion to state its views on one particular aspect of this problem. In the course of the oral proceedings of the Eastern Greenland case before the Permanent Court of International Justice the Danish agent stated with reference to constitutional provisions limiting the power of a Foreign Minister:

> "...the Danish standpoint is that such internal constitutional restrictions are of no importance in international law, in any case unless they are expressed in an absolutely clear and unequivocal manner in the Constitution of the State in question." (*P.C.I.J.*, Series C, No. 66, pp. 2758 and 2759).

It appears from the written pleadings that the point at issue was the international relevance of Norwegian constitutional provisions concerning the procedure to be followed for the adoption of a decision by the Government, in particular the question whether

such a decision should necessarily be adopted by the King in Council. The question of parliamentary approval or countersignature of a Royal Resolution by a Minister did not arise in the case (*P.C.I.J.*, Series C, No. 63, pp. 880-884). The statement contained in paragraph (9) of the commentary of the International Law Commission does not appear to reflect quite accurately the Danish position.

Although the proposal of the Commission seems to deprive constitutional provisions of their international relevance to a somewhat greater extent than recognized by the opinion which prevails in the doctrine of international law, the Danish Government is ready to accept the proposal as a basis for solving this intricate problem. It is essential, however, to maintain the safeguarding clause of the proposal according to which a State is not bound by the declaration of its representative if the violation of its internal law was manifest.

The last sentence of article 31 calls for an additional comment. This provision seems to be based on the juridical construction that the consent is valid even in cases of manifest violation of internal law, although the State is entitled in such cases to withdraw the consent thus expressed by its representative. It would seem preferable to consider the consent as not validly expressed from the point of view of international law. Consequently, the formula in articles 33 and 34 ("many invoke...as invalidating its consent to be bound by the treaty") should be employed in the present article also. The theoretical objections mentioned in paragraph (5) of the commentary do not seem to be decisive. As the question of invalidity under international law is considered to be distinct from the question of invalidity under national law, there does not seem to be any reason why the invalidity in international law should not be made dependent upon a criterion which is not necessarily relevant under national law, such as the manifest character of the violation of constitutional limitations.

Article 44

The Danish Government agrees that fundamental changes of the circumstances may be invoked as a ground for terminating or withdrawing from a treaty under the conditions specified in paragraph 2.

It must be borne in mind, however, that this is a field in which contracting parties are likely to evaluate factual circumstances differently and draw different legal conclusions from the facts. If the principle of the binding force of treaties is not to be unduly weakened, it seems essential to include an additional provision to the effect that a State should not be entitled to withdraw from a treaty under this article unless it is ready to submit any controversy on this point to the decision of an arbitral or judicial tribunal. Even if no general clause concerning the judicial settlement of disputes is ultimately added to the draft articles, it seems advisable to attach such a clause to this specific article.

10. Finland

[PART I]

Transmitted by a letter of 17 April 1964 from the Permanent Representative to the United Nations

[*Original: English*]

Part I of the draft articles on the law of treaties drawn up by the International Law Commission constitutes, in the opinion of the Government of Finland, an adequate basis for the codification of this branch of the law.

With regard to some specific articles, however, the Government of Finland would wish to submit the following observations:

Article 1

Since the definitions contained in article 1 considerably affect the subsequent articles every effort should be made to formulate these definitions as clearly and unequivocally as possible. As the definition contained in paragraph 1(*a*) of article 1 is given for the purposes of this Convention only and since the Convention deals exclusively with treaties concluded between States, there appears to be no need in this connexion to touch upon other subjects of international law. Consequently, the words "or other subjects of international law" could be deleted from sub-paragraph (*a*).

Article 3

For the same reason as stated above under article 1, the whole of paragraph 3 concerning international organizations could be deleted from article 3 as well as the words "and by other subjects of international law" from the end of paragraph 1. These words could perhaps be replaced by the words "which are subjects of international law", as all States do not possess international sovereignty. Another possibility would be to delete the whole of article 3 as superfluous, as suggested by some members of the International Law Commission.

The Government of Finland wish, in this context, to point out that, although the draft treaty deals only with States, nothing would prevent the inclusion, if desired, in the commentaries on certain articles, of statements indicating that these articles should *ex analogia* be applied to, for example, the Holy See and certain international organizations, and that a new draft agreement regarding this question could be worked out later.

Paragraph 2 of this article does not seem quite satisfactory, as it only mentions the federal State and its member states, although there exist several other types of composite States where the member states possess the capacity to conclude treaties in certain fields. The said paragraph might, therefore, read for example as follows: "In a union of States, the capacity of its members to conclude treaties depends on its constituent treaty or its constitution".

Article 12

The contents of the proposal of the International Law Commission on this article call for no comments, but its form invites some remarks. In the draft the two types of treaties, the formal treaties and those in simplified form, are not always dealt with separately. For instance, the principle embodied in paragraph 1 regarding the necessity of ratification applies to all treaties. Paragraph 2 of the same article contains so extensive exceptions, that they in fact cancel the principal rule, especially since most treaties are treaties concluded in simplified form. Paragraph 3, again, contains counter-presumptions, i.e. exceptions, which in part are contradictory to the preceding paragraph. This unnecessarily complicated and in a technical sense unsatisfactory article could be simplified, for instance, as follows: "All treaties which are not concluded in simplified form require ratification, unless the treaty otherwise provides or a contrary intention of the signatory States clearly appears from statements made in the course of negotiations or the signing of the treaty, from the credentials, full powers or other instrument issued to the representatives of the negotiating States, or from other circumstances evidencing such an intention".

Article 16

In article 16 regarding the legal effects of ratification, accession, acceptance and approval, it would perhaps have been possible to deal with the question as to whether and on what conditions such acts could be revoked. Reasons can be given as well for as against the inclusion of such a possibility. Revocations may have a harmful effect on the position of other signatory States. But in some cases it may be unjust to prohibit revocation unconditionally. Such would be the case, for example, if a signatory State would be compelled to wait until the treaty enters into force and only then be able to denounce it, provided that this is allowed by the terms of the treaty.

Article 17

The view that a State, which has ratified a treaty (that has not yet entered into force) and which subsequently commits acts contrary to the objectives of the treaty, thereby violates its obligations,

is quite acceptable. One may even accept the presumption that the mere signing of a treaty puts the signatory State under obligation of good faith. It is, however, doubtful whether such an obligation should also ensue in respect of States which have only taken part in the negotiation of a treaty or in the drawing up or adoption (authentication) of its text.

Article 18

Paragraph 1 of article 18, which deals with the formulation of reservations, could be made simpler by combining—as has been suggested—sub-paragraphs (*a*), (*b*) and (*c*) into one single paragraph. Another possibility would be to regard sub-paragraph (*a*) alone as sufficient.

Article 27

Although the provisions contained in article 27, paragraph 2, are in compliance with the practice of the Secretariat of the United Nations, it would appear sufficient to transmit the copy of the *procès-verbal* only to the State which has received the incorrect copy of the treaty, while the other States would be only notified of the action taken.

[PART II]

Transmitted by a letter of January 1965 from the Permanent Representative to the United Nations

[*Original: English*]

In the opinion of the Government of Finland, the draft articles, submitted by the International Law Commission, constitute an entirely satisfactory basis for the future work on the codification of the part of the law of treaties relating to the validity and termination of treaties.

With regard to certain of the draft articles, the Government of Finland would wish to make the following specific observations, which the Commission may wish to take into account in its further work.

In the title of part II of the draft articles as well as in the title of section II, it would perhaps be more appropriate to speak not of the invalidity but of the validity of treaties, since in article 30 the emphasis is placed on the validity of treaties in general and since the articles contained in section II deal both with the validity and the invalidity of treaties.

Article 38

The main part of the provisions contained in article 38 seem self-evident. Hence it would appear possible to delete them altogether. The last sentence of sub-paragraph (*b*) of paragraph 3, on the other hand, embodies an important principle which deserves to be explicitly recognized in the draft articles.

Article 40

The Government of Finland concur in the conclusion that a decision on termination and suspension of the operation of multilateral treaties requires, in addition to the agreement of all parties to the treaty, also the consent of not less than two thirds of all States which participated in the drawing up of the treaty in question. As to the length of time during which this principle should apply, a period of three to five years after the entry into force of the treaty would not seem unreasonable.

Article 51

The acceptance of that procedure contained in article 51 would undoubtedly be of great importance. However, the draft article still fails to establish the means which could be resorted to in the event negotiations and other efforts for the settlement of a dispute prove to be unsuccessful. This should not be interpreted to imply that unilateral measures for withdrawing from treaty obligations are permissible.

A particular difficulty arises from the fact that some States do not accept compulsory settlement of disputes, for instance, through arbitral or judicial procedure. For those States which in principle accept such compulsory settlement of disputes, there remains only the possibility to agree—for example, through a separate protocol, as was done in connexion with the Geneva Conventions on the Law of the Sea, 1958, and with the two Vienna Conventions on Diplomatic and on Consular Relations, 1961 and 1963 respectively—to submit disputes arising out of the application or interpretation of a particular treaty or convention to this kind of procedure. As a compromise one may also accept the *status quo*, however, with an additional stipulation to the effect that, if the contracting party which wishes to withdraw from the treaty obligations proposes to the other parties to settle the dispute by judicial or arbitral procedure and this offer is rejected, the first party has the right of denunciation.

As to the details of this draft article, sub-paragraph (*b*) of paragraph 1 appears inadequate in so far as it does not fix any period of time within which an answer must be given in urgent cases. This period could suitably be two weeks or one month.

[PART III]

Transmitted by a letter of 24 September 1965 from the Permanent Representative to the United Nations

[*Original: English*]

In the opinion of the Government of Finland the draft articles submitted by the International Law Commission constitute an entirely satisfactory basis for the future work on the codification of this part of the Law of Treaties.

With regard to certain of the draft articles the Government of Finland would wish to make the following specific observations, which the Commission may wish to take into account in its further work.

Article 55

There might be advantage also to state that the party must abstain from acts calculated to frustrate the objects and purposes of the treaty. Such an addition would complete the article in conformity with all that has already been stated concerning the same matter in other articles.

Article 62

Concerns the importance of custom as a source of international law; therefore this article does not really belong to the law of treaties.

Since international custom and the law of treaties are equivalent sources of law, the principle expressed in article 62 might be considered self-evident.

Article 67

This article does not in all respects satisfactorily solve the question of amendment of multilateral treaties between certain of the parties only.

A correction of a formal nature should be made to paragraph 1 of the article.

As it is admitted in the commentary (2), the second and third conditions overlap to some extent. The latter could be left out.

Critical observations should be made concerning paragraph 2 of the article. It would have been reasonable that States which wish to amend the treaty (*inter se* agreement) would notify all parties as stated in article 66 regardless of the fact that the treaty allows certain arrangements between certain of the parties only.

All parties should be notified of above-mentioned plans of amendment as soon as negotiations are under way.

The position of the parties not involved in the amendment is even worse due to the fact that no term has been set by the article for notification. It has not even been mentioned that it should take

place at earliest convenience or as soon as possible upon conclusion of the special treaty.

Articles 69-73

The Government of Finland considers the rules concerning the interpretation of treaties as both useful and appropriate.

11. Hungary

[PART III]

Transmitted by a note verbale *of 1 September 1965 from the Permanent Representative to the United Nations*

[*Original: English*]

1. The last sentence in paragraph 3 of the commentary to draft article 59 indicates that a treaty provision imposed upon an aggressor State does not fall under the rule of nullity set forth in article 36. It clearly follows from this right statement that the consent of an aggressor State is not needed to establish an obligation for it by the provision of a treaty to which it is not a party. It would be advisable to include this highly important exception in the text of article 59 itself.

2. According to article 59 of the draft, an obligation may arise for a State from a provision of a treaty to which it is not a party if the State in question has *expressly* (italics added) agreed to be so bound, while a right—as provided for in article 60—may arise for a State if...(*b*) the State expressly *or impliedly* (italics added) assents thereto. However, according to article 61, the provision of a treaty establishing a right or an obligation as referred to in articles 59 and 60 respectively may be revoked or amended only with the consent of the State in question, without any distinction being made—in contrast to articles 59 and 60—between an express consent which seems to be needed for the revocation or an unfavourable amendment of a provision establishing a right, on the one hand, and implied consent which may be enough for the revocation or a favourable amendment of a provision establishing an obligation, on the other. It would seem advisable to adjust the provisions of article 61 to the provisions of articles 59 and 60.

3. In draft article 64 the International Law Commission has determined the effect of severance of diplomatic relations on the application of treaties.

The draft contains no provision dealing with the effect of severance of consular relations on the application of treaties. Although it is without doubt that, considering the interests of co-operation of States, the maintenance of consular relations is desirable even in case of severance of diplomatic relations, the severance of consular relations cannot be considered impossible at the present stage of development of international law. The Vienna Convention on Consular Relations concluded on 24 April 1963 provides for this possibility in article 27. It would therefore seem desirable for the International Law Commission to deal also with the effect of severance of consular relations on the application of treaties in article 64 or in a separate article. It would be appropriate to draft a new provision according to which the provisions of paragraphs 1 to 3 of article 64 should apply to the severance of consular relations accordingly.

4. Article 66 deals with the question of the amendment of multilateral treaties. It seems desirable that the general rule set forth in paragraph 1 of this article should be complemented with a special rule in regard of general multilateral treaties.

According to paragraph 1, sub-paragraph (*c*) of draft article 1 of the law of treaties, a general multilateral treaty is a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole. It is clear from this definition that every State, even those which are not parties to the original treaty, should be invited to take part in a conference dealing with the amendment of general multilateral treaties.

Such an addition to article 66 presupposes the alteration of the text of article 8 by bringing the provisions of article 8 into accord with the definition of general multilateral treaties as contained in article 1.

5. The provision contained in paragraph 3 of article 66 lays down a specific rule dealing with a case which seems to be rather hypothetical. The question arises whether there is need to create a new rule for a hypothetical case whose regulation seems hardly justified by practice. The provision seems to be questionable also on the ground that it attaches a certain effect to the signature of a treaty. This, however, seems to be out of place in the section of the draft dealing with the modification of treaties.

6. The commentary to article 69 explains the textual approach to treaty interpretation adopted by the Commission. The text of the article itself seems to be more rigid than the commentary in this respect, not even mentioning the intention of the contracting parties. It would seem desirable to draft article 69 more flexibly in this respect and to give expression of the thought contained in paragraph (10) of the commentary, i.e. that it is the intention of the parties which is sought and it is presumed that their intention is that which appears from the text.

7. Article 70 of the draft refers to recourse to the preparatory work of a treaty merely as a further means of interpretation. This seems to be inconsistent with article 69, paragraph 3, where the subsequent practice of the parties in the application of the treaty is considered a primary means of interpretation. The preparatory work done prior to the conclusion of a treaty is believed to be of the same importance as the subsequent practice in regard to determining the intention of the parties.

12. Israel

[PART I][6]

Transmitted by a note verbale *of 26 April 1963 from the Permanent Mission to the United Nations*

[*Original: English*]

1. The Government of Israel is pleased to note the progress which has been made in connexion with the law of treaties. In general, the practical approach which has been adopted is seen to be adequate to present needs, and the Commission's general decision that its draft articles on the law of treaties shall serve as the basis for a convention on the topic is acceptable. Particular satisfaction is felt at the manner in which the problems of reservations to multilateral conventions and the functions of the depositary authority have been dealt with, thereby responding to requests which have been made by the General Assembly during recent sessions, and with the question of treaties in simplified form. It is noted that this progress is the consequence of the conscientious preparatory work which has been undertaken by the present Special Rapporteur on the law of treaties and by the previous Special Rapporteurs on the topic, and the Government is happy to express its appreciation for their work.

I

2. It is observed that several of the articles refer to tacit consent as a method by which various stages of the treaty-making process can be accomplished. Examples of this are found in articles 9, 19 and 27. The question of tacit consent appears to be of increasing practical significance; and it is believed that further consideration might be given to all its implications. Furthermore, it is being adopted in some domestic constitutional practices in connexion with the parliamentary ratification of treaties. The notion of tacit consent raises the question of the length of time which has to lapse before the presumption of consent may be inferred. Article 9, paragraph 3(*b*), and article 19, paragraph 3, refer to a period of twelve months.

[6] Additional observations on part I are included in the comments on part II.

Article 19, paragraph 4, refers to a period of two years and article 27, paragraph 1, simply to a "specified time-limit". This Government feels that under certain circumstances a period of twelve months might prove too brief for such a presumption and therefore suggests that its extension be considered. At all events, it is believed that closer consideration might be given to the question of uniformity for the different periods of time involved.

II

The following specific observations are put forward.

3. With regard to paragraph (5) of the commentary to article 1, attention is called to the fact that in United Nations practice the designation "declaration" is used with increasing frequency for the purpose of distinguishing certain quasi-normative texts from instruments which are intended to be international treaties. This has been pointed out in the memorandum of the Office of Legal Affairs published in document E/CN.4/L.610. Without taking any position on the precise legal characterization of such declarations, it is suggested that appropriate mention of this aspect should appear in the final text of the commentary.

4. It is believed that the last member of the final sentence of paragraph (8) of the commentary to article 1 may be open to misconstruction. In a set of articles dealing with the conclusion, entry into force and registration of international treaties, it is probably unnecessary to consider whether individuals or corporations created under national law do or do not possess capacity to enter into agreements governed by public international law, or what is the proper law of such instruments. There are a number of such agreements which purport to be governed by public international law, or at least by Article 38 of the Statute of the International Court of Justice. Perusal of the summary records of the Commission's fourteenth session suggests that this particular phrase may not adequately reflect the Commission's discussions on this matter.

5. The English and French texts of the draft articles do not fully correspond to one another in their definition of "reservation" (article 1, paragraph 1(*f*)). While the English text speaks of "a... statement...[purporting]...to exclude...the legal effect of some provisions", the French text refers to "*certaines* dispositions". Paragraph (13) of the commentary to this article would appear to support the view that the French text, in fact, reflects more precisely the Commission's intention that a true reservation relates to a *specific* provision of a treaty. An appropriate modification of the English text is therefore suggested.

6. It is felt that article 1, paragraph 2 ("Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State") might give rise to difficulties on the internal level, especially in the countries in which duly ratified international treaties become part of the law of the land. While accepting the principle, therefore, doubts are felt whether the provision itself is fully appropriate to an international treaty, and whether the idea would not better be expressed should it appear in the commentary.

7. With regard to article 3, it is suggested that for the present purposes the question of capacity would be adequately covered if paragraph 2 of this article were eliminated.

8. (*a*) With regard to article 4, it is suggested as a matter of principle that full powers to conclude a treaty in simplified form should not normally be dispensed with. On the other hand, it is believed that the transaction of international business would be facilitated were the representatives referred to in paragraph 2(*a*) and (*b*) to be regarded as normally having implied authority to conclude all treaties of the type referred to in that paragraph, whether in solemn form or in simplified form. It is accordingly suggested that in paragraph 4(*a*) the word "shall" be substituted by "may" and that sub-paragraph (*b*) be eliminated.

(*b*) It is noted that no reference is made to the language of full powers, and other like instruments, used in connexion with the making of treaties. It is assumed that each State is free to follow its own inclinations in this regard.

(*c*) With regard to paragraph (8) of the commentary to this article, by Government decision the Minister for Foreign Affairs has a standing Commission which covers the complete exercise of the treaty-making power. It has not hitherto been this Government's practice to clothe its diplomatic representatives abroad or its permanent representatives at the headquarters of international organizations with comparable full powers. However, it sees no objection to adopting this practice in the future.

(*d*) With regard to paragraph (9) of the commentary, it is suggested that, owing to developments in contemporary treaty-making practice, two types of precautionary signature, whether or not technically designated signature *ad referendum*, have to be contemplated. The first type is that dealt with by the Commission, concerning which no observations are made. The second type is exemplified by the 1958 Conference on the Law of the Sea. The four Conventions adopted by that Conference specifically state that they are each subject to ratification, whereas the Optional Protocol of Signature concerning the compulsory settlement of disputes provides that it is "subject to ratification, where necessary, according to the constitutional requirements of the signatory States". The representative of Israel signed that Optional Protocol *ad referendum* in order to establish on the international level that ratification of any of the Conventions would not in itself imply ratification of the Optional Protocol. (Cf. doc. A/CN.4/121, sect. A, para. 1: *Yearbook of the International Law Commission, 1959*, vol. II, p. 82). It is suggested that the Commission consider whether its articles adequately deal with that type of precautionary signature.

(*e*) With regard to provisional full powers also referred to in paragraph (9), the addressee of the letter or telegram is not indicated. It is the practice of the Government to address such letters to the Minister for Foreign Affairs of the other party, or the Secretary-General of the organization concerned, and to transmit them through the diplomatic channel. On the other hand, telegrams are normally despatched to the Israel diplomatic mission concerned and handed over by it to the other party.

9. (*a*) With regard to article 5, despite its apparently descriptive character it relates to an essential phase of the treaty-making process. The negotiating phase may also be of importance for other aspects of the law of treaties. Its retention is accordingly urged.

(*b*) Attention is, however, drawn to a discrepancy between the English and French texts of this article. Whereas the English text refers to "some other *agreed* channel", the French text speaks of "une autre voie *officielle*". It is suggested that the French text be brought into line with the English.

10. Article 6 (*b*) of the English text speaks of "a treaty drawn up within an organization". From paragraph (6) of the commentary to this article it appears that article 6(*b*) is intended to refer to treaties drawn up within an *international* organization. It is accordingly suggested that the word "international" be added in the text of article 6(*b*), thus making it conform more closely to the French text.

11. With regard to article 9, it is believed that a period of five years from the date of the adoption of the treaty would be sufficient for the purposes of paragraphs 1(*a*) and 2.

12. With regard to the expression "concluded between a small group of States" appearing in paragraph 2 of article 9, and again in paragraph 3 of article 20, it is observed that in paragraph (12) of the commentary to article 1 a different expression is used, namely "limited number of States". The distinction which the Commission seeks to draw between general multilateral treaties as defined in article 1 and treaties concluded between a small group of States is appreciated. However, it is felt that the smooth application of the law would be facilitated were the commentary to introduce more precision with regard to the concept of "small group of States".

13. The Government wishes to express its reservations to article 12 which, if it has been correctly understood, introduces doctrinal considerations alongside its practical rules. It is not considered necessary, for the purpose of drawing up practical rules, to adopt a position in principle on the controversial question of the necessity or otherwise in general international law for ratification of treaties which themselves are silent on the question. In the view of this Government, it is essentially for the negotiators of the treaty to establish whether ratification is necessary or not. The question of the necessity for ratification may itself be part of the negotiation, or it may be conclusively determined by the terms of the full powers of one or both of the negotiators. It is suggested that a pragmatic point of departure such as this could lead to a simplification of the article which, in its present form, is unduly complex.

14. With regard to the withdrawal of reservations dealt with in article 22, it is suggested that in respect of those treatics for which there is a depositary, the State wishing to withdraw its reservation will comply with the necessary requirements if it employs the depositary as the channel for the transmission of the necessary notification. This would appear to conform more to the general character of the multilateral treaty for which there is a depositary, as it emerges from the draft articles as a whole, than the present wording which is open to the interpretation that the State concerned is obliged to inform the other interested States individually. If the depositary is employed in these circumstances, the withdrawal of the reservations should normally take effect in accordance with the general provisions of the treaty, or the residual provisions of the draft articles (in the event of the silence of the treaty), for the taking of effect of communications transmitted by or through the depositary, unless of course the notice of withdrawal specifies otherwise.

15. (*a*) With regard to article 25, it is correct to include in the draft articles a reference to the registration of treaties. However, this Government hesitates to agree that the articles are the proper place for introducing any change in existing practices which distinguish between registration in implementation of Article 102 of the Charter and filing and recording in accordance with the regulations made by the General Assembly thereunder. It is recalled that the distinction between obligatory registration and voluntary filing and recording was deliberately maintained when the regulations were first drawn up in 1946. It may also be pointed out that the Charter is not the only international constitution which calls for the registration of treaties. Reference may be made, for instance, to article 81 of the Constitution of the International Civil Aviation Organization.

(*b*) It may be the case that upon the completion of the work on the law of treaties it will be necessary for the General Assembly to re-examine and consolidate the practices in connexion with the registration of treaties, and to co-ordinate them with the practices of the specialized agencies. The Commission therefore might well consider whether, in due course, the General Assembly's attention should not be drawn to this aspect.

16. With regard to article 29, it is suggested that in enumerating the functions of the depositary special reference should be made to the depositary's duty to register international treaties and related documents. In this connexion attention is called to the discussions which preceded General Assembly resolution 364 B (IV) of 1 December 1949 and also to relevant inter-agency agreements such as that of 17 February 1949 between the United Nations and the International Labour Organisation (United Nations, *Treaty Series*, vol. 26, p. 323).

17. It is believed desirable to clarify *de lege ferenda* that as a residual rule phrases such as "promptly", "as soon as possible", etc., appearing in paragraphs 3 (*d*), 6 and 7 (*a*) of article 29, as well as in paragraph 3 of article 15, should, unless the treaty itself provides otherwise, be interpreted in such a way as to allow for the observance of the normal administrative processes customary in the depositary authority for the preparation of the relevant communications, and for the receipt of those notifications through the normal channels by the home authorities of the individual States. This mitigates against equating the concept of "promptness" with that of "immediacy", which was applied by the International Court in the *Right of Passage* case (preliminary objections), with particular reference to the terms of Article 36, paragraph 4, of the Statute of the International Court of Justice.

18. It appears that the expression "any such matters" which occurs in article 29, paragraph 8, of the English text has a rather wider meaning than "*autres actes similaires*" of the same article of the French text. It is accordingly suggested that the term "*acte*" be replaced by another expression which more accurately accords with the English text.

19. This Government specifically welcomes the inclusion of the annex in the report of the fourteenth session of the Commission's work and suggests that it should also be included in the final text of the draft articles, when these are adopted.

[PART II] [7]

Transmitted by a note verbale *of 15 May 1964 from the Permanent Representative to the United Nations*

[*Original: English*]

I

1. The Ministry wishes again to express its appreciation to the Commission, and the Special Rapporteur on the law of treaties, for the remarkable progress which has been achieved in placing the law of treaties upon the widest and most secure foundation, as desired by the General Assembly.

2. Careful reconsideration of the consistency of the terminology is desirable. The following instances are given:

(*a*) The expression "conclude a treaty" appears in articles 1(1)(*a*), (*b*) and (*e*), 3, 30, 36 and 49 of the draft, as well as in Articles 43 (3) and 80 of the Charter. On the other hand, the expression "enter into a treaty" is used in articles 25 (2), 31, 33, 34, 41 and 44 of the draft, and in Articles 63 and 102 of the Charter.

(*b*) Different expressions are used in draft articles 12(2)(*c*), 12(3)(*b*), 39 and 46(2)(*b*) in referring to the "*travaux préparatoires*" of a treaty, without it being clear whether this differentiation is intentional.

(*c*) The word "nullity" appears in the title of article 47, in the text of articles 30 and 46, in the title to section VI, and in the title and text of article 52. However, the terminology of the substantive articles dealing with "nullity" is more differentiated, since it distinguishes between relative voidability and absolute voidness. Thus: article 31 refers to "invalidate the consent" and "withdraw the consent". Article 32 uses the expressions "without any legal effect" and "invalidate the consent". Articles 33 and 34 use the expression "invalidating its consent". Article 35 uses the expression "without any legal effect" and "invalidating its consent". Articles 36 and 37 use the word "void". Article 45 uses the expression "becomes void and terminates". While it is recognized that absolute uniformity of terminology is not possible, it is felt that the many variations employed may become a source of difficulty.

(*d*) The word "instrument" is being used in many different senses. Cf. articles 1(1)(*a*), 1(1)(*b*), 1(1)(*e*), 4(4), 4(5), 4(6), 12(3)(*c*), 15, 16, 18, 19, 23, 24, 26, 29, 40 and 52.

(*e*) There is inconsistency in the terms used to express a residuary rule, without it always being clear whether this is intentional. Thus:

(*i*) "Unless another procedure has been prescribed in the text or otherwise agreed upon" in article 7;

(*ii*) "Unless it is otherwise prescribed by the terms of the treaty itself" in article 8;

[7] Including certain additional observations on part I.

(*iii*) "When...the treaty specifies..." in article 13, and "provides" in article 14;

(*iv*) "Unless the treaty itself expressly contemplates" in article 15;

(*v*) "Unless the treaty [itself] otherwise provides [prescribes]" in articles 20(3), 29, 40, 50, 53;

(*vi*) "where the treaty does not specify..." in article 23;

(*vii*) "Except as provided in the treaty itself..." in article 46;

(*viii*) "Subject to the provisions of the treaty..." in article 54.

This multiplicity of terms might become a source of confusion.

II

3. The following observations are made on *article 30*:

(*a*) The French text ("*est réputé être en vigueur*") may introduce an element of legal fiction which is not present in the English text ("shall be considered as being in force").

(*b*) Doubt is felt over the use of the word "nullity" in the absence of corresponding usage in the substantive articles.

(*c*) This article does not foresee the operation of the rules for separability.

4. The following observations are made on *article 31*:

(*a*) It is suggested that it would be preferable for the second member of the first sentence to refer to "competence to enter into the treaty" rather than "competence to enter into treaties", and that the end of the sentence should read "unless the violation of that law, etc.", in order to take into account a situation, such as exists sometimes in Israel, where, without prejudice to the general treaty-making power, the exercise of the treaty-making power for a given treaty (e.g. a treaty of extradition) is subjected to specific conditions.

(*b*) The first sentence of this article uses the expression "shall not invalidate the consent" and may be inconsistent with the second sentence, which uses the expression "may not withdraw the consent".

(*c*) It appears that the general principle which underlies article 47 is operative as regards the subject matter of article 31. Accordingly, it is suggested that appropriate expression should be given to this interrelation, a matter which, it is considered, would permit of a more concise text for article 31.

(*d*) It is understood that the word "manifest" is to be taken in an objective sense, and it is suggested that this should find expression in the text.

5. The following observations are made on *article 32*:

(*a*) Redraft the first part of paragraph 1 so that it should refer to the "consent...to be bound by *the* treaty...".

(*b*) Redraft the conclusion of paragraph 1 to read:

"...the act of such representative shall have legal effect if it is afterwards confirmed..."

(*c*) Redraft paragraph 2 to read:

"In cases where the authority conferred upon a representative to express the consent of his State to be bound by *the* treaty has been made subject to particular instructions, his omission to observe those instructions...". (This redraft is based on paragraph (5) of the commentary, and assumes that article 4 will continue substantially in its present form.)

(*d*) It is assumed that the particular instructions should be brought to the notice of the contracting States prior to the termination of the negotiation, and it is suggested that this should find expression in the text.

(*e*) It is believed that, subject to article 46, an appropriate provision for voluntary separability should be introduced into this article.

6. The following observations are made on *article 33*:

(*a*) Place this article after article 34, in order to distinguish the reprehensible from the non-reprehensible *vices de consentement*, and place the former in ascending order of calumny.

(*b*) In lieu of "fraudulent conduct" it would be preferable to refer to "fraudulent act or conduct".

(*c*) Paragraph 2 as at present drafted can be interpreted as excluding the option of the injured State, contrary to what is stated in paragraph (6) of the commentary. That is the effect of the word "only" which, it is suggested, would be better omitted.

7. The following observations are made on *article 34*:

(*a*) The error to which this article refers is described, in paragraph 1, as an error relating to a "fact or state of facts". However, paragraph (7) of the commentary is not so limitative and it is suggested to bring the text of the article into line with the commentary.

(*b*) Redraft paragraph 4 to read:

"When there is no error as to the substance of a treaty but there is a mistake in the wording of its text, the mistake shall not affect the validity of the treaty and articles 26 and 27 then apply."

(*c*) Paragraph 4 is understood as intended to apply only to the case in which the parties are in agreement, or are presumed to be in agreement, as to the existence of the mistake. This appears from the commentary to article 10 of the Special Rapporteur's second report (A/CN.4/156). The judgment of the International Court in the *Frontier Land* case indicates that a mistake in transcription can vitiate the treaty (as opposed to invalidating a party's consent), subject to the necessary proof being forthcoming (*I.C.J. Reports, 1959*, pp. 222-6), and that in any event such a mistake can be cured by subsequent ratification of the treaty, its publication, and by acquiescence (p. 227). It is suggested, therefore, that the language of paragraph 4, and if necessary articles 26 and 27, be adjusted accordingly.

(*d*) The proposed redraft of paragraph 4 will require consequential amendments to the title to section V of part I, and to articles 26 and 27, by substituting the word "mistake" for the word "error" wherever appearing therein (the same adjustment to be made in the final text of the commentary to those articles).

8. The following observations are made on *article 35*:

(*a*) There is a possible inconsistency between the absolute expression "without any legal effect" found in paragraph 1 and the relative partial invalidation of the consent according to paragraph 2.

(*b*) It is not clear whether any difference is intended between the expression "shall be without any legal effect" in paragraph 1 of article 35 and the expression "shall be void" appearing in article 36. Perhaps, therefore, it would be better to draft paragraph 1 as follows:

"If an individual representative of a State is coerced...the State whose representative has been coerced may invoke the coercion as invalidating its consent to be bound by the treaty."

(*c*) For the reasons stated in observation (*c*) to article 33, the word "only" should be omitted from paragraph 2. The provisions of articles 33 and 35 regarding separability should remain substantially identical.

9. It is suggested to complete *article 36* by adding a provision to the effect that the article also applies where the participation of a State in an existing treaty was procured by the threat or use of force.

10. The only comment to *article 37* is that it should be made quite clear in the commentary that for a rule of *jus cogens* to exist, the two elements, as set out in this article, must subsist simultaneously. This is already implicit in paragraph (4) of the commentary.

11. In order to clarify the significance of *article 38* as determinative not of the manner but of the time of termination, it is suggested that the factor of "time" be mentioned specifically in the title and in the opening part of paragraph 1. In its present form, the article is open to the misconstruction that it states the obvious, but it is

considered that this clarification of the time element would be useful.

12. It is suggested that *article 39*, while unobjectionable in itself, should open the possibility of suspending the operation of the treaty, as an alternative to terminating it, in the circumstances mentioned in the article. This could be achieved by an addition along the lines of article 40, paragraph 3.

13. The following observations are made on *article 40*:

(*a*) There is a possible inconsistency between paragraph 1 of the text and the reference to "new 'treaty'" in paragraph (1) of the commentary, in view of the formal definition of "treaty" contained in article 1, paragraph 1(*a*). The text of the article is acceptable, on the assumption that it includes the possibility of a tacit agreement of all the parties to terminate an existing treaty.

(*b*) After the words "A treaty" in paragraph 1, add "in whole or in part".

(*c*) It is suggested that in paragraph 2, the period should correspond to that adopted for article 9 (see paragraph 11 of the Government's observations on part I).

(*d*) Consideration should also be given to the question whether articles 9 and 40 should not refer to two thirds of the States which drew up the treaty including two thirds of the parties.

(*e*) In order to accommodate the functions of the depositary to the function sought to be conferred upon it by article 40, paragraph 1(*a*), appropriate modifications will be required in article 29.

14. With regard to *article 41*, in the light of what is stated in paragraph 15 of the Commission's report and paragraph (2) of the commentary, it is believed that the article contains an inherent contradiction. If the later treaty was intended to terminate the earlier treaty, then the termination of the later treaty would not bring about the revival of the earlier treaty. But if the later treaty was intended to suspend the operation of the earlier treaty, the termination of the later treaty will, following article 54, bring about the revival of the earlier treaty. In either event, the whole matter depends upon the interpretation of the intention of the parties to the later treaty. If the article is retained, it is suggested that the element of suspension (with the omission of the word "only" in paragraph 2) should precede the element of termination. A reconstruction of the article along these lines might facilitate the problem of the placing of this provision.

15. With regard to *article 42*, paragraph (8) of the commentary seems to suggest that the definition of breach in paragraph 3 is not exclusive.

16. The following observations are made on *article 43*:

(*a*) Redraft paragraph 2 to read:

"If it is not clear that the disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty will be total and permanent, the impossibility may be invoked only as a ground for suspending the operaton of the treaty."

(*b*) It should be clarified that this provision does not apply in the case where the impossibility is the consequence of breach of the treaty by the party invoking the impossibility.

17. The following observations are made on *article 44*:

(*a*) It is suggested that the expression "fact or situation" appearing in paragraph 2 should coincide with whatever expression is used in article 34, which at present reads "fact or state of facts". Cf. observations on article 34 above.

(*b*) It is suggested that the article could also envisage the suspension of the operation of the treaty, in whole or in part.

18. In view of the problems of intertemporal law which arise, observations on *article 45* are reserved until the Commission has completed its first draft of part III of the law of treaties.

19. Article 32 should be included among the articles mentioned in *article 46*.

20. It is believed that *article 47* requires careful reconsideration to take account of the following aspects:

(*a*) The word "nullity" does not appear in any of the articles mentioned in article 47.

(*b*) No reference appears to the effect of the general principle on the exercise of the right to require the suspension of the operation of the treaty, despite the fact that suspension is included in one of the articles mentioned in article 47 (article 42).

(*c*) Since the principle itself is one of general application, article 47 should distinguish carefully between the general principle and the specific concept of tacit consent as it is employed in part I of the draft articles (cf. paragraph 2 of the Government's observations on part I).

(*d*) The drafting of the introductory part of the article could be simplified were it to be worded more positively. The following redraft is therefore suggested (also taking account of observation (*c*) to article 31):

"A State may not rely upon articles 31 to 35 and 42 and 44 if that State, after having become aware of the facts giving rise to the application of those articles, shall have elected by conduct or otherwise to consider itself bound..."

This text also makes redundant the specific reference to "waiver", which, in the context, may be a complicating factor, and avoids the awkwardness of the phrase "debarred from denying". The commentary should make it clear that the election will be presumed after the lapse of a reasonable period of time, such time depending, of course, on all the circumstances.

21. Consideration should be given to whether *article 48*, which is in principle correct, should not be framed in more general terms covering also sections III, IV, V and VI of part II, and placed after the present article 2. That could lead to a simplification of part I, similar to that intended for part II by article 48. In fact, similar provisions already appear in articles 5, 6, 7, 9, 18(1)(*a*), 20(4), 27(4), 28 and 29(8). Such generalization would correspond, it is believed, to existing practice as regards the two types of treaties to which article 48 applies. Nevertheless, it might be more satisfactory to draft two separate provisions, one relating to a treaty which is the constituent instrument of an international organization, and one relating to a treaty which has been drawn up within an international organization. It should, however, be indicated that sections I and II of Part II are fully applicable to both these classes of treaties. In the penultimate phrase of the article, the words "to that treaty" should be inserted after "the application".

22. There are no observations on *article 49*.

23. The following observations are made on *article 50*:

(*a*) The notice should correspond in principle, and subject only to the rules of separability, to the requirements for the instrument regarding participation contained in article 15, paragraph 1(*b*).

(*b*) It is believed that paragraph 1 should likewise be framed as a residual rule, operative in the event of the silence of the treaty.

(*c*) It is further suggested to substitute "to the depositary" for "through the depositary".

(*d*) A corresponding modification to article 29 will be required, in order to complete the enumeration of the functions of the depositary.

24. There are no observations on *article 51*.

25. The following general observations are made on *section VI*:

(*a*) It is assumed that all three articles will require reconsideration in the light of the conclusions to be reached by the Commission on the question of the effects of treaties on third States (*pacta in favorem* and *in detrimentum tertii*).

(*b*) Each one of the three articles deals with the treaty as a whole. Some provision should be added regarding the consequences of the operation of article 46 on the matters dealt with in section VI.

(*c*) The use of the word "nullity" in the title of section VI raises the question of terminology referred to generally in observation 2(*c*) above.

(*d*) Article 29 will require adjustment in order to authorize the depositary to perform functions which are the consequence of section VI.

26. The following observations are made on *article 52*:

(*a*) This article attempts to deal with two distinct matters, namely: treaties which are a "nullity" *ab initio*, and treaties the consent to which may be invalidated subsequently at the initiative of one of the parties. It is suggested that these two aspects should be brought more sharply into focus.

(*b*) It is suggested that these difficulties, as well as those of a terminological character, would be reduced were the text to be reconstructed by referring not to the general concept of "nullity", but more specifically to the legal consequences of the application of the different articles of section II of part II to which it relates.

(*c*) Subject to the foregoing, it is suggested that paragraph 1(*a*) should refer to the "legal consequences of acts performed in good faith by a party in reliance on the void treaty". While it is true that *omnia pro rite praesumuntur*, the invalidation of the consent to be bound by a treaty ought not in itself to impair claims based upon the alleged illegality of acts performed in reliance on that treaty. A passage in the Judgment of the International Court of Justice in the *Northern Cameroons* case (*I.C.J. Reports, 1963*, p. 34) alludes to this, in the case of termination of a treaty.

(*d*) It is suggested to commence paragraph 1(*b*) by a connecting word such as "Nevertheless".

(*e*) In paragraph 3, it would be better to substitute "invalidation of a State's participation in a multilateral treaty" for "nullity of a State's consent to a multilateral treaty", thus corresponding more closely to the language of articles 8 and 9.

27. The following observations are made on *article 53*:

(*a*) It is suggested to redraft paragraph 1(*b*) to read:

"(*b*) Shall not affect the legal consequences of any act done in conformity with the provisions of the treaty while that treaty was in force or..."

(*b*) For reasons similar to those given in observation 26(*b*), it would probably clarify matters if the article were to specify the articles of part II to which it relates.

(*c*) For reasons given in observation 18, paragraph 2 is reserved.

(*d*) The commentary should make it clear that once a treaty is terminated, it can only be revived, in the future, by some formal treaty (in the sense used in the draft articles). This is necessary because of differences of approach of different legal systems on the effect of the repeal of a statute which itself repeals an earlier statute. There is a statutory provision in force in Israel to the effect that where any enactment repealing any former law is itself repealed, such last repeal shall not revive the law previously repealed unless words be added reviving such law. It is assumed that the same principle applies in international law.

28. The following observations are made on *article 54*:

(*a*) It is assumed that this article does not refer to the consequences on the operation of a treaty of the suspension of diplomatic relations between the parties (in the case of a bilateral treaty), or between some of the parties (in the case of a multilateral treaty).

(*b*) The suspension of the operation of a treaty is mentioned in articles 30, 40, 41, 42, 43, 46, 49 and 50. Articles 42 and 43 also raise the possibility of the suspension of the operation of a part of a treaty. It is accordingly suggested that article 54 should specify the substantive articles to which it refers.

(*c*) It is suggested, having regard to the peremptory effect of the termination of a treaty, to extend the option to suspend the operation of a treaty also to the matters covered by articles 39 and 44, and thus facilitate the possibility of a later resumption of the operation of the treaty.

[PART III]

Transmitted by a letter of 8 September 1965 from the First Secretary of the Permanent Mission to the United Nations

[*Original: English*]

1. The Commission's intention, as indicated in paragraph 15 of its Report (A/5809), to consider the possible amalgamation of the three parts of the law of treaties into a single draft convention, together with its observation that rearrangement of the material may be found to be desirable, have been duly noted. Since all the different parts and sections are in substance closely interconnected, it is considered appropriate for the Commission's final text to consist of a single draft of articles dealing as comprehensively as feasible with all the law of treaties. The necessity for rearrangement of the material is also appreciated. The only observation felt to be appropriate at this stage is that it is believed that the whole text would gain considerably in clarity were the section dealing with interpretation to appear as early in the final text as would be consistent with the logical exposition of the material.

2. With reference to paragraph 21 of the Report, the suggestion that most-favoured-nation clauses in general might at some future time appropriately form the subject of a special study by the Commission is noted with approval.

3. In the course of the examination of the draft articles, some further inconsistency in terminology and discordance between the three language versions has been noted. However, in view of the proposals advanced by the Special Rapporteur in his fourth report (A/CN.4/177) on the question of terminology and definitions, it is not considered necessary in these observations to deal particularly with this aspect, except where either inconsistency in terminology, or discordance between different versions of the draft articles, may have occasioned difficulties in understanding the intention of any draft article.

4. With regard to *article 55*, the following observations are made:

(*a*) It is believed that the title of this article may be narrower than the scope of the article itself. It is assumed that in due course this article will be combined with article 30. Since the principle of *pacta sunt servanda* is the fundamental principle of the law of treaties, it would appear that it should be enunciated at the very beginning of the codification. In the Charter of the United Nations, the principle is indeed placed in the Preamble.

(*b*) On the other hand, the principle of good faith has a broader scope than the application and effects of treaties, and it is particularly appropriate as regards the application of the draft articles themselves. It would therefore appear to be necessary to avoid formulating the text in a way which could lead to the impression that the principle of good faith was limited to the application of treaties.

(*c*) Having regard to the reference, in paragraph (3) of the commentary, to the provisional entry into force of treaties, the question may arise, and require some mention in the commentary at least, of the interrelation of this article with article 24, it being understood, of course, that the general principle of *pacta sunt servanda* would apply to the underlying agreement upon which the provisional entry into force is postulated.

(*d*) Paragraph (4) of the commentary has been noted, and meets with approval.

(*e*) It is not clear whether the discordance between the three versions is a reflection of transient difficulties.

5. With regard to *article 56*, it is believed that the concordance of the three language versions requires further close examination.

In this article, too, the question of the interrelation with article 24 may arise.

6. There are no observations on *articles 57 and 58*.

7. With regard to *article 59*, it is considered that in general the French version expresses the substance of the rule somewhat better than the English, especially in the "if" clause. While the nature of the compromise solution which the Commission has proposed is appreciated, and it is not the intention of this observation to challenge the basic concept of this article, it is suggested that further attention be given to the actual language used. In addition, it is suggested that the last five words should be replaced by "agreed to be bound by that obligation".

8. It is suggested to change the order of *articles 59 and 60*.

9. With regard to *article 61*, it is suggested that the provisions of this article require to be more closely co-ordinated with the provisions of part II relating to the termination of treaties, and those of part III relating to the modification of treaties. Article 61 in its present form may be open to the interpretation that it gives to the third State more extensive rights, possibly even amounting to a right of veto, than the principal parties to the treaty themselves have under the general economy of the draft articles. It is suggested that the position of the principal parties should be safeguarded by some reference to articles 38-47 and 49-51, as regards revocation, and that the principles of articles 65-67 as regards modification should also be applicable, in order to govern the legal relationship between the third State and the principal parties to the treaty.

10. With regard to *article 62*, it is suggested that the opening words should read: "Nothing in these articles precludes".

11. With regard to *article 63* the following observations are made:

(*a*) Further to No. 14 of this Government's observations to article 41 of part II, it is noted from paragraph (12) of the commentary to article 63 that the Commission inclines to the view that cases of partial termination should be removed from article 41 and placed in article 63. This is believed to be correct. In addition, it seems that the interrelation between articles 41 and 63 would be rendered clearer if the element of suspension were also removed from article 41 and placed either in article 63 or in a separate section which would collect together all the provisions relating to the suspension of the operation of a treaty, as distinct from its termination. If article 41 is then left to deal exclusively with implied termination of a treaty, its situation in the section dealing with termination will be logically correct and the implications of that article will be placed in better focus.

(*b*) Paragraph 1 should preferably refer not only to the obligations of States, but also to their rights.

(*c*) With regard to paragraph 2, the fundamental legal question which arises is whether the treaty provision must always be taken at its face value, which is what the text seems to imply, or whether it should not be made open to the possibility of a material examination in order to establish whether in fact there is an inconsistency.

(*d*) Examination of this article has led to a re-examination of all the articles on termination in the light of the proceedings in the Commission's fifteenth session. While the provisions on termination cover the topic quite extensively, it is noted that an important cause of termination, namely obsolescence, is not mentioned by the Commission. It is believed that an understanding of article 63 would be facilitated, and possibly the scope of its application reduced, if place were found in the draft articles, or at least in the commentaries, for the problem of obsolescence.

12. With regard to *article 64*, which, it is submitted, is at present out of place, it is suggested that the last words of paragraph 2 should read: "disappearance of the means necessary for its operation". At the same time, it is assumed that the Commission did not intend to open the door to a contention that the severance of diplomatic relations may become an excuse for even a temporary suspension of the operation of a treaty in the very contingency for which the treaty was made, a matter which can be illustrated by reference to the Geneva Conventions of 1949 regarding the protection of war victims. It is suggested that the article be re-examined from this point of view. It is possible that paragraph (3) of the commentary on this article may similarly be too categorical.

13. With regard to *article 65*, and having regard to paragraph (7) of the commentary, which correctly recognizes the possibility of an oral agreement or tacit agreement to amend a treaty, it is suggested to commence this article as follows: "A treaty may be amended by agreement in writing between the parties and the rules laid down in part I shall apply...etc.". For comment on the expression" the established rules of an international organization", see No. 14, (*d*) and (*e*) below.

14. With regard to *articles 66 and 67*, the following observations are made:

(*a*) It is suggested that paragraph 1 of article 66 should carefully distinguish between the impersonal proposal to amend a multilateral treaty, and the right of a party to propose an amendment to a treaty, which right may be restricted by the terms of the treaty itself. In general, it is considered that the obligations of the other parties to the treaty should be determined in the first place by the treaty itself (if it contains provisions on the subject), and only in the second place by general rules. This distinction, it is believed, is not clearly made.

(*b*) It is noted that article 66 refers to a proposal initially made for amendment in relation to all the parties, and article 67 relates only to proposals initially made for *inter se* amendments. This distinction is accepted. However, the question arises whether the possibility should not be envisaged that a group of parties to a multilateral treaty might initiate consideration of amendments without it being clear initially what kind of amendments will result therefrom. It is believed that this kind of situation may be more prejudicial to the rights and positions of the other parties than the situations covered by articles 66 and 67. The suggestion is therefore made that the question of notice of proposed amendments should form the subject of an independent provision, coming between articles 65 and 66, which should be couched in such a way as will apply to all proposed amendments. In this connexion, it is pointed out that as this group of articles stands at present, notification of the conclusion of an *inter se* agreement as provided in paragraph 2 of article 67 may come too late, having regard, particularly, to paragraph 1(*b*)(i) of article 67. The other parties to the treaty must be given an early opportunity to determine whether the enjoyment of their rights under the treaty, or the performance by them of their obligations, are likely to be adversely affected by a proposed amendment or modification of the treaty.

(*c*) It is furthermore suggested that the Commission re-examine the question whether the recipients of any notification regarding proposed amendments, whether general or *inter se*, should be limited, at all events for a defined initial period, only to the parties to the treaty. Indeed, circumstances can be envisaged in which a multilateral treaty will not enter into force, for want of a sufficient number of ratifications, unless amendments, the necessity for which has been established only after adoption of the text, are made. The Commissions's proposal does not take this possibility into account.

(*d*)The expression "established rules of an international organization" in article 65 and in paragraph 2 of article 66 seems highly ambiguous in the present context. Does it refer to the established rules of an international organization which apply to the members of that organization as such, or does it refer to those rules which apply to treaties concluded or treaties which have been drawn up within an international organization, the parties of which may not necessarily all be members of that organization?

(*e*) In this connexion, this Government's proposal to generalize article 48, contained in No. 21 of the observations on part II, is

recalled, and the Special Rapporteur's proposal for a new article 3*bis* (A/CN.4/177) has been noted with appreciation. In the observation on article 48, it was suggested that two separate provisions are required. Further consideration of this aspect in the light of the provision under examination, and generally, leads to the question of the adequacy of the criterion that a treaty may have been drawn up within an international organization. It is believed that the real criterion has to be sought in the material connexion of the treaty with the organization within which it has been drawn up, so that, in effect, the treaty has a material link with the constitution of that organization. The International Labour Conventions supply a good illustration of this. Many treaties which have been drawn up within the United Nations have no material connexion of that kind, or at best one of an extremely tenuous character, with the United Nations, the standing machinery of which may be regarded as having been used primarily as a matter of diplomatic convenience. The connexion is even less evident with regard to conventions drawn up in conferences, convened by one of the organs of the United Nations, in which non-member States have participated on invitation of the convening organ.

(*f*) With regard to paragraph 2(*b*) of article 66, it is probably not sufficient to refer only to article 63, but, as indicated above, closer co-ordination generally between articles 59-61 and articles 65-67 seems to be required.

(*g*) It is suggested to amend paragraph 1(*a*) of article 67 to read: "The possibility of such an agreement is...etc.".

15. With regard to *article 68*, the following observations are made:

(*a*) The meaning of the word "also", in the first line, is not clear. Is it intended to refer only to articles 65 and 66, or does it in addition refer to article 67?

(*b*) Paragraphs (*a*) and (*b*) seem to be redundant. Sub-paragraph (*a*) is probably covered by articles 41 and 63, especially the latter, and sub-paragraph (*b*) seems to be indistinguishable, in its practical effect, from paragraph 3(*b*) of article 69.

(*c*) There remains sub-paragraph (*c*) which, from some points of view, may be regarded as also having a logical connexion with the problem dealt with in article 45. It is believed that the substance of sub-paragraph (*c*) should find an appropriate place in the draft articles. It is based on the passage in Judge Huber's award in the *Island of Palmas* case quoted in paragraph (3) of the commentary. In that award it appears as the second leg of the intertemporal law, the first leg appearing in the passage from the same award quoted in paragraph (11) of the commentary to article 69. It is noted that in the original article numbered 56 submitted by the Special Rapporteur in his third report (A/CN.4/167), the correct order of postulating the two branches of the law was maintained, as was the case in the Special Rapporteur's original proposals for the articles numbered 70 and 73 in that report (A/CN.4/167/Add.3). No explanation is furnished by the Commission for its reversal of the order of the two branches of the intertemporal law, and the Commission is invited to reconsider whether this reversal of the order does not introduce new complications into a branch of the law which is already complicated enough. It is appreciated that the distinction between the interpretation of a treaty as a step logically prior to its application, and the modification of a treaty as a consequence of its reinterpretation through its application, does exist from a theoretical point of view. However, the practical consequences of that distinction appear to be so fine that the wisdom of expressing it in the way the Commission has sought to do is questioned. It is therefore suggested that paragraph (*c*) of article 68 should be brought into closer association with, but placed subsequent to, the first leg of the intertemporal law as it appears at present in article 69, paragraph 1(*b*).

16. With regard to *articles 69 and 70*, the following observations are made:

(*a*) In general, the considerations expressed more particularly in paragraphs (6), (7) and (8) of the commentary are appreciated. Without prejudice to ultimate decisions which will be taken in political organs, it is considered appropriate that the Commission's final draft codification on the law of treaties should contain provisions on the question of interpretation along the lines of those drawn up by the Commission. As already indicated in No. 1 above, it is even considered that in a single draft of articles, the provisions on interpretation, or at all events on the matters dealt with in articles 69-71, should be placed early in the set of articles.

(*b*) The philosophy of the Commission's approach as expounded in paragraph (9) of the commentary is also accepted as being most in accord with State practice and international requirements.

(*c*) Paragraphs 2 of article 69 does not, strictly speaking, seem to constitute part of any general rule of interpretation, but in reality to be a definition. This is confirmed by paragraph (12) of the commentary. Indeed, this definition in some respects completes that of "treaty" in article 1, and it also is of general application to the draft articles as a whole. Its removal from article 69 would make the general rule of interpretation clearer. It is accordingly suggested to insert it in article 1. With regard to its text, there may be room for ambiguity over the expression "drawn up" (which appears elsewhere in the draft articles). Compare *Shorter Oxford English Dictionary* and *Webster's Third International Dictionary*. A possible understanding of that expression is that it relates to draft instruments, but presumably the intention is to refer to the final texts of the instruments in question.

(*d*) As a consequence of removing paragraph 2 of article 69, paragraph 3 could be suppressed as a separate paragraph, and its elements combined to form sub-paragraphs (*c*) and (*d*) of the existing paragraph 1. The word "also" in paragraph 3 may give rise to confusion. Paragraph (13) of the commentary describes paragraph 3 as specifying "further authentic elements of interpretation", while article 70 as a whole is entitled "Further means of interpretation". It is suggested that the appropriate point of departure for the process of interpretation consists in each one of the four elements, at present separated in paragraph 1 and paragraph 3 of article 69, which stand on an equal footing.

(*e*) The expression "ordinary meaning to be given to each term" in paragraph 1 of article 69 may become a source of confusion, to the extent that it seems to leave open the question of changes in linguistic usage subsequent to the establishment in the treaty text. Reference is made, in this connexion, to the following sentence in the judgment of the International Court of Justice in the *U.S. Nationals in Morocco* case: "...in construing the provisions of Article 20 [of the Treaty of 16 September 1836 between the United States and Morocco]...it is necessary to take into account the meaning of the word 'dispute' at the times when the two Treaties were concluded". (*I.C.J. Reports, 1952*, at p. 189.)

(*f*) Apart from that, care must be taken not to formulate the rule as a whole in such a way as would lead to excessive molecularization of the treaty. The advisory opinion of the International Court of Justice in the *Maritime Safety Committee* case drew attention to this aspect in the following sentences: "The meaning of the word 'elected' in Article 28 of the Constitution of IMCO cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the Article. The word obtains its meaning from the context in which it is used." (*I.C.J. Reports, 1960*, at p. 158). These difficulties could be overcome if the introductory sentence of article 69—and leaving aside the question of the time factor—read: "A treaty shall be interpreted in good faith and in accordance with the ordinary meaning given to the language used in its context". The reference to the "context of the treaty" would then have to be removed from sub-paragraph (*a*). In addition to the necessary adjustment to the introductory phrase of paragraph 1, it is believed that this aspect would be brought more into focus were the order of sub-paragraphs (*a*) and (*b*) to be reversed.

(*g*) With regard to sub-paragraph (*b*), it seems that the text needs slight adjustment, in order to clarify that the rules of genera-

international law there referred to are the substantive rules of international law, including rules of interpretation, and not the rules of interpretation alone.

(*h*) In view of the proliferation of multilingual versions of treaties, it is considered that comparison between two or more authentic versions ought to be mentioned in article 69, as this seems to be normal practice. Article 73 deals only with the specific problem of what happens when that comparison discloses a difference. However, the importance of comparison is greater, as it frequently assists in determining the meaning of the text and the intention of the parties to the treaty, and to that extent it forms part of any general rule of interpretation in the case of multilingual treaties.

(*i*) The reconstruction which is proposed, including in particular the transfer of paragraph 2 of article 69 to article 1, may make it unnecessary and, indeed, confusing to refer specifically to the preparatory work of the treaty in article 70.

17. It is suggested that *article 71* be either combined with article 69, or placed immediately after it.

18. With regard to *articles 72 and 73*, full consideration must await the information to be furnished by the Secretariat regarding drafting practices for multilingual instruments. At the same time it is suggested to make article 73 more consistent with article 72 by substituting the word "versions" for the word "texts" wherever appearing in article 73.

13. Jamaica

[PART II]

Transmitted by a letter of 22 September 1964 from the Permanent Representative to the United Nations

[*Original: English*]

Article 33

Where fraud is subsequently discovered, the defrauded party should take steps to invalidate its consent to the treaty *within a stated time after the discovery of the fraud.* In other words, a party who has discovered fraud at the hands of the other party and continues for an indefinite time to act upon the relevant clauses of the treaty should thereupon be deemed to have subsequently acquiesced in the fraud and be consequently precluded from invoking such fraud as a reason for the termination of the treaty *unless the conditions of termination are agreed upon by both parties.*

Article 36

The scope of the article could be extended to include circumstances where the threat or use of force does not necessarily involve any strict violation of the principles of the Charter of the United Nations but was nonetheless a material factor in bringing about the conclusion of a treaty.

It should be readily recognized that an improper use of force can be so manipulated as to avoid violation of the principles of the Charter. Such improper use of force (or concealed threat) tends to violate the essential elements of consent in much the same way as fraud may be taken to violate such consent with reference to article 33.

Possibly, when the threat or use of force does not constitute a violation of the principles of the Charter, the treaty could be regarded not as void *ab initio* but *voidable* at the instance of the other State concerned.

Article 44

(*a*) The exceptions under paragraph 3 could possibly be extended to include "fundamental change of circumstances which the parties could reasonably have foreseen and the occurrence of which they impliedly undertook not to regard as affecting the validity of the treaty".

(*b*) On 14 October 1963, the Jamaican delegation mentioned in the Sixth Committee, *inter alia*, the desirability of making allowance in this article for fundamental change of circumstances which may sometimes arise out of State succession. This aspect of the matter is sufficiently important to be again mentioned in this memorandum.

Fundamental change of circumstances is not necessarily an inevitable consequence of State succession. There may be, however, instances when a newly independent State finds the terms of a treaty so manifestly unjust or inequitable that that State may be justified in not recognizing such a treaty as one which it should inherit. This situation will perhaps be dealt with by the International Law Commission when it considers succession of States, but it is considered appropriate that article 44 should provide for such a situation notwithstanding the possibility that it may again be dealt with by the Commission under "Succession of States".

General

The Jamaican delegation also raised in the Sixth Committee the advisability of making provision for the individual in the draft articles on the law of treaties.

Whilst the law of treaties is primarily concerned with States relationship, the individual is increasingly being made subject to rights and duties established under treaties and conventions. The Nürnberg Trials, the Genocide Convention and the draft covenants on human rights being considered by the General Assembly are but few examples of the increasing role of the individual in international law (and more precisely in the law of treaties).

The subject, therefore, is considered as deserving "special mention" in any contemporary codification of the law of treaties.

14. Japan

[PART I]

Transmitted by a note verbale *of 4 February 1964 from the Permanent Representative to the United Nations*

[*Original: English*]

I. *General observations*

1. The Government of Japan is of the opinion that the draft articles in their ultimate form should be a "code" rather than a "convention". In its view, much of the law relating to the conclusion of treaties is not very suitable for framing in conventional form, for two reasons. First, the conclusion of treaties always involves procedures on two different planes, internal and international. Although the draft articles profess to be concerned only with the international aspect of treaty making, this will inevitably bring repercussions on the internal aspect of treaty making. If it were decided that the draft articles should form conventional norms from which in principle no derogation is permitted, it would in effect be putting an unduly tight strait jacket on the procedural formalities of treaty making in each State. Second, an attempt to prescribe procedures of treaty making in great detail will entail the undesirable results of not being able to cope with the actual needs of finding mutually acceptable procedures by the contracting parties.

2. This is not to suggest that the code as proposed should be another addition to the already numerous codifying attempts of the past, none of which have been endowed with the authority of an official code. It would seem possible to employ a procedure through which the draft articles could be adopted, after full examination and discussion by all the Governments, as an authoritative recommendation regarding the procedures to be followed in concluding international agreements, but not in the form of a convention in the technical sense. This could be done, for instance, by an insertion in the draft articles of a provision of a general character along the following line:

General provisions

State parties to the present code recognize that the provisions of the present code are generally declaratory of established principles of international law and practice, and declare that they shall endeavour to conform themselves to these provisions as a common standard of conduct.

3. In case the draft articles were to take the form of a "convention", the Government of Japan would like to see the convention formulated on the basis of the following two principles:

(*a*) That the provisions of the convention should be as concise as possible, leaving out all the detailed technicalities to the decisions of the parties to each individual international agreement.

(*b*) That the convention should include a provision of general character, which would enable States to derogate from any of the provisions of the convention by mutual agreement between the parties to each individual international agreement (see article 2 *bis* of the annexed Japan draft).

4. The Government of Japan has no strong view on the title given to such code or convention. Nevertheless it is suggested that the term "treaties" in the present title might more appropriately be replaced by the term "international agreements". Though the former is clearly used here in the generic sense and not in the specific sense, it might still lead to misunderstanding. as the discussions in the Commission in its second and third sessions have revealed. In spite of the proviso in article 1, paragraph 2, it would seem more appropriate to employ a neutral term like "international agreements".

5. In the view of the Government of Japan, the three parts of the draft articles as envisaged by the Special Rapporteur should ultimately be amalgamated in one. As distinct from the case of the four conventions on the law of the sea, the three parts of the law of treaties are so closely interrelated with one another that it would serve no useful purpose if they form three separate conventions independent of one another.

II. *Observations on individual articles*

The Government of Japan submits its observations on individual articles as follows. These observations are made, however, with an eventual convention in view, and not a code, for which different considerations would apply.

The draft articles as amended in accordance with these observations are annexed hereto for reference.

Article 1

The definitions given in paragraph 1 should be kept, subject to the following observations:

(*a*) The enumeration of categories of international agreements by designation in paragraph 1 (*a*) is not very useful, as it could not hope to be exhaustive in any case.

(*b*) The term "treaty in simplified form" in paragraph 1 (*b*), though current in use, seems to be superfluous in the context of the present draft articles.

(*c*) The term "general multilateral treaty" in paragraph 1 (*c*) cannot be precisely defined, and will cause a great difficulty in application. It had better be dispensed with.

(*d*) The distinction between "full powers" and "credentials" as used in article 4 is not very clear. It is suggested to standardize the terminology employing the term "instrument of full powers" in paragraph 1 (*e*).

(*e*) It would seem better to replace the word "vary" in paragraph 1 (*f*) by the word "restrict", since only such statement as would restrict the legal effect of the provisions of the international agreement will properly fall under the term "reservation".

Article 3

1. Paragraph 2 should be deleted, since it does not appear to add much to the provisions of paragraph 1. It is even misleading in that it does not refer to the other element of international capacity to conclude international agreements—the requirement of recognition of such constitutional capacity by the other contracting party or parties concerned.

2. The same could be said of paragraph 3, which therefore should also be deleted.

Article 4

1. The requirement of furnishing evidence of authority referred to in paragraphs 3 and 4 (*a*) could no doubt be waived by the other negotiating State or States, whatever the international agreement in question might be. This should be made clear in the article.

2. It would perhaps be too strict, in view of the current practice, if the requirement of subsequent production of the instrument of full powers were to be made absolute, in the contingency envisaged under paragraph 6 (*b*) and (*c*).

3. The rule stated in paragraph 6 (*a*) is no doubt correct, but it is doubtful whether this needs express provisions.

Article 5

The article would not have much utility in practice and is to be deleted in its entirety.

Article 6

The subject dealt with in this article does not appear to be directly relevant, though certainly related, to the procedure of treaty-making. It belongs rather to the problem of conference procedures and had better be left with the decision of the conference or of the States concerned.

Article 7

A general rule on authentication applicable both to bilateral and multilateral agreements is not easy to formulate. The precise legal nature of the acts enumerated in paragraph 1 may not be exactly the same. To illustrate the point, the rule stated in paragraph 3 would prove to be too strict in practice for bilateral agreements, if it excluded the possibility of subsequent modification, not of wording (the matter covered by articles 26 and 27), but of substance. It is not very unusual for the negotiating parties to add minor changes of substance to the text already authenticated. For this reason, the article had better be dispensed with, while the substance of paragraphs 1 and 2 of this article may be incorporated into the provisions of articles 10 and 11.

Articles 8 and 9

It is believed best to leave the matter to the decision of the States participating in the conference. The articles should therefore be deleted in their entirety.

Article 10

There are cases where initialling is equivalent to signature (cf. article 21, paragraph 1, of Sir Gerald Fitzmaurice's first report). It seems desirable to take into account this eventuality (see article 10, paragraph 3 (*c*) of the Japan draft).

Article 12

1. The principle adopted in paragraph 1 should in our view be stated in the reverse, i.e. that the international agreement does not require ratification unless it expressly provides for the requirement of ratification.

2. The only exception to the principle stated above seems to be the one referred to in paragraph 3 (*c*), and this can be formulated in a new paragraph.

3. The same rule should be applicable, *mutatis mutandis*, to approval, which in practice is employed as a simplified procedure of ratification in most cases. For this reason, provisions on approval in article 14 should rather be amalgamated with the provisions in this article, and not with those in article 14.

Article 13

Since articles 8 and 9 are to be deleted, it will be necessary to incorporate provisions of paragraph 2 of article 9.

Article 15

1. Paragraphs 1 (*b*) and 1 (*c*) are perhaps too technical and trivial to merit inclusion here.

2. Paragraph 2 is stating the obvious and could be dispensed with.

3. The proper place for paragraph 3 would appear to be section V rather than here.

4. The article in its entirety could therefore be deleted, while the essence of paragraph 1 (*a*) could be combined with the provisions of article 16.

Article 17

1. This article would seem to impose a great obligation, admittedly of good faith, upon a State which has not decided to become a party to the international agreement. The obligation of the nature stated in this article, if any, should not in principle accrue to the State referred to in paragraph 1. For this reason paragraph 1 should be deleted.

2. The wisdom of having an article of this character may legitimately be doubted, since the whole idea underlying it would appear to be too legalistic in approach. Moreover, the criterion given in this article for refraining from certain kinds of acts is in any case too subjective and difficult of application. A better solution would seem to be to leave the matter entirely to the good faith of the parties.

Articles 18, 19 and 20

1. The Government of Japan takes exception to the rules proposed by the International Law Commission on the question of reservation to multilateral international agreements. In its view, the basic principle governing the question of reservation should rather be the reverse, that a State may make a reservation only if the intention of the parties is not against the reservation in question. There is no inherent right of a State to become a party to an international agreement with whatever reservation it pleases.

2. An international agreement is almost always the result of a compromise among various conflicting interests, arrived at through a series of negotiations. If it were allowed to upset this balance of interests, after the agreement has been established, through the loophole of reservations, then it is feared that the whole system under the agreement in question might fall to the ground. The parties to the agreement are entitled to protect this integrity of the agreement.

3. From the standpoint *de lege ferenda*, the rule proposed by the Commission is to be rejected in that it would in effect encourage the making of reservations by States parties to the international agreement. Since the reservation is the means through which a derogation from the principles established under the agreement is sought, its abuse should be carefully guarded against.

4. It must also be borne in mind that the rules to be proposed in these articles are residual by nature, and applicable only to those cases where the international agreement in question is silent on this point. The parties are always free to choose whatever rule they like on this question by agreement among themselves.

5. According to the provisions of article 18, paragraph 1 (*d*), a State may not formulate a reservation which is incompatible with the object and purpose of the agreement, which, in consequence, would seem to be null and void. Nevertheless, article 20, paragraph 2 (*b*) provides that the application of this test of compatibility with the object and purpose of the agreement is left entirely to individual parties, who are entitled to draw its legal consequences. It would seem more logical to set up a system under which the general intention of the parties is ascertained, be it by a certain majority decision or by unanimity.

6. The opinion of the International Court of Justice in the case concerning reservations to the Genocide Convention is certainly to be respected. But it is submitted that the rule enunciated by the Court is not to be regarded as a sacred rule capable of universal application. The Court itself made it abundantly clear that "the replies which the Court is called upon to give to the questions asked by the General Assembly are necessarily and strictly limited to the [Genocide] Convention," and that the Court was seeking these replies "in the rules of law relating to the effect to be given to the intention of the parties [of the Genocide Convention]". Thus the rule to be proposed *de lege ferenda* need not necessarily follow the line taken up by the Court, which after all was trying to find out what the intention of the parties was in this specific case.

7. It is not very seldom that a declaration attached by a State to an international agreement causes in practice a serious difficulty of determining whether it is in the nature of a reservation or of an interpretative declaration (see, for example, the case of an Indian declaration to the IMCO Convention). For this reason, a new paragraph is suggested in an attempt to eliminate this practical difficulty. Under these provisions, mere silence to a declaration not entitled as reservation will not produce the legal effect of a tacit acceptance of it as provided in article 19 (see paragraph 2 of article 18 of the Japan draft).

Article 21

The principle of reciprocity in the operation of a reservation would seem to require that a non-reserving State in its relations with the reserving State should not merely be *entitled to claim*, but should be *definitively entitled to* the same modification effected by the reservation. For this reason it is suggested to delete the word "claim" in paragraph 1 (*b*).

Article 23

The substance of paragraph 2 is acceptable, but the matter can safely be left to the interpretation of the international agreement in question.

Article 24

The technique of provisional entry into force is in fact sometimes resorted to as a practical measure, but the precise legal nature of such provisional entry into force does not seem to be very clear. Unless the question of legal effect of such provisional entry into force can be precisely defined, it would seem best to leave the matter entirely to the intention of the contracting parties. Provisions of article 23, paragraph 1 could perhaps cover this eventuality.

Article 25

The provisions in this article are on the whole acceptable. However, it is not clear from the letter of paragraph 1 whether the obligation to register under this article concerns the category of international agreements referred to in Article 102 of the Charter of the United Nations, or whether it concerns all the international agreements as defined in these draft articles.

Articles 26 and 27

These two articles will serve a useful purpose in establishing procedures for correction of errors, but they appear to be too detailed for a convention. In the case of a convention, the two articles could better be amalgamated in one article.

Article 29

1. Paragraph 1 is to a great extent redundant with paragraph 1 (*g*) of article 1. The first sentence should therefore be deleted.

2. Paragraphs 2 to 7 will no doubt provide a useful guide in a code, but it does seem a little out of place as well as proportion to provide for procedural details of a depositary in a general convention on the law of international agreements. The article could be reformulated in a more concise form.

ANNEX. JAPAN DRAFT

Draft articles on the law of international agreements

PART I. CONCLUSION, ENTRY INTO FORCE AND REGISTRATION OF INTERNATIONAL AGREEMENTS

Section I: General provisions

Article 1

Definitions

1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

(*a*) "International agreement" means any agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, concluded between two or more States or other subjects of international law and governed by international law.

(*b*) "Signature", "Ratification", "Accession", "Acceptance" and "Approval" mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by an international agreement. Signature, however, also means according to the context an act whereby a State authenticates the text of an international agreement without establishing its consent to be bound.

(*c*) "Instrument of full powers" means a formal instrument of whatever designation issued by the competent authority of a State authorizing a given person to represent the State either for the purpose of carrying out all the acts necessary for concluding an international agreement or for the particular purpose of negotiating or signing an international agreement or of executing an instrument relating to an international agreement.

(*d*) "Reservation" means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving an international agreement, whereby it purports to exclude or restrict the legal effect of some provisions of the international agreement in its application to that State.

(*e*) "Depositary" means the State or international organization entrusted with the functions of custodian of the text of the international agreement and of all instruments relating to the international agreement.

2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State.

Article 2

Scope of the present articles

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every international agreement as defined in article 1, paragraph 1 (*a*).

2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law.

Article 2 bis

Derogation from the present articles

Notwithstanding the provisions of article 2, paragraph 1, States parties to the present articles may, by mutual agreement, derogate from any of the provisions of the present articles.

Article 3

Capacity to conclude international agreements

Capacity to conclude international agreements under international law is possessed by States and by other subjects of international law.

Section II. Conclusion of international agreements by States

Article 4

Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept an international agreement

1. For the purpose of negotiating, drawing up or authenticating an international agreement on behalf of a State:

(*a*) The Head of State, Head of Government and Foreign Minister are not required to furnish any evidence of their authority;

(*b*) The Head of a diplomatic mission is not required to furnish any evidence of his authority in regard to an international agreement between his State and the State to which he is accredited;

(*c*) The Head of a permanent mission to an international organization is not required to furnish any evidence of his authority in regard to an international agreement drawn up under the auspices of the organization in question to which he is accredited;

(*d*) Any other representative of the State shall be required to furnish evidence of his authority by producing an instrument of full powers, unless this requirement is waived by the other negotiating State or States.

2. For the purpose of signing an international agreement on behalf of a State, except where the proposed international agreement expressly provides otherwise:

(*a*) The Head of State, Head of Government and Foreign Minister are not required to furnish any evidence of their authority;

(*b*) Any other representative of the State shall be required to furnish evidence of his authority by producing an instrument of full powers, unless this requirement is waived by the other negotiating State or States.

3. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of a State other than the Head of State, Head of Government or Foreign Minister, that representative shall be required to furnish evidence of his authority by producing an instrument of full powers.

4. In case of urgency, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned shall be accepted, provided that the instrument of full powers shall be produced in due course unless this requirement is waived by the other negotiating State or States.

Article 5. [Delete]

Article 6. [Delete]

Article 7. [Delete]

Article 8. [Delete]

Article 9. [Delete]

Article 10

Signature and initialling of the international agreement

1. Where the international agreement has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the international agreement itself or in a separate agreement:

(*a*) That signature shall take place on a subsequent occasion; or

(*b*) That the international agreement shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (*a*) The international agreement may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the State concerned, in which case the signature is subject to confirmation.

(*b*) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the international agreement.

(*c*) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the international agreement.

3. (*a*) The international agreement, before being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the international agreement.

(*b*) When initialling is followed by the subsequent signature of the international agreement, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the international agreement.

(*c*) Notwithstanding sub-paragraphs (*a*) and (*b*) above, initialling may be equivalent to signature provided that the intention is clearly indicated by the circumstances.

Article 11

Legal effects of a signature

1. Where an international agreement is subject to ratification, approval or acceptance, signature does not establish the consent of the signatory State to be bound by the international agreement.

However, the signature shall:

(*a*) Operate as an authentication of the text, if the text has not been previously authenticated in another form; and

(*b*) Qualify the signatory State to proceed to the ratification, approval or acceptance of the international agreement in conformity with its provisions.

2. Where the international agreement is not subject to ratification, approval or acceptance, signature shall establish the consent of the signatory State to be bound by the international agreement.

Article 12

Ratification or approval

1. An international agreement requires ratification or approval when the international agreement expressly prescribes that it shall be subject to ratification or approval, respectively, by the signatory States.

2. In addition to paragraph 1 above, ratification or approval is necessary in cases where the representative of the States in question has expressly signed "subject to ratification" or "subject to approval" respectively.

Article 13

Accession

A State may become a party to a multilateral international agreement by accession when it has not signed the international agreement and:

(*a*) The international agreement specifies accession as the procedure to be used by such a State for becoming a party; or

(*b*) The international agreement has become open to accession by the State in question through agreement of the States concerned.

Article 14

Acceptance

A State may become a party to an international agreement by acceptance when:

(*a*) The international agreement provides that it shall be open to signature subject to acceptance and the State in question has so signed the international agreement; or

(*b*) The international agreement provides that it shall be open to participation by simple acceptance without prior signature.

Article 15. [Delete]

Article 16

Legal effects of ratification, accession, acceptance and approval

Ratification, accession, acceptance or approval, which must be carried out by means of communication of a written instrument, establishes the consent of the ratifying, acceding, accepting or approving State to be bound by the international agreement.

Article 17. [Delete]

Section III. Reservations

Article 18

Formulation of reservations

1. A State may formulate a reservation to an international agreement, only if:

(*a*) The making of reservations is authorized by the terms of the international agreement or by the established rules of an international organization; or

(*b*) The international agreement expressly authorizes the making of reservations to specified provisions of the international agreement and the reservation in question relates to one of the said provisions; or

(*c*) The international agreement expressly prohibits the making of a specified category of reservations, in which case the formulation of reservations falling outside the prohibited category is by implication authorized; or

(*d*) In the case where the international agreement is silent concerning the making of reservations, the reservation is not incompatible with the object and purpose of the international agreement.

2. A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as reservation.

3. A reservation may be formulated:

(*a*) Upon the occasion of the adoption of the text of the international agreement, provided that it must be confirmed at the time of signature, ratification, accession, acceptance or approval of the international agreement; or

(*b*) Upon signing the international agreement at a subsequent date; or

(*c*) Upon the occasion of the exchange or deposit of instrument of ratification, accession, acceptance or approval.

Articles 19-20

The effect of reservations formulated

1. The effect of a reservation formulated in accordance with the provisions of article 18 shall be conditional upon its acceptance, express or tacit, by all States parties to the international agreement or to which the international agreement is open to become parties, unless

(*a*) The international agreement otherwise provides; or

(*b*) The States are members of an international organization which applies a different rule to international agreements concluded under its auspices.

2. A reservation shall be regarded as having been tacitly accepted by a State if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

3. An objection by a State which has not yet established its own consent to be bound by the international agreement shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the international agreement.

Article 21

The application of reservations

1. A reservation established in accordance with the provisions of article 19-20 operates:

(*a*) To modify for the reserving State the provisions of the international agreement to which the reservation relates to the extent of the reservation; and

(*b*) Reciprocally to entitle any other State party to the international agreement to the same modification of the provisions of the international agreement in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the international agreement which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the international agreement *inter se*.

Article 22

The withdrawal of reservations

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

Section IV. Entry into force and registration

Article 23

Entry into force of international agreements

1. An international agreement enters into force in such manner and on such date as the international agreement itself may prescribe.

2. If an international agreement does not specify the date of its entry into force:

(*a*) In the case of a bilateral international agreement not subject to ratification, approval or acceptance, it enters into force on the date of its signature or, when the international agreement is embodied in two or more related instruments, on the date of signature of the last instrument; and

(*b*) In other cases, it enters into force on the date to be determined by agreement between the States concerned.

3. The rights and obligations contained in an international agreement become effective for each party as from the date when the international agreement enters into force with respect to that party, unless the international agreement expressly provides otherwise.

Article 24. [Delete]

Article 25

The registration and publication of international agreements

1. The registration and publication of international agreements entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. The procedure for the registration and publication of international agreements shall be governed by the regulations in force and established practices for the application of Article 102 of the Charter.

3. International agreements entered into by any party to the present articles, not a Member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

Articles 26-27

Correction of errors in the text of international agreements

1. Where an error is discovered in the text of an international agreement for which there is no depositary after the text has been authenticated, the interested States shall by mutual agreement correct the error in either of the following ways, unless another procedure has been agreed upon:

(*a*) By having the appropriate correction made in the text of the international agreement and causing the correction to be initialled in the margin by representatives duly authorized for that purpose; or

(*b*) By executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the international agreement and the corrections which the parties have agreed to make.

2. Where an error is discovered in the text of an international agreement for which there is a depositary, after the text has been authenticated:

(*a*) The depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to the attention of any other States which may subsequently have signed or accepted the international agreement, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction; and

(*b*) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the ratification of the text and transmit a copy of the *procès-verbal* to each of the States which are or may become parties to the international agreement.

3. Whenever the text of an international agreement has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date on which the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of an international agreement made under the provisions of this article shall be communicated to the Secretariat of the United Nations if that international agreement has been registered therewith under article 25.

Article 28

The depositary of multilateral international agreements

1. Where a multilateral international agreement fails to designate a depositary of the international agreement, and unless the States which adopted it shall have otherwise determined, the depositary shall be:

(*a*) In the case of an international agreement drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

(*b*) In the case of an international agreement drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating States shall consult together concerning the nomination of another depositary.

Article 29

The functions of a depositary

1. A depositary of an international agreement shall act impartially in the performance of his functions as custodian of the original

text of the international agreement and of all instruments relating thereto.

2. In addition to any functions expressly provided for in the international agreement and unless the international agreement otherwise provides, a depositary shall have the duty:

(*a*) To prepare certified copies of the original text or texts and transmit such copies to all States parties to the international agreement or to which the international agreement is open to become parties;

(*b*) To furnish to the State concerned an acknowledgement in writing of the receipt of any instrument or notification relating to the international agreement and promptly to inform the other States, mentioned in sub-paragraph (*a*) above, of the receipt of such instrument or notification, or when appropriate, of the fulfilment of the conditions laid down in the international agreement for its entry into force;

(*c*) On a reservation having been formulated, to communicate the text of such reservation and any notification of its acceptance or objection to the interested States as prescribed in articles 18 and 19-20;

(*d*) On receiving a request from a State desiring to accede to the international agreement, to communicate the request to the States whose consent to such participation is specified in article 13 as being material; and

(*e*) On an error having been discovered in the text of the international agreement, to inform all States concerned of such error, and the objection, if any, to the correction of such error, raised by any of them and, on proceeding with the correction thereof under the provisions of article 26-27, draw up and execute a *procès-verbal* of such correction and furnish them a copy thereof.

3. The depositary shall have the duty of examining whether a signature, an instrument, a notification, a reservation, or an objection to a reservation is in due form under the provisions of the international agreement in question or of the present articles, and, if need be, to communicate on the point with the States concerned. In the event of any difference arising between a State and the depositary as to the performance of these functions, the depositary shall, upon the request of the States concerned or on its own initiative, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

15. Luxembourg

[PART I]

Transmitted by a note verbale *of 14 December 1964 from the Permanent Representative to the United Nations*

[*Original: French*]

Part I: Conclusion, entry into force and registration of treaties (articles 1-29)

Before dealing in detail with the twenty-nine articles which make up the first series of provisions drawn up by the International Law Commission on the law of treaties, the Luxembourg Government would like to stress the importance it attaches to this part of the Commission's work and to express its very deep appreciation of the value of the draft articles.

The Luxembourg Government hopes that the Commission's work will soon result in the conclusion of a world-wide convention on this fundamental subject. It is with that object that the Luxembourg Government takes the liberty of submitting herewith a number of critical comments and proposals. Those articles or parts of articles on which no observations have been made are fully approved by the Luxembourg Government.

Article 1

The expression "treaty". Paragraph 1(*a*) of this article assigns the following meaning to the expression "treaty": "Treaty means any international agreement in written form...concluded between two or more States or other subjects of international law and governed by international law." It is obviously difficult to define a notion so fundamental as that of an international treaty: indeed, a point has been reached beyond which ideas can no longer be defined in strictly juridical terms. The question therefore arises whether it is advisable to give a legal definition of the terms "treaty" or whether it might not be better simply to state the idea and leave it to doctrine to define it.

The essence of the paragraph quoted lies in defining a treaty as "any international agreement". But the term "agreement" is nothing else than a synonym of "treaty". If the International Law Commission wished to maintain a provision of this nature, it appears to the Luxembourg Government that a valid definition of the idea of a treaty should concentrate on three elements:

(*a*) the consensual nature of a treaty, which represents an agreement between two or more parties;

(*b*) the nature of the parties, who are either States or other subjects of international law;

(*c*) the binding effect sought by the parties, in the sense that the treaty (unlike a mere declaration of common purpose, of a political nature) has always as its purpose a legal commitment entered into by the parties.

On the other hand, there might be some question whether it is correct to include in the actual definition of the treaty two elements stated in the International Law Commission's text, namely, the written form and the reference to international law.

According to the draft text (which should be clear in itself, without reference to the commentary), the question may well arise whether the written form should be regarded as a matter of substance, that is, whether it ought to be a factor in determining the validity of treaties or whether it is simply a way of saying that the future convention shall apply only to treaties in written form. If the second interpretation is the correct one, it would be preferable to eliminate that element from the definition and to add at the end of the article a provision stating that

> "The rules laid down by these articles relate only to international treaties in written form".

Further, the question arises whether it is really necessary to say that the draft articles refer exclusively to treaties "governed by international law". That qualification seems to be implied by the very nature of the contracting parties; hence, the rules of international law could only be made inapplicable as an exception by inserting a specific reference to another system of juridical rules or possibly by virtue of the very special subject of a particular agreement. That is such an exceptional case that it would be better not to complicate the general definition of a treaty by a reference to that unlikely assumption.

In the opinion of the Luxembourg Government, if the term "treaty" is to be defined, the definition might read somewhat as follows:

> "The expression, ' treaty' means any agreement between two or more States or other subjects of international law designed to create a mutual obligation for the parties, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation etc."

"Treaties in simplified form". The term "treaty in simplified form", as stated in paragraph (11) of the commentary, could be defined by the form, or rather the absence of form of the treaty. Actually, the indications under sub-paragraph (*b*) of article 1, paragraph 1, do not constitute a definition, but are merely an enumeration of the various formal procedures characteristic of this category of agreements.

The term described in this sub-paragraph recurs twice in the articles which follow: in article 4, paragraph 4(*b*) which states that treaties in simplified form may be signed without requiring the representatives of the parties to produce instruments of full powers; and in article 12, paragraph 2(*d*), which states that such

treaties shall be presumed not to be subject to ratification. Juridically, a treaty in simplified form is therefore characterized by the absence of full powers and the waiving of ratification. The use of certain procedures, such as those indicated in article 1, paragraph 1(*b*), appears to betoken a determination to waive such formalities. That being the case, the real definition of "treaty in simplified form" would be something like the following: "a treaty concluded in circumstances which indicate as regards the parties the willingness to enter into a commitment without observing the formalities of full powers and ratification".

The foregoing shows that the term "treaty in simplified form" does not describe a category of agreements which is sufficiently precise to constitute a normative idea; in reality, it is a purely descriptive term, certainly interesting from the point of view of juridical doctrine, but only with difficulty usable in framing a legal definition. For the purposes of these draft articles, it should be sufficient to indicate at the appropriate places in what circumstances the parties should be regarded as having renounced the production of full powers and ratification.

Consequently, the Luxembourg Government proposes the deletion of this part of the definitions.

"*General multilateral treaty*". Paragraph 1(*c*) defines the term "general multilateral treaty" to mean a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole. Subsequently, this term is used in only one other place in the draft articles, namely in paragraph 1 of article 8, which states that "every State" may become a party to such a treaty. The Luxembourg Government reserves its right to express its views on the substance of this question in its commentary on article 8. For the time being, confining itself to the matter of definitions, it would like to make the following comments.

(*a*) This specific term is introduced without the text having previously defined the term "multilateral treaty" in general.

(*b*) In the opinion of the Luxembourg Government, "of general interest to States as a whole" is much too vague a criterion to form the substance of a workable definition. Since the use of the term defined in this sub-paragraph will actually govern the question of the participation of States in multilateral treaties, the application of such a debatable criterion might give rise to insoluble conflicts concerning the general nature of the norms established by a multilateral treaty, or whether they are of interest to States as a whole.

For the reasons given, the Luxembourg Government considers that this sub-paragraph should be deleted from the article on definitions.

The term "approval". "Approval" is one of the many terms enumerated in paragraph 1(*d*). As it is commonly understood, the term means the internal formalities to which an international treaty is subject and, more particularly, parliamentary approval of treaties. It is only as a result of an unfortunate confusion of terms that "approval" has come to be used in international affairs as the equivalent of the term "ratification"; the converse is also true, moreover, since the term "ratification" is also frequently used in municipal law to mean parliamentary approval.

The Luxembourg Government invites the Commission to consider whether it should not take advantage of this opportunity to perfect the terminology once and for all; in these draft articles, which are concerned solely with the *external* and international aspect of the problem, references to the term "approval" of international treaties should be systematically eliminated and only the terms "ratification" and "accession" should be maintained.

Article 4

This article seeks to define the powers of the different organs of the State—Heads of State, Heads of Government, Ministers for Foreign Affairs, Heads of Missions—with regard to the different operations leading to the conclusion of international treaties. According to their position in the national and international hierarchy, these officials can, to a greater or lesser degree, act *qualitate qua*, i.e., without being required to furnish the other party or parties with evidence of their authority to perform the various acts designed to bring international treaties into being and into force. This conception, which is based on the idea that trust should prevail in international relations, must be fully approved.

Since the norms defined in this article do not, however, necessarily coincide with the powers granted by the municipal law of various States—in fact, they attribute to Heads of Governments, Ministers for Foreign Affairs and Heads of Mission wider powers than those which they possess by virtue of the internal laws and usages of certain countries—it would be advisable to make it quite clear that article 4 concerns only mutual relations between States, and is not intended to modify the powers accorded to external organs by municipal law. A clarification of this type would be extremely useful, and even indispensable, for States, such as Luxembourg, which accept the principle that international treaties become an integral part of municipal law.

In practice, it would be a question of completing this article by a final sub-paragraph, worded as follows:

> "The provisions of this article do not have the effect of modifying national constitutions, laws and usages as regards the powers of organs of the State in foreign relations."

Moreover, paragraph 4(*b*) of this article provides that in the case of "Treaties in simplified form", it shall not be necessary for a representative to produce an instrument of full powers, unless called for by the other party. This provision opens the door to great uncertainty, for it would be practically impossible to distinguish between treaties which are invalid owing to lack of full powers and treaties which are valid as a result of the utilization of the "simplified form".

In reality, in the text as drafted it is a question of establishing the cases in which a treaty can be validly negotiated, drawn up, authenticated and signed without it being necessary for the person executing these formalities to possess an instrument of full powers executed in good and due form. Observation of practice shows that the so-called "treaties in simplified form" are most frequently concluded either within the established diplomatic relations between two countries (this is the case of "exchanges of diplomatic notes"), or within an existing international organization (this is the case of the "agreed minute" mentioned in article 1, paragraph 1(*b*). If full powers are dispensed with in such cases, it is because the negotiation and signing of the agreement take place on the basis of an established and well-tested relationship of trust. It is for this reason that in such cases it is not necessary to call for full powers.

This being so, it would seem dangerous to adopt provisions which would have the effect of encouraging the practice of treaties in simplified form beyond the limits so defined. The Government of Luxembourg therefore proposes that sub-paragraph 4(*b*) should be deleted.

In fact, it believes that the problem is already solved by paragraph 2, except that in this provision the idea of a "Head of a permanent mission to an international organization" would have to be replaced by the more general idea of "representative". Indeed, it sometimes happens that a country is represented in an international organization by a member of its Government or by other persons designated *ad hoc* as representatives.

Article 5

The International Law Commission rightly notes that the contents of this article are more descriptive than normative. It is indeed difficult to formulate precise juridical rules for the first phase when drawing up treaties: this is governed by simple usages, but from the juridical point of view it is subject to the principle of liberty.

At the most, the period of negotiation could only give rise to juridical problems involving the responsibility which participating

States might incur as a result of their actions during the negotiations. The Government of Luxembourg feels that article 5 in its present form should be deleted.

Article 6

This provision is of capital importance to the structure of the whole. The article prepared by the International Law Commission is based on the following system:

(*a*) The text of treaties drawn up by an international conference convened by the participating States themselves or by an international organization is adopted by a two-thirds majority;

(*b*) The text of treaties drawn up within an international organization is adopted by the voting rules applicable in that organization;

(*c*) The text of other treaties is decided upon by the mutual agreement of the States participating in the negotiations. In the commentary it is specified that these "other cases" include bilateral treaties and multilateral treaties concluded between a small group of States otherwise than at an international conference.

This systematization elicits an initial comment. It is difficult to conceive how a multilateral treaty, even between a small group of States, could be concluded otherwise than at an international conference. Any negotiations designed to result in the signing of a multilateral treaty assume, by the force of circumstances, the character of a meeting of representatives of several Governments, which is itself the definition of an international conference, even if such a conference is constituted and operates in an informal manner. Thus, a great number of multilateral treaties which, although the number of parties is more or less limited, play a role of the greatest importance in the European and Atlantic regions, have been drawn up in international conferences. Such is the case of the Conventions which established Benelux, the European Communities, the Council of Europe, the Organization for European Economic Co-operation, the Atlantic Alliance, the Organization for Economic Co-operation and Development, the European Free Trade Association, the Treaty of Brussels and the Treaty establishing the Western European Union, etc. This shows that sub-paragraph (*c*) of article 6 in reality concerns only the case of bilateral treaties, whereas the general rule regarding multilateral treaties is the clause of sub-paragraph (*a*) which subjects "international conferences" to the principle of the two-thirds majority.

This rule appears to be based on the general practice at conferences convened under the auspices of the United Nations. It must be recognized that this rule is totally unsuited to the conditions prevailing at conferences of a regional character, where it is inconceivable for negotiations to be undertaken otherwise than on the basis of mutual agreement, that is, unanimity.

The Government of Luxembourg believes that the only principle which is truly consistent with the consensual character of treaties, whether bilateral or multilateral, is the *principle of mutual agreement.* It must be recognized that as soon as this principle is abandoned, the transition is made from the contractual plane to the institutional plane. For this reason, the Government of Luxembourg believes that a derogation from the principle of unanimity between the contracting parties is conceivable only when a multilateral treaty is drawn up within the framework or under the auspices of an international organization. It recognizes, moreover, that there is a growing tendency for the negotiation of international conventions to take place within an organized structure and consequently in accordance with the voting rules applicable in the various organizations. For this reason it believes that article 6 could without disadvantage be composed as follows:

(*a*) At the beginning, it would be necessary to affirm as a general principle that the adoption of the text of treaties takes place by mutual agreement of the States participating in the negotiations.

(*b*) On the other hand, when a treaty is drawn up within or under the auspices of an international organization, establishment of the text would be governed by the voting rules applicable in the organization. Even this position cannot be affirmed without reservations, for it is known that there are examples of international institutions which make decisions according to the majority principle whose constitutions explicitly refer certain questions to subsequent agreements, precisely in order to guarantee the application of the principle of unanimous agreement. (See, as an example, articles 220, 236 and 237 of the Treaty establishing the European Economic Community.)

(*c*) Finally, at international conferences the voting rules unanimously adopted by those conferences would be applicable.

The Government of Luxembourg therefore has the honour to submit the following draft to the International Law Commission:

"1. The adoption of the text of a treaty takes place by the unanimous agreement of the States participating in the negotiations.

"2. In the case of a treaty drawn up at an international conference, the adoption of the text takes place according to the voting rule established by the rules of procedure of that conference.

"3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place according to the voting rule applicable in the competent organ of the organization, except in the case of a derogation resulting from the constitution of the latter."

Article 8

This article distinguishes between "general multilateral treaties", that are, generally, open to "every State", and other treaties that are only open to States which took part in the adoption of its text, States to which accession to the treaty was made open by its terms, or States which were invited to attend the conference at which the treaty was drawn up.

It will be recalled that the "general multilateral treaty" is defined in article 1 as being a treaty which establishes "general norms of international law" or "deals with matters of general interest to States as a whole". In its commentary on article 1, the Government of Luxembourg has already explained why it does not think that this definition can be used, in view of the uncertainties that are inherent in the notions it employs.

With regard to the provisions of article 8 itself, the Government of Luxembourg considers that the parties to any multilateral convention have the sovereign right to decide on the participation of States which were not among the original parties. It is not possible to find an *a priori* solution to this question, since the solution depends very much on the purpose of each individual treaty and on the political and juridical aims of the original parties. The Government of Luxembourg therefore considers that paragraph 1 of this article should be deleted, since the three hypotheses contained in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 2 give a complete and satisfactory ruling on the matter.

Article 9

This article is based on the following distinction: Multilateral treaties may be opened to the participation of other States:

in the case of most multilateral treaties, either by a two-thirds majority decision by participating States—or, as the case may be, by a decision of the competent organ of an international organization;

in the case of multilateral treaties "concluded between a small group of States", by mutual agreement of all the parties.

We first wish to draw attention to the debatable nature of the notion of "a small group of States" to which is subordinated the distinction, a very important one in view of its consequences, between treaties that may be made open by a majority decision and treaties that may be made open by a unanimous decision. But whenever a multilateral treaty is not simply opened to any State whatsoever it could be claimed that one is dealing with a "small group of States".

In accordance with the views just expressed regarding article 6, relating to the adoption of the text of a treaty, the Government of Luxembourg considers the procedure suggested in article 9, paragraph 1, to be inadmissible. Such a procedure would enable third States to accede in spite of the objections that might be raised by a minority of the parties. It would also make it possible to introduce subsequent alterations to the instruments of accession of multilateral treaties. In reality, the opening of a multilateral treaty to the participation of States other than those to which it was originally open is equivalent to altering the accession clauses of a multilateral treaty or to introducing such clauses into a treaty where they did not exist. Such a provision should therefore in principle be subject to the same requirements as the revision of the treaty.

The Government of Luxembourg therefore proposes replacing article 9 with a clause which could be combined with paragraph 2 of article 8 to form a new article, stating simply that:

> "A multilateral treaty may be opened to the participation of States other than those to which it was originally open, subject to the provisions regarding revision of the treaty."

Having established this principle, the question arises as to whether it might not be appropriate to introduce to that effect a simplified procedure which would obviate the need for another international conference. The provisions of article 9, paragraph 3, could, *mutatis mutandis*, provide the model for such a solution: When the depositary of a treaty receives a request for admission from a third State, he shall consult the original parties in order to discover whether the provisions regarding revision of the treaty are being complied with. Provision could also be made that, at the expiry of a specified time-limit, consent of a party shall be presumed if it has not notified the depositary of its objection.

The Government of Luxembourg considers that this solution, while respecting the consensual nature of international treaties, would provide enough flexibility to allow multilateral conventions to be opened to the accession of other States, without undue inconvenience, subject to the agreement of all the original parties.

Article 10

This article gives rise to two questions which are intended to clear up certain doubtful points.

In paragraph 1, the meaning of the words "in the treaty itself or in a separate agreement" does not seem very clear. International treaties are often set out in a number of documents, including "annex protocols" and "signature protocols". But the treaty *in the legal sense of the word* is represented by all these documents put together. The words quoted therefore seem superfluous in this context.

Further, in the text of this article the distinction is not drawn very clearly between a signature "*ad referendum*" and a signature "subject to ratification". It seems certain that a signature *ad referendum* followed by a confirmation only has the effect of a signature within the meaning of article 11, and that such a signature, even if confirmed, can still be subject to ratification, should the occasion arise. In order to avoid any misunderstandings in this matter, it would seem advisable to delete the word "full" in paragraph 2, sub-paragraph (*c*), as this wording could give the impression that, once a State had confirmed a signature *ad referendum*, it would be fully committed to the terms of the treaty. This does not, however, seem to be the scope of the confirmation: it simply has the effect of transforming the signature *ad referendum* into a signature pure and simple, which, in accordance with the provisions of the treaty, will have one of the effects defined in article 11.

Article 11

The Government of Luxembourg would like to make a remark regarding the terminology employed in connexion with this article. As was pointed out with regard to article 1, the use of the word "approval" should be forbidden in any instrument referring exclusively to the international operation of treaties.

Article 12

In accordance with the lengthy explanation given earlier, the Government of Luxembourg proposes deleting paragraph 2, sub-paragraph (*d*) relating to treaties "in simplified form". The assumption contained in this sub-paragraph is already implicit in sub-paragraph (*c*), referring to the intention to dispense with ratification resulting from "other circumstances evidencing such an intention". Now the form in which an agreement is concluded is one such circumstance.

The deletion of sub-paragraph (*d*) would have the added advantage of making it possible to delete the whole of paragraph 3 which, in any case, is merely a repetition of the provisions of paragraph 2. Once the assumption contained in paragraph 2, sub-paragraph (*d*) is eliminated, paragraph 3 will no longer refer to treaties which themselves expressly provide that they shall come into force upon signature (paragraph 2(*a*)). Now it is difficult, if not impossible, to see how the hypothetical cases mentioned in paragraph 3 can arise when a treaty expressly provides that it shall come into force upon signature. The cases referred to in this connexion in paragraph (8) of the commentary are not sufficiently representative to warrant inserting an actual provision in the draft articles.

The question raised in the same paragraph of the commentary regarding treaties that come into force provisionally is another matter. In such cases, application will be subject to the treaty subsequently coming into force and will still be made only within the limits of the powers normally held by the Governments of the contracting parties.

Article 14 et seq.

In this article—and the same holds true for articles 15, 16 and 17—the International Law Commission attempted to clear up an unfortunate confusion in terminology resulting from replacing the ideas of ratification and accession by those of "acceptance" and "approval", respectively. As stated in paragraph (2) of the Commission's commentary, this terminology seems to be due to considerations connected with the internal constitutional structure of certain States; from the international point of view, it creates confusion.

The Luxembourg Government, for its part, proposes that the expressions "acceptance" and "approval" in articles 14, 15, 16 and 17 should be eliminated entirely. Regarding the idea of approval, it has already been said that it is an expression peculiar to the internal juridical structures which should be completely banished from international practice. On the other hand, account could be taken of terminology using the idea of "acceptance" by means of an additional article, inserted after article 17, saying that the provisions concerning ratification and accession shall be applicable to "acceptance", according to whether acceptance follows prior signature or not. That article could be worded as follows:

> "The provisions of the foregoing articles concerning ratification shall be applicable to treaties signed subject to acceptance; the provisions concerning accession shall be applicable to treaties containing the provision that they shall be open to participation by simple acceptance, without prior signature."

Article 15

This article calls first of all for two comments concerning terminology. In paragraph 1, sub-paragraph (*c*), it would be preferable to say "two alternative texts" rather than "two differing texts". In paragraph 2, sub-paragraph (*a*), the word "*certifié*" (French text only) refers to the exchange of instruments, and therefore should be in the singular.

The Luxembourg Government also considered the relationship between the provisions of article 15, paragraph 2, and the provisions of article 23, respecting the entry into force of treaties. Not only does article 15 define the procedures applicable to ratification, accession or acceptance, it also determines the time at which the instruments shall enter into force. Article 23, in its turn, determines

the entry into force of treaties, which it is difficult to dissociate from the effect of the instruments mentioned in article 15.

It would seem necessary to distinguish here between two things: firstly, the time at which the mutual undertaking between the parties begins (from that time on, the parties can no longer withdraw unilaterally); secondly, the time at which the treaty enters into force—that is, becomes effective. When a treaty makes no provision in this respect, those two effects (the mutual undertaking and the entry into force) take place at the same time. On the other hand, some treaties provide that the entry into force shall take place later than the mutual engagement.

This analysis reveals that we must distinguish between the *procedure* for bringing about ratification, accession or acceptance (the subject of article 15) and the question of *the time* at which the treaty will enter into effect (the subject of article 23). As for such effect, we must distinguish, in accordance with the foregoing, between the time of the *commitment* of the parties (which takes place at the time agreement is documented by the exchange or deposit of the formal documents) and the time of *the entry into force* of the treaty (which may take place later).

In view of these distinctions, the Luxembourg Government considers that articles 15 and 23 should be redrafted.

New provision

The Luxembourg Government now proposes the insertion of a new provision stating that, owing to the effect of the entry into force of a treaty, the parties shall be obliged to take all appropriate measures to ensure the effectiveness of the treaty, specially by ensuring its publication and by taking the necessary measures for it to be carried out. Such a provision would remind States that the first obligation they incur in becoming bound by an international treaty is to take the measures necessary to ensure the effectiveness of the treaty in their national territories. Sometimes clauses of this type appear in some treaties (for example, one could cite article 86 of the Treaty to establish the European Coal and Steel Community and article 5 of the Treaty to establish the European Economic Community), but the same obligation is implicit in any international treaty.

The provision proposed above could be drafted as follows:

"By the entry into force of the treaty, the parties thereto shall be bound to take all measures, both general and particular, and above all measures of publicity, that are necessary to secure the application in full of the treaty in their territories."

Article 25

The Luxembourg Government fully approves the provisions of this article, but queries whether paragraph 2, as drafted, is not, in fact, an amendment to the United Nations Charter. In order to overcome this difficulty, it would be sufficient to redraft the paragraph as follows:

"States which are parties to the present article and are not Members of the United Nations shall undertake to register with the Secretariat of that Organization the treaties which they have concluded."

[PART II]

Transmitted by a note verbale *of 23 December 1964 from the Permanent Representative to the United Nations*

[*Original: French*]

The Luxembourg Government approves the solution adopted by the International Law Commission with respect to failure to observe a provision of the internal law of a State regarding competence to enter into treaties. The rule drafted by the Commission, however, leaves another question open, viz, failure on the part of the representatives of a State to comply with other rules of internal law (more specifically of constitutional law), beside the provisions regarding competence to enter into treaties.

The following might be quoted as examples: a treaty of alliance concluded by a State that is constitutionally neutral; a military treaty concluded by a constitutionally demilitarized State; a treaty modifying the structure and competence of internal authorities as a result of the transfer of sovereign powers to an international organization (this difficulty led to discussions in various European countries at the time when the treaties setting up the European communities came into force); a treaty containing clauses contrary to the guarantees of fundamental freedoms granted under the constitution, etc. There is no need to point out that to subordinate the validity of international treaties to the observance of such rules, even if included in the constitution of a State, might lead to great uncertainty in international relations. A treaty must be presumed valid once it has been concluded by the organs competent to represent a State internationally; the violation of constitutional provisions—except those relating to the competence to enter into treaties, in the exceptional case referred to in this article—should not therefore be adduced as justification for questioning the validity of a treaty duly entered into.

It would perhaps be advisable for the International Law Commission in its commentary to deal more fully with the question we have just mentioned.

Article 37

The clause proposed by the International Law Commission is likely to create a great deal of legal uncertainty.

From a formal point of view one should ask first of all what "peremptory norms of general international law" mean here. Does it mean international usage, certain general principles of law, or can it also mean peremptory norms defined by international treaties? If the latter assumption is correct—and such would indeed appear to be the case from the commentary to the article—we should then ask, starting from what general level could an international treaty be regarded as validly establishing a peremptory norm which would be binding on other treaties. Moreover, the proposed clause would have the effect of introducing the whole question of the conflict of rules resulting from successive international treaties, whenever the source of a norm regarded as peremptory was an international treaty concluded previous to the treaty in dispute. By combining with this article the rule *pacta sunt servanda* (which is undoubtedly a peremptory norm), any international treaty incompatible with a previous treaty could be claimed to be null and void, except where the authors of the later treaty unquestionably have the power to abrogate the first treaty.

The uncertainty would be no less great from the substantive point of view. Indeed, as the Commission itself has pointed out, there is no authority in international life that is competent to define which norms are peremptory in relations between States and which are not. Precisely because of the contractual nature of all international treaties, it may even be claimed that *all* rules formulated by treaty are peremptory since each one represents an undertaking of a State towards other States. Indeed, a law which has its origin in a contract, owing to the mutual undertaking which it implies, is always more coercive than the law which is simply the law of a country, certain provisions of which allow wider freedom to the subjects to whom they relate.

It appears to the Luxembourg Government that the International Law Commission wished to introduce here a cause of nullity similar to the criteria of morality and "public policy" which in internal law are used to assess the compatibility of private contracts with certain fundamental conceptions of the social order. It is questionable whether such conceptions are suitable for transfer to international life, which is characterized by the lack of any authority, political or judicial, capable of imposing on all States certain standards of international justice and morality. Consequently, the proposed clause, far from serving its purpose, is likely only to have the effect of creating uncertainty and confusion. Much to its regret, the Luxembourg Government concludes that

in the present state of international relations it is not possible to define in juridical terms the substance of peremptory international law.

Lastly, the question arises *who* would be qualified to claim the nullity contemplated by this article: could such nullity be claimed only by the States parties to the treaty held to be incompatible with a peremptory norm? In that case the application of the provision would imply a contradictory attitude of the party claiming nullity, since that party itself would have contributed to the preparation and entry into force of the treaty disputed by it; it would be a kind of *venire contra factum proprium*. On the other hand, if it was assumed that third parties could claim the nullity of a treaty which they regarded as incompatible with a peremptory rule, this would be inconsistent with the principle of relativity, which, in the absence of any supra-national authority, continues to dominate the entire subject of international treaties.

Article 39

The Luxembourg Government proposes that the part of the text concerning "statements of the parties" should be clarified by the insertion of the word "concordant". This addition would prevent a party from invoking its own unilateral statements in order to secure the right to denounce a treaty or withdraw from it.

Article 40

The situation contemplated by the International Law Commission as justification for the provisions of paragraph 2 is not sufficient reason for the introduction of such a complicated rule. If it was really desired to safeguard against the—in fact highly improbable—inclinations of a small number of States which were the first to accede to a multilateral convention and wished to terminate it by mutual agreement, paragraph 2 might be replaced by a provision to the effect that States that had taken part in drawing up a treaty, but had not become parties to it, could still bring that treaty into force among themselves, even after the original parties had terminated it by mutual agreement.

It would certainly be preferable, however, to delete paragraph 2 of this article altogether.

Article 45

In accordance with its comments on article 37, the Luxembourg Government proposes that article 45 too should be deleted.

Article 48

The distinction drawn in the commentary between treaties drawn up "within" and those drawn up "under the auspices" of an international organization is too vague to serve as the criterion for the application of this provision. The Luxembourg Government considers that the clause in article 48—the fundamental idea of which it fully approves—should apply only in cases where a connecting link is established between a treaty and the statute of the organization concerned. Such a link should be considered to exist, for example, whenever there is a necessary relationship between the position of a State as a party to a treaty and its position as a member of the organization within which the treaty was negotiated and concluded. On the other hand, this clause should not apply when an international treaty, although concluded under the auspices of a specified organization, is open to States which are not also members of that organization.

Thus, to give some specific illustrations, the Treaty instituting the Benelux Economic Union provides that the States parties should conclude supplementary conventions on various matters (e.g. freedom of movement and legal co-operation) included in the Union's aim; in this case the connecting link is clearly established. The same is true of the conventions envisaged in article 220 of the Treaty establishing the European Economic Community, the object of which is the protection of persons and their rights, the elimination of double taxation, the mutual recognition of companies and the reciprocal recognition and execution of judicial decisions. The same is also true of the European Convention on Human Rights, which is intimately linked to the aims and operations of the Council of Europe.

The difficulty is to define this connecting link between a treaty and the law of an international organization in a sufficiently specific and precise way. For this purpose, a second sentence worded as follows might perhaps be added to the article:

> "This provision shall not apply when a treaty drawn up within an international organization is open to States which are not members of that organization."

General comments on grounds of nullity and the termination of treaties

Articles 33 to 37 and 42 to 43 indicate a number of grounds the effect of which is either to make a treaty void *ab initio* (fraud, error, coercion, conflict with a peremptory norm) or to terminate its operation (breach, impossibility of performance, fundamental change of circumstances, emergence of a new peremptory norm). These rules are not without analogy in certain civil law provisions. But unlike internal law, where there is always a judge competent to settle disputes arising out of contracts concluded between individuals, there is no authority at the international level capable of determining if the nullity or termination of a treaty on one of the grounds indicated, is invoked with good reason by a particular State. As the International Law Commission has repeatedly brought out in its commentary, this state of affairs entails a real danger for the permanence of international treaties. The danger is particularly marked in the case of a ground of nullity as vague as that of conflict with a peremptory norm of general international law, and, as far as the termination of treaties is concerned, in cases of breaches of undertakings, impossibility of performance, and, even more, fundamental changes of circumstances.

The Luxembourg Government considers that it is not possible in practice to embody in a formal treaty the various grounds of nullity, and particularly the motives for termination of treaties, if the various States do not undertake at the same time to submit, as far as the application of those provisions is concerned, to a jurisdiction or compulsory arbitration. Since it is illusory to believe that such a state of law can be reached in the foreseeable future, the Luxembourg Government ventures to propose the following solution.

At the end of the articles, *a new provision* should be inserted authorizing States parties to make a reservation, under which the provisions mentioned could not be invoked against them by States which were not bound in regard to them by the acceptance of arbitration or a compulsory jurisdiction. The effect of such a clause would be that the provisions of these articles could be taken in two ways:

In relations between States bound by an undertaking of an arbitral or judicial nature, the provisions relating to the nullity and termination of treaties would have full legal force;

In the relations with other States, only the general rules of international law would be applicable. That would not mean that the provisions drawn up by the International Law Commission would be unimportant; but between such States they would be for guidance only, and not have the force of legal rules proper.

The article proposed by the Luxembourg Government might be worded as follows:

> "Upon acceding to these articles, States parties may, without prejudice to the general rules of international law, exclude the application of the provisions relating to the invalidity and termination of treaties in regard to any State that has not accepted in respect to them an undertaking concerning compulsory jurisdiction or compulsory arbitration, regarding a treaty alleged to be invalid or to have terminated."

Article 51

The provisions of this article would not apply to the extent that a State had made use of the reservation proposed in the new article given above. In fact, as no legal obligation would then exist between such a State and any other State which had not undertaken with regard to the former State an obligation to submit to arbitration or a jurisdiction, the procedure laid down in the article would no longer serve any purpose.

16. MALAYSIA

[PART I]

Transmitted by a note verbale *of 26 July 1963 from the Ministry of External Affairs*

[*Original: English*]

The Ministry of External Affairs, Federation of Malaya presents its compliments to the Office of the Secretary-General of the United Nations and ... has the honour to inform the latter that the Government of the Federation of Malaya has no objection to part I of the draft articles on the law of treaties of the report of the International Law Commission issued at its fourteenth session held from 24 April to 29 June 1962.

[PART II]

Transmitted by a note verbale *of 15 September 1964 from the Ministry of External Affairs*

[*Original: English*]

...the Government of Malaysia has no objection to part II of the draft articles on the law of treaties...

17. NETHERLANDS

[PARTS I AND II]

Transmitted by a letter of 26 February 1965 from the Permanent Representative to the United Nations

[PART I]

[*Original: English*]

The scope of the draft articles

Although the Netherlands Government endorses the principle on which, in paragraph 21 of its report, the Commission bases its commentary on the introduction, it believes it would be better if no mention were made yet in articles 1, 2 and 3 of the draft of the fact that the provisions apply to *treaties entered into by international organizations* and if the question as to which articles could be made to apply in their original form to treaties concluded by international organizations, and to what extent special articles would have to be drafted for those organizations, were gone into later. The Netherlands Government has in mind the method adopted for laying down the "Régime Relating to Honorary Consular Officers" in the Vienna Convention on Consular Relations of 24 April 1963.

Article 1

The Netherlands Government believes the word "party" should be defined; it occurs so frequently in the draft that some definition is essential. The Government would suggest the following:

" 'Party' to a treaty means a State that is bound by the provisions of the treaty."

Quite apart from the adoption of the definition of the word "party" proposed above, the Netherlands Government believes it is self-evident that the same meaning should be attached to the word "party" in all te articles; if a definition of the word "party" is given, it even becomes essential to do so. The Netherlands Government would draw attention to the anomalous meaning of the word "party" in paragraph 2 (*a*) of article 15 and to the suggested amendmend.

The Netherlands Government would prefer to have the words "concluded between two or more States or other subjects of international law and" deleted from the definition of the word "treaty" in paragraph 1 (*a*), because the term "subjects of international law" can be interpreted in different ways in view of the provisions of article 3.

If it is deleted, the last sentence in paragraph (8) of the commentary should also be deleted, for the question as to whether individuals and corporations can be considered as subjects of international law is a different matter altogether and had better not be dealt with in this context; it certainly cannot be disposed of in a single definition.

Other amendments suggested are:

Paragraph 1 (*c*): "...deals with *other* matters of general interest to the *community of States*";

Paragraph 1 (*d*): in the first and second lines, "Acceptance" and "Approval" to be replaced by "and Acceptance" (see below under article 14);

Paragraph 1 (*f*): "accepting or approving" to be replaced by "or accepting".

Article 3

Paragraph 1

The Netherlands Government doubts whether everyone will attach the same meaning to the term "other subjects of international law", even in the light of the interpretation in paragraph (2) of the commentary.

Paragraph 2

The Netherlands Government would point out that this paragraph may also be applicable to other forms of States than "federal unions", for instance, to the Kingdom of the Netherlands with its three autonomous countries. The Statute of the Kingdom provides for the delegation by the Government of the Kingdom to the Governments of the individual countries of powers to conclude certain categories of treaties. The Netherlands Government would be glad if the Commission would refer in its commentary to this example of a form of State that is different from the better-known federal form.

Paragraph 3

With reference to the above remarks under the heading "The scope of the draft articles", it is suggested that this matter be dealt with in connexion with rules with regard to international organizations.

Article 4

The Netherlands Government would suggest deleting "approve" in the title and "approval" in paragraph 5 of this article (see below under article 14).

Article 5

This article can hardly be interpreted as a treaty rule; it would be more appropriate in a code. Apart from that, the Netherlands Government would observe that the word "representatives" in the first sentence should read "government representatives".

Article 6

The Netherlands Government believes that the Commission's reason for including this article, the need for which is also felt by the Netherlands Government, was to provide for the adoption of treaties at *large* international conferences. The growing practice of following the procedure of majority vote referred to in paragraph (2) of the Commission's commentary indeed applies to the adoption of the texts of general multilateral treaties.

However, at smaller conferences such as regional ones, or conferences on some specific subject in which only a limited number of States are interested, it is still the general rule for texts to be

adopted by unanimous vote. Though the unanimity rule may sometimes cause trouble at small conferences, making the majority vote the general rule at all conferences, including those of a small group of States to each of whom settlement of the problem under discussion may be of vital concern is likely to have much more serious consequences.

Accordingly, it is suggested that the scope of article 6 be restricted to the drawing up of general multilateral treaties. It might also be stipulated in this paragraph that replacement of the majority rule by some other voting rule may only be decided upon at the *opening* of a conference.

In view of the fact that general multilateral treaties are in the minority among the aggregate of bilateral and multilateral treaties, it would seem more correct if paragraph (*c*) came first as being the general rule. The present paragraphs (*a*) and (*b*) give special provisions that apply only in the particular circumstances described therein.

It is not impossible that in actual practice the principle of unanimity will be dropped in favour of some special voting rule that is also suitable for smaller conferences. However, this special voting rule may differ from that now being put forward by the Commission for large international conferences. The Netherlands Government would therefore prefer, at this stage of the development of international law, not to lay down any hard and fast rules in respect of small conferences.

Accordingly, it is suggested that the following alterations be made to the text:

"The adoption of the text of a treaty shall take place:

"(*a*) As a general rule, by agreement between the States taking part in the negotiations;

"(*b*) In the case of a general multilateral treaty drawn up at an international conference... (thenceforth reading as the text of paragraph (*a*) up to:)...shall decide at the beginning of the conference to adopt another voting rule;

"(*c*) In the case of a treaty drawn up within an *international* organization, by...(thenceforth reading as the text of paragraph (*b*))."

Article 8

Paragraph 1

The Netherlands Government shares the views of the members whose opinion is quoted in paragraph (4) of the Commission's commentary on article 9.

Paragraph 2

There is no Commission commentary on paragraph 2 of this article, which deals with becoming a party to treaties other than "general multilateral" treaties.

The Netherlands Government believes that sub-paragraph (*b*) gives the main rule and that other contingencies are mentioned under (*a*) and (*c*), unless the treaty should stipulate otherwise. The right order would therefore appear to be:

(*a*) becomes (*b*);

(*b*) becomes (*a*) and "unless the treaty states otherwise, or" should be inserted after "text";

(*c*) unaltered.

Article 9

A new principle underlies this article. It concerns the modifications of the participation clause in the event such a clause appears in or is implied in a multilateral treaty (paragraph 1) or in a treaty concluded between a small number of States (paragraph 2). Needless to say, it is always possible to make the necessary changes in a treaty in the normal way by obtaining the approval of all the parties to the treaty. It is therefore only a question of deciding whether a more "simple" procedure should be laid down for extending participation in a treaty. The Netherlands Government doubts whether a procedure of this type is really necessary.

At any rate, it would like to see its application restricted to future general multilateral treaties (unless there is an express stipulation in the treaty itself that debars its application), while special procedures might be made for treaties to which the provisions governing accession can no longer be applied on account of changed circumstances, as is the case, for instance, with treaties concluded under the auspices of the League of Nations.

Suggested modification of text:

The Netherlands Government would prefer to have six years inserted in paragraphs 1 and 2 instead of the four years proposed by Sir Humphrey Waldock.

Article 11

See comments on paragraph 1 of article 17 regarding the obligations referred to in paragraph 2 (*b*).

Suggested modifications of text:

In line 2 of paragraph 2, in line 2 of paragraph 2 (*a*) and in line 2 of paragraph 3: "acceptance or approval" to be replaced by "or acceptance" (see below under article 14).

Article 12

The unsystematic arrangement of this article may cause some confusion for a clear distinction has not been made between cases in which the obligation or otherwise to ratify a treaty does not apply in equal measure to *all* the States that have taken part in drafting the text and cases in which *one* of the parties signs a treaty.

Accordingly it might be better to start with the cases described in paragraphs 3 (*a*) and (*b*), which now appear as exceptions to exceptions of the general rule. That would make it clear that further provisions would have to be made only for cases where the treaty is silent upon the question of ratification and the *common* intention of the drafters of the treaty cannot be gathered from the circumstances either. The Netherlands Government feels some hesitation as to the words "statements...or other circumstances evidencing such an intention", unless these words are elucidated.

The following text is proposed:

"*Article 12*

"*Ratification*

"1. A treaty requires ratification where:

(*a*) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

(*b*) The common intention that the treaty shall be subject to ratification by the signatory States clearly appears from statements made in the course of the negotiations [or from other circumstances evidencing such an intention];

(*c*) It does not fall within one of the exceptions provided for in paragraph 2 below.

"2. A treaty shall not be subject to ratification by the signatory States where:

(*a*) The common intention to dispense with ratification clearly appears from statements made in the course of the negotiations [or from other circumstances evidencing such an intention];

(*b*) The treaty is one in simplified form;

(*c*) The treaty itself provides that it shall definitively come into force upon signature.

"3. In cases not covered by paragraph 1 (*a*) and (*b*) a signatory State will become bound by the treaty by signature alone, if the credentials, full powers, or other instrument issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty without ratification.

"4. In cases covered by paragraph 2 above, a signatory State shall nevertheless become bound by the treaty only upon ratification, if the representative of the State in question has expressly signed 'subject to ratification'."

Article 13

It would appear that the first six words of paragraph (*a*) apply equally to paragraph (*b*). Accordingly, the words "it has not signed the treaty and" might be deleted from paragraph (*a*) if the words "it is not a signatory State and" are added to the opening sentence of the article.

This article does not provide for States becoming a party to a treaty by accession in accordance with the provisions of article 8 in so far as article 8 refers to treaties in which it is not expressly stipulated that States can become parties by another procedure than by signing the treaty (either followed by ratification or not). Consequently, the article should be supplemented.

The Netherlands Government would also observe that in the text no account has been taken of the not unusual case of a signatory State not ratifying the treaty within the time-limit, but becoming a party to the treaty all the same because the latter provides for accession thereto. (See article 28 of the Revised Berne Convention for the Protection of Literary and Artistic Works, dated 26 June 1948. [8])

The Commission's commentary might also make mention of the fact that a State can also become a party to a treaty by virtue of a later treaty providing for such a contingency.

Article 14

The Netherlands Government feels that the new term "approval" should not be adopted. The term does not denote a form that differs essentially from "acceptance"; its use might cause confusion in national procedures and it cannot be regarded as a common term. Accordingly, article 14 might be restricted to "acceptance".

This article does not provide for States becoming parties to treaties by "acceptance" in accordance with the provisions of article 8 in so far as article 8 refers to treaties in which it is not expressly stipulated that States can become parties by "acceptance". Consequently, the article needs supplementing.

It is proposed that the text be modified as follows:

The words "or (by) approval" to be deleted in four places, viz. in the title and in the second, fifth and eighth lines.

Article 15

Suggested modifications to the text:

The words "acceptance and (or) approval" to be replaced by "and (or) acceptance" in four places, viz. in the title, in paragraph 1(*a*) and in paragraphs 2 and 3;

The words "two differing texts" in paragraph 1(*c*) to be replaced by "two alternative texts";

The words "party or parties" in paragraph 2(*a*) to be replaced either by "signatory States" or by the phrase used in article 18, paragraph 3(*a*).

Article 16

The Netherlands Government believes there have been two instances (one within the United Nations and one connected with the Greek ratification of the IMCO Treaty) of instruments of ratification having been withdrawn a short time after they had been deposited. Opinions may vary as to whether depositing an instrument of ratification, accession or acceptance constitutes an irrevocable act. It might be argued that the final formality in the procedure of becoming a party to a treaty is so important (in most countries the relative documents must be signed by the Head of State) that it cannot but be looked upon as an irrevocable act. Sir Gerald Fitzmaurice, the former Special Rapporteur, endorses this view in paragraph 5 of article 31 of his first report [9] in the following words: "Ratification once made cannot, as such, be withdrawn" (see also paragraph 1 of article 33). On the other hand, it cannot very well be argued that the effect of such an act is irrevocable.

Circumstances may change to such an extent after an instrument of ratification has been deposited that the State concerned may be compelled to withdraw it without waiting for the treaty to come into force and then giving notice of termination. If this line of argument is adopted, the right of withdrawal should only be recognized after three years from the date on which the instrument was deposited.

Since this has become a pressing problem in view of the two precedents already mentioned, the Netherlands Government would suggest that the Commission take it up again, but with due regard for the rules for giving notice of termination of treaties or of withdrawal from international organizations that will be the subject of later discussions.

Suggested modifications:

The words "acceptance and (or) approval" to be replaced by "and (or) acceptance" in three places, viz. in the title and in the second and fifth lines;

"Article 13" in the third line to be replaced by "articles 12, 13 and 14".

Article 17

Paragraph 1

The Netherlands Government is of the opinion that the "obligation of good faith" mentioned in this paragraph cannot be held to apply to all cases in which a State that has taken part in the negotiation, the drawing up or adoption of a treaty (provided it is a multilateral treaty) does not append its signature to the treaty. An obligation of good faith may only be presumed to exist if a State has signified that it is seriously considering becoming a party to a treaty, either by having signed it or in any other manner. Consequently, the words "which takes part in the negotiation, drawing up or adoption of a treaty, or" should be deleted.

Paragraphs 1 and 2

The words "acceptance or approval" should be replaced by "or acceptance".

Article 18

The Netherlands Government would point out that this section should also apply to "statements" that are actually reservations. (See paragraph (13) of the Commission's commentary on article 1.)

Suggested modifications of the text:

The words "accepting or approving" in the second line of paragraph 1 to be replaced by "or accepting";

The words "acceptance or approval" to be replaced by "or acceptance" in paragraph 2(*a*)(iii) and in paragraph 2(*b*).

Article 19

The Netherlands Government would suggest that "two years" be substituted for "twelve months" in paragraph 3, and "four years" for "two years" in the fourth line of paragraph 4; the two periods proposed by the Commission are really too short in view of current State practice.

Suggested modification of the text:

The words "acceptance or approval" in paragraph 2(*a*) to be replaced by "or acceptance".

Article 20

The Netherlands Government fears that the expression "a small group of States" in paragraph 3 (and likewise in paragraph 2 of

[8] United Nations, *Treaty Series*, vol. 331, p. 245.

[9] *Yearbook of the International Law Commission*, 1956, vol. II, p. 104.

article 9) is not sufficiently clear and might lead to difficulties of interpretation.

Article 22

The Netherlands Government presumes that any notifications of withdrawal of reservations are sent through the authority with whom the relative documents have been deposited.

Article 23

From the brief commentary it might be concluded that a treaty comes into force in its entirety on one particular date. However, some treaties come into force in stages on different dates. If such a contingency is covered by the words "in such manner", there is no need to supplement the text. The Netherlands Government would merely point out that in the next article (article 24) the coming into force of a treaty is qualified by the words "in whole or in part".

Suggested modifications of the text:

The word "small" in paragraph 2(*b*) to be replaced by "same";

In paragraphs 2(*a*) and (*b*), "acceptance, or approval" to be replaced by "or acceptance";

The words "accepted or approved" in paragraph 2(*c*) to be replaced by "or accepted".

Article 24

The Netherlands Government interprets this article as referring only to cases in which States have legally committed themselves to a provisional entry into force. The signatory States may also enter into a non-binding agreement concerning provisional entry into force (within the limits imposed by their respective national laws, of course). In the latter case as opposed to the former they would be free to suspend the provisional entry into force. Since the term "provisional application" used in article 24 may also be understood to refer to this second, non-binding form of provisional application, it might be advisable to substitute the term "provisional entry into force". The same remarks apply to the use of this term in paragraph (2) of the commentary.

The Netherlands Government is also of the opinion that the terms of article 24 are too stringent since they permit termination of "a provisional entry into force" in two cases only, viz.:

(1) when the treaty enters into force definitively, and

(2) if the States concerned agree on its termination.

The Netherlands Government believes that a Government should also be entitled to terminate a provisional entry into force unilaterally if it has decided not to ratify a treaty that has been rejected by Parliament or if it has decided for other similar reasons not to ratify it.

If these suggestions are adopted, the text should be modified as follows:

The words "acceptance or approval" in the first sentence to be replaced by "or acceptance";

The second sentence to read "In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional entry into force or one of the States shall have notified the other State or States that it has decided not to become a party to the treaty".

Article 27

The Netherlands Government is of the opinion that the manner of describing States that have to be notified of any amendments to texts is too cumbersome and that it is even too broad in paragraph (*b*), Accordingly, it would suggest using the phrase "each interested State" everywhere, i.e. in paragraphs 1(*a*) (lines 5 to 8) and 1(*b*) (last 3 lines), in paragraph 2 (last 2 lines) and in paragraph 4 (fourth line).

Article 29

In this article the Commission uses six expressions to define certain duties of depositaries:

"To execute a *procès-verbal*" (paragraph 3(*c*));
"To furnish an acknowledgement in writing" (paragraph 3(*d*));
"To communicate" (paragraph 5(*a*) and (*b*));
"To inform" (paragraph 7(*a*));
"To draw up a *procès-verbal*" (paragraph 7(*b*)); and
"To bring to the attention" (paragraph 8).

The Netherlands Government feels that it would be preferable to use a single, uniform, simplified formula, unless the treaty expressly states otherwise. Another advantage of a uniform formula is that it could include by implication the notifications not mentioned in the article about denunciation, extension of territorial application, amendments, renewal, statements to the effect that States continue to be bound, etc. The Netherlands Government has in mind the text of article 19 of the Convention on the Recovery Abroad of Maintenance concluded at New York on 20 June 1956[10] entitled "Notifications by the Secretary-General", the beginning of which reads:

"1. The Secretary-General shall inform all Members of the United Nations and the non-member States referred to in article 13:
"(*a*) Of communications under paragraph...
"(*b*) Of information received under paragraph...
"(*c*) Of declarations and notifications made under...
"(*d*) Of signatures, ratifications and accessions under...
"(*e*) Of the date on which the Convention has entered into force under...
"(*f*) Of denunciations made under...
"(*g*) Of reservations and notifications made under...

"2. The Secretary-General shall also inform all Contracting Parties of requests for revision and replies thereto received under..."

Suggested modifications of the text:

The words "acceptance or approval", in paragraph 4, to be replaced by "or acceptance".

[PART II]

Terminology

Some inconsistency in terminology was noticed in the second group of articles, different terms being used in various articles to express the same idea.

In articles 31, 33 and 34, for example, we read "*invalidate* the consent (expressed by the representative of a State)", whereas in articles 32 and 35 it says "the expression of consent *shall be without any legal effect*". The legal consequences of the contingencies described in those five articles are next referred to in article 52, the provisions of which apply in equal measure to all those contingencies, yet the term used in paragraph 3 of that article to express the same idea is "the *nullity* of a State's consent".

In articles 36 and 37 on the other hand it is stated that under certain circumstances a treaty will become "*void*". This "voidness", too, falls under the provisions of article 52 but there it is termed the "*nullity* of a treaty". (It is only the "voidness" referred to in article 45 that has different legal consequences in virtue of article 53, paragraph 2.)

The expression "*nullity*" in article 52 (and in articles 30, 46, 47 and 51) therefore applies to all the contingencies described in articles 31 to 37, although these articles come under section II, the title of which is "*Invalidity of treaties*".

Accordingly, endeavours should be made to secure greater uniformity of terminology.

---

[10] United Nations, *Treaty Series*, vol. 268, p. 46.

Section I: General provision

The possible *effects of an outbreak of hostilities on the validity and operation of treaties* have obviously been deliberately omitted from the Commission's report. Although the Netherlands Government appreciates the Commission's motives for doing so, it feels that a general provision covering this point is indispensable.

Since it is a recognized fact in international law that a state of war invalidates some treaties while it suspends the operation of others, it would be irrational to ignore in part II of the draft articles on the law of treaties the fact that treaties may be invalidated or rendered inoperative for reasons other than those mentioned in article 31 and subsequent articles, as has been done in article 30.

The same thing is true of the *succession of States*, which also prompts questions regarding the validity of treaties previously concluded.

The Netherlands Government would suggest that it be made quite clear in the text of the present draft articles that the possible consequences of an outbreak of hostilities or of a succession of States on the validity or operation of treaties have not been dealt with the following articles.

Article 30

No comment.

Article 31

The Netherlands Government endorses the Commission's guiding principle underlying this article, namely that as a rule the violation of national laws regarding the manner in which the consent of a State to a treaty is to be obtained or the way in which it is to be conveyed does not invalidate consent expressed by a State internationally. The Netherlands Government considers the principle that international law takes precedence over national laws of great importance to the development of the international legal system.

The exception to the rule, which is made in the draft article by the addition of "unless the violation of its internal law was manifest", may, however, seriously undermine the rule itself. It would be easy for States wishing to shirk their obligations under treaties to make every breach of their national regulations appear to other parties as *manifest* violations of their national laws.

The Netherlands Government would therefore propose that the clause "unless..., etc." be altered and the word "manifest" replaced by a more objective term. The Netherlands Government would suggest that the wording of part of the Commission's own text of paragraph (7) of the commentary be used as the basis of the new text and that the eighth line of the article, after the comma, should read:

"unless *the other parties have been actually aware of* the violation of internal law *or unless this violation* was *so* manifest *that the other parties must be deemed to have been aware of it.* Except in...".

Article 32

No comment.

Article 33

Since paragraph 1 mentions both the defrauded State and the State which has committed the fraud, the reference to "the State in question" in paragraph 2 is not sufficiently clear. It is suggested that "the State in question" in the second line of paragraph 2 be changed to "the *injured* State".

However, the Netherlands Government believes that paragraph 2 of article 33 should be omitted altogether if its suggestions in regard to the complete revision of article 46 are adopted (see comments on article 46).

Article 34

No comment, except that the suggested revision of article 46 would also affect the text of paragraph 3 of article 34.

Article 35

No comment, except that the suggested revision of article 46 would also affect the text of paragraph 2 of article 35.

Article 36

The Netherlands Government fully endorses the principle underlying this article, but the manner in which it is formulated prompts a few questions.

First, it should be noted that, also in the light of paragraph (3) of the Commission's commentary, a rule like the one in question is only acceptable and can only be applied in practice if the term "use of force" is taken in its strict sense, i.e. to mean "armed aggression", to the exclusion of all forms of coercion of an economic or psychological nature. However reprehensible such forms of coercion may be in certain circumstances, under the present international conditions they cannot be lumped together under a single, general rule prohibiting coercion without creating rather than clearing away uncertainties, in other words, without making the rule of law ineffective even in its strict sense.

Secondly, the question arises to what extent this stipulation would be enforceable with retrospective effect. Would it be assumed that the "principles of the Charter" did not become valid until 1945 when the United Nations Charter came into force?

Article 37

The Netherlands Government endorses the principle underlying this article, i.e. that according to modern ideas the will of the contracting parties is no longer the sole criterion by which to determine what can be lawfully contracted. However, the Netherlands Government feels that it is a pleonasm to say "a peremptory norm from which no derogation is permitted".

Article 38

No comment.

Article 39

With the possible exception of some old treaties, the insertion in which of a clause regulating the termination or the denunciation was simply overlooked, it is hard to imagine that contracting parties nowadays would be so careless as to "forget" to make such provisions. Consequently, the fact that no mention is made of ways in which a modern treaty may be denounced should be ascribed rather to the parties deliberately having avoided the subject. If in such cases the *travaux préparatoires* were referred to, it would almost invariably be found that the subject had indeed been discussed by the parties, but that for political reasons it was not thought opportune to mention the conditions under which the treaty should cease to operate, or that the parties disagreed on what those conditions should be, or that they took the effect of such conditions as a matter of course, or that there were some other reasons or a combination of reasons for the parties having refrained from making any stipulations in respect of the duration or termination of the treaty.

Accordingly, in all such cases it may be assumed that the contracting parties indeed had the possible termination of the treaty in mind, though often in exceptional circumstances only.

It hardly seems right that all the provisions intended but not actually made in the articles of the treaty in question should be replaced by the single provision that any treaty can be terminated by giving one year's notice. This provision, embodied in the last sentence of article 39, may be diametrically opposed to the contracting parties' intentions. Inclusion of the provision would only be justified on the grounds that it would supply the missing clause in a few old treaties. But it is precisely those treaties to which article 39 does not apply.

It is suggested that article 39 be modified as follows to make it suitable for existing and future treaties:

Seventh line : "...intended to admit *under certain conditions* denunciation or withdrawal. *Under those conditions*, a party may denounce or...".

Article 40

Paragraph 2

No single period can be laid down that would be reasonable for all the different kinds of treaties. The Netherlands Government endorses the opinion voiced by the United States representative at the 784th meeting of the Sixth Committee of the General Assembly that the contracting parties should be at liberty to lay down in the treaties shorter or longer periods to suit each particular case.

The best general period would be ten years, because a shorter period of say five years might constitute a drawback, especially for technical treaties, in that a number of States interested in the project might still be engaged in making the necessary preparations such as adapting their national laws when the contracting parties are discussing the termination of the treaty.

Suggested changes in the text:

Paragraph 2, last line but one, to read: "...expiry of *ten* years, *or such other period as the treaty may stipulate*, the agreement...".

Article 41

No comment.

Article 42

Paragraph 2(a)

In the Netherlands Government's opinion the Commission's intention, which is clear from paragraph (7) of its commentary, is not quite realized in paragraph 2(*a*) of the above article. Whereas the Commission explains that it is only the injured party that has the right described in paragraph 2(*a*), paragraph 2(*a*) has the unrestricted term "any other party".

Paragraph 2(*a*) could be clarified by modifying the text in the manner suggested by the United States representative at the 784th meeting of the Sixth Committee of the General Assembly, viz.: "Any other party, *whose rights or obligations are adversely affected by the breach*, to invoke...".

Paragraph 2(b)

The same representative's suggestion that a similar alteration be made in paragraph 2(*b*) must be due to some misunderstanding. If paragraph 2(*b*) were modified in that manner paragraph 2(*b*)(*i*) would have the same effect as paragraph 2(*a*), while paragraph 2(*b*)(*ii*) could then be taken to mean that a decision to terminate a treaty could be made by *fewer* than all the other parties. It should not be possible for so far-reaching a decision as that on the termination of a treaty to be made unless there is unanimity among *all* the other parties. It is therefore suggested that the Commission's draft text for paragraph 2(*b*) be left as it is.

Paragraph 4

As regards paragraph 4, see remarks under article 46.

Article 43

No comment, except that the remarks on article 46 also apply to paragraph 3 of article 43.

Article 44

The Netherlands Government agrees with the Commission that the settlement of boundaries should be excepted from the *rebus sic stantibus* principle (see paragraph 3(*a*) of article 44 and paragraph (12) of the commentary). However, treaties by which boundaries are settled often cover other points as well. For example, the Netherlands-German treaty of 8 April 1960 settling the boundaries and regulating matters closely connected therewith also contains provisions on matters that have nothing to do with determining territorial boundaries; for instance, on the maintenance in good condition of the waterways forming part of the frontier. Besides, this treaty on boundaries itself forms an integral part of a complex of greatly divergent regulations, all of which are embodied in a single, general treaty.

Accordingly, it would be more rational not to exclude in their entirety from paragraph 3(*a*) treaties the main purpose of which is to determine territorial boundaries but only in so far as they regulate transfers of territory or the settlement of boundaries. The text of paragraph 3(*a*) might be modified as follows:

"To stipulations of a treaty which effect a transfer of territory or the settlement of a boundary."

On the other hand, one might well ask whether not only treaties concluded to settle territorial boundaries (including treaties concerning transfers of territory) but also other "dispositive" treaties should be excluded from the *rebus sic stantibus* principle, i.e. treaties by which certain *de facto* conditions are created or modified, after which they have served their purpose, only the conditions created by them remaining. However, one can rightly say of this category of "executed treaties" that, once treaties have served their purpose, the *rebus sic stantibus* principle can no longer be applied to them; the most it can be applied to is the condition created, but that is outside the scope of the law of treaties.

If treaties settling territorial boundaries were included in the category of "dispositive" treaties for the purpose of applying the above-mentioned principle, it might be concluded that those treaties, too, would cease to operate and lapse the moment settlement of the boundaries was completed, because they establish a real right to the delimited territory, and that testing that fact against the theory of change of circumstances falls outside the scope of the law of treaties, so that paragraph 3(*a*) might be deleted from article 44. Such a theory seems unrealistic; at any rate, it does not agree with the views hitherto expressed in the literature on the subject and in the jurisprudence.

Accordingly, the Netherlands Government believes that it would be more correct to adopt the principle that treaties concerning the settlement of boundaries or transfer of territories constitute a separate category. They are treaties that regulate the territorial *delimitation* of sovereignty. All other treaties, including those that establish a so-called "easement" or "servitude", regulate in some way or another the *exercise* of that sovereignty.

The remarks on article 46 also apply to paragraph 4 of the above article.

Article 45

As regards paragraph 2, see remarks on article 46.

Article 46

The Netherlands Government's comments are given in the attached annex and it is suggested that the text of this article be modified accordingly; the reasons that have prompted the Netherlands Government to make this suggestion will also be found in the annex.

If the text of article 46 is modified in the manner suggested, the separate paragraphs regarding the separability of treaties in articles 33, 34, 35, 42, 43, 44 and 45 will become redundant.

Article 47

In the opinion of the Netherlands Government this article should also be made to apply to article 31. The plea of invalidity admitted by way of exception in the clause in article 31 reading: "unless... etc." should be restricted by article 47. Whether this clause should be left as it is or be modified as suggested in the Netherlands Government's comments on article 31 is irrelevant. Restricting the plea of invalidity is believed to be inherent in the primacy of international law.

The Netherlands Government also wonders whether article 47 should apply to article 36, too. However, assuming that the word

"force" in article 36 only means "armed aggression", the Netherlands Government can agree with the Commission's views that article 36 should not be referred to in article 47.

Suggested modifications:

Third line: "... under articles *31* to 35 and...";

Paragraph (*b*), second and third lines: "...in the case of articles *31* to 35...".

Article 48

The Netherlands Government endorses the provision of this article and would emphasize that under that provision the general rules of part II, section III, shall not apply to the treaties referred to in the article but only in so far as the organizations concerned have their own rules. However, the category of treaties that have been drawn up "within an international organization" might be more clearly defined—in keeping with the gist of paragraph (3) of the commentary—by modifying the phrase "drawn up within an international organization" to read "drawn up *by the competent organ* of an international organization".

Article 49

No comment.

Article 50

It is stated in paragraph 1 that a right to give notice of termination must be either expressed or implied in the treaty, but no mention is made of the fact that such notice should in the first place be given in the manner prescribed in the treaty. It is therefore suggested that the third line of paragraph 1 be modified to read "provided for in the treaty must, *unless the treaty otherwise provides*, be communicated ...".

Article 51

This article has once again brought home to the Netherlands Government how desirable it is that it be made obligatory for disputes about points of law that cannot be resolved in any other way to be submitted to the International Court of Justice. In this matter the Netherlands Government agrees wholeheartedly with "some members of the Commission" who voice their opinion in the second half of paragraph (2) of the Commission's commentary.

Article 52

No comment.

Article 53

Paragraph 3(c)

Since some treaties remain in force for a certain period after notice of termination has been given, the text of the second and third lines of this subsidiary clause might be modified to read:

"...prior to *the date upon which* the denunciation or withdrawal *has taken effect* and the validity ..."

Article 54

No comment.

ANNEX

to the Netherlands Government's comments on part II of the draft articles on the law of treaties

1. If treaties are split up into various parts (in the absence of explicit provisions for such division in the texts of the treaties), difficulties are sure to arise, on the one hand, "subjectively"—on balance, the advantages to a party to a treaty would be outweighed by the disadvantages in the event of division *per se* (if that were not so, *agreement* would be sure to be reached still on express division)—and, on the other hand, "objectively": it is difficult to say whether the effect of a certain division would be compatible with the "object and purpose" of the treaty as a whole.

2. The Commission realizes all this and has endeavoured to find a solution by making a distinction in article 46, which excludes the possibility of splitting up a treaty, between inseparability for "objective" (paragraph 2(*a*)) and for "subjective" (paragraph 2(*b*)) reasons.

3. The Commission also rules out division in a number of cases where division might *theoretically* be thought possible (i.e. those described in articles 31, 32, 36, 37 and 39).

4. However, the difficulties outlined under 1 have not been overcome completely by the distinction made under 2. They have not been overcome in respect of the "objective" reasons, because it might well be that the cancellation of part of a treaty does not "interfere with the operation of the remaining provisions" (see paragraph (6) of the Commission's commentary under article 46), while that cancellation might still run counter to the "object and purpose" of the treaty.

The "subjective" difficulty has not been entirely obviated either, because in article 46, paragraph 2(*b*), the subjective inseparability involves *both* parties, while proof is demanded deriving from either the text of the treaty or from statements made by *both* the parties *during the negotiations culminating in the conclusion of the treaty*. This is not very rational, because what may be essential to one party may be precisely the opposite to the other; if during the negotiations no difficulties arise in regard to certain texts, there will be nothing whatever to indicate what is essential to them and what is not; moreover, the parties may well change their minds during the period of operation of a treaty regarding the value they attach to certain of its clauses.

5. If difficulties arise after a treaty has been concluded, either immediately or later, they can be solved only by the parties to the treaty or by judicial settlement. No directives need be given for the solving of difficulties by the parties themselves. If no solution can be found, it would of course be helpful if each party could substantiate its accusations by quoting the provisions of a convention on the law of treaties, but obviously such provisions (if they are to be just and not merely designed to "cut Gordian knots") can never be so clearcut as to exclude the possibility of the other party coming forward with counter-arguments deriving from the very same provisions. Accordingly, the question is whether the *Courts* should be given directives.

A very broadly worded article might meet the case (deleting the special provisions regarding separation in articles 33, 34, 35, 42, 43, 44 and 45). Something on the following lines might do:

"1. Except as provided in the treaty itself, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall in principle relate to the treaty as a whole.

"2. If a ground mentioned in articles 31, 32, 33, 34, 35, 36, 37, 39, 42, 43, 44 and 45 for nullity, termination, suspension of the operation of a treaty or withdrawal from a treaty, applies only to particular clauses of a treaty, and a party to the treaty wishes to uphold the remainder of the treaty, the other party or parties shall accept the continuing validity and operation of the remainder of the treaty, unless such acceptance cannot reasonably and in good faith be required from such other party or parties.

"3. The provisions of paragraph 2 shall not apply if:

"(*a*) the clauses in question are not separable from the remainder of the treaty with regard to their application; or

"(*b*) it appears either from the treaty or from the statements made during the negotiations that acceptance of the clauses in question was an essential element of the consent of a party to the treaty as a whole."

Such a text would lay down: (*a*) the principle of inseparability; (*b*) separability depending on the circumstances at the moment at which the treaty was concluded and at the moment when difficulties arose: and (*c*) the *limited* absolute exclusion of separability if it should simply be impracticable, or if during the negotiations one or more of the parties made it clear that the coherence of the various parts of the treaty was essential. Since paragraphs 1 and 3 of the suggested text were largely modelled on the Commission's draft, the same objections attach to the text as were raised against the corresponding parts of the Commission's text; but it is believed that these objections have been practically eliminated by the text of paragraph 2, which makes the whole matter subject to the rules of good faith between the contracting parties.

[PART III]

Transmitted by a letter of 1 March 1966 from the Permanent Representative to the United Nations

[*Original: English*]

Introduction

1. In its report on part II of the draft articles, the Netherlands Government expressed the desire with regard to article 51 that the obligation to submit to international jurisdiction disputes on points of law which cannot be resolved in any other way be generally recognized. The article under consideration at the time concerned the procedure for suspending or terminating *other* treaties, in which no provision was made for their suspension or termination. In pursuance of a regulation to be inserted in article 51, disputes on such treaties could be referred to the International Court of Justice.

The points raised in the ILC's comments on that article included the absence of a regulation governing disputes on the interpretation and application of the articles *in question* concerning the law of treaties. In its commentary on this last part of the law of treaties, the Netherlands Government would lay particular stress on the desirability of an article on the settlement of disputes that may arise in connexion with the articles in question. To formulate regulations especially for the codification of the law of treaties without establishing a procedure for settling disputes would be doing things by halves.

2. If the articles relating to the law of treaties are included in one or more treaties, it would seem desirable to arrange at the same time in what circumstances States which are, or are to become, parties to that treaty or those treaties may make reservations with respect to some provisions thereof. It might not be advisable to place a general ban on reservations. This can only be decided when the articles are available in a more definitive form.

Section I: "The application and effects of treaties".

Article 55: "*Pacta sunt servanda*".

3. No comment.

Article 56: "Application of a treaty in point of time".

4. Paragraphs 5 and 7 of the ILC's comments have not convinced the Netherlands Government of the desirability of choosing for the end of paragraph 2 of this article a wording different from that chosen for the end of paragraph 1. The Netherlands Government would not expressly rule out the possibility that the "very nature of a treaty indicates that it is intended to have" certain legal consequences even after its termination. Therefore the Netherlands Government proposes (to emulate the set-up originally proposed by rapporteur Sir Humphrey Waldock in his article 57) that one and the same wording be used for both contingencies.

5. Where the first paragraph rightly excepts "any situation which *ceased to exist*", the second makes a similar exception for "any situation which exists". The Netherlands Government assumes that what is meant in the second paragraph is a "situation which *comes into existence*".

6. Proposal concerning the text of article 56, paragraph 2:

> "... or any situation which *comes into existence* after the treaty has ceased to be in force with respect to that party, unless the *contrary appears from the treaty*."

Article 57: "The territorial scope of a treaty".

7. The Netherlands Government considers this provision acceptable as a general principle. It is assumed that the subject of international law constitutes a unity.

Only the word "territory" implies a limitation which is not always encountered in practice. In fact, treaties intended to apply mainly to the territories of the parties need not to that end be limited in their operation. The operation of treaties which lend themselves to application, for instance, to ships sailing under the flag of and aircraft registered in a State party must not, on the grounds of this provision, be deemed as ruled out in respect of ships or aircraft outside the territory of that State. The same thing can be said of treaties which lend themselves to application by diplomatic or consular representatives in the territory of a State which is not a party to the treaty; or for application on the continental shelf, which does not belong to the territory of a State but falls within the jurisdiction of the coastal State for certain purposes pursuant to the relevant 1958 Treaty of Geneva. Particularly in the latter case it is quite conceivable that disputes may arise, for instance, on whether or not customs treaties relating to minerals won on the continental shelf or to operational material placed on that shelf are applicable.

Accordingly, account should be taken in article 57 of the operation of treaties *outside* the territory of the parties, as far as the jurisdiction of a State extends under international law. A proposal for a text to this effect will be found in point 11.

8. Article 57 only gives the general rule, without allowing for special factors such as the federal structure of a State or the position of dependent territories. It might be said that protectorates, trust territories and colonies do not form part of the "entire territory" of a State; this cannot be so readily said of autonomous parts of a State, such as the Isle of Man and also Zanzibar in certain respects, or of the component parts of a federal State such as the Federal Republic of Cameroon, the Federal Republic of Nigeria and the Swiss Federal State. Yet nowadays the autonomous or component parts of States with different constitutional structures are frequently seen to be competent to decide for themselves whether or not they shall be bound by treaties, *vide* the Ukraine, Byelorussia and the three parts of the Kingdom of the Netherlands, to mention only three.

9. If the territorial validity of a treaty is not laid down in the treaty itself, a State may in the first instance wish to become a party for one of its territories, leaving it to the government of each other part to decide whether or not the treaty shall be accepted later for that part, too. If the treaty itself prescribes no other procedure, expression can be given to this territorial differentiation when the treaty is signed and/or ratified. It would not be appropriate to lay down in the law of treaties a rule depriving States of the opportunity of availing themselves of territorial differentiation which present international legal practice offers them, thus curtailing the autonomy due to a single part of the State within the whole and obstructing in the future the conclusion of treaties whose purpose is to serve the common weal.

In practice, it is only States with federal structures and constitutions granting the component parts autonomy with respect to treaty commitments that need (at all events initially) the opportunity to become parties to treaties for only one or some of their component parts, and perhaps for some other part or parts at a later stage. The Netherlands Government does not know of any instance of this faculty having been abused by a State with a different structure.

Nevertheless, if the existing faculty is expressed in a rule of the law of treaties, it would seem right to make that rule as accurate a reflection of the usual practice as possible and to restrict it to States whose component parts, under the constitution of the State, can decide for themselves autonomously whether or not to accept the rights and obligations of a treaty.

Moreover, it is natural that the federal government should be required to make it clear, when the State becomes a party to a treaty, whether it is doing so as a complete unit or for some of its federal States only, and in the latter event, for which. Generally speaking, the other parties to the treaty cannot be expected to be so well acquainted with the constitutional structure of a federal State that without any notification from that State they can be certain that the treaty is effective in one or all of its parts.

10. This point might conceivably be settled under article 19 and succeeding articles on reservations. However, as a rule "territorial reservation" is not reservation in the material sense, i.e. not a reservation on any provision laid down in the treaty. (It is of course a different matter where territorial treaties are concerned.) It would not seem right therefore to adopt in respect of statements regarding the territorial application the same procedure as that prescribed for material reservations.

11. The foregoing considerations have prompted the drafting of the following, which is suggested for article 57:

"The scope of a treaty extends to the entire territory of each party, and *beyond it as far as the jurisdiction of the State extends under international law*, unless the contrary appears from the treaty *or, in accordance with paragraph 2 of this article, from the act by which the State expresses its consent to be bound by the treaty.*

A State consisting of parts which under constitutional provisions decide autonomously and individually whether they shall accept a treaty shall, provided the contrary does not appear from the treaty, declare in the act by which it expresses its consent to be bound by the treaty to which of its constituent parts it shall apply. This declaration shall not be regarded as a reservation within the meaning of article 18. In the absence of such a declaration the State shall be deemed to be bound by the treaty with respect to all the constituent parts of that State."

Article 58: "General rule limiting the effects of treaties to the parties."

12. The principle that a treaty "neither imposes any obligations nor confers any rights upon a State not party to it without its consent" does not apply to *all* treaties. One consequence of a treaty defining the frontier between two States or transferring a piece of territory is to alter the area over which the consuls of third States may exercise jurisdiction. Another consequence may be that agreements formerly effective in the area transferred are no longer so, or vice versa. A treaty relating to the demarcation of the continental shelf, concluded in pursuance of article 6 of the relevant 1958 Treaty of Geneva, may result in a customs agreement becoming, or ceasing to be, applicable to minerals won from the part of the shelf concerned.

Broadly speaking, treaties governing the *territorial demarcation* of sovereignty (or with respect to the continental shelf, the territorial delimitation of "sovereign rights") certainly do involve rights and obligations for third States. Such treaties constitute a separate category as opposed to all other treaties, which concern matters relating to the *exercise* of that sovereignty. Cf. a similar commentary by the Netherlands Government on article 44.

The ILC might consider the addition of a clause to article 58 covering this exception to the general principle.

Article 59: "Treaties providing for obligations for third States."

13. No comment.

Article 60: "Treaties providing for rights for third States."

14. In some circumstances the faculty of "implied assent" by a third State provided in paragraph 1(*b*), combined with the ban imposed by article 61 on revoking or amending the provision in question without the third State's consent may place a very heavy burden indeed on the contracting parties. This combination will be particularly unfortunate in the case of a treaty that accords rights to a large group of States or to the community of States in general, like the treaties on the freedom of shipping in some of the international waterways. Giving a voice in matters concerning the regulations operative for those waterways to a State which has never formally reacted to the conclusion of the treaty, and whose subjects have only in exceptional cases availed themselves of the rights accorded, would be going further than is compatible with reasonable practice, quite apart from the fact that the parties concluding the treaty would then be unable to find out which States had given "implied assent".

15. Suggested modification of end of article 60, para. 1:
"...and (*b*) the State *expressly assents* thereto".

Article 61: "Revocation or amendment of provisions regarding obligations or rights of Third States."

16. The combination of articles 60 and 61 has already been commented on under point 14. The Netherlands Government has considered whether the objective, i.e. the denial of rights to third States which have scarcely if at all reacted to the offer of a right, could also be achieved by leaving article 60 intact and adding to article 61 the requirement: "and provided the State has actually exercised the right" (and, if desired: "and complied with the obligation"). Although theoretically formulation on these lines would appear to have a more equitable effect than that described under 14 and 15, in practice it would be so difficult to produce evidence of "traditional rights", that the clearer arrangement recommended under 14 and 15 is preferable.

17. The Netherlands Government would make three remarks on the text of article 61:

Firstly, the ILC has not made it clear in paragraph 1 of its commentary why the complete or partial *withdrawal* of an *obligation* imposed on a third State should require the assent of the third State. Its assent does indeed seem to be required if modification of the original obligation gives rise to a new or more onerous obligation, but article 59 would appear to be automatically applicable in such a contingency.

Secondly, the *modification* of a *right* granted to a third State need not be mentioned separately in article 61. For if such modification amounts to partial withdrawal of the right, it is governed by the rule governing withdrawal, and if the modification involves the granting of a new or more comprehensive right, article 60 is applicable.

Finally, the Netherlands Government considers that the rule laid down in article 61 is intended to protect the third State against withdrawal (or modification) of the *right* accorded, and not against withdrawal (or modification) of the *treaty provision* from which that right is derived.

For these reasons it is suggested that article 61 be worded as follows:

"Article 61: *Revocation of rights* of third States.

"*When* under *article 60* a right has arisen for a State from a provision of a treaty to which it is not a party, *the right* may be *revoked* only with the consent of that State, unless it appears from the treaty that *the right* was intended to be revocable."

Article 62: "Rules in a treaty becoming generally binding through international custom."

18. No comment.

Article 63: "Application of treaties having incompatible provisions."

19. Paragraph 4: Unlike the wording of article 67, in paragraph 1(*b*)(ii) of which account is rightly taken of the object and purpose of the treaty as a whole, that of article 63, paragraph 4, suggests that every multilateral treaty can simply be divided up into a number of bilateral legal relationships, leaving no remainder. The ILC itself does indeed acknowledge in paragraph 13 of its commentary, that paragraph 4 is worded as though the problem of successive treaties between parties, some of which are the same parties, giving rise to incompatible obligations only has to be settled from the points of view of priority of the rights and obligations of the States concerned (paragraph 4) and of liability for non-compliance with the obligations of a treaty (paragraph 5).

The ILC has not lost sight of the coherence of the various provisions and of their joint connexion with the object and purpose of the treaty, i.e. of its integrity. On the contrary, paragraphs 14, 15 and 16 of the commentary are evidence of the great care with which it has approached this problem from various angles. Nevertheless, the very one-sided result seen in paragraph 4 is unsatisfactory.

There might be some justification for concluding that the problem is not yet ripe for codification. Customary international law has not yet crystallized in this respect. So far, international relations have not been regulated well enough to allow a clear rule of law to be formulated.

Article 64: "The effect of severance of diplomatic relations on the application of treaties."

20. No comment, except that paragraph 3 can be dispensed with in the light of the proposal made earlier by the Netherlands Government for the modification of article 46, which should then include reference to article 64.

Section II: "Modification of treaties."

Article 65: "Procedure for amending treaties."

21. The first few words of the second sentence, viz. "If it is in writing", imply recognition of the possibility of a written and ratified treaty being amended by a verbal agreement. Although in practice this is very occasionally resorted to, it is not recommended. The Netherlands Government would therefore suggest that no mention be made of it in this article.

It should be noted that deletion of these words does not rule out the possible significance of a verbal agreement in connexion with the present article. A verbal agreement *with* "subsequent practice" is recognized in article 68(*b*). Without "subsequent practice" a verbal agreement would be of little or no importance.

22. Suggested text, second line:
"...the *parties*. The rules laid down...".

Article 66: "Amendment of multilateral treaties."

23. Paragraph 3: In its present form, this paragraph could be taken to mean that, conversely, a State party which has *not* signed the agreement (nor otherwise clearly intimated that it does not wish to oppose the amendment) is indeed liable if there is a breach of treaty.

The Netherlands Government would note here in the first place that under paragraph 1 of the article the said treaty State would have taken part in the preliminary consultation on the desirability of an amendment, in fact initially it would probably have assisted in drawing up the amendment agreement. Adopting the line of thought expounded by the ILC in paragraph 13 of its commentary, the Netherlands Government considers that liability for a breach of treaty would as a rule be out of place in this amendment procedure, even if it involved a State party that had dissociated itself from the proposed amendment in the course of the procedure.

24. Suggested modification of text:
It would be advisable to delete paragraph 3.

Article 67: "Agreements to modify multilateral treaties between certain of the parties only."

25. The notification prescribed in paragraph 2 may be *post-factum* notification. A considerable time might even elapse between conclusion of the "*inter se* agreement" and its being made known to the other States parties, without the regulation in paragraph 2 being violated. The Netherlands Government considers that notification should be given in good time. In many instances it will be virtually impossible to notify the other States parties when the first proposals for the agreement are tabled. But when the States concerned have reached an accord in substance on the proposed *inter se* agreement and when its conclusion is only a question of making that accord definitive, there would seem to be nothing to prevent the other States parties from being informed at once.

26. Suggested modification of paragraph 2:
"Except in a case falling under paragraph 1(*a*), the *intention to conclude* any such agreement shall be notified to the other parties to the treaty."

Article 68: "Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law."

27. No comment.

Section III: "Interpretation of treaties."

Article 69: "General rule of interpretation."

28. If it must be assumed that it is desirable to lay down interpretation rules, the Netherlands Government can concur with the ILC on the two basic principles adopted, namely that the actual text of the treaty is the most authoritative source from which to learn the parties' intentions, and that the text should be judged in the very first place in good faith.

29. Paragraph 1: The rule given in paragraph 1(*b*) is applicable only to terms used in treaties whose significance derives partly from the fact that they have a more or less established meaning in international law. In other words, where a treaty refers, or appears to refer to concepts of international law, observance of this rule would mean that efforts must be made to discover the intention of the parties concluding the treaty by considering the meaning of these concepts elsewhere in international law and independently of the treaty to be interpreted. The Netherlands Government believes that when interpreting a treaty it is essential that the intention of the parties be ascertained from the treaty itself in accordance with the rule under (*a*); any endeavour to discover that intention from international law in general is a matter of secondary importance. The rules under paragraph 1(*a*) and (*b*) are therefore not of equal value: rule (*b*) is less important than rule (*a*) and would not be applied until rule (*a*) had proved ineffective.

Rule (*b*): The Netherlands Government cannot agree to reference to the "law in force at the time of (the) conclusion (of the treaty)". Some legal terms will certainly have to be given the meaning they had when the treaty was concluded. The example given in paragraph 11 of the ILC's comments, viz. the interpretation of the term (Canadian) "bay" according to its meaning at the time, confirms this. But it is just as certain that in *other* cases legal terms will have to be interpreted according to their meaning in the legal rules in force at the time the dispute arises and again in other cases in the light of the law in force at the time of interpretation. For example, in treaties concerning a specific use of the "territorial sea" or of the "open sea", the meaning of these terms will have to be regarded as keeping abreast of changing legal views.

Accordingly, the Netherlands Government is in favour of deleting paragraph 1(*b*). Deletion of the entire sentence is more likely than deletion merely of the words "in force at the time of its conclusion"

to leave unanswered the question whether any term should be interpreted in any specific case according to the law in force at the time or to that in force now. It would seem more correct and quite enough in itself to allow oneself to be guided solely by good faith when answering the question.

30. Paragraph 3: Having regard to the ILC's arguments as set down in paragraph 14 of its commentary, the Netherlands Government can agree to no separate reference being made in paragraph 3(*b*) to "subsequent practice of organs of an international organization upon the interpretation of its constituent instrument". This question should indeed be dealt with under the law relating to international organizations. Meanwhile, however, the present article may not discount the possible influence of what is conventional within the organization.

The present wording of paragraph 3(*b*) would appear to rule out that influence, or at least greatly to restrict it, by requiring the "understanding of *all* the parties".

Yet even after deletion of the word "all" the clause "which clearly establishes the understanding... etc." would amount to a needless and therefore undesirable curb on the interpretation procedure, making it unnecessarily rigid. The Netherlands Government suggests that the words "which clearly... etc." up to and including "its interpretation" be deleted from paragraph 3(*b*).

31. Proposed texts for paragraph 1 and paragraph 3(*b*):

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each *term in* the context of the treaty and in the light of its objects and purposes."

"3. ...(*b*) Any subsequent practice in the application of the treaty."

Articles 70 to 73 inclusive:

32. No comment.

General remarks:

33. As regards the form in which the codification of the law of treaties would take, the Netherlands Government has noted that in the years 1956-1960 the ILC and its rapporteur Sir Gerald Fitzmaurice assumed when drafting the articles that they would be included not in a treaty but in an "expository code". Paragraph 16 of the 1962 ILC report reiterates some arguments for this form, "a code of a general character". The set-up was modified in 1961, when the ILC decided to reword the articles in such a way that they could be incorporated in a treaty. The arguments supporting such a move are given in paragraph 17 of the 1962 ILC report.

The final choice between Code and Treaty will have to be made by the General Assembly of the United Nations. Before the final decision is taken as to the form in which the findings shall be set down, it would be a good thing if the ILC were to study the various possibilities more closely and state how they imagine a code would be put into effect and what binding force or authoritative power it is likely to possess.

18. Pakistan

[PART I]

Transmitted by a note verbale *of 7 January 1963 from the Permanent Representative to the United Nations*

[*Original: English*]

The Permanent Representative of Pakistan to the United Nations ...has the honour to state that all the draft articles contained in chapter II of the report of the International Law Commission covering the work of the fourteenth session are in accordance with settled principles of international law and the Government of Pakistan are in full agreement with all the provisions thereof.

...

[PARTS II AND III]

Transmitted by a note verbale *of 10 December 1965 from the Permanent Mission to the United Nations*

[*Original: English*]

[PART II]

Article 43: The following sub-paragraph may be added to this draft article:

"A party to a treaty may not plead impossibility of performance if the impossibility is based upon a change of circumstances deliberately brought about by that party. Such a party should restore the *status quo* and carry out its obligations under the treaty."

Article 44: In paragraph 3 of this article, after clause (*b*), the following clause may be added as clause (*c*):

"(*c*) To changes of the circumstances which have not been foreseen by the parties but which have been deliberately brought about or created by one of the parties to the treaty."

Article 45: This article should be deleted. A separate specific provision should be made to the effect that the interpretation and application of, as well as disputes under, sections II and III (draft articles 31 to 45) should be made subject to the compulsory jurisdiction of the International Court of Justice.

[PART III]

Article 61: This article should be amended so that instead of requiring the consent of the third party, a mere notice to the third party will do.

Article 67: This article should be deleted altogether.

Article 68: Clause (*c*) of this article should be deleted.

19. Poland

[PART I]

Transmitted by a note verbale *of 25 October 1963 from the Permanent Mission to the United Nations*

[*Original: English*]

1. It is the view of the Polish Government that since general international treaties relate to universal norms of international law or refer to problems of interest to the entire international community, they should be opened for accession to all States without exception.

Any limitation of the participation in such treaties would be contrary to their universal character and might result in discrimination of some States, which is contradictory with the universal character of international law.

Therefore, the second part of *article 8, paragraph 1*, which follows the just principle that "in the case of a general multilateral treaty, every State may become a party to the treaty", should be deleted as being restrictive in relation to that very principle.

2. The expression "a small group of States", used in several articles of the draft, raises serious doubts, for it is too general, and it allows for different, sometimes even contradictory, interpretations, which in the future can bring about considerable difficulties of practical nature.

3. Too far-reaching obligations of States participating in international negotiations are contained in *article 17, paragraph 1*.

It seems unjustified and inconsistent with international practice to extend the obligation specified in this article to States which only participated in the elaboration of the draft treaty or only took part in the negotiations. Acceptance of such a concept could lead, in certain cases, some States to refrain from participating in the negotiations of international treaties.

4. It might be advisable to consider whether the adoption of such a wide formula as "incompatible with the object and purpose of the treaty", contained in *article 18, paragraph 1(d)*, would not lead in practice to a considerable restriction of the right of States to make reservations to treaties. Such a restriction might consequently reduce the possibility of their participation in certain treaties. This would be particularly undesirable with regard to general international treaties.

[PART II]

Transmitted by a note verbale *of 21 July 1964 from the Permanent Mission to the United Nations*

[*Original: English*]

In the view of the Government of the Polish People's Republic, part II of the draft articles on the law of treaties constitutes a considerable contribution to the codification and progressive development of international law and, in general, is acceptable. The following provisions, however, rouse some reservations:

Article 36

Coercion as defined in this article should include not only "the threat or use of force" but also some other forms of pressure, in particular economic pressure, which in fact represents quite a typical kind of coercion exercised sometimes on concluding treaties.

Article 39

In the phrase "from the character of the treaty and from the circumstances..." the conjunction "and" should be replaced by "or". For it seems sufficient that the appropriate intention of the parties should result only from the character of the treaty or only from the circumstances accompanying its conclusion, or from the statements made by the parties.

Article 40, paragraph 2

In order to avoid any excessive dependence of the future operation of a treaty upon the will of countries that have not undertaken any obligations under that treaty, the term provided for under this paragraph should be as short as possible and at any rate should not exceed four years. Such a period of time is in general quite sufficient for carrying out in the countries concerned the procedure connected with the ratification or adoption of the treaty.

Article 50, paragraph 2

The revocation of the notice by a party to the treaty should be subject to the agreement of the remaining parties. For their interests should be safeguarded, taking into consideration the fact that after the notice of termination, etc., has been communicated by the country concerned, the other parties to the treaty frequently take appropriate steps in order to adjust themselves to a new situation that will arise if that country ceases to be a party to the treaty. Moreover, it may happen that in connexion with a notice communicated by a country, another country withholds its own intended notice and, after the revocation of the notice by the former country, the latter country would be unable to communicate its own notice on account of the expiration of the period of time provided for under the relevant agreement for giving such a notice.

20. PORTUGAL

[PART II]

Transmitted by a note verbale *of 27 August 1964 from the Permanent Mission to the United Nations*

[*Original: English*]

Article 30

This article contains a general provision affirming the principle of the validity of treaties and of their continuance in force and operation, provided that the prerequisite conditions laid down in part I are complied with.

At the same time the exceptions it mentions give a concise notion of the structure of Part II, since it foresees the nullity, termination or suspension of the operation of the treaty or the withdrawal of one of the contracting parties.

Our observations on this principle and the various exceptions will be found in the commentaries on the articles under these specific headings.

Article 31

The subject-matter of this article is of the highest importance, as is apparent not only from its possible practical implications but also from the special attention devoted to it as a matter of doctrine. The object is to determine the scope of the constitutional provisions of each State governing its competence to conclude treaties, or more precisely to find out if these provisions can affect the validity, in international law, of the consent given to a treaty by the representative of a State, if it is apparent that he was qualified to express such consent.

Logically, the position to be taken must be based upon consideration of the constitutional texts in question. In the case of Portugal, these do not solve the problem. Article 81, paragraph 7 of the Portuguese Constitution empowers the President of the Republic to negotiate international conventions and treaties, submitting them through the Government to the National Assembly for its approval. This approval is expressly mentioned in article 91, paragraph 7, as being among the powers of the Assembly.[11]

This approval enables the President of the Republic to ratify the treaties.

The question has arisen with regard to similar constitutional provisions whether they should be considered as determining whether the State can be deemed to be bound by the consent given by a representative who was apparently authorized to give it.

Two opposing currents of opinion have come to light concerning the doctrine of the powers of representatives of contracting States, one upholding the pre-eminence of internal law and the other that of international law.

According to the first, international juridical validity ought to be attributed only to a treaty concluded by representatives who are *fully* (*plenamente*) authorized by internal law to contract the obligations in question. The provisions of internal law concerning the limitations placed upon the competence of the State organs to conclude treaties must be considered as part of international law. Hence if the agent of a State purports to represent it in violation of its constitutional law, that State is bound neither under its internal law nor under international law.

On the other hand, the second group maintains that internal constitutional law should be resorted to only for the purpose of determining which organ or person has the power to represent the State; but that when this representative has definitively bound himself in the name of the State in question, this obligation subsists in international relations, even if an excess has been committed in the exercise of the powers of representation. International law lays down only the procedure and the conditions which permit States to express their consent to treaties, as well as the conditions which must be fulfilled by the different organs and agents in order to be recognized as authorized to act under these procedures in the name of the State. Again, while internal law determines the organs and the procedures by which the will of the State to conclude treaties is formed, international law only takes into account the external manifestations of that will on the international plane. It is thus possible that a treaty may be valid in international law,

[11] Only in urgent cases is the Government permitted to approve international conventions and treaties (article 109, paragraph 2). The existence of an urgent situation is assessed at his discretion by the President of the Republic. (Cf. Prof. Marcelo Caetano, *Curso de Ciencia Politica e Direito Internacional*, 3rd ed., vol. II, p. 182).

while remaining invalid in internal law, a situation which may render the agent responsible under domestic law, because of the juridical consequences of his actions.[12]

The growing complexity of the constitutional provisions in each State and the difficulties of their interpretation, even without underrating recourse to internal law, have in the meanwhile increasingly emphasized the need in international law for placing treaties under the shelter of the juridical questions thus raised. That is the reason why restrictions designed to ensure stability in the application of treaties are placed in the way of referring back to internal law—a point on which there are an important number of opinions both in theory and in international practice.

Whether one speaks of incorporating national law into international law as regards the competence of the organs acting in representation of the State, or of the mere conformity of international law with national law in this respect, it is certain that, leaving aside those two opposing trends, an attempt is made to formulate a rule which should, without refusing to apply constitutional law, appropriately safeguard the position of the contracting States. A principle of good faith is thus invoked, by virtue of which, where the organ acting in the name of a certain State did so in such a way as to convince the opposing State in good faith that it was competent to enter into the contract, the treaty will be binding upon the State thus represented, even if the representative exceeded the powers conferred on him by his internal law.[13]

On the other hand, it is taken as generally recognized that a treaty concluded in disregard of the provisions of the constitutional law governing the formation of the will of a State does not bind the latter, if such provisions are expressly laid down and have a "sufficiently notorious character".[14]

Thus, as a result of this preoccupation with safeguards in concluding a treaty, and principally in executing it, a doctrine has emerged which, without affecting the applicability of constitutional restrictions, formulates reservations with regard to their indiscriminate application, centred as it is, above all, on the apparent powers of the organs representing the States in accordance with their constitutional laws.

It is precisely this doctrine that article 31 seeks to establish. Naturally, in order to achieve a proper understanding of this article, it is not possible to think only of cases where a representative of the Portuguese State may conclude a treaty in violation of constitutional rules. If it is advantageous to invoke such a violation in order to consider the treaty as not binding, it is also necessary to bear in mind, and perhaps with greater reason, those other cases of treaties in which Portugal may intervene in good faith, in the rightful belief that the intervention of the organ of the other State or States is in conformity with their domestic laws.

From this point of view it appears to be more in conformity with the requirements of the international community to regard as valid the intervention of an organ having authority as set forth in article 4, and only to accept that the State may declare itself not bound when the violation of its internal law is *manifest*.

This exceptional hypothesis is couched in rather vague terms, but it does not seem appropriate, or even possible in the present stage of international law to substitute a different wording with a more limited and stricter connotation. We might speak of a violation that is "absolutely manifest", as in paragraph (12) of the commentary on the draft, or of one that is "sufficiently notorious", as preferred by De Visscher, without achieving appreciably greater precision. It is even necessary to underline that cases in which a binding treaty results, despite disregard of constitutional norms, are exceptional. And it would seem that a vague expression such as that in article 31 will make it possible to decide, according to the circumstances of each case, whether knowledge of the rule or rules of the internal law of another State regarding competence to conclude treaties could be demanded from a State about to enter into a contract with that other State.

Hence, while recognizing the imprecise nature of the limitation contained in this article, we do not see any juridical disadvantage in accepting the proposed text, which appears otherwise to conform best to international practice and jurisprudence.

Finally, it should be stated that what is perhaps the most flagrant instance of a failure to bind a State—namely, that in which the representative does not fulfil the conditions laid down in article 4 and is nevertheless permitted to express the consent of this State—is regulated by article 32 in terms which in practice amount to an important limitation within this exception. And this is one more reason for rendering it acceptable.

Article 32

Once it is pointed out that this article has in view only those cases where an unauthorized representative claims to express the consent of his State definitively so as to produce a binding effect and where consequently there is no possibility of a subsequent ratification or approval, it becomes obvious that the only solution can, in principle, be that the treaty is not binding upon the State: the representative has failed to comply with the conditions laid down in article 4 necessary to express the consent of his State, and nevertheless has expressed it.

This solution becomes inescapable not only in view of the principles regulating representation in national and international law, but also because of the exigencies of the very structure of the draft, which in article 4 sets out the qualifications which the representative should have in order to be accepted as such.

It would be stretching this consequence too far, however, if we refused to concede that the State can ratify the action of its representative, expressly or implicitly. It is on this basis that the exception contained in the last part of paragraph 1 of this article is understood.

Paragraph 2 contains a principle related to the preceding article —the external appearances of consent are relevant in international law—but which naturally gives way when the limitations imposed upon the powers of the representative have been communicated in due form to the other contracting States. Since the latter cannot allege ignorance of these limitations, it must strictly be held that they entered into the contract with the representative in the precise terms in which he was empowered to do so. It would, therefore, be unjustifiable that despite this knowledge these States should be able to take advantage of the circumstance that the representative expressed consent unconditionally.

Article 33

The theory of vitiated consent has not been studied in international law with the same precision and to the same extent as in domestic law. This has been prevented by the circumstances in which international agreements have developed, allowing the contracting parties to obtain a more profound knowledge of each other, and requiring as a rule safeguards as to the manner of action. For this reason the list of cases where such flaws have existed and produced an effect is restricted. On the other hand, a complete theory concerning these vitiations has been considered in international law as a possible cause of conflicts, and a dangerous weapon enabling States to refuse compliance with obligations assumed.[15]

[12] Cf. Julio Diena, *Diritto Internazionale Pubblico*, Spanish transl., p. 401; Balladore-Pallieri, *Diritto Internazionale Pubblico*, 7th ed., pp. 126 *et seq.*; D. Anzilotti, *Corso di Diritto Internazionale*, vol. I, pp. 305 *et seq.*

[13] See Balladore-Pallieri, *op. cit.*, p. 130.

[14] Charles De Visscher, *Théories et réalités en droit international public*, 2nd ed., p. 311.

[15] Cf. Balladore-Pallieri, *op. cit.*, p. 212.

This does not in any way imply the irrelevance of error, fraud and coercion in international law, which in this regard avails itself of many of the principles in force in domestic law on this question. And it must be stressed that, despite the rare occasions on which these vitiations are found to occur in practice, they occasion certain scruples in this field for two reasons which we must set out: firstly, because international law, following in this aspect the less evolved juridical orders, contents itself with the external manifestation of the will, making it correspond, in principle, to the real will; and secondly, because as a rule the declaration of the will is imputed, not to its physical author, but to the juridical community in representation of which the organ has acted. For this reason, the vitiation normally occurs only when the will expressed by the representative does not correspond with the real will of the competent internal organ. Lack of accord between the declaration of the organ of representation and its own will is an exceptional situation.[16]

Now, passing over these particular aspects which we may call internal, article 33 only refers, in the commentary, to the "fraudulent conduct" of a contracting State as having induced a State to give consent to a treaty.

The difficulty, stressed in the Report, of being unable to arrive at a universally accepted notion of deceit led to the use in the various texts of the draft of the French word "*dol*", the English word "fraud" and the Spanish word "*dolo*". In the absence of any precedents that would help to elucidate the precise scope of the notion of fraud, it was thought best to leave it to be worked out in practice and in the decisions of international tribunals. This appears to be reasonably prudent.

On the positive side, article 33 lays stress upon deceit as vitiating the will, just as in domestic law, and considers it as a cause of nullity of a treaty. This nullity is relative, and this corresponds to the present state of theory: that is to say, only the State whose will has been so vitiated can invoke and avail itself of the nullity.[17]

We note that this article omits aspects that are doubtful in theory, for instance, the question who is to decree the annulment. It is, however, understandable that the draft should not make allusion to it, this being a matter to be regulated if necessary in texts regarding arbitration or the competence of international tribunals.

Paragraph 2 makes it possible to apply the allegation of fraud only to the clauses affected by it. The mere statement of this possibility would soon provoke the objection that partial nullity of a treaty is in some cases impracticable, because the clauses which have been the object of the fraud are not separable from the instrument. Nevertheless, the reference to article 46 restricts partial nullity to cases in which such clauses are clearly separable from the rest of the treaty with regard to their application, or in which the acceptance of these clauses has not been made an essential condition of the consent of the parties to the treaty as a whole.

This being so, partial nullity is restricted in reasonable terms.

The consequences of nullity are set out in article 52.

Article 34

Regarding error as vitiating consent, the considerations set out above in regard to fraud are valid *mutatis mutandis*. Further error is seldom proved and the solutions given in the present article are based on the rare cases which become obvious.

Paragraph 1 formulates a general principle regarding an error as it may affect the substance of a treaty. It attributes to it the same effects of relative nullity as in the case of fraud; it is permissible to conclude that only essential error was contemplated. No distinction is made between unilateral and mutual error, although it seems that both kinds are included.

The statement in the report that an error of law is admissible on the same footing as one of fact does not seem satisfactory to us. This is because the expression "error related to a fact or state of facts" in the text does not imply exclusion of an error of law. But these terms do without doubt designate an error of fact. The report recognizes this since it subsequently seeks to show that the line between law and fact is not always an easy one to draw and that an error as to internal law would for the purposes of international law be considered an error of fact.

This effort at interpretation could easily have been omitted (on the basis of elements outside the draft) had it been provided that an error alleged as the ground of annulment can be an error of fact just as much as an error of law, the admissibility of which is not otherwise placed in doubt by the authorities.[18]

It is also interesting to record that in the report one is given to understand that the effect of invalidating consent will be to make the treaty void *ab initio*, that is to give it a retroactive effect. There is thus a clash with the theory most in vogue, which even in cases of annulment on the ground of error does not allow such effects.[19] Article 52, however, seeks to mitigate the application of this principle.

Paragraph 2 excludes from nullity cases in which the party led into error has contributed to it up to a point. This exception finds a precedent in a decision of the Permanent Court of International Justice, according to which it is not permissible for a party to enter a plea of error when it has contributed to that error by its own conduct, or where it could have avoided it, or even where the circumstances were such as to put the party on notice of a possible error.

As has been seen, there is complete accord between the content of this decision and the exceptions laid down in paragraph 2.

An identical principle is to be found in article 659 of the Portuguese Civil Code. Also articles 217 to 222 of the Draft Civil Code, Book I, General Part (1st Ministerial Revision), now in hand, are in our view based on it.

Paragraph 3 refers to article 46, as in cases of fraud, for the permissibility of partial annulment in cases where the error related to particular clauses only of the treaty.

Finally, paragraph 4, which deals with errors in the wording of the text, does not permit the invalidation of the treaty, but provides for correction of these errors in accordance with articles 26 and 27 of Part I. This is another application of the principle of stability of treaties, which permits their invalidation, even if only partial, solely in extreme cases.

Articles 35 and 36

These two articles deal with matters the importance and novelty of which we are bound to emphasize. An attempt is here made to assign juridical effects to coercion exercised in order to secure consent to the conclusion of a treaty.

From ancient times to present days, international law has moved in the direction of considering as valid treaties that are concluded under coercion, thus departing from the theory of vitiation of consent applied in private law. This departure is due to the favouring of the use of force for the settlement of international disputes and to the absence of a supra-national body which could take up these disputes and find a solution for them. The result has been that the tenacious defence of treaties concluded under coercion has come to base itself on the right of the strongest and on the anti-juridical ground that the weakest can only choose one of two alternatives, either total ruin or signature of the treaty—and the latter is considered the more favourable! This reasoning has been opposed as being manifestly devoid of foundation. Therefore, it

[16] See in this respect Paul Guggenheim, *Traité de droit international public*, vol. I, pp. 92 and 93.

[17] Cf. in this respect, Guggenheim, *op. cit.*, p. 92; Louis Cavaré, *Le droit international public positif*, vol. II, p. 56.

[18] Cf. Louis Cavaré, *loc.cit.*

[19] See P. Guggenheim, *loc. cit.*

remained for the advocates of this view to support the validity of these treaties on grounds of the social order, or rather the desirability of establishing a general stability which demanded that there should be an end to conflicts—an end which, it is claimed, would be secured precisely by a respect for such international instruments. [20] Although it is recognized that this solution in no way satisfies our sense of justice, it has been persistently supported on the ground that it is in conformity with the nature of positive law, which has to limit itself to a realistic basis and to achieve a *modus vivendi* acceptable among States.

The establishment of the United Nations, however, and the acceptance of its Charter, Article 2, paragraph 4 of which prohibits any recourse to the threat or use of force in the solution of international disputes, ought to have opened new perspectives in this field, with a corresponding and necessary influence on the positive law of treaties, as indeed had previously been brought about by the old League of Nations.

What has just been stated relates to coercion exercised collectively on the State itself. But this may be very clearly distinguished from the coercion which is brought to bear on the will of the physical person representing the State. If this person is coerced the principles of private law are applied and the consent thus obtained is considered null. [21]

The most important innovating aspect of these two articles lies in the unification of the rules in the two cases. Whether the coercion is exercised upon the subject of the law or upon his agent, it is always relevant: in the first case it annuls the treaty, and in the second, the consent on which its conclusion was based.

This nullity is absolute, for it does not need to be invoked by the State concerned as in the cases of fraud and error which have been examined above. Also, in assessing the gravity of the consequences resulting from coercion, the two articles are in accord with the most modern theory, which admits in international law both kinds of nullity, absolute and relative, but upholds only the latter in cases of consent procured under coercion. [22]

We may thus see the gravity which is attributed in the draft to procuring consent by coercion, since it is given a unique position, that of the more rigorous of those two kinds of nullity.

This approach is praiseworthy as being the best calculated to ensure the rule of morality in international relations.

Article 35, which deals with coercion of the representative of a State, refuses juridical protection of any kind to consent thus expressed and, as can be seen, adopts the line of traditional doctrine.

Its paragraph 2 is similar to articles 33, paragraph 2, and 34, paragraph 2, already examined when dealing with fraud and mistake, and does not call for observations different from those made in those cases.

The doctrine expressed in article 36 is also an innovation; it lays down the law concerning the coercion of a State by the threat or use of force. The report states that it was thought desirable to go back to the principles of the Charter of the United Nations and that it was considered that the precise scope of the acts in question should be determined in practice by interpretation of the relevant provisions of the Charter.

Given the close connexion between this subject of coercion in the conclusion of treaties and the above-mentioned principle of the Charter, which is of almost universal validity, it is judged best as a precaution, not to go more deeply into details respecting the methods of this coercion.

Article 37

Even in our times it is still stated that the rules of international law are not of a peremptory character, and that treaties may have a wide content, without limitations of any sort. The reason for this is seen in the absence of any norm prohibiting treaties which are *contra bonos mores* or contrary to a fundamental principle of international law. However, it may be stated that mainly from the coming into force of Article 20 of the Covenant of the League of Nations, it has come to be understood that there are limitations to the juridical objects of a treaty. Under Article 20 members of the League agreed that in future they would not undertake obligations contrary to the Covenant. And doctrine has been moving with increasing force towards acceptance of the rule that every convention violating international law, rules of universal morality and fundamental human rights must be considered null owing to the unlawful character of its purpose. Even those authors who, keeping in mind the possibility of a treaty modifying international custom, recognize the difficulty of solving the question, and ask if all treaties which affect principles which are essential to the structure of international society should not be considered null, as for example, those providing for recourse to piracy or disrespect for the human person. [23]

Today, under Article 103 of the Charter of the United Nations, it is accepted that the obligations of Member States under the Charter shall prevail over those under any international agreement if there is a confict between the two.

Article 37 of the draft seeks to confirm this new trend in positive international law. But it is evident that we are still in the early phase of producing a positive rule, compatible with the evolution of this branch of law. That this is so is shown by the allusion made to "a peremptory norm of general international law", without singling out from among these rules those from which no derogation is permitted and which can be modified only by a subsequent norm having the same character. A mere enumeration of examples, as emphasized in the report, would incur the risk of rendering interpretation difficult in regard to other cases of incompatibility not expressly mentioned.

Nor would it profit much, as far as the certainty of this provision is concerned, to include in it, according to some suggestions, acts constituting crimes against international law, such as genocide, or other offences constituting violations of human rights or the principle of self-determination. It is well known how much these notions have become corrupt in reality, so that any reference to them would in no way contribute in practice towards removing them from the confusion existing with regard to them. Again, any reference would not in any way add to the clarity or efficacy of this article.

We are of the opinion, therefore, that the position adopted by the Commission regarding article 37 is a balanced one, and that it will be difficult to go further in the definition of *jus cogens* and its effect on treaties which appear to be incompatible with it.

Article 38

Section III of the draft contains a series of articles relating to the duration of treaties. Although it would be possible to evaluate

[20] See in Louis Cavaré, *op. et vol. cit.*, p. 54, the series of arguments supporting this thesis of the irrelevance of coercion in regard to treaties. This irrelevance is supported in relation to moral and material coercion by Paul Fauchille in his *Traité de droit international public*, vol. I, p. 298.

[21] See Diena, *op. cit.*, p. 409; Balladore-Pallieri, *op. cit.*, p. 213; Prof. A. Marques Guedes, *Direito Internacional Público*, vol. II, pp. 293 and 294. It is clear that this problem is not acute in normal cases where ratification by the Head of State, on whom the effects of coercion are not felt, is a means of impeding the effects of the treaty. But there are still cases where the organ coerced is the same that ratifies and cases in which the coercion is not known by the ratifying organ.

[22] Cf. Guggenheim, *op. cit.*, p. 92.

[23] See, in defence of the first point of view, Guggenheim, *op. cit.*, p. 57; and in support of the second, which would limit the juridical object of treaties, or at least expressing doubts regarding the unlimited scope of that object, Fauchille, *op. cit.*, pp. 301 *et seq.*; Diena, *op. cit.* p. 409; Madame Paul Bastid, *Cours de droit international public approfondi*, 1959-1960, p. 127.

them as a whole, it is more convenient to study each one of the cases, or groups of cases, provided for in each rule.

Article 38 mentions the most frequent of the relevant cases, generally deemed in international affairs to be causes of termination intimately connected with the nature of the treaties. This makes detailed comments superfluous.

Paragraph 1 deals with the termination of treaties through the operation of their own provisions. Such clauses are currently applied in international instruments and fulfil the function of resolutory conditions.

Paragraph 2, which refers to denunciation of bilateral treaties, points out the special advantage of fixing a date on which the denunciation is to take effect. The formula used is not very clear, since reference is made to the date of denunciation of the treaty, a circumstance which can in certain cases lead to difficulties in interpretation. However, it would be difficult to lay down a more precise principle. It is understood that denunciation is effected by the normal procedure, that is through notification of the desire to exercise the right of denunciation.

The same can be said of clause (*a*) of paragraph 3, which deals with the application of the principle of the denunciation of bilateral treaties to multilateral treaties.

The ground for termination of a treaty provided in clause (*b*) of paragraph 3—reduction of the number of parties below a minimum number agreed upon as being necessary for the treaty to continue in force—covers the application of a clause like those in some recent treaties, for example, that on the political rights of women. The final part of this clause, which states that termination does not result from the mere fact that the number of parties falls below the number initially fixed as a condition for the treaty to enter into force, represents in reality a restrictive interpretation of the first part of the clause. It might, indeed, be understood that to fix the number of parties necessary to enable a treaty to enter into force showed a belief that this number was a requisite and paramount condition for its continuance in force. It was sought to do away with this condition, for a plausible reason: a treaty may be terminated by agreement, by denunciation or by withdrawal of the contracting parties. This means that when it is desired to terminate a treaty by reason of the reduction of the number of the parties it is necessary to state this in an express clause inserted in the instrument.

This rule is commendable since it ensures a greater certainty in application.

Article 39

If a treaty contains no provisions regarding its termination, then it is possible to lay down two principles: either to make its denunciation upon the withdrawal of one of the parties impossible in any event or purely and simply to let the solution of each case depend upon the will of the parties or an appreciation of other factors.

The discussion of this issue, of which the report gives an account, makes fully patent the difficulties experienced in reconciling the need for stability of treaties with the exigencies of a just solution and of a balanced satisfaction of interests. It is conceded that, side by side with treaties the nature of which excludes the supposition that the contracting States had any intention of permitting denunciation or withdrawal of one of the parties, e.g. treaties of peace and of delimitation of frontiers, there are others in which the existence of such an intention may be easily proved. On the other hand, it is necessary to take into account the fact that there is no clause regarding denunciation or withdrawal. It seems therefore reasonable to establish, as is done in article 39, a negative principle, in order later on to admit such a possibility of denunciation or withdrawal on the basis of three factors:

The character of the treaty;

The circumstances of its conclusion;

The statements of the parties, made either before or after conclusion.

This rule is not supplemented by any guidance as to the method for interpreting the joint will of the contracting parties. Once the interpretation of treaties is classified as an operation of juridical technique, the existence of a certain number of general rules is recognized, which make up a logical system very often not coinciding with private law. Any interpretation that may be given to them cannot be separated from their *useful effect*, expressed in the maxim *ut res magis valeat quam pereat*. On the other hand, the express mention of the statements of the parties, which the report explains as including the preparatory work and the subsequent conduct of the parties, gives the required emphasis to this spirit of interpretation, which De Visscher calls "the politic in the interpretation of treaties". [24]

We think, in brief, that the summary of the basic elements of interpretation contained in article 39 leaves sufficient latitude for the application of those principles, and leads one to believe that the special nature of the subject discussed was kept in mind.

The notice period of at least twelve months for signifying intention to denounce or to withdraw is justified as being a means of duly safeguarding the interests of States which may continue to be parties to the treaty.

Article 40

International theory recognizes as a rule that treaties may be terminated either when an intention of such a possibility is made clear in a clause initially inserted, or when a common declaration to that effect is made later on. It is with this latter manner of terminating a treaty that the present article deals.

There is nothing noteworthy about paragraph 1, which admits three fully justifiable forms of agreement.

Paragraph 2, which relates especially to multilateral treaties, embodies one of the points of view evolved during the discussion of the draft. According to this point of view, it is laid down as a supplementary rule that such treaties may be terminated with the consent of all the parties and, in addition thereto, with the consent of at least two-thirds of the States which drew up the treaty.

This rule is noteworthy because it seeks to give importance to the consent of States which took part in the drafting of the treaty and which still have the right of becoming parties to it. It does not seem reasonable, however, to wait indefinitely for them to become parties and in the meantime to continue to require their consent to termination. Their consent will be of importance only up to a certain moment. The draft does not mention the number of years after which their consent will no longer be necessary, but the report states that the points of view of the various Governments consulted are being awaited.

In our view this period should not exceed 5 years. The operation of the treaty over this period appears to us normally sufficient to enable the States to decide whether to become parties to a treaty; and when they are not interested in becoming parties, no principle involving protection of their interests, even potential interests, can render defensible the need for their consent to the termination of the treaty.

But we wish to say clearly that other considerations bearing on international practice may not prevail over this logical reasoning and make advisable a different time-limit. The period would then depend upon the evaluation of factors not placed before us.

---

[24] *Op. cit.*, pp. 313 *et seq.* Regarding the true will of the parties to treaties, the difficult situation of the student is better understood when one recalls the phrase of Paul Valéry: "Les véritables traités sont ceux qui se concluraient entre les arrière-pensées"—cited in *Principes de droit international public* by Charles Rousseau (*Recueil des Cours de l'Académie de Droit International*, 1958, p. 501).

The extension of the rules laid down in paragraphs 1 and 2 to cases in which application of a treaty is suspended does not call for any detailed criticism.

Article 41

This article, dealing with the total or partial termination of a treaty by another subsequent treaty, points in clause (*a*) to an incontestable case, namely that the parties have indicated their intention that the matter should be governed by a later treaty.

But clause (*b*) is more complex and raises a question of interpretation to which the observations made regarding article 39 could apply. The issue here is to demonstrate the incompatibility of the provisions of the new treaty with those of the old one, and to assess the true intention of the parties as to whether the latter should prevail.

The text of this article indicates that the incompatibility here dealt with is true incompatibility. From this it follows that it is not possible to harmonize the obligations resulting from the new treaty with those resulting from the old one. [25]

There is no doubt that where a new treaty is concluded which shows this degree of incompatibility in relation to the old treaty, the will of the parties can only be understood as intending to put an end to the latter. Hence the impossibility of applying the provisions of both treaties simultaneously will lead to the application only of the provisions of the more recent one.

However, in a desire to respect the will of the parties, paragraph 2 lays down that the original treaty must be applied where it appears from the circumstances that the later treaty was only intended to suspend the application of the first. On a very strict construction, this principle is already contained in paragraph 1, since in the case it deals with there was no intention to regulate the matter wholly in the new treaty, nor is there true incompatibility between the two. Thus complete interpretation permits us to find in paragraph 1 the guidelines for the situation dealt with in paragraph 2.

Despite this, this last paragraph is useful, as it stresses the intention of the draft to ascertain the will of the States, and as it gives a greater sureness for asserting that the first treaty is suspended, notwithstanding the fact that the subsequent treaty regulates the same matter.

Article 42

Failure to comply with the obligations assumed in a treaty is generally recognized as a ground for suspending or even for terminating its operation. This is a principle of domestic law at present in force (see article 709 of the Portuguese Civil Code), but it is modified in public international law.

The solution contained in paragraph 1 for bilateral treaties does not raise doubts as to the possibility of one party dissociating itself from a treaty with which the other party has failed to comply, and even less as regards the possibility of simple suspension.

In any case, it appears necessary to recognize this right only when the violation is of a certain gravity, or renders impossible the achievement of the objectives aimed at. This is laid down in paragraph 1 which speaks of "material breach" and in clauses (*a*) and (*b*).

When dealing with multilateral treaties, certain aspects will be seen which did not pass unperceived by the Commission. There is indeed a need for distinguishing between cases where only one party reacts to the violation, and cases where all affected parties by common agreement invoke the breach. In the first case the situation is the same as in bilateral treaties, but the affected party may not go further than suspension of the treaty, wholly or partly.

Where, however, all the affected parties combine to take joint action, they are permitted to suspend the treaty, wholly or partly in relation to the defaulting State, or may even terminate it.

On this point we have two observations to make.

The first observation relates to the terms of the solution given in the draft, for a certain current of opinion among jurists makes a distinction, as far as the rights of the parties affected by the violation are concerned, between contractual treaties and law-making treaties. Although in regard to contractual treaties the principle is applied without hesitation that it is permissible for the injured party to free itself of its obligations under the treaty, in regard to normative treaties—that is to say, treaties which formulate rules of objective international law—it is held rather that the norms continue in force despite the violation, and despite the fact that the injured parties have also for their part temporarily given up complying with them.

Paragraph 2 of this article does not go beyond permitting the injured parties the alternatives of suspending or terminating the treaty, without making any distinction between the categories to which the treaty is question may belong.

In connexion with this, a second observation must be made.

Should the decision to suspend or terminate the treaty be left to the free determination of the parties? Or should not rather a guiding principle be laid down, according to which the party or parties concerned should go beyond suspension only where the violation is of a certain character?

In our opinion, the latter is the preferable solution, in order to ensure greater stability of treaties and better discipline in international relations. The Commission naturally must have also had in mind these requirements, as its report, when alluding to the cessation of application through concerted action of the injured parties, mentions the case where the violation has frustrated or undermined the operation of the treaty as between all parties.

It appears necessary, however, that this should be embodied in an article or at least mentioned in paragraph 2(*b*)(ii). Expressed as a mere observation in the report, it will not even possess the value given by article 39 to the statements made by the parties before the coming into force of the treaty in relation to that treaty.

Paragraph 4 refers to article 46, as is done by articles 33, paragraph 2, and 34, paragraph 3. On this we have no comment to make.

Paragraph 5 gives emphasis to any provisions in the treaty or in any related instrument which may regulate in a different manner the rights of the parties in the event of a breach. This rule justifies itself.

Article 43

International doctrine has always admitted impossibility of performance as a ground for terminating a treaty. [26] This impossibility may be either physical or juridical, and both cases are covered by the letter of this article.

As an example of the first, we may mention the submersion of an island, and of the second, the case where the performance of a treaty in relation to one of the contracting parties constitutes *per se* a breach of that treaty, e.g. a treaty of alliance among three States, two of whom are at war with each other.

It is obvious that the disappearance or the total and permanent destruction of the subject-matter of the rights and obligations agreed upon in the treaty should not involve the same consequences as when such disappearance or destruction are temporary. Permanent impossibility permits the termination of a treaty, but temporary impossibility permits only its suspension (No. 2).

The reference to article 46 regarding impossibility of performance only in respect of a few clauses, contained in paragraph 3, is justified

[25] This case is distinguished from non-authentic incompatibility, which does not render impossible the simultaneous application of two documents; as the later one limits itself to restricting the rights flowing from the first. Cf. Guggenheim, *op. et vol. cit.* pp. 144 and 145.

[26] Cf. Marques Guedes, *op. et vol. cit.*, p. 304; Balladore-Pallieri, *op. cit.*, p. 300; Fauchille, *op et vol. cit.*, p. 378.

in the same manner as in the case of similar provisions examined by us earlier.

Article 44

Although this article does not mention the principle *rebus sic stantibus*, it provides for its application. The article is thus in line with theory, jurisprudence and positive international law.

The difficulty does not lie in the acceptance of the principle, but in the terms in which it has to be formulated. The great majority of writers accept the principle where there is a *substantial alteration* of the circumstances which really determined or influenced the conclusion of a treaty.[27]

It is considered that it is not logical to presume that this principle is implicit in the generality of treaties. On the contrary, where there are no elements for concluding that there was a will, either tacit or express, as to the consequences of any alteration of the *de facto* circumstances in regard to the rights of the parties, the most that can be said is that the parties did not foresee this contingency. And if this alteration is liable to affect the treaty to a greater or lesser degree, this is because a norm of international law permits it. This norm, which may be more or less clearly expressed, and which has been accepted since long ago, even in international litigation, is now incorporated in this article 44.

In the interests of the stability of treaties, already mentioned, this principle cannot be accepted without limitations, for it is certain that States are subject to continuous changes of circumstances, and it would not be in any manner justifiable that such changes should serve as a ground for each State to liberate itself, by a unilateral denunciation, from complying with the obligations under a treaty which they had freely concluded. Hence the State should not be able to make indiscriminate use of such changes.

Even more: this principle must be invested with an exceptional character, since it is very important to the international community that undertakings subscribed to in instruments of this kind should be fulfilled. It is this character that is implicitly recognized when speaking of a fundamental change in the *de facto* circumstances, or of the danger of persisting in a binding obligation that might seriously affect the right of self-preservation of a contracting State (Diena), or of a grave change of circumstances (Cavaré), or of an essential change (Anzilotti), etc.

It is precisely this exceptional character that is recognized in paragraph 1 of article 44.

Paragraph 2 stresses only the "fundamental change" which has occurred with regard to a fact or situation existing at the time when the treaty was entered into and defines it in terms which, although not indisputable, we deem adequate in the present phase of evolution of this branch of law. Clause (*a*), when speaking of the essential basis of the consent of the parties to a treaty, goes back in the last resort to the interpretation of the will of the parties. Clause (*b*), although strictly speaking covered by the preceding clause, should be maintained.

The essential change in the character of the obligations undertaken in a treaty should only be taken as relevant when it is proved that they constitute an essential basis of the consent of the parties to the treaty. But in any event, the usefulness of clause (*b*) is to be found in its positive reference to the change in the nature of obligations.

It is clear that, with only these two clauses, this article permits some doubts to subsist in regard, for example, to substantial political changes within each contracting State. Nevertheless, we are of the view that it is better to have a somewhat vague formula such as the one on "fundamental change of circumstances", so as to permit consideration in each case of the applicability of the said principle.

[27] For all writers, see Balladore-Pallieri, *op. cit.*, pp. 301 *et seq.*, and the authors there cited on p. 302, note 22.

The two exceptions contained in paragraph 3 have been justified on unequal grounds. The first—a treaty fixing a boundary—justifies itself more in a negative way; that is to say, as being an exception destined to avoid friction between States on account of the frontier delimitation, tends to reflect the change of circumstances referred to in paragraph 2.

But clause (*b*) justifies itself in a positive fashion, to the extent that it provides for cases which the parties indirectly agreed would not be subject to the application of the principle *rebus sic stantibus*, since with regard to the change in certain circumstances of fact they inserted special clauses in the treaty itself, adopting various solutions.

Paragraph 4 makes the principle of the separability of treaty provisions applicable to this article and is fully acceptable.

Article 45

This provision is closely linked to article 37, to such an extent that during the work of the Commission doubts arose as to whether both should not be incorporated in a single article. Thus, just as a treaty incompatible with *jus cogens* is null, so too it is inevitable to establish that even where a treaty was concluded under conditions of perfect validity it would lose that validity so soon as an imperative norm begins to take effect, causing the nullity of all treaties concluded in conflict with that norm. Paragraph 2 is yet another reference to article 46, which is reasonable because the new imperative norm of international law may be incompatible with only one or some of the clauses of the treaty.

This article is likewise connected with article 53, paragraph 2, wherein are set out the consequences of the application of a treaty which becomes invalid when a new rule of *jus cogens* is established. These consequences will be commented on later.

Article 46

The indivisibility of a treaty is established in paragraph 1 of this article as the rule, for the purposes of nullity, termination, suspension or withdrawal by one of the parties.

Paragraph 2 has a double object: it establishes an express relation with the provisions, already examined by us, in which the separability of a treaty is admitted, and, on the other hand, it defines the cumulative conditions necessary for a partial utilization of the treaty. The first of these conditions is based on a practical criterion, whether the treaty can be executed if the clauses in question are separated from the rest of the treaty. The second condition rests on an interpretation of the will of the parties and leads to the functioning of the principle of indivisibility, notwithstanding the fact that the clauses are clearly separable from the rest of the treaty as regards performance. For indivisibility it is sufficient that the clauses in question constituted an essential condition of the consent of the parties to the treaty as a whole.

Once the object and the functioning of the principle of indivisibility are understood in these balanced terms, we have no fundamental objection to it.

Article 47

The loss of the right to allege the nullity of a treaty as a ground for terminating it or withdrawing from it is regulated in terms which are in our opinion reasonable. Clause (*a*), in recognizing waiver of the right as a ground for loss, seeks to apply a general principle. We are dealing here with a right which does not have an unrenounceable character.

Clause (*b*) refers to the conduct of the parties and gives importance to it in this context, where its unequivocal result has been that the party has elected to consider itself bound by the treaty.

We wish, however, to call attention to a divergence between the text of this article and the comments which are made on it in the report. Although in the introduction and in clause (*b*) reference is made to articles 32 and 35, the report refers twice to cases of

nullity mentioned in articles 31 and 34 as being the ones provided for in the article.

We suppose that there is an inexactitude in the text of the article, which probably goes back to one of the earlier drafts before the final draft was agreed upon. For when we deal with the loss of that right, the loss is only understandable when the application of the treaty depends on the attitude of the parties, either by waiving the right or by conducting themselves in a manner equivalent to an express waiver.

Article 35, dealing with the consequences of coercion exercised on the person of the representative of a State, has not established that the treaty may be annulled, nor, therefore, that the State has the right to invoke the fact of coercion. On the contrary, the solution presented is nullity *ipso facto*, that is to say absolute nullity of the treaty to which consent was secured in such circumstances. This being so, it is not understood why, in relation to such a rule, article 47 should seek to regulate the waiver of a right to invoke the nullity of a treaty which is considered automatically void.

On the other hand, one does not see the reason why the case covered by article 31, according to which the validity of consent may be disputed by a State whose representative acted in manifest violation of his domestic law, is excluded from the waiver provision.

We think for this reason that it is through error that reference is made in the text of article 47 to articles 32 and 35 and that in reality the intention was to refer to the cases considered under articles 31 and 34.

Article 48

The reciprocal relations between multilateral treaties and international organizations are of particular interest. The latter owe their existence to the former.

These treaties also form the basis of numerous other treaties. Thus the character, structure and working of such organizations owe much to them, as Manfred Lachs points out.[28]

It is therefore inevitable that when a treaty is the constitutional act on which such an organization is based, or has been drawn up within such an organization, the clauses of the present draft on the termination of treaties should remain subject to the rules established in the organization concerned. If, for instance, the International Labour Organisation is the organization concerned, it will be evident that the treaties which have been or may be concluded under its auspices will have to take into account the rules which govern that organization.

This approach could be extended to section II of the draft which deals with the grounds of the invalidity of treaties. If as the report suggests the Commission did not think it necessary to make any special provision, it was because the principles embodied in that section appeared by their very nature not to require modification when applied to the treaties with which article 48 deals.

Only on this supposition can the objection be avoided that to refer only to section III is excessively restrictive.

Article 49

The knowledge which we have of the rules contained in article 4 of part I of the draft, relating to evidence of authority to conclude a treaty, comes from a copy of the first report on the law of treaties by Sir Humphrey Waldock, a document in the archives of the Office of the Attorney-General (*Procuradoria Geral da República*) of Portugal.

After examining the text of this article 4 as worded in the above-mentioned report, we do not have any hesitation in accepting the rule that the evidence of authority, therein minutely regulated in regard to the power of a representative of a State to negotiate, sign, ratify, accept, or accede to a treaty, should be the same when it is sought to denounce, terminate or suspend the operation of a treaty, or even to obtain a severance of the ties which had been evolved through the treaty.

In all cases, it is sought to ensure that the organ or representative of the State is authorized to execute acts of the nature described.

Article 50

This article seeks to embody in paragraph 1 the international practice regarding the method to be used when it is intended to notify that it is sought to terminate, withdraw from or suspend the operation of a treaty, under a right expressly or impliedly provided for in the treaty. At the same time the article denies that public declarations made by the responsible organs have any effect as a notification, and requires a formal notice in all cases.

Paragraph 2 grants the power to revoke the notification at any time before the date on which it takes effect. Once this principle is established, the other contracting States may at their discretion take their stand only as of the effective date, even though notice has been given at the proper time.

We think, therefore, that this principle is acceptable.

Article 51

The procedure to be followed in the cases mentioned in the preceding article, otherwise than under a provision of the treaty, is set out in a manner which is somewhat cautious as well as vague. The fundamental purpose is to find a method of settling disputes between States. The Commission has recognized that the obligation to give notice to the other party or parties, and the conditions incumbent upon the State alleging the nullity of a treaty with respect to the States that are notified, constitutes a step forward. If the parties notified should raise objections, the course will lie in searching for a solution of the dispute in conformity with Article 33 of the Charter of the United Nations which, as is known, calls upon the parties to any dispute likely to endanger the maintenance of international peace and security, to seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

We are convinced that to go much further in the formulation of this rule in article 39 would be tantamount to considering it a dead letter in anticipation, and we judge paragraphs 1, 2 and 3 acceptable.

As regards paragraph 4, we must observe that, since this draft comes from an organ of the United Nations, the reservation which it makes regarding "the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes" is too broad. We are of the opinion that these rights or obligations should have been reserved only when they are incompatible with the Charter.

It would, *in fine*, be the application of a principle based on the same grounds as article 48.

Paragraph 5 presents another opportunity, independent of the formalities described above, enabling a party to invoke the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging violation of the treaty.

No reason is seen why in such cases such invocation should be impeded. Perhaps in a well-systematized discipline of private interests such a solution would not have been the most appropriate. Since, however, we are dealing with relations between States, it is not possible to deny that paragraph 5 shows an exact consideration of the realities involved.

[28] In "*Le développement et les fonctions des traités multilatéraux*" (*Recueil des Cours de l'Académie de droit international*, 1957, II, p. 328).

Article 52

Apart from any considerations of doctrine, this article purports, through logical criteria, to determine the effects of the nullity of a treaty with regard to acts executed before such nullity was alleged. It would be possible to support views that nullity produces effects *ex tunc*, since the nullity vitiates not merely acts executed under the aegis of the treaty, but the international instrument itself. It is not possible, however, to ignore the good faith with which a party has acted till then, and this consideration compels recognition of the legality of acts done by that party in the conviction that the treaty was valid. This is what results from paragraph 1, clause (*a*).

In order to prevent the legality of these acts from subsisting beyond the moment when nullity is invoked, clause (*b*) permits the re-establishment, as far as possible, of the position which would have existed if the acts had not been performed.

Under paragraph 2 the validity of the said act cannot be invoked by the party whose fraud or coercion has been the cause of the nullity. This position seems to us defensible, on the basis of exactly the same principle of good faith which confers legality on such acts.

There is no reason for refusing to extend these same principles to the legal consequences of nullity of consent given to a multilateral treaty. This is done in paragraph 3 in terms which do not call for any observation.

Article 53

The legal consequences of the nullity of a treaty are summarized in a principle formulated in paragraph 1. The parties are freed from any obligation to continue to apply the treaty; on the other hand, the legality of acts performed in conformity with the treaty, of any situation which may have resulted from the application of the instrument, are preserved.

A reservation is made, however, in paragraph 2 which deals with the case where a rule of *jus cogens* is the ground for the nullity of the treaty. Whenever this happens, any situation resulting from the operation of the treaty retains its legality only in so far as it is compatible with this rule.

This solution is not free from doubt. It may be considered more equitable to apply in this case the rule of paragraph 1, and respect, therefore, the situations resulting from the treaty, for its nullity of the treaty does not go back to its constitution which was according to rule but to a later moment and to an extraneous fact, that is, to the subsequent coming into existence of a peremptory norm of law. The imperative nature of the latter would have made itself sufficiently felt if it only produced the nullity of the treaty, but respected the situations existing prior to its own date which were brought about legitimately.

It seems to us that this question is linked, to a certain extent, with the lawfulness of the content of treaties, a matter examined already in our comments on article 37. If it is understood, as we have presumed, that contents are limited by imperative norms of international law, it will be easier to maintain that situations brought about in conformity with the juridical order in force at the time might subsist when a change occurs therein through a new rule.

The contrary course laid down in paragraph 2 does not appear to us, in substance, to be completely divorced from the view which does not accept any limitation on the content of treaties, because of a want of norms of international law which could establish such limitations. If this were so, the formulation of one of these rules should refuse legitimacy to prior treaties where they are not in harmony with it. It would then be easy to foresee the existence of treaties contrary to certain structural principles of international society.

We must bear in mind, however, that today, as we have shown, such treaties, where they exist, must be considered null.

For the rest, confronted by the possible formulation of rules of imperative law that have their source in international organizations, which are not representative of the highest principles of social intercourse, it would be advisable to safeguard situations having their origin in the application of treaties lawfully executed.

On the other hand, however, one must recognize that the solution preferred in paragraph 2 adapts itself better to the basic factor of invalidity of a treaty, or rather to the imperative nature of the supervening norm.

Paragraph 3 represents the application of the principle of paragraph 1 to the case where a State withdraws from participation in a multilateral treaty. Clauses to the contrary are naturally safeguarded.

Paragraph 4 underlines that, in spite of the provisions of paragraphs 1 or 3, a State is not exempted from its duty to comply with obligations contained in another treaty to which it remains subjected under any other rule of international law. It thus seeks to safeguard the application of general international law, in the absence of a clause stating that the denunciation of a given treaty does not affect the obligations of the parties imposed upon them under this right.

Article 54

This article is clearly consequential upon the preceding one as regards the juridical consequences of the suspension of the operation of a treaty. Paragraph 1 is an adaptation of paragraph 1 of article 53 to this situation; although suspension temporarily affects the obligation of applying the treaty, it does not modify the juridical relations set up by it between the contracting States, or the legitimate character of acts and situations that are in conformity with the treaty.

Paragraph 2 logically regulates the conduct of the parties during the period of suspension.

[PART III]

Transmitted by a note verbale *of 1 June 1966 from the Chargé d'Affaires a.i. to the United Nations*

[*Original: English*]

Article 55

To begin part III of the draft articles with an article stating that "a treaty in force is binding upon the parties to it and must be performed by them in good faith" gives expression to a principle which is universally accepted, though not always observed. It proved absolutely necessary, in regulating the application and effects of treaties, to begin by expressly stating the fundamental rule "*Pacta sunt servanda*". This rule is of such importance that one school of thought regards it as the foundation for the binding force of the rules of public international law. But even when the view is taken that this branch of law cannot be reduced solely to rules expressed in treaties, because customary international law must also be taken into account, the principle "*Pacta sunt servanda*" is certainly recognized as having sufficient force to be the foundation for the legal rules expressly or tacitly accepted or recognized by States. [29]

It is with precisely these rules of treaty law that the present case is concerned, and this is sufficient justification for according complete approval to article 55. It must be pointed out that failure to obey the rule it lays down is partly responsible for the existing crisis in international relations.

The discussion which took place on the question whether the rule should refer to treaties "in force", and which is mentioned in the commentary on this article, led to the best solution: since a number of articles deal specifically with the entry into force of treaties, their nullity, termination, etc., it is from all points of view advisable to make the rule laid down in article 55 secure by relating it to treaties in force.

[29] On the validity of this principle, and on the claim that it possesses objective, immutable and metaphysical validity, see Paul Guggenheim, *Traité de droit international public*, vol. 1, pp. 8 and 57.

Article 56

The principle that treaties are not retroactive is generally accepted in public international law, save where they contain provisions to the contrary or where it can be proved that the parties intended them to have retroactive effect.

Paragraph 1 of this article states the rule that a treaty is not retroactive "unless the contrary appears from the treaty".

It is explained in the commentary that this expression was considered preferable to the phrase "unless the treaty otherwise provides". This preference was based on the view that the expression selected is the more general of the two and that it allows for cases where the very nature of the treaty indicates that it is intended to have retroactive effects.

We assume that it was also desired to recognize, as a basis for the retroactive application of treaties, cases where such application is based on the interpretation of the will of the parties: that is to say, cases where the treaty contains no express provisions sanctioning retroactivity. This question of interpretation, however, will receive special attention later, when articles 69 and 71 are under consideration.

At all events, it seems to us reasonable to include a rule on non-retroactivity.

The provisions of paragraph 2, to the effect that a treaty does not apply to any fact or act taking place or any situation existing after it has ceased to be in force, are also acceptable. It is noted, however, that the formula considered less appropriate to the hypotheses in paragraph 1 has been used here, where there is more justification for it: namely, the clause making the application of the treaty to facts subsequent in date to the expiry of its validity dependent upon express provisions of the treaty permitting such application.

The reference to article 53 is necessary.

This article, as was stated in Opinion No. 74/63, regulates the legal consequences of the lawful termination of a treaty: it releases the parties from any further application of the treaty, and does not affect the legality either of any act done in conformity with the provisions of the treaty or of any situation resulting from the application of the treaty.

The doubt felt about the doctrine propounded in article 53 was expressed in the commentary on that article, to which the reader is referred. However, it appears that the Commission has now come to consider that the text of article 53 needs revision.

Article 57

On the basis of international practice, the decisions of international tribunals and the teachings of the literature, the Commission has embodied in this article the rule that treaties apply in principle to the entire territory of the parties. However, since many treaties are, by their very nature, limited in territorial application, the Commission has allowed for exceptions to the principle where indicated by the treaty itself.

It should be noted that care was taken to avoid any reference to "territories for which the parties are internationally responsible", which would immediately have focused attention on the so-called "colonial clause", with all the interpretations to which that clause has given rise. We have no further comment to make on this article.

Article 58

The affirmation of the principle that 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, affords no grounds for misgivings. It is, after all, an application of the old principle "*Pacta tertiis nec nocent nec prosunt*". In relation to other States a treaty is *res inter alios acta*, constituting an affirmation of their independence and equality. Many decisions handed down by international tribunals have been guided by this fundamental rule. However, the question which is discussed in the literature, and which the Commission itself discussed, is whether exceptions can be made to this rule of international law. This problem will be taken up in our comments on the articles which follow, and which record the solutions favoured by the Commission after long discussion.

Article 59

The creation of *obligations* for a State not a party depends, according to this article, upon two conditions:

(*a*) The parties must have intended the provision in question to be the means of establishing an obligation for the State not a party to the treaty;

(*b*) The State in question must have expressly agreed to be bound by the obligation.

This means that the State not a party can be bound only with its express consent, and not *ipso jure*. It may be said, then, that the basis of this obligation is not the treaty, but the agreement thus established between the parties to the treaty, on the one hand, and the third State on the other. Consequently the sovereignty of the last-mentioned State is not affected.

This being so, there is no objection to the acceptance of the rule laid down in this article, which is also accepted in the literature.[30]

We also note with approval that, keeping aloof from the more liberal school of thought, the article gives no weight to tacit consent but requires that consent should be express.

Article 60

In essentials, this article re-states the rule laid down in the preceding article as it affects the *rights* arising for a State from a treaty to which it is not a party.

Although at first sight this seems a less complex aspect of the subject than the one dealt with in article 59, inasmuch as it relates to the recognition of rights and not the imposition of obligations, it is really a more delicate matter, because the rights thus conferred can be waived at any time, so that the treaty would tend to lack the necessary sureness and stability in this respect.

From the discussion of this point in the literature we may discern two main trends of thought: one asserting that rights conferred on a State not a party are non-existent until that State manifests its expressed acceptance of them, and the other maintaining that such rights exist until they are disclaimed or waived, even if tacitly, by the State concerned.

In an endeavour to reconcile these trends of thought, and noting that in practice they would produce different results only in very exceptional circumstances, the Commission sought a solution as nearly neutral as possible. It therefore prescribed, firstly, that the parties must intend to accord such a right, and secondly that the beneficiary State not a party must give its *express* or *implied* acceptance.

This appears to be a balanced solution resembling, in the view of some authors, the requirements of ratification which are put forward in the transaction of business.[31]

Paragraph 2 of this article states, in fairly broad terms, the conditions for the exercise of the right by the beneficiary State not a party; those conditions are not confined to the express and direct provisions of the treaty concerning the exercise of the right, but also include conditions established in conformity with it. The latter clause takes into account cases in which the treaty provides for this matter to be dealt with in a supplementary instrument or even by unilateral decision of one of the parties.

---

[30] Cf. for example Louis Cavaré, *Le droit international public positif*, vol. II, p. 128; C. De Visscher, *Théories et réalités en droit international public*, p. 324.

[31] See, in this connexion, Cavaré, *op. et vol. cit.*, p. 129.

Article 61

It is reasonable that, in principle, the consent of a State not a party should be required for the revocation or amendment of treaty provisions from which obligations or rights have arisen for that State.

Some attempt is thus made to avoid placing the beneficiary State in the unprotected situation described by writters on the subject, in which that State would have no right to demand, through effective legal and practical channels, the application of the treaty, and would be unable to ask for its revision.

It is naturally understood that, in the absence of the consent referred to above, the provisions of the treaty can be revoked or amended only by the parties, without producing any effects for the State not a party.

Article 62

The Commission prudently took the view that it would be premature to formulate rules on treaties creating so-called "objective régimes"—that is, rights and obligations valid *erga omnes*—and preferred to rely on international custom. Thus, if a provision which is included in a treaty, and which is intended to bind third States not parties to the treaty, has already become a customary rule of international law, there is nothing to prevent it from overriding what is laid down in articles 58 to 60.

This takes into account both the existence in international practice of treaties creating "objective régimes", such as those relating to freedom of navigation in international rivers or maritime waterways, and the teachings of legal theorists in favour of the admissibility of treaties which are of general importance and which are applicable even to States not parties to them.

Such multilateral treaties, containing "objective" legal rules which are laid down in the interests of States in general and which represent a stage in the progressive evolution of international law, cannot fail to influence all States not parties provided that they conform to the principles of international law, and thus possess general binding force. [32]

This binding force will certainly be required where there is no doubt about the existence of the customary principle or about its general binding force.

It is on this basis, therefore, that article 62 is acceptable. The customary rules of international law which we are discussing must, of course, meet the prescribed requirements. Only thus can they be recognized as affording sufficient grounds for a departure from the rules laid down in articles 58 to 60.

Article 63

Article 103 of the United Nations Charter, providing that the rules laid down in the Charter shall prevail over rules which are laid down in treaties and which are incompatible with the Charter rules, finds expression in article 63, paragraph 1.

Paragraph 2 provides for the case in which an earlier or a later treaty prevails in virtue of a provision to that effect in another treaty. It is clear, however, that this rule is to be applied only when the parties to both treaties are the same.

If this is not the case, the situation calls for the application of the two rules that follow.

Paragraph 2 determines in the most acceptable manner, by means of a current rule of interpretation of law, the applicability of a treaty to which any other treaty refers.

Paragraph 3 establishes a connexion with article 41, which was examined in the aforementioned Opinion No. 74/63. The Commission considered it necessary to regulate, in this paragraph, cases of total or partial incompatibility, suggesting at the same time that the expression "in whole or in part" should be eliminated from article 41. The relationship between an earlier treaty, still in force, and a later treaty on the same subject is regulated as follows: the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.

Paragraph 4, sub-paragraphs (*b*) and (*c*), concerning the hypothesis that not all the same States are parties to both treaties, give effect to the principle laid down in article 58 and do not call for any comment from us.

The same can be said of sub-paragraph (*a*), which deals with the case where the same States are parties to both treaties.

The reservation concerning the responsibility incurred by concluding or applying a treaty the provisions of which are incompatible with obligations towards another State under another treaty is acceptable in the terms in which it is expressed.

When the various solutions given in this article are examined in the light of contemporary theory, it is seen that they represent a laudable attempt to stabilize practice in the settlement of conflicts between treaties.

It is often found that there are no special difficulties in connexion with treaties of a type for which the scope of practical application has already been demonstrated by experience, whereas, in the case of treaties embodying clauses of new or uncommon content, the lack of reliable legal criteria on which to determine their compatibility or incompatibility is bound to be felt.

The more or less markedly political character of some treaties makes the determination of this compatibility a delicate undertaking. Conflicts between the rules laid down in international treaties are dominated by political factors to this day.

Once incompatibility has been established, it is a praiseworthy step forward to be able to determine which treaty is applicable. This is accomplished in paragraphs 3 and 4 of this article.

The whole difficulty, however, will lie in establishing incompatibility. As Charles Rousseau points out, the application of the technical process of positive law cannot but leave a certain virtually irreducible and insoluble margin of incompatibility. [33]

For this reason it would be imprudent to go further by laying down criteria for incompatibility.

Moreover, the solution given in paragraph 3 and paragraph 4, sub-paragraph (*a*), seeks to reconcile so far as possible the application of two treaties having the same objective; and the solutions given in paragraph 4, sub-paragraphs (*b*) and (*c*), are conditioned by the position of the State not a party.

In view of all the foregoing, we see no reason to object to this article.

Article 64

Of the various grounds admissible in international relations for suspension of the operation of treaties, this article deals specifically with the severance of diplomatic relations between parties. It does so, however, in order to affirm that such severance does not in itself constitute grounds for suspension, and to make it a condition for suspension that the severance of diplomatic relations should make the application of the treaty a practical impossibility (paragraphs 1 and 2).

Consistently with the general view that the parties should so far as possible be held to compliance with the obligations they have assumed, paragraph 3 seeks to safeguard all those clauses of the treaty which are not affected by the impossibility of application.

Article 46, which is referred to in paragraph 3, states the principle of the inseparability of treaty provisions and lays down the conditions

[32] Cf. Manfred Lachs, *Le développement et les fonctions des traités multilatéraux*, in *Recueil des cours*, 1957, II, vol. 92, p. 317.

[33] *Principes de droit international public*, in *Receuil des cours*, 1958, I, p. 506.

in which such provisions may be recognized as separable or may be partially applied; this article was analysed in Opinion No. 74/63.

Moreover, the principle calling for isolation of the effects of severance of diplomatic relations is already expressed in article 2 of the Vienna Convention on Consular Relations of 1963, which provides that such severance shall not *ipso facto* involve the severance of consular relations.

It should also be borne in mind that the other cases in which the application of a treaty depends upon the unbroken continuity of diplomatic relations fall within the scope of the rules relating to the termination or suspension of the application of treaties, which are studied in the aforementioned Opinion.

As it stands, this article represents an acceptable application of the principle "*Pacta sunt servanda*", which was stated in article 55 and whose value we emphasized in our comments on that article.

Article 65

In view of the difficulty of deriving from international practice a code of rules on the modification of treaties, the Commission confined itself to formulating certain general rules concerning the process of amendment and the use of *inter se* agreements.

Not being in possession of the text of part I, we are unable to evaluate the relationship between the rules in question and those laid down in some of the articles in part I.

Apart from the specified relationship to part I of the draft articles, the rule laid down in article 65 merely recognizes the possibility that a treaty may be amended by the parties; this seems a desirable provision.

Writers on the subject frequently refer to the need to modify treaties which, because of a change in the circumstances in which they are applied, have ceased to afford effective protection for interests. Provided that the amendment is made by agreement between the parties, there is no reason why the possibility of such amendment should not be accepted in broad terms.

Article 66

Article 66 is concerned only with the modification of multilateral treaties in relation to all the parties thereto.

In this article, the Commission rejects the idea sometimes put into practice that certain States can proceed to alter a treaty without consulting the others.

There is no doubt that such a practice violates the principle of equality among States. This principle is not upheld in its entirety even on the hypothesis that some of the States parties may proceed to modify the treaty by themselves and that the remainder will then accept or ratify the modification.

For this reason it must be considered desirable to recognize the rights defined in paragraph 1, sub-paragraphs (*a*) and (*b*), which must be regarded as clearly linked to the obligation assumed by the parties to perform the treaty in good faith.

The provision of paragraph 2, sub-paragraph (*a*), is a consequence of the foregoing principle and an application of the rule laid down in article 58; it is justified on the same grounds as that principle and that rule.

The reference made to article 63 covers those cases in which the amendment to the treaty does not receive the approval of all the States parties and hence gives rise to a problem of application in relation to the non-ratifying States where there is incompatibility between the provisions of the treaty and those of the agreement amending it.

Paragraph 3 is fully justified since, if a State is not a party to the agreement amending the treaty and afterwards signs that agreement or otherwise clearly indicates its consent thereto, it cannot invoke the application of that agreement as a breach of the treaty. Its signature of consent places it under the same legal obligation as the States among which the agreement was concluded.

Article 67

This article, unlike articles 65 and 66, is concerned with the modification of a treaty by what it termed an *inter se* agreement: i.e., an agreement entered into by some only of the parties to a multilateral treaty and designed *ab initio* to modify it between themselves alone.

However, in laying down rules to cover this case it is impossible to ignore the existence of other States not parties to the modifying agreement, and for this very reason that agreement must not produce a substantial change of such a nature as to affect the enjoyment of the rights or the performance of the obligations of those States; nor must the agreement be incompatible with the treaty as a whole, or with its objectives.

It is stated in the commentary that the conditions laid down in paragraph 1, sub-paragraph (*b*), of this article are not alternative, but cumulative. This is, indeed, the most logical inference, since the disjunctive "or" is used only in the transition from sub-paragraph (*a*) to sub-paragraph (*b*), and in the latter the copulative "and" is used between sub-paragraphs (ii) and (iii).

Nevertheless this article is very broad in scope and great care should be taken in the drafting, inasmuch as a restricted agreement may frustrate the treaty or affect the position of the States not parties to the amending agreement, which will continue to abide by the treaty in its original form.

We therefore think it advisable that sub-paragraph (*b*) should begin with an expression which will make it clear that the conditions therein specified are *cumulative*.

We note that, according to paragraph 2, notification of the parties not participating in the agreement is required only in cases other than that mentioned in paragraph 1, sub-paragraph (*a*).

At first sight this seems a balanced solution. But it should be borne in mind that even where the agreement is provided for in the treaty it is necessary to bring it to the notice of the other States. for the decisive reason that it is important to know whether the agreement concluded in virtue of a provision of the treaty is within the limits of what that provision allows.

We consider, therefore, that notification should be required without making an exception for the case mentioned in paragraph 1, sub-paragraph (*a*).

Article 68

Sub-paragraph (*a*) of this article applies the principle laid down in article 63, paragraph 3, and nothing further need be said about it.

The possibility of modification by subsequent practice is admissible provided that this article refers, as it appears to us to do without any doubt, only to cases where all the parties join in concluding the new treaty, or in the modifying practice, and where all of them are covered by the new customary rule.

Only on this basis, therefore, are the principles laid down in the article acceptable.

Sub-paragraph (*c*), in particular, should be read in conjunction with article 45 in part II of the draft articles, which is analysed in Opinion No. 74/63.

Article 69

This article, like those which follow, deals with the controversial question of the interpretation of treaties. The difficulty of formulating rules for guidance is bound up with the very nature of interpretation; there are those who maintain that interpretation should be avoided where the text is unequivocal, while others retort that only after certain technical processes have been applied is it possible to vouch for the unequivocality of the text in question.

Generally speaking, this problem of international law presents no special features when considered solely in relation to treaties. Indeed, some of the doubts occasioned are common to the general theory of interpretation of laws and legal acts.

However, it would be a mistake to underestimate the importance of the trend of opinion which claims that the interpretation of treaties requires a logic of its own, often irreconcilable with that applied to the interpretation of contracts in private law.

Hence the references made in conversation to "the political element in the interpretation of treaties", and the divergence observed between judicial practice, stamped with the particular characteristics of specific cases, and the theoretical ideas found in the literature.[34]

The Commission endeavoured to encroach as little as possible on the freedom of the interpreter, but without refusing him a number of guiding principles drawn from the practice of international tribunals and from a common fund of theoretical writings. In article 69, the Commission accordingly formulated four rules.

The *first* of these flows from the principle expressed in article 55 (*Pacta sunt servanda*)—the true starting point in determining the meaning of any provision; it proclaims that this should be done in good faith.

Closely bound up with this is the *second* rule, to the effect that the *ordinary meaning* must be given to the text. It seems to us that on this point, notwithstanding the apparent simplicity of the formula, many doubts may arise, as indeed they do arise in matters of private law. The expressions "ordinary meaning", "natural meaning", "normal meaning" and "clear meaning" are used in an attempt to describe texts which do not require any reference to other sources for the purpose of defining their meaning.

It is assumed, to begin with, that the words of the provision have been used in their usual sense. However, the determination of that sense is not so straightforward as it would appear at first sight.

This observation is not made in order to replace that formula by another, or in order to shift the use of that formula to a later stage in the process of interpretation, for it seems to us common sense that, in the absence of convincing reasons to the contrary, the ordinary meaning should be accepted. Our intention is merely to stress that the true practical efficacy of this second rule lies in so guiding the interpreter that he will seek that meaning before anything else; but in order to arrive at it he may have to use the various technical processes open to him. Thus it is not a matter of avoiding interpretation, but of interpreting according to certain logical guidelines.

The *third* rule needs no clarification, given the evident and recurrent necessity of referring to the context of the treaty and to its objects and purposes.

Lastly the *fourth* rule, which enjoins that attention should be paid to the rules of international law in force at the time of conclusion of the treaty, is based upon many decisions of international tribunals.

However, we feel bound to point out that, while this rule is clearly included in the general theory of interpretation of legal acts, its broad application may in many cases present considerable difficulties where treaties are concerned. It should be borne in mind that a dispute may arise many years after the treaty was concluded, and that the conditions of international life and the rules of international law may have changed considerably in the interim.

What, then, stands in the way of an up-to-date interpretation of the provisions in question? Fear that one of the parties may take refuge in the pretext that *de facto* conditions have changed and that innovations have been made in the rules of international law? But the same fear may be felt where the party concerned relies on a state of affairs that has ceased to exist.

At all events it was necessary to point out that this rule is perhaps excessively rigid when applied to the interpretation of treaties, especially the so-called law-making treaties. It is also necessary to relate it to the principle of "*rebus sic stantibus*", which is evaluated in the aforementioned Opinion in connexion with article 44 in part II of the draft articles.

Article 69, paragraph 2, states a rule that is generally accepted in the literature and in the practice of international tribunals: the rule that a treaty should be read as a whole, and its clauses clarified by reference to one another.[35] It seems to us that recourse to elements outside the treaty, but bearing a close connexion with it, is wholly justified.

Paragraph 3 calls for no comment, since an agreement between the parties regarding the interpretation of the treaty and subsequent practice in its application may often constitute important sources of information from which to deduce the true intention they expressed in concluding the treaty.

Article 70

This provision supplements the preceding one by providing for recourse to further means of interpretation when the interpretation according to article 69 proves to be insufficient. Although it has been affirmed, manifestly on the basis of municipal law, that once treaties have entered into force they have an autonomous existence independent of the preparatory work, there is no doubt that the preparatory work is generally recognized as important in reconstructing the real intention of the parties.[36]

This article does not make a distinction, as the writers sometimes do, between preparatory work *lato sensu* and *stricto sensu*; it should be noted that the former category includes some work, such as the records of closed meetings between heads of delegations, which may give a false picture of the course of negotiations.

We believe that there is nothing to be gained by making such a distinction, and that the interpreter should be left free to make use of the various items of preparatory work in whatever way seems most appropriate in each case.

Article 71

The principle embodied in this article is not open to question: since the purpose of interpretation of the provisions is to determine the real intention of the parties in concluding the treaty, it is natural that in some cases they will be found to have used certain terms in a meaning other than their ordinary meaning.

It is, however, open to question whether there is any need to make this rule, which is clearly included in the preceding ones, the subject of a separate provision.

However, the rule was formulated in the interests of greater clarity, and in particular in order to emphasize that cogent reasons are needed to carry the conviction that the parties have departed from the ordinary meaning referred to in article 69, paragraph 1.

On the basis of these considerations, the formulation of a separate rule is accepted.

Article 72

The principle laid down in paragraph 1 of this article seems to us acceptable inasmuch as it gives equal validity to the text of a treaty in different languages when the text has been authenticated in those languages, and makes a reasonable exception where a different rule has been agreed upon by the parties.

Paragraph 2 also recognizes an agreement between the parties as conferring authenticity on a version of the treaty drawn up in a language other than one of those in which the text of the treaty was authenticated; it also recognizes the existence of a rule laid down by an international organization to the same effect.

There is no doubt that this article will help to determine the exact validity of the text of a treaty in the various languages in which it has been drawn up.

---

[34] In this connexion see De Visscher, *op. cit.*, p. 313.

[35] On this point see Cavaré, *op. et vol. cit.*, p. 95.

[36] Cf. Guggenheim, *op. et vol. cit.*, p. 135; Balladore-Pallieri, *Diritto Internazionale Pubblico*, 7th ed., p. 294.

The only question which might arise is whether it would not be appropriate to allow here for a possibility similar to that envisaged in article 69, paragraph 3, and recognize, in addition to an agreement between the parties, any practice adopted by them which shows in an unequivocal manner that they have conferred authority on a version drawn up in a language not used for the authenticated texts.

Article 73

Paragraph 1, in conferring equal validity on the different authentic texts of a treaty, makes a natural exception where the treaty itself provides that, in the event of divergence, a particular text shall prevail.

It follows from this that, as provided in paragraph 2, the terms of a treaty are presumed to have the same meaning in each text. The second sentence of paragraph 2, which refers back to the general rules for interpretation laid down in articles 69 to 72, provides for cases, other than that referred to in paragraph 1, in which a comparison between authentic texts discloses a difference in meaning or some ambiguity or obscurity. As a remedy for this deficiency a rule is laid down which, although vague, provides some guidance, namely, that the different texts should be reconciled so far as possible.

We see no valid reason why this principle should not be accepted.

21. Sweden

[PART I]

Transmitted by a letter of 7 October 1963 from the Royal Ministry for Foreign Affairs

[Original: English]

The law of treaties is of fundamental importance to the regulation of relations between States, and clarification, codification and development of its contents may be expected to facilitate treaty relations and reduce the risk of controversies caused by differing views of the law. It is, therefore, most gratifying that the International Law Commission has devoted much time and energy to this field of international law. The repeated changes of rapporteur on the topic and the Commission's engagement upon other fields of law have delayed the presentation of draft articles on the law of treaties. Although this may be regrettable, there is fair compensation in the fact that the successive reports on the topic have been of great value and, in themselves, useful not only to the scholar but also to the judge and the legal practitioner.

The Commission has now submitted a first group of draft articles for consideration. Without prejudicing the position it will take to the final proposals that the Commission will submit, the Ministry for Foreign Affairs wishes to make the following observations at this stage.

The question whether the codification of the law of treaties should take the form of a convention—or several interconnected conventions—or of a code has been discussed in the Commission. The Ministry for Foreign Affairs has no objection to the decision in favour of a convention. It is of the opinion, however, that this decision must have important consequences for the contents of the convention. A convention is an instrument by which the parties undertake legally binding obligations. It is not a place for describing convenient practices and procedures. Such descriptions might perhaps usefully be made in a code of recommended practices, which may be subjected to such modifications from time to time as the current needs of States indicate.

Much of the contents of a procedural nature that was contemplated by Judge Sir Gerald Fitzmaurice for a *code* of the law of treaties has rightly been discarded in the draft articles for a convention that are now presented. It seems, nevertheless, that a number of the articles presented are still of this character. In the opinion of this Ministry, it would be wise to omit such provisions. They appear to be unnecessary and may prove to become quickly obsolete and a burden in an instrument that is intended to be legally binding for a long time to come. There is no need for such an instrument to cover all the phases of the conclusion of treaties, if legal rules do not attach to all of them.

The rules of the law of treaties are largely dispositive, i.e. the parties may depart from them by agreement. There is hardly any need to state examples of the various ways in which such departures may be made, or in which the parties may exercise their freedom where no rule exists. What is needed, rather, are statements of the residuary rules of international law which govern a specific question where the parties have *not* solved the question. In addition, cogent rules—from which the parties may not depart—should obviously be stated, if indeed any are found.

Applied to the present draft, the considerations advanced above lead to the conclusion that certain articles might be omitted, or perhaps transferred to a code of recommended practices.

As there is nothing in the law of treaties to prevent States from issuing full powers either "restricted to the performance of the particular act in question" or more generally, *article 4, paragraph 6(a)* seems unnecessary and rather in the nature of a procedural recommendation. *Article 5*, as the Commission itself recognizes, is only descriptive and seems superfluous unless there be the ambition systematically to present all aspects of the conclusion of treaties.

Similarly, *article 6, sub-paragraphs (b) and (c)* seem redundant as, in effect, they only state that an agreement between the parties on the manner in which a text is to be adopted shall be governing. They do not appear to lay down any residuary rules.

Article 7 seems to be more instructive as indicating possible procedures than helpful as legal guidance. Legal content may, however, be read into the article if it is meant to lay down that, in case of doubt, signature *ad referendum*, initialling, incorporation of a text into the final act of a conference, or in a resolution of an international organization, amounts to an authentication of the text. This would require also that the act of authentication has any legal effect, which seems very doubtful. The commentary to article 7 suggests that after authentication, any change in the wording of the text would have to be brought about by an agreed correction of the authenticated text. But, it may be asked, can any modifications be made, but for agreement, in a text before authentication?

Article 8—the substance of which will be discussed below—read along the following lines might be simplified if drafted in accordance with the approach suggested here.

In the absence of express provisions to the contrary in a treaty or in the established rules of an international organization adopting treaties;

A general multilateral treaty shall be deemed to be open to every State;

Other treaties shall be deemed to be open to States which took part in the adoption of the text or which, although they did not participate in the adoption of the text, were invited to attend the conference at which the treaty was drawn up.

As the article reads at present, the impression may be gained by paragraph 2 that a State which took part in the adoption of a treaty text cannot be excluded from participation even by an express clause to that effect, a contingency that is most unlikely, but would hardly be illegal.

While most of the provisions of *article 9* contain legal—and indeed seemingly new rules, from which States may not depart even by agreement—the stipulations of sub-paragraph 3(*a*) relate to procedure, and it is hard to see why they should be non-dispositive. If that is not the intention, they might perhaps be transferred to a code of recommended practices or to a commentary.

Article 10 would be improved and considerably abbreviated if recast as residuary rules, governing only in the absence of agreement between the parties. Paragraphs 1 and 2(*a*) would be un-

necessary. Paragraphs 2(*b*) and (*c*) and 3 contain useful rules. It should be made clear, however, that they operate only in the absence of agreement between the parties. As it reads, paragraph 3(*a*) gives the impression that initialling can *only* function as authentication, which is not true in all instances. Under article 10, paragraph 2(*b*), signature *ad referendum* is only treated as an act authenticating a treaty. It would perhaps be well if States agreed that this would always be the significance they attach to the reservation. The Commission has not expressed any view on the practice, which nevertheless exists, attributing to this reservation the meaning "subject to ratification".

Given the provisions in articles 8 and 9 and the freedom of States to prescribe in treaties applicable procedures for participation in a treaty, the need for *articles 13 and 14* may perhaps be doubted. While some provisions of *article 15* contain important legal rules, other parts appear to be exclusively procedural. Illustrative of this is paragraph 1(*c*). It requires that in case a treaty offers to the participating States a choice between two differing texts, the instrument of ratification must indicate to which text it refers. It does not, however, give any legal guidance in case this procedure is not observed.

Articles 18 and 19, likewise, contain much that simply exemplifies what the parties may prescribe and much that merely amounts to procedural rules, which would fit better in a code of recommended practices. Such a code would also, it seems, be the most appropriate place for the rules contained in *articles 26* and *27* relating to the correction of errors. Both *article 28* and *article 29* regarding depositaries contain legal rules of a dispositive nature. Even so, it may perhaps be questioned whether the rather detailed duties imposed upon depositaries in article 29, paragraphs 3-8 are of such permanent nature that they ought to be included in a convention.

The observations made above are not intended as criticism of the various provisions the omission of which is suggested, but are only prompted by a desire to see the convention limited to basic rules of a strictly legal nature, and to see convenient procedures and rules, possibly subject to frequent modifications, treated only in a special code of recommended practices. In addition to these observations, the Ministry wishes to offer a few comments upon the contents of some of the rules which, in its opinion, should be retained in a convention.

The provision on capacity—*article 3, paragraph 1*—is stated in broad terms, and necessarily so. In view of the circumstance that the conclusion of treaties by an entity may perhaps constitute the chief indication of its being a subject of international law, it becomes obvious that the statement that treaty-making capacity is possessed by subjects of international law is not very helpful. However, any elaboration in detail on this point is bound to meet great difficulties. The development of the law on the point might better be left to take place in the practice of States and of international organizations and in the judgements of international tribunals.

The formulation of *article 4* is not wholly satisfactory. The point seems to have been lost that the legally relevant question is whether a representative is competent to bind the authority he purports to represent. The procedural rule that the Head of a State or a Foreign Minister is not required to produce an instrument of full powers, for instance, is a consequence of the legally more important rule that they are, by their offices, deemed competent to bind at any rate the executive branch of the Government they represent. The rule contained in paragraph 3 gives the impression that States *must* furnish the representatives concerned with full powers. In practice, this is often dispensed with. To have legal meaning, the paragraph should state that the competence of these agents depends upon their being authorized to bind the Governments they purport to represent, and that the existence of such authorization shall be deemed to be conclusively established by the presentation of full powers emanating from a competent authority. Such formulation would not obligate States actually to make use of full powers, but would indicate that a State which accepts the signature of certain representatives without examining full powers takes the risk of the treaty being denounced as concluded by one who did not have requisite authority or one who has exceeded his authority.

Paragraph 4(*b*) of article 4 merely reflects and accepts the common practice that States, when concluding treaties of an informal character, often do not ask for full powers. The legally interesting question, however, is whether they do so at their own risk. It is believed that the answer must be in the affirmative. The rationale of such a rule would be that it is easier for a State to ask a foreign representative to present full powers than it is for a State to prevent all its representatives from acting without authority. If the answer were in the negative, the conclusion would ensue that representatives signing this kind of treaties are always competent to bind the authorities they purport to represent. This can hardly be accepted.

The rule embodied in paragraph 6(*b*) of article 4 regarding telegraphic full powers again merely seems to record what has been thought to be common procedure. In fact, telegraphic full powers are often accepted as sufficient evidence of authority without any requirement of subsequent confirmation. The question is whether they offer adequate guarantees of authenticity. If not, the rule should be that States accepting them do so at their own peril.

The novel provision in *article 6, sub-paragraph (a)*, although in itself perhaps not undesirable, may have complicated consequences at conferences between States some of which are parties to the convention on the law of treaties and others are not. Less than universal adherence to that convention may also very much complicate the application of *article 9*.

The "all States" formula which has been proposed in *article 8, paragraph 1* seeks to establish a right—which does not exist under present customary international law—for every State to participate in general multilateral treaties. Although the effect of the provision may, if so desired, be excluded by express provisions in such a treaty, and although there are arguments in favour of the inclusion of such a residuary rule as is submitted, the objection must be raised that such a rule should preferably not be introduced without a complementary provision on method or machinery for determining which entities purporting to be States shall be deemed to possess statehood. A similar problem, it must be admitted, arises with respect to the question which of two rival governments is competent to bind a State under a treaty. A suggested solution to this problem, too, would be welcome.

Article 12 seeks to solve, in a very complex form, an old problem which the Commission characterizes as largely theoretical. The Commission recognizes that the difference between the elaborate provisions it submits and the simple rule that ratification is not necessary unless expressly agreed upon by the parties is not very substantial. If the same boldness were displayed on this point as on several others, the latter formulation should be preferred, perhaps with the qualification that ratification would also be required in cases where there is a clear implication that the parties intended the treaty to be subject to that procedure. No dangers would flow for States from such a residuary rule, as they may always by express clauses *prescribe* ratification.

A rule along the lines expressed in *article 17* may be usefully included in a convention. It seems, however, that the present draft goes too far in imposing obligations, e.g., upon States which only take part in the drawing up of a treaty text within the framework of an international organization—and perhaps even vote against the adoption of such text.

The legal problem of reservations is admittedly most difficult. The draft provisions submitted in *articles 18-20* represent a respectable effort to cover the problem. Further analysis nevertheless seems necessary, and an attempt should perhaps be made to differentiate even more between different types of treaties.

With respect to *article 23*, it should be noticed that the cases do not seem to be covered where a treaty does not stipulate any date on which or the mode in which it is to enter into force, but is simply

signed or simply provides for ratification. The residuary rule of international law would presumably point to the entry into force on the date of signature and ratification, respectively.

The text of draft *article 24* seems to require an *agreement* between the parties to a treaty to terminate provisional application of the treaty. The commentary seems to suggest, however, that termination may occur when it is clear "that the treaty is not going to be ratified or approved by *one* of the parties" (emphasis supplied). As provisional application is often provided for because internal constitutional procedures have not been completed, and as there is often no absolute assurance that the outcome will be to confirm the provisional acceptance of the treaty, it is believed that the commentary comes closest to the legal position underlying present practice.

[PART II]

Transmitted by a letter of 2 April 1965 from the Royal Ministry for Foreign Affairs

[*Original: English*]

The Swedish Government wishes first to submit some views on the terminology used in the draft to describe the various forms of invalidity of treaties and the various grounds for invalidating treaties.

In article 31 a State is authorized to *withdraw its consent* to a treaty under certain circumstances. It does not seem clear, however, whether such withdrawal of consent will affect the treaty only from the moment it is expressed or retroactively from its conclusion.

Articles 32(1) and 35(1) prescribe that treaties are to be *without any legal effect*. According to comment (3) to the latter article, this expression would mean that the treaty is *ipso facto* void and absolutely null. It is not clear whether the expression is deemed to have the same meaning in article 32, although this is made likely by the fact that article 47 refers to *nullity* both under article 32 and article 35 and provides that treaties stricken by such nullity may nevertheless be valid by acquiescence. It may be queried whether it would not be desirable to use more uniform terminology.

Under articles 36, 37 and 45 treaties become *void* under certain circumstances. In comment (6) to article 36 the treaties dealt with in the article are said to be "void *ab initio*", rather than voidable. It is not clear whether this flows from the article itself or from articles 47 and 52. Nor is it clear whether the treaties void under article 37 because of conflict with a peremptory norm are, likewise, void "*ab initio*". They are characterized as null in comment (4) to article 37, but unlike the treaties dealt with in article 36, they are subject to article 52.

Under articles 33 and 34 fraud and error may be *invoked as invalidating the consent* given by a State to a treaty. Comment (8) to article 34 declares this to mean that the treaties are *not automatically void*, but if the ground is invoked, the treaties will be void *ab initio*. It appears from article 47 that these treaties may also be characterized as *null*. Again, it would seem desirable to achieve more uniform terminology. It may be queried whether the expression *may be invoked as invalidating the consent* is adequate to convey the desired meaning. Any fact, presumably, may be invoked. The relevant question is whether a given fact has any legal consequence. The expression does not appear to answer that question.

With respect to the particular articles, the Swedish Government, without prejudice to the final position it may take, wishes to submit the following comments:

Article 30. In view, *inter alia*, of the draft article 8 submitted by the Commission, that "every State may become a party" to general multilateral treaties unless otherwise provided by the treaties or the established rules of an international organization the case must be envisaged that a State recognized by some parties to a multilateral convention may become a party to such a convention, although it is not recognized by one or several of the other parties to the convention. The practice seems to be followed in this matter that a party which, because of non-recognition, finds itself unable to accept the obligation to apply the multilateral convention to another party, formally notifies the depositary of the position taken.

Article 31. The Swedish Government shares the view of the Commission that it would introduce serious risks for the security of treaties generally to leave it to internal law to determine the competent treaty-making organ of a State, and that the basic principle should be, as the Commission suggests, "that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a State organ or agent competent under international law to give that consent".

The exception to this rule contemplated by the Commission covers the cases where a violation of internal law is manifest. The formulation of that exception does not seem quite satisfactory: if the consent in these cases is indeed "invalidated", it could not very well be "withdrawn". A better formulation of the present substance would seem to be:

> "... shall not invalidate the consent expressed by its representative. Nevertheless, in case the violation of its internal law was *manifest*, a State may withdraw the consent expressed by its representative. In other cases it may not withdraw such consent unless the other parties to the treaty so agree."

Article 32. The provisions contained in this draft article are closely connected with the draft presented on article 4, which was criticized by the Swedish Government in its comments to the first part of the Commission's draft. It was pointed out in that context that rather than *prescribing* that agents should be provided with full powers—something that is often dispensed with in practice—the draft ought to answer the legally interesting question what effect, if any, should be attributed to consent expressed by a representative who had not been asked to present any evidence of authority and who, in fact, had not possessed authority.

For systematic reasons it may be desirable to retain in the first part of the draft rules regarding the existence of competence, and to insert into the second part the corresponding rules relating to the effect of lack of competence. A reformulation of article 4 seems nevertheless desirable to eliminate what may be viewed as procedural recommendations and to insert only rules of legal significance. Sub-paragraphs 1 and 2 of article 4 would not call for any modification. Sub-paragraph 3, however, might be changed to read along the following lines:

> "No other representative of a State shall be deemed (by his offices and functions), and without presenting evidence in the form of written credentials, to possess authority to negotiate on behalf of his State."

While the original text would seem to imply a duty to request the presenting of full powers—which in practice is commonly dispensed with—the above text would simply lay down that a State which negotiates or signs an agreement with a representative not presenting full powers may find that the latter was not authorized. Such a formulation would tie up well with draft article 32(1). Sub-paragraph 4(*a*) of article 4 might similarly be changed to read along the following lines:

> "Subject to the provision of sub-paragraph 1, a representative of a State shall not be deemed (by his offices and functions), and without presenting evidence in the form of written credentials, to possess authority to sign a treaty on behalf of his State."

Such formulation, again, would well tie up with the provision of article 32(1), while the present formulation of sub-paragraph 4 (*a*) would seem to lay down as mandatory that full powers must be requested.

The substance of draft article 4, sub-paragraph 4(*b*) relating to agreements in simplified form was criticized in the earlier Swedish comments. It was suggested to be easier for a State to ask a foreign representative to present a full power than it is for a State to prevent all its representatives from acting without authority. To this argu-

ment is added the circumstance that it is extremely difficult to delimit the concept of agreements in simplified form. If that concept cannot be well defined, there would be a large group of cases where, under the draft presented by the Commission, it would be uncertain whether the lack of authority of the agent would render the treaty invalid under article 32. From the point of view of clarity it would therefore be preferable to treat the conclusion of agreements in simplified form in the same way as the conclusion of other agreements. This is best done by the exclusion of article 4, paragraph 4(*b*). That modification would simplify the application of article 32.

The question may further be raised whether in article 32(1) the burden of denunciation should not be placed upon the State whose representative has acted without authority. Even though the other State should bear the risk when it has not checked the existence of authority, it would not be unreasonable—in view of the fact that such risk-taking is most common—to ask that the first State should denounce the agreements as soon as it becomes aware of it, or else be held bound. The commentary (4) to article 32 as well as article 47 point in this direction, but an express modification of the last part of article 32(1) would seem to be required.

Articles 33 (fraud) and 34 (error) deal with contingencies that must be very rare and there may be a question on this ground whether they are really needed at the present stage. However, the formulations appear unobjectionable.

Article 35 (personal coercion) likewise deals with a contingency that is most unusual. As there have been some well-known cases of this kind, however, and as the rule has a good deal of support in doctrine, an express provision on the matter might perhaps be desirable.

Articles 36 (coercion of a State), 37 (violation of a peremptory norm), 44 (fundamental change of circumstances), and 45 (violation of an emerging peremptory norm) represent a bold tackling of difficult problems that are connected with the very structure of present-day international society. It is, of course, only logical that when the threat or use of force against a State is forbidden under Article 2(4) of the United Nations Charter, a treaty imposed by such threat or use of force should also be invalid. Rules prescribing the invalidity of treaties violating existing or emerging peremptory norms likewise may be said to be required from the viewpoint of logic and consistency. The formal inclusion of such rules in an instrument covering the law of treaties, however welcome from the standpoint of theory and progressive development, must necessarily also be considered in the context of present-day political organization of the international society.

The stability of State relations, cannot, of course, but be threatened by the conclusion of treaties through coercion or in violation of peremptory norms of international law. One cannot, however, completely disregard the fact that invalidation of a great many existing treaties—especially border treaties—which have been brought about through some form of coercion, would dangerously upset the existing stability. It should also be borne in mind that so long as the international community is not equipped with an organization capable of ensuring peaceful change and effectively implementing its decisions, unfortunately treaties may continue to be made—armistices, peace settlements and others—in contravention of legal principles, and yet continue to be upheld and gradually—like past peace treaties—even become an element of stability.

To the concern voiced above, is added concern for the method by which the invalidity of a treaty is envisaged to be determined. The circumstance cannot be disregarded that while the draft submitted considerably develops and specifies the grounds on which treaties may be claimed to be invalid, it does not simarly develop the methods by which such claims may be examined and authoritatively decided. The orderly procedure prescribed in article 51 is thoughtfully drafted and useful as far as it goes. It does not, however, offer any safeguards against abusive claims of invalidity that a State may be tempted to advance on the basis of any one of the many grounds provided in the draft. Even more disconcerting is the fact that the article does not appear to answer whether a treaty is subject to unilateral termination or remains valid, once the means indicated in Article 33 of the Charter have been exhausted without result.

In this connexion attention must also be paid to article 51(5). If the meaning of this provision is that a State—to take the examples cited in paragraph (7) of the comment—discovering that an error or change of circumstances has occurred, may cease immediately to perform under the treaty and merely invoke the error or the change of circumstances as a ground for termination, the strength of the article, limited as it is, will be even further reduced.

Problems connected with a policy of "non-recognition" of treaties deemed invalid would not, of course, disappear even if compulsory jurisdiction were given to the International Court of Justice to determine claims of invalidity based upon provisions regarding, for instance, changed circumstances. Such jurisdiction would, however, do much to reduce the risk of abusive claims.

Articles 38(1), (2) and (3)(*a*) (termination of treaties through the operation of their own provisions) contain interpretative rules, the need for which may be somewhat doubtful. The provision laid down in sub-paragraph (3)(*b*) seems to be a useful residuary rule.

Article 39 offers a reasonable and partly new solution to the problem raised by treaties containing no provisions regarding their termination.

Article 40(2) and (3) likewise seem to contain useful innovations regarding the termination or suspension of the operation of multilateral treaties, while the need for sub-paragraph 1 is less obvious.

Article 41 (termination implied from entering into a subsequent treaty) likewise lays down a rule of construction that may be useful.

Article 42 deals with the important question of the effect of breach of treaty obligations. The limitation of the article to "material breach" seems well advised and the definition of that concept acceptable. The question may be raised whether the procedure prescribed in article 51 offers an adequate and sufficiently rapid response to the urgent problem of breach of a treaty.

With respect to breach of a multilateral treaty the provisions suggested might, in most instances, be adequate. It is noted, however, that the draft only entitles a party to a multilateral treaty to suspend or terminate the treaty in relation to another party which has violated it or to seek the agreement of the other parties in order to free itself wholly from the treaty. Circumstances might be such, however, that the State ought to be allowed even to terminate or suspend the treaty unilaterally, e.g. if the participation of the State committing the breach was an essential condition for the adherence of the other State.

Article 43 on supervening impossibility of performance may be useful, even though the contingency envisaged is probably rare.

(Articles 44 and 45 have been commented upon above.)

Article 46 on separability appears on the whole to be a most useful and necessary complement to the development of grounds of nullity and termination. The—perhaps inadvertent—reference in sub-paragraph (1) to the possibility of a treaty providing about its own nullity might well be avoided.

Article 47 on waiver and acquiescence seems likewise to be an indispensable complement to the rest of the draft. It would seem desirable in addition expressly to provide in this article that a State may by its conduct or through acquiescence be debarred from exercising its right under article 31 to withdraw its consent.

Article 48 contains a special rule on the termination of constituent instruments of international organizations and of treaties which have been drawn up within international organizations. Such a rule would seem to be required. As several of "the provisions of part II, section III" referred to will be clearly inapplicable to

the treaties concerned, it might be preferable to refer to "relevant provisions of part II, section III".

The provision contained in article 49 on evidence of authority to denounce, terminate or withdraw from a treaty might perhaps with advantage be attached to article 4 itself. It would seem even more important to provide expressly that lack of such authority might entail invalidity of the act in accordance with article 32.

The rule contained in article 50 that a State may revoke its notice of termination or denunciation may be framed in too general terms. While the rule suggested may be reasonable in cases such as a breach, it is doubtful whether it is acceptable regarding normal notices of termination in accordance with express provisions for notice in treaties. The purpose of such provisions would seem to be to enable other parties to take suitable measures in good time to meet the new situation. These measures could not be taken with confidence if notices of termination were susceptible of being revoked. The rule suggested might also have the effect of neutralizing provisions requiring advance notice, as it would, in fact, make it possible for a State to defer its decision to terminate until the day before the notice given would take effect.

Article 51 has been commented upon above.

Article 52 regarding the legal consequences of the nullity of a treaty deals in very general and abstract terms with problems of great complexity. A fuller discussion than that offered in the commentary would seem desirable to illustrate and analyse the various cases that may arise. The expression "may be required" in subparagraph 1(*b*) seems inadequate.

Article 53 regarding the legal consequences of the termination of a treaty similarly calls for further clarification. The delimitation between article 53(2) and article 52 is not obvious: article 52 deals with the nullity of treaties, and thereby presumably refers at any rate to all treaties termed void, a term used in article 52(1)(*a*), but article 53(2), too, refers to treaties which are void.

It might perhaps be preferable to speak, in article 53, of releasing parties "from any further *obligation* to apply a treaty", rather than releasing the same parties "from application of the treaty". Cf. article 54. The expression "a situation...shall retain its validity" also seems to require improvement.

Although article 54 on the legal consequences of the suspension of the operation of a treaty is somewhat less complex than the previous articles, further illustration of the effect of the abstract rules might be clarifying.

22. Turkey

[PART II]

Transmitted by a note verbale *of 15 January 1965 from the Permanent Representative to the United Nations*

[*Original: English*]

1. It is envisaged in *article 36* of the draft that treaties concluded under the threat or use of force in violation of the principles of the Charter of the United Nations shall be void. In order to enforce this article, it is essential that the threat or use of force be in violation of the principles of the Charter of the United Nations. The article does not specify what kind of threat or use of force is intended. This has been left to the interpretation of the principles of the Charter of the United Nations. Presumably, it is thought that the evolution resulting from such interpretation will be applied in the field of the law of treaties. It is obvious that this will have certain disadvantages. First of all, as a rule, the principles in question will in general be interpreted in connexion with the solution of political questions. Such a political interpretation can hardly be expected to possess the degree of clarity required in juridical matters. Besides, this interpretation may not be acceptable to countries not members of the United Nations. Furthermore, it is always possible that the principles in question may be changed in the future. Therefore, it would be helpful to define the threat or use of force envisaged in this article in order to eliminate these drawbacks.

2. *Article 37* of the draft states that a treaty is void if it conflicts with a peremptory norm of general international law. This article, which at first glance appears to be essential and useful, cannot easily be applied without modification. First of all, the examples cited to prove the usefulness of this article are not compatible with reality. It is not customary today for nations to conclude treaties dealing with the use of force, with crime, traffic in slaves and genocide. That is why one should act with caution before including the notion of *jus cogens* in international law. What is meant by *jus cogens* is not defined in the article. This will make it possible for every nation to interpret *jus cogens* to fit its own needs. As a matter of fact, this is just what has happened. Since the mechanism of compulsory jurisdiction has not been set up in international law, these different interpretations, rather than meeting the needs of the international community, will give rise to new misunderstandings. For this reason, it would be wrong to include the notion of *jus cogens* unilaterally in the law of treaties without first establishing a competent machinery vested with authority to settle the differences arising between nations over *jus cogens* or entrusting existing organizations such as the International Court of Justice with this duty.

3. Although *article 39* stipulates that a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation, it recognizes exceptions from this principle for certain treaties. These exceptions do not exactly reflect the needs of our times. As the International Court of Justice has observed, the majority of treaties concluded today contain provisions regarding termination or withdrawal. When such a provision is not inserted into a treaty, it means that the parties do not desire to make termination or withdrawal possible. Despite this practice, to recognize exceptions for certain treaties might, in the final analysis, result in ignoring the will of the parties. It is not appropriate to cite as an example the commercial treaties of today which are generally concluded for short durations. In case no exception was recognized, would treaties concluded without limitation last forever? The answer to this question depends upon whether priority should be given to the interest of one party, of both or all parties concerned or to the maintenance of international law and order. We believe that it will be in the benefit of the international community if in exceptional cases envisaged in *article 39*, each party were to be given the right to request the reviewing of the treaty in question instead of the right of termination or withdrawal.

4. In our opinion, in paragraph 2 of *article 40*, the period after which a treaty may be terminated with the agreement only of the States parties to it should be ten years.

5. *Article 44* of the draft has accepted the principle that a change in the circumstances existing at the time when the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in the present article. Although it is gratifying that the International Law Commission has taken care to state the essential limitations to the application of this principle—which happens to be one of the most controversial subjects in international law—the acceptance of this principle without first providing for full guarantees in regard to its application might create conditions harmful to international law and order. Since the commentary on this article does not define the place of this principle in present day international law with sufficient clarity, we will refrain from expressing a detailed opinion on this subject. What we are concerned with here is the end result reached by the article. The article recognizes, under certain limitations, the right to invoke termination of or withdrawal from a treaty because of change of circumstances. Turkey does not concur in this view. Substantial changes in conditions taking place after the treaty has been signed can only entitle the parties to request negotiations for the adaptation of the treaty to changed circumstances. If the parties cannot reach an agreement in this respect,

they can always seek arbitration or apply to international juridical organs. Therefore, Turkey suggests that the article be amended in such a way as to provide that the parties concerned should first enter into discussion among themselves and subsequently refer the dispute to the International Court of Justice should they fail to reach an agreement.

6. Regarding *article 45* of the draft, Turkey believes that the views expressed in *article 37* are valid in respect of this article also. We would like to add as a reminder that in the majority of the present day multilateral treaties, certain clauses are included to show the connexion between these treaties and those signed previously.

7. *Article 51* of the draft defines the methods to be followed in determining the nullity or for terminating, withdrawing from and suspending a treaty. Paragraph 3, which sets out the methods to be employed, contains the most important provisions of the article. According to this paragraph, if the parties cannot reach an accord on the points cited above, they shall resort to methods enumerated in Article 33 of the United Nations Charter.

The commentary on *article 51* states that in the opinion of some delegations no compulsory settlement is envisaged, with the explanation that no such clause exists in other treaties. Reference is also made to the view expressed by some members that the method of compulsory settlement is not realistic. Turkey believes that this remark holds true in respect of other articles as well.

Provisions which do not enjoy the concurrence of all nations cannot be incorporated in international law without first providing for appropriate guarantees. Therefore, Turkey proposes that paragraph 3 of *article 51* should be complemented by the addition of a paragraph to the effect that the parties shall have the right to apply to the International Court of Justice.

[PART III]

Transmitted by a note verbale *of 4 October 1965 from the Permanent Representative to the United Nations*

[*Original: English*]

Article 55. The confirmation by the International Law Commission of the rule of *pacta sunt servanda*, which is the basis of the law of treaties, is useful and necessary in view of the opinions which have been advanced during the last few years. Particularly the effectiveness of this principle may be enhanced if it is strengthened by the principle of good faith. The draft prepared by the Special Rapporteur has put a clear emphasis on the principle of good faith. Although the International Law Commission observed in its commentary on the article that the principle of good faith constitutes an inseparable part of the rule of *pacta sunt servanda*, this observation has not, nevertheless, been fully and clearly reflected in the text. The Government of Turkey is, therefore, of the opinion that a paragraph similar to the second paragraph of the draft submitted by the Special Rapporteur should be included in the article, and that it should be clearly stipulated that the parties to a treaty should refrain from calculated acts to prevent the application of treaties. Furthermore, paragraph 4 of the draft of the Special Rapporteur stated that the parties not respecting the treaties should be held responsible for their action. Although this rule is principally concerned with the subject of international responsibility of States, the Government of Turkey believes that a paragraph similar to paragraph 4 of the draft of the Special Rapporteur should be added to the article until the eventual codification of the international responsibilities of States. The fact that such a specific provision was incorporated in paragraph 5 of article 63 renders this addition as suggested by the Turkish Government necessary.

Article 56. The Government of Turkey recognizes that the provisions of a treaty should, as a principle, be applied only in relation to facts and acts taking place while the treaty is in force. Nevertheless, it would seem that in view of the nature of the exception to this principle set out in the last part of paragraph 1 of the article and for the sake of avoiding misunderstandings which might subsequently arise in its interpretation, the exception should be restricted to more specific and definite cases. The Turkish Government therefore suggests that the words "unless the contrary appears from the treaty" in the last part of paragraph 1 of the article should be replaced by the words "unless the treaty stipulates otherwise".

Article 60. The Government of Turkey recognizes the general principle formulated in the article with regard to treaties providing rights for third States. Nevertheless, it considers that the conditions required for enjoying such rights are inadequate. Paragraph 2 of the article stipulates that a State, which is not a party to a treaty, exercising a right in accordance with paragraph 1, should comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. This paragraph, in actual fact, restricts the powers of States, parties to the treaty, to conclude, a new treaty in the extent of vested rights of third States. This situation is not only a restriction of the powers of sovereign and independent States, but it also causes an imbalance and injustice between their responsibilities. It may be possible for a certain number of States, parties to a treaty, to amend the rights recognized to third States under certain conditions by concluding among themselves a separate treaty similar to the original treaty but not based on provisions thereof.

To restrict the right to conclude a new agreement to exclusive compliance with the provisions of the existing treaty, as provided for in paragraph 2, runs contrary to the changing requirements of international life. With this view, the Government of Turkey suggests that the words "or established in conformity with the treaty" in the last part of paragraph 2 of the article should be deleted from the text and replaced by the words "or established by a new similar treaty".

Article 61. According to this article, a third State, acquiring an implicit right pursuant to section (*b*) of paragraph 1 of article 60, may suspend the application of the treaty to which it had not given its expressed consent. Such a legal situation is untenable. Article 61 can only be accepted if the word "impliedly" in section (*b*) of paragraph 1 of article 60 is deleted. Article 61 which would thus be based on a collateral agreement would be acceptable to parties. The stipulation that "unless it appears from the treaty that the provision was intended to be revocable" in article 61 would not suffice to remedy this shortcoming. Turkey can accept article 60 only if the word "impliedly" is deleted from section (*b*) of paragraph 1 of article 60.

Article 68, Although the commentary on section (*c*) of the article includes a statement to the effect that account was taken of a new general rule of international law, this point was not reflected in the text of the article with sufficient clarity. Because of this, difficulties may arise in the future. For instance, since the term "general international law" has been utilized in paragraph (*b*) of article 69, it may be claimed that the terminology of article 68 has a different connotation. In order to avoid such misunderstandings, the Turkish Government proposes the inclusion in the text of section (*c*) of article 68 of the word "general" immediately after the word "international".

Article 69. Interpretation of international treaties is an important subject related to their application. There are sufficient number of rules for interpretation as confirmed in the decisions of the International Court. A consensus to be reached on the principles on which these rules are based and on the order of their priority will pave the way for their codification and remove the difficulties encountered in their application. The elimination of the difficulties and disputes arising from differences of interpretation will enhance the application of international treaties. The Turkish Government, imbued with this desire, supports the efforts of the International Law Commission in codifying the rules concerning the interpretation of treaties. Turkey is also in accord with the principles employed by the International Law Commission as the basis of the rules of interpretation of treaties.

23. Uganda

[PART II]

Transmitted by a letter of 16 October 1964 from the Permanent Representative to the United Nations

[*Original: English*]

As far as I can see there may be some difficulties in the interpretation of article 31 of the draft. This article stipulates that if a representative who had been given authority to conclude a treaty signs a treaty the terms of which conflict with any internal legislation of that State, this fact will not invalidate the treaty unless the parties should agree that the internal law is clearly violated. In this respect I feel that the other parties will have to examine the "internal law" which is alleged to be violated by the treaty so concluded, thereby interfering with the sovereignty of that State. Am I right in assuming that the procedures followed in the ratification of treaties will take account of any conflicts between the proposed treaty and internal law? I am aware that the other contracting parties would wish to have some sort of assurance that the treaty they have signed would not be declared null and void, but still it is, I think, a dangerous principle which leaves room for internationally concluded treaties to bypass constitutional procedures of a Member State.

I am very much in favour of article 36 which attempts to depart from the hitherto recognized procedure of coercing States to become parties to a treaty. I understand that before the First World War coercion was an accepted procedure for forcing States to accede to treaties, and we are glad to see that article 36 eliminates this element of coercion which has definitely become out of date.

24. Union of Soviet Socialist Republics

[PARTS I AND III]

Transmitted by a note of 15 June 1965 from the Permanent Mission to the United Nations

[*Original: Russian*]

[PART I]

The competent authorities of the Union of Soviet Socialist Republics have the following comments on the draft articles on the law of treaties, prepared by the United Nations International Law Commission at its fourteenth to sixteenth sessions:

Participation in multilateral treaties (articles 8 and 9)

The competent Soviet authorities consider that, in codifying the law of treaties, it is necessary to proceed from the assumption that general international agreements should be open to participation by all States. This is required by the principle of the equality of States. Moreover, as such treaties usually regulate matters of interest to each and every State and are intended to establish or develop universally recognized principles and rules of contemporary international law which are binding on all States, to deny certain States the possibility of becoming parties to such treaties is contrary to their very spirit and purpose and is harmful to international co-operation.

Ratification (article 12)

Since the expression "treaty" in draft article 1 means any agreement (treaty, convention, exchange of notes or letters, etc.) concluded between two or more States and since the majority of such agreements are not at present subject to ratification, article 12 must be based on the assumption that an international treaty is subject to ratification if the treaty itself so stipulates or if the representative of a State has signed it "subject to ratification".

[PART III]

Treaties providing for obligations for third States (article 59)

It must be borne in mind that there are cases where obligations under a treaty may be extended to a third State without its consent being required. This is true, for example, of treaties which, in accordance with the principle of the responsibility of States, impose obligations on aggressor States guilty of launching and conducting a war of aggression.

The above comments on the draft articles on the law of treaties are not exhaustive or final. The competent authorities of the Soviet Union reserve the right to present further comments and observations on the draft articles at the appropriate time.

25. United Kingdom of Great Britain and Northern Ireland

[PART I]

Transmitted by a letter of 20 December 1963 from the Permanent Representative to the United Nations

[*Original: English*]

Article 1, paragraphs 1(a) *and* (b)

Her Majesty's Government are not entirely satisfied with the definitions of "treaty" and "treaty in simplified form". In particular it is doubted whether the list of expressions contained in the definition of the term "treaty" is either necessary or desirable. It would be better to mention any examples in the commentary. The element of an intention on the part of the States concerned to create legal obligations has not been, but should be, included in the definition.

Article 3, paragraph 1

In the view of Her Majesty's Government, article 3, paragraph 1, in the Special Rapporteur's draft articles is to be preferred to the International Law Commission's formulation, which does not adequately define the expression "subjects of international law". There exist many States and territories which possess less than full sovereignty. In certain cases, such States and territories have been enabled themselves to conclude treaties with foreign States by treaty entrustments and similar means. The article and commentary do not take account of the existence of these means.

Article 8

In the opinion of Her Majesty's Government, the presumption in paragraph 1 is unsatisfactory and, in any event, the drafting of the article will require further attention. Particularly, in paragraph 2 it is unclear to which cases the opening words ("In all other cases...") relate; what constitutes taking part in the adoption of the text; and whether the final expression ("...unless the treaty otherwise provides") qualifies sub-paragraphs (*a*) and (*b*) as well as (*c*). It is considered that the final expression should qualify at least sub-paragraphs (*a*) and (*c*). An international conference should not be rendered incapable of excluding from participation in a treaty a State which has taken part in the adoption of the text. Economic conditions might for instance justify exclusion in the case of a commodity agreement; or a State may be excluded until it has fulfilled a prior condition, such as the ratification of a related convention.

Article 9

Whilst the underlying idea of this article is acceptable, it may be difficult to operate in practice. For example, it will be many years before a convention on the law of treaties comes into force for all States and during that interim period some States will be parties and others will not. In relation to a particular multilateral treaty, it is likely therefore that some contracting States will also be parties to a convention on the law of treatie sand some will not. A proposal to open the multilateral treaty to new States in accordance with this article might be opposed by these latter States who would be under no obligation to comply with the article. Again, it is unclear what effect the provision would have upon a treaty forming the constitution of an international organization and containing express provisions on membership. The majority of such organizations have comprehensive membership articles.

The expression "a small group of States" is imprecise and should be clarified both here and wherever it occurs in these articles.

Article 12

The principle in paragraph 1 that treaties require ratification unless the contrary intention appears reflects the provisions regarding the ratification of treaties which appear in the constitutions of many States. However, this is a principle which has not been applied by many other States. As a practical matter there is much to be said for the contrary rule that a treaty does not require ratification and comes into force on signature unless the treaty itself provides otherwise. Her Majesty's Government fear that the rather complicated system of presumptions laid down in the present text will give rise to difficulties which do not at present exist.

Article 17

Whilst the principle of this article is sound, its application in practice may cause difficulties unless the drafting is made more precise. Particularly, the expressions "takes part in the negotiation ..." (paragraph 1), "*signify* that it does not intend ..." (paragraph 1) and "unduly delayed ..." (paragraph 2) are unclear.

Article 18

Her Majesty's Government note that this article deals only with reservations and assumes that the International Law Commission intends to take up the related matter of statements of interpretation in a later report.

Articles 19 and 20

Her Majesty's Government appreciate the effort of the International Law Commission to deal with this difficult and controversial subject. However, they feel that the two articles are not completely satisfactory and there may be difficulties in applying them in detail in practice. This comment relates in particular to paragraphs 3 and 4 of article 19 and to paragraphs 2 and 3 of article 20.

In general, it is considered that a reservation which is incompatible with the spirit and purpose of a treaty should not be capable of being accepted under article 19, and that provisions such as those made in articles 19 and 20 might be more readily acceptable if this interpretation and application were made subject to international adjudication.

Article 22

The article provides that a withdrawal of a reservation shall take effect when notice of it has been received by the other States concerned. Such a withdrawal might, however, necessitate adjustments by these other States to their laws or to their administrative practices and, in the view of Her Majesty's Government, they should be allowed a reasonable time (e.g. three months) before becoming bound by any new obligations resulting from the withdrawal, unless the treaty expressly provides otherwise.

Article 23

Her Majesty's Government consider that an automatic rule would be preferable to that provided in paragraph 3, which depends on the parties reaching a further agreement. The rule should, it is suggested, be that a treaty which is not covered by paragraphs 1 and 2 of the article enters into force on the date of signature or, if it is subject to ratification, acceptance or approval, when it has been ratified, accepted or approved by all the participants.

Article 25

The registration of treaties is already dealt with under Article 102 of the Charter and it is considered unnecessary and undesirable to duplicate those provisions.

[PART II]

Transmitted by a letter of 10 February 1965 from the Permanent Representative to the United Nations

[*Original: English*]

Article 31

Her Majesty's Government are in general agreement with this article. However, as drafted, the proviso "unless the violation of its internal law was manifest" might be difficult to apply in practice without clarification. It is not clear, for example, to which persons the violation must be manifest; nor whether those persons must, in fact, have had actual knowledge of the violation at the material time.

Article 33

Her Majesty's Government doubt the need for this article, but believe that if it is included there should be provision for independent adjudication on its interpretation and application.

Article 34

Independent adjudication would also be necessary for the interpretation and application of this article. The cases referred to in the commentary underline this need.

Article 35

It is not clear whether paragraph 1 of this article would cover signature of a treaty which is subject to ratification and, if so, whether a signature procured by coercion is capable of being ratified.

Article 36

Her Majesty's Government consider that this article should be subject to independent adjudication.

Article 37

If this article is accepted, Her Majesty's Government consider that its application must be very limited. The article as drafted calls for a great deal of elucidation. In particular, the relationship of the article to Article 103 of the Charter is not clear. It would be useful if examples of peremptory norms contained in the Charter or found in the remainder of the Commission's draft articles on the law of treaties could be given. In any event, Her Majesty's Government consider it essential that the article be made subject to independent adjudication. This observation applies also to article 45 and article 53, paragraph 2.

Article 42

While Her Majesty's Government do not dissent from the principle of this article, they are, however, concerned lest the article be open to abuse in that a State might invoke an alleged breach on the part of another State in order, simply, to provide a ground for terminating a treaty. Whilst recognizing that article 51 provides certain safeguards, Her Majesty's Government consider that a State which is accused of a breach should be able to call upon the other State to establish objectively that a breach has, in fact, occurred before that other State may invoke the breach in the manner proposed in the article. Thus, it is considered that provision for independent adjudication is required.

Article 44

In certain circumstances a fundamental change in circumstances may be invoked as a ground for terminating or withdrawing from a treaty. It is considered, however, that the article should not apply to all treaties but only to those which contain no provision for denunciation (or which contain a provision which would not permit denunciation within, for example, twenty years of the fundamental change). Moreover, it is doubted whether a subjective change of

policy or a change of a government can ever be regarded as a fundamental change of circumstances.

In the view of Her Majesty's Government, the security of treaties would be impaired if procedural steps in addition to those proposed in article 51 were not required. In connexion with the principle of *rebus sic stantibus*, the view is taken that a party alleging a fundamental change of circumstances is under an obligation, before it may invoke the change in any way, to propose negotiations to the other party and if the negotiations are not successful at least to offer arbitration of the issue. Her Majesty's Government consider that this element of the principle should be retained.

Article 49

Article 4 draws a distinction in certain circumstances between authority to negotiate, draw up and authenticate a treaty, on the one hand, and authority to sign, on the other. It does not, however, use the word "conclude", unlike article 49. It is not certain, therefore, whether the rule which is to apply in similar circumstances, to authority to denounce, etc., is that relating to authority to negotiate, draw up and authenticate or that relating to authority to sign.

Article 51

Her Majesty's Government consider that the fundamental principle underlying the law of treaties is *pacta sunt servanda*. Paragraph 1 of this article is of great importance and value. With regard to paragraphs 3 and 4, however, Her Majesty's Government consider that whilst the draft articles on the invalidity and termination of treaties, when in force, would mark an advance in the law of treaties, they would, paradoxically, constitute an impairment of the general security of numerous existing and future treaties unless there were provisions for independent international adjudication or arbitration, as appropriate. The possibilities of abuse, in the absence of proper safeguards, exist most plainly in relation to practically all the articles and, in particular, in relation to articles 36, 41, 42, 43 and 44. Articles such as these would be acceptable only if coupled with the protection of an ultimate appeal to an independent judicial tribunal. This accords with Article 36, paragraph 3 of the Charter by which legal disputes should as a general rule be referred by the parties to the International Court of Justice, and with the intent of resolution 171 (II) of the General Assembly. In general, Her Majesty's Government suggest that the draft articles should be subject to interpretation and application by the International Court of Justice or, if such a provision is not generally acceptable, should only be capable of being invoked against a State which has accepted the compulsory jurisdiction of the Court if the State relying on the article is willing to submit the issue to the Court.

Article 52

The operation of article 52, paragraph 1(*b*) might be difficult in practice, especially if a treaty had been executed to a large extent or if formal legislative or other internal steps had been taken to give effect to it. It is not clear in what manner and by whom the parties may be required to restore the *status quo ante*.

Article 53

The article as drafted does not make provision with regard to the accrued obligations of a State under a treaty at the time of its denunciation by that State.

[PART III]

Transmitted by a letter of 11 January 1966 from the Permanent Mission to the United Nations

[*Original: English*]

The Government of the United Kingdom have studied with interest part III of the International Law Commission's draft articles on the law of treaties and wish first to offer the following general comments:

(*a*) They recall their comment upon the need to provide for independent adjudication of disputes in the operation of certain articles in part II, and in particular the comment on article 51. Certain articles in part III also demonstrate the need for independent adjudication; for example, the test of compatibility in articles 63(3) and 67(1)(*b*)(ii), the test contained in article 67(1)(*b*)(i), the provisions of article 68 and the articles in Section III on Interpretation.

(*b*) The articles in part III raise again the question of the extent to which the provisions of the draft articles would affect treaties in force before the conclusion of any instrument on the law of treaties. To the extent to which the articles state customary law, the effect of any convention on the law of treaties should be identical with that of customary law. However, difficult problems might arise with regard to any provisions in a convention on the law of treaties which amounted to progressive development of international law. In their revision of the draft articles, it is suggested that the Commission should consider the possible retroactive effects of their proposals and also their effect upon existing treaties.

(*c*) The United Kingdom Government regret the deletion of the article proposed by the Special Rapporteur on the application of treaties to individuals (A/CN.4/167, article 66). It is felt that contemporary international law supports the proposal of the Special Rapporteur, particularly having regard to the development of the law relating to human rights by the United Nations and other international organizations.

In addition, the United Kingdom Government have the following comments upon individual articles in part III:

Article 61. It is felt that the rule proposed might over-safeguard the position of the third State to the detriment of the States parties to the treaty. It is suggested that States parties should be permitted to amend a provision affecting a third State unless it appears from the treaty or the surrounding circumstances that the provision was intended not to be revocable or unless the third State is entitled to invoke the rule of "estoppel" or "preclusion" (which forms the basis of article 47) against the amendment.

Article 63. It is suggested that paragraph 2 should be drafted so as to avoid any appearance of referring to a specific earlier or later treaty, for example, by making it read "any earlier or later treaty".

Article 64. It is considered that, if the exception in paragraph 2 is not carefully and narrowly defined, the rule in paragraph 1 of article 64 will be impaired. In paragraphs 3 and 4 of its commentary, the Commission recognizes that "cases of supervening impossibility of performance...may occur in consequence of the severance of diplomatic relations". The question of supervening impossibility of performance is dealt with in article 43, but only as regards the disappearance or destruction of "the subject matter of the rights and obligations contained in the treaty". The severance of diplomatic relations affects not the subject-matter of the rights and obligations, but rather "the means necessary for the application of the treaty". In view of this difference, it is considered that the requirement of "impossibility of performance", referred to by the Commission in the commentary on article 64 and set out in article 43, should be expressly included in the formulation of article 64 (2).

Treaty obligations concerning the peaceful settlement of disputes should not be capable of being suspended by reason only of the severance of diplomatic relations.

Article 68. The United Kingdom Government consider that the operation of paragraph (*c*) would not be satisfactory. The question of the exact point of time at which a new rule of customary law can be said to have emerged is an exceedingly difficult one. Moreover, treaties ought not to be modified without the consent of the parties. For these reasons article 68(*c*) should be deleted.

Article 69. The United Kingdom Government support the view favoured by the Commission that the text of a treaty must be presumed to be the authentic expression of the intentions of the

parties (paragraph 9 of the commentary). The concept of the "context" of a treaty is considered to be a useful one, not only with regard to interpretation but also with regard to other draft articles which contain expressions such as "unless the treaty otherwise provides", "unless the contrary appears from the treaty", and "unless it appears from the treaty that ...". As regards the definition of the "context" in paragraph 2, it is considered that the words "including its preamble and annexes" should be omitted on the ground that they constitute parts of a treaty.

The United Kingdom Government support the Commission's proposal in paragraph 1(*b*).

26. United States of America

[PART I]

Transmitted by a note verbale *of 17 February 1964 from the Permanent Representative to the United Nations*

[*Original: English*]

The Government of the United States of America commends the International Law Commission and expresses appreciation for the Commission's efforts and contributions in the development of the law of treaties.

The following comments are submitted by the United States Government on the group of draft articles (1-29) on the conclusion, entry into force and registration of treaties submitted by the Commission in its report to the General Assembly. These comments are submitted with the understanding that they do not express the final views of the United States Government regarding the articles involved.

Article 1

The only parts of this article about which any immediate suggestions are made are paragraph 1(*b*) and paragraph 2.

The provisions of paragraph 1(*b*), when considered in conjunction with the provisions of article 4, paragraph 4(*b*), give rise to the question whether the definition should be based upon and limited to form only. If paragraph 1(*b*) is retained as now drafted the result of the application of paragraph 4(*b*) of article 4 will be to require full powers in connexion with many informal agreements which at present are signed without any requirement of full powers. Many such informal agreements have the appearance of a formal treaty so far as form is concerned but are not subject to ratification or other subsequent approval. On the other hand, it would seem that agreements which require ratification or other subsequent acceptance, even though in one of the forms specified in the definition, should be excluded from the definition.

In view of the foregoing it is suggested that consideration be given to replacing the definition in paragraph 1(*b*) of article 1 by a definition reading somewhat as follows:

> "(*b*) 'Informal treaty' means a treaty not subject to ratification or other subsequent approval that is concluded by an exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument."

The disclaimer in paragraph 2 seems to be satisfactory as far as it goes. The characterizations and classifications given in paragraph 1 are undoubtedly useful in international law but they may be misleading in that they might be understood by some as a part of international law that had the effect of modifying internal law. For example, the characterization, or designation, or even the form given an international agreement is often of little legal significance. In many instances the name given an agreement or the form in which it is cast is purely a matter of convenience rather than one of legal significance.

In view of this the suggestion is made that paragraph 2 be expanded to read as follows:

> "2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State or affect the requirements of that law regarding the negotiation, signature, and entry into force of such agreements."

Article 2

This article is useful in calling attention to the necessity of considering the articles in their context. It is also useful in avoiding a question whether the absence of a written text affects the legal force of an international agreement.

Article 3

Paragraph 1

It would appear that unless the provisions of the paragraph are given a broader meaning than that assigned it in the Commission's commentary, it would constitute a narrow limitation on areas emerging to independence. The reference to "other subjects of international law" is so general that it may be of little value. On the other hand, to limit its scope to international organizations, the Holy See, and cases such as an insurgent community is too limiting. Colonies and similar entities given some measure of authority in foreign relations, especially when approaching statehood, should not have to be in a state of insurgency to conclude a valid international agreement. Where the parent State has entrusted a colony or other subordinate jurisdiction with authority to conduct its foreign relations with respect to certain matters, or specifically authorized it to conclude a particular agreement, the new law of treaties should not preclude commitments entered into in such circumstances from constituting valid international agreements. So far as such colony or entity is entrusted with a measure of authority by the parent State in the conduct of its foreign relations it necessarily becomes a "subject of international law" for the purposes of article 3, paragraph 1. It would be a cruel paradox if, in the face of the existing movement of new entities toward full independence, areas approaching independence could not be encouraged by the parent State giving them authority to conclude agreements in their own names.

Paragraph 2

No objection is perceived to this paragraph.

Paragraph 3

The use of the word "constitution" in this paragraph may be too limiting, especially in view of the use of the word "constitution" in an apparently different sense in paragraph 2 in connexion with a federal State and the statement in the Commission's commentary that "...the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instrument of the organization but also on the decisions and rules of its competent organs. Comparatively few constituent treaties of international organizations contain provisions concerning the conclusion of treaties by the organization; nevertheless the great majority of organizations have considered themselves competent to enter into treaties for the purpose of furthering the aims of the organization."

The reference in the commentary to the dictum of the International Court of Justice in its opinion on "Reparation for Injuries Suffered in the Service of the United Nations" would seem to serve as a good measure of the authority of an international organization to conclude international agreements. The statement in the dictum, which refers to the Charter of the United Nations, reads:

> "Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

The word "authority" would seem to be less likely to create confusion than the word "constitution" which is generally understood to be a written document.

Considerable further attention should be given to the wording of this paragraph so that its meaning would be clear without

reference to the commentary. It would be desirable, for example, to be more specific as to what "international organizations" are being referred to. It is assumed that the intention is to limit the phrase to organizations established by Governments, normally by some form of international agreement, and intended to constitute an international entity between the Governments as such rather than merely a forum for exchange of information or discussion by informal groups.

Article 4

Paragraph 1

The provisions of paragraph 1 seem to be highly desirable. So far as they apply to Heads of State and Heads of Government those provisions are fully consistent with long-established practice in relations between nations. The practice is not as fully developed and widespread so far as Foreign Ministers are concerned but no objection is seen to applying the provisions to them.

Paragraph 2

This paragraph reflects widespread practice and its inclusion should help to clarify those cases where some question may exist particularly in international organizations where treaties are formulated.

Paragraph 3

The requirement imposed by the phrase "shall be required" may be too strong in this provision. In some cases very high-level delegations are sent from one State to another to negotiate or draw up a treaty and the insistence upon any particular credentials may in certain circumstances be out of place and perhaps viewed as a discourtesy, particularly in view of the efficiency of modern communications which make it possible to check upon the authority of any given individual. In view of this it may be desirable to replace the phrase "shall be required" by "may be required".

Paragraph 4

Sub-paragraph (a)

This provision is simply declaratory of widespread practice and it may be helpful in resolving any questions that arise, even though such questions may seem unlikely.

Sub-paragraph (b)

This sub-paragraph, when applied in conjunction with paragraph 1(*b*) of article 1, could, as stated above in the comment on article 1, result in full powers being required for many informal agreements that are now signed without any requirement of documentary evidence of authority. Adoption of the revision of paragraph 1(*b*) of article 1 as suggested in the comment on article 1 would avoid such a result. If that revision is adopted the phrase "treaties in simplified form" in sub-paragraph (*b*) should be replaced by "informal treaties".

Paragraph 5

This paragraph may have the effect of encouraging the preparation in the field of many instruments of ratification, accession, approval or acceptance that have long been prepared in foreign ministries. Whether this would be desirable may be questionable because of the likelihood of considerably more mistakes being made in such documents when they are drawn up in the field than when they are prepared in a foreign ministry.

Paragraph 6(a)

The recognition in this provision of full powers of a general or "blanket" character may be very helpful in relieving the pressure imposed upon Heads of State and others by the issuance of numerous full powers. There may be instances, however, where because of the importance of a particular treaty, a State would wish to see a specific authorization. Such special cases could be handled by a request by the State desiring the evidence of specific authorization, a procedure that would not be precluded by paragraph 6(*a*).

Paragraph 6(b)

The word "shall" in the phrase "shall be provisionally accepted" should be replaced by "may". The acceptance of a letter or telegram pending the receipt of full powers is a relatively recent innovation based purely upon convenience and courtesy and should not be made a requirement of international law.

Article 5

This article is more in the nature of a statement of existing practices. It is purely informative rather than rule-making in its substance. No objection is perceived to the article other than that it may unnecessarily contribute to the length of the convention in which it is included.

Article 6

No objection is perceived to this article. It would seem to serve a useful purpose by stating general rules that may be helpful guidelines and controlling in the absence of agreement upon some other procedure as provided in paragraph (*a*).

Article 7

It seems questionable whether this article is at all necessary or useful. In its present wording the article is more confusing than helpful.

Placing the initialling as the first of the procedures for authentication seems to overemphasize that procedure far beyond the importance heretofore given it. In most instances the initialling procedure is not used at all. Placing the initialling procedure first would have the effect of adding an additional procedure that is usually dispensed with but which would be considered necessary in many more cases simply because it was included in a convention on treaties. Initialling a text does not always have the effect of making a given text the definitive text of a treaty. In some instances initialling merely constitutes agreement by the representatives negotiating the treaty that they have reached agreement upon a particular text to refer to their respective Governments for consideration. At the same time it may be understood that the governments concerned may decide whether that particular text shall be the definitive text of a treaty to be signed, whether it may be modified before it is signed, or whether any treaty will be concluded at all. In making a determination as to which alternative will be adopted, the governments may decide that further negotiations will be necessary before a definitive text can be agreed upon. (Paragraph (4) of the Commission's commentary on article 10 states, in part, "Initialling is employed for various purposes. One is to authenticate a text at a certain stage of the negotiations, pending further consideration by the Governments concerned.")

Article 8

Paragraph 1 of article 8 seems to contemplate that a general multilateral treaty would be open to all States even though it contained no provision for such—that the terms of the treaty or the established rules of an international organization would have to specifically preclude participation by other States.

Such a provision as that in paragraph 1 of article 8 may not come into play very often because most multilateral treaties as such permit additional States to become parties by signature, signature and ratification, or accession. However, the existing rule, and it is one of the fundamental rules of treaty law, is that in the absence of provision for additional parties to participate *it is impossible for them to do so in the absence of agreement by the parties.*

It is recognized, of course, that the emergence of many new States to independence requires attentive consideration to the matter of opening many existing treaties to their participation. It is believed, however, that such participation can be accomplished just as

effectively and in a more orderly manner by procedures more in keeping with established treaty law.

Paragraph 2(*a*) of article 8 is equally unacceptable. The mere fact that a State participated in formulating and adopting a particular treaty may not necessarily entitle it to become a party. After a considerable period of years has elapsed following the entry into force of a given treaty the parties may find it necessary to make some adjustments with respect to States desiring to become parties. There may be circumstances justifying or requiring such adjustments and it would seem to be a backward step to preclude the parties from taking such action. It may not always be possible to anticipate what change in circumstances may justify a new look at a treaty in connexion with participation by a State that stood idly by for years while the parties, through their initiative, co-operation, and forbearance brought a particular organization or subject of international law to a fruitful state. Inclusion of such a provision as paragraph 2(*a*) in a general convention on treaties may have exactly the reverse effect of the apparent intention of the provision. It may result in States entering into certain new multilateral treaties including specific provisions limiting the States that may actually become parties. It may also result in some States approving the treaty with reservations to assure that it would have a voice in later participation by States that did not join in the actual development of the application of the treaty.

No objection is perceived to paragraph 2(*b*) since it merely states that the intention of the parties is to be given effect. Inclusion of such an obvious rule in a convention on the law of treaties could, however, have the effect of establishing a strong presumption that every possible international problem that could arise in connexion with treaties had been anticipated by the formulators of the convention and covered by the convention. The difficulty of any such farsighted anticipation is well evidenced by the developments that have taken place in the law of treaties during the past two decades. These developments were not anticipated—they were brought about by changing circumstances.

Paragraph 2(*c*) would be subject to all the comments made with respect to paragraph 2(*a*) above.

Article 9

The comments regarding paragraphs 1 and 2(*a*) of article 8 apply equally to paragraph 1 of article 9.

There are, however, additional objections to article 9, paragraph 1.

The use of the phrase "multilateral treaty" in paragraph 1 is too indefinite to serve as a descriptive term in any rule of law having such new and broad effects as those contemplated by that paragraph. Apparently the words "multilateral treaty" are intended to include "general multilateral treaty" as defined in article 1, paragraph 1(*c*) and any group of States other than "a small group of States". How small must a group be to constitute "a small group"? Are the members of the Organization of American States, the parties to the Antarctic treaty, or the parties to the North Atlantic Treaty a "small group" of States? If not, then the provisions of those treaties as to what States could participate would be rendered meaningless by the provisions of article 9, paragraph 1(*a*).

Sub-paragraphs (*a*) and (*b*) of paragraph 1 of article 9 would not only permit—even necessitate—the amendment of a treaty without concurrence of all the parties but would involve another new concept. Sub-paragraph (*b*) would, in effect, permit the amendment of treaties by international organizations. This new concept, rather than providing flexibility in the negotiation and application of treaties, might have the reverse effect of eliciting reservations by many States in approving a convention on the law of treaties and on other new treaties to be concluded, particularly States whose legislatures must approve treaties before they can become binding.

Paragraph 2 has the obvious defect of uncertainty as to what is meant by the phrase "a small group of States".

Paragraph 3 is consequential upon paragraphs 1 and 2 and procedural for the application of those earlier paragraphs, and could stand as written if the substantive paragraphs were adopted.

Paragraph 4 of article 9 assumes that all treaties are divisible as to parties and can be applied between some of the parties while certain other parties are not in treaty relations with each other. This is not the case in many instances, such as treaties establishing international organizations and treaties for defence. The Charter of the United Nations is a prime example of a treaty where all Members must be in treaty relations with each other.

Article 10

It is assumed that the provisions of paragraph 1 of this article are not intended to exclude the possibility of a treaty being adopted by an international body, authenticated by its officers and opened to ratification without any procedure or requirement for signature, such as the International Labour Organisation Conventions. However, even though the provisions of paragraph 1 are permissive, they might give rise in some instances to a question whether they exclude the procedure of bringing the treaty into force without signature. Such a question could be avoided by inserting the phrase "but with respect to which signature is contemplated", between the words "adopted", and "the States".

Sub-paragraph (*c*) of paragraph 2 of article 10 may cause some difficulty, particularly if signature alone can bring the treaty into force. A State may have to satisfy certain national requirements before it can agree to be bound by a particular treaty and it may find it undesirable or impossible to have its obligations date from the time of signature *ad referendum* rather than from the date when its national requirements are satisfied. This difficulty could be overcome by adding after the word "treaty" at the end of the present wording the phrase "unless the State concerned specifies a later date when it confirms its signature".

Paragraph 3(*a*) of article 10 may give rise to some question in connexion with certain documents, such as memorandums or minutes of interpretation that are intended to be binding solely on the basis of initialling. Such documents sometimes accompany a more formal document that is signed and brought into force by signature.

Although the article addresses itself to the procedures by which a State becomes a *signatory* to a treaty, it may be advisable to include a disclaimer in a fourth paragraph in the article reading somewhat as follows:

"4. Nothing in this article shall prevent the initialling of any document, particularly a subsidiary one, from having a final effect when the parties intend that such initialling completes the document without any signature."

Article 11

All of the provisions of this article appear to be in conformity with long and widely accepted practices and procedures on treaty making. The provisions serve a useful purpose in crystallizing principles that are now being followed.

Article 12

As the principal effect of this article is that treaties require ratification in the absence of certain circumstances, it may be more appropriate to list first the requirement for ratification than to begin by enumerating the exceptions. Furthermore, the phrase in paragraph 3(*b*) reading "other circumstances evidencing such intention" might well be clarified by including as an example the fact that similar treaties concluded by the parties with each other or by either with third States have been subject to ratification. It is suggested, accordingly, that the second and third paragraphs of article 12 be rearranged and revised to read somewhat as follows:

"2. Ratification of a treaty is necessary where:

"(*a*) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

"(*b*) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of negotiations or from other circumstances evidencing such an intention, including, but not limited to the practice of either or both of the States concerned to ratify similar treaties previously concluded between them or concluded by one of them with a third State;

"(*c*) The representative of the State in question has expressly signed 'subject to ratification' or his credentials, full powers or other instruments duly exhibited by him to the representatives of the other negotiating States expressly limit the authority conferred upon him to signing 'subject to ratification'.

"3. A treaty shall be presumed not to be subject to ratification by a signatory State where:

"(*a*) The treaty itself provides that it shall come into force on signature and the treaty does not fall under any of the cases provided for in paragraph 1 above;

"(*b*) The credentials, full powers, or other instruments issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty, without ratification;

"(*c*) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention, including in the case of a bilateral treaty, but not limited to, the practice of either or both States concerned to conclude similar treaties previously concluded between them, or with third States, without ratification;

"(*d*) The treaty is informal."

Article 13

The final determination on the wording and acceptability of this article is dependent upon the acceptability of articles 8 and 9 to which it refers. A question may arise under the provisions of article 13 as now written whether article 11 would permit the admission of new States to membership in the United Nations contrary to the provisions of the Charter, particularly under the provisions of article 9 which may be somewhat broader than, and possibly in conflict in some respects with, article 8. Article 8 appears to be fully in conformity with the Charter of the United Nations. The first paragraph of that article appears to make participation subject to the terms of the Charter. However, paragraph 1(*a*) of article 9 seems to permit the admission of additional States to participation in a multilateral treaty without regard to the provisions of that treaty. The two-thirds rule in paragraph 1(*a*) would appear to be in conflict with the provisions of Article 4 of the Charter of the United Nations.

Article 14

The acceptability of this article, like article 13, is dependent upon the acceptability of articles 8 and 9 to which it refers. Like article 13, it is completely silent as to the requirements of the particular treaty involved and makes the rules to be established in a convention on the law of treaties paramount.

Article 15

This article as a whole is a very desirable one that would clarify and crystallize international practices and procedures to a great extent but a few changes seem necessary for achieving that objective.

Paragraph 1(a)

The phrase "a written instrument" in paragraph 1(*a*) of article 15 should be expanded to read "a signed written instrument" or "a written instrument signed by an appropriate authority". The phrase as written would seem to condone an infrequent practice of submitting a written instrument that merely bears a stamped seal. Such instruments do not appear to be sufficient evidence of a State's intention to become bound by an international agreement that requires an instrument of ratification, acceptance or approval.

Paragraph 3 omits any reference to the date of deposit, a detail sometimes omitted in a depositary's notification to other Governments, and would seem to impose an unnecessary burden on a depositary by the phrase "and the terms of the instrument".

Although the phrase "shall be notified promptly...of the fact of such deposit" might well be understood by many as necessarily including the date, the failure of some depositaries to mention the date of deposit and the importance of the date justifies a specific reference to the date in the requirement on notification.

The requirement that the depositary shall notify "the terms of the instrument" would seem to require that the depositary transmit to each of the many States concerned a copy of the instrument received or at least a statement of its terms. Such a requirement would seem not only unnecessary but could become quite burdensome to the depositary and delay transmission of the notification.

The practice that appears to be most generally followed by depositaries at the present time is to give the States concerned a notification that a given State deposited its instrument of ratification or accession on a certain date. The text of any reservation or understanding included in or accompanying the instrument when it is deposited is included in the notification. Such a notification seems to be acceptable to most States and no need for any change is perceived.

It is suggested, accordingly, that the final clause of paragraph 3 of article 15 be revised to read somewhat as follows: "shall be notified promptly both of the fact and of the date of such deposit".

Article 16

This provision is declaratory of existing international practices and understandings. It appears to be fully in keeping with the requirements of orderly treaty making. It appears, however, that the reference to "article 13" should be replaced by a reference to "article 15".

Article 17

This appears to be a highly desirable provision. So far as it pertains to action following signature or deposit of an instrument of ratification, accession or approval, it reflects generally accepted norms of international law. Moving the obligation back to cover the period of negotiation and drawing up to the time of adoption appears to be an addition not generally considered. Such additional coverage would, however, seem to be an improvement that would permit the States participating in a given negotiation or drawing up to proceed with confidence that their efforts would not be frustrated without some advance warning.

Article 18

Section III at the outset should specify that it applies to multilateral treaties. The introduction to the commentary on articles 18, 19 and 20 shows clearly that the articles are intended for application only with respect to multilateral treaties. Articles 21 and 22 are equally limited to multilateral treaties. However, if let stand in the general terms in which it is written, it may be misleading and become a source of confusion so far as bilateral treaties are concerned. Accordingly, section III should be entitled not merely "Reservations" but "Reservations to multilateral treaties".

The use of the word "formulate" in the introductory clause in paragraph 1 of article 18 is not clear. The word "formulate" normally means, according to the Webster's New International Dictionary, "To reduce to, or express in or as in a formula; to put in a systematized statement or expression". However, from the provisions that follow the initial clause in article 18 the word "formulate" in paragraph 1 seems to be intended to permit a State to propose a reservation and to become a party to a treaty with that reservation. This meaning is supported especially by the four exceptions, (*a*)-(*d*), enumerated in paragraph 1. Viewed in this sense article 18 is intended to specify that a State has the right to become a party to any multilateral treaty with a reservation provided none of the

first three of the exceptions in paragraph 1 apply. Paragraph 1(*d*), the fourth of the exceptions, appears from the commentary to be completely subject to the provisions of article 20. The last sentence of paragraph (15) of the commentary in the Commission's report reads:

> "Paragraph 1(*d*) has to be read in conjunction with article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations."

Under such a construction any State could become a party to a multilateral treaty under the provisions of article 20, paragraphs 2(*a*) and 2(*b*), if any State party to that treaty accepts the reservation, regardless of objection by other parties and regardless of the "object and purpose of the treaty". Under such provisions many States could have become parties to the Charter of the United Nations with reservations that could have seriously weakened its structure and created chaos on matters of voting, planning, and similar matters requiring co-operative action based upon each Member being in treaty relations with all the other Members.

The provisions of paragraph 1(*d*) do not seem to take into account the nature or character of a multilateral treaty which in itself would preclude ratification with a reservation that was not accepted by all or at least a large majority of the parties.

Consideration should be given to the inclusion in article 18, paragraph 1(*d*) of a reference to the character of the treaty involved. This could be accomplished by revising paragraph 1(*d*) to read somewhat as follows:

> "(*d*) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty, or the treaty is of such a character that each party to it must be in treaty relations with every other party."

Article 19

The provisions of paragraph 3 of article 19 regarding tacit acceptance of reservations is of considerable merit so far as concerns admission to a treaty of States making reservations to the treaty. It is questionable, however, whether a State should be presumed to be bound by a new treaty relation that it never expressly approves. At most the State failing to object should be precluded from preventing participation in the treaty by the reserving State but should not be presumed to be in treaty relations with the reserving State unless the specific treaty involved contains provisions on which such an assumption could be based.

Article 20

The provisions of paragraph 1(*a*) do not clearly take into account the provisions in some treaties that specifically permit reservations and require acceptance by a given number or fraction of the parties. Perhaps the provisions assume that the requirements of the terms of the treaty are to be fulfilled. It would seem desirable to make the provisions more specific by adding to paragraph 1(*a*) the phrase "unless required by the terms of the treaty".

Paragraph 2

In paragraph (15) of the Commission's commentary on article 18 the following statement is made:

> "Paragraph 1(*d*) has to be read in conjunction with article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations."

Under such a construction the provisions of paragraph 1(*d*) of article 18 could be rendered almost meaningless. For example, if such a rule had been in force when the Charter of the United Nations was being ratified, any State ratifying with a reservation would have become a Member of the United Nations with that reservation if at least one party had accepted that reservation. In this connexion consideration could be given to the relation of such a rule to the ratification of amendments to the Charter of the United Nations adopted under Article 108 thereof.

Sub-paragraph (a)

The phrase "any State to which it is open to become a party to the treaty" would include a State which, although having the right to become a party, never becomes a party. In such circumstances, acceptance of a reservation by a non-contracting State could not bring the treaty into force between that State and the reserving State. Perhaps the phrase "as soon as the treaty is in force" may have been intended to mean when the treaty is in force between the two States referred to as well as the normal connotation that the treaty has become a binding instrument with respect to any two or more States. In its present wording, however, the intended effect of the provision is not clear.

Sub-paragraph (b)

These provisions imply that a State may not object to a reservation on any ground other than that it is "incompatible with the object and purpose of the treaty". Such an implication could lead to endless disagreement and confusion. For example, the reserving State might insist that its reservation was compatible with the object and purpose of the treaty and the objecting State would insist that it was not so. The "incompatibility" criteria might well be employed in connexion with determinations whether a State may be considered a party to a treaty with a given reservation but it seems to be an unnecessarily limited basis for objecting to treaty relations with the reserving State. A State may feel that, because of the type of treaty and the circumstances, a given reservation by another State would render relations under the treaty between the two States inequitable. If each State were not free to decide which reservations it will accept and which reservations it will reject, on such bases as it considers appropriate in its national interest, it would have to accept all reservations except those "incompatible...with the treaty". If the criteria for objecting to a reservation is limited to "incompatibility" the treaty rights expected by a State under a multilateral treaty it ratified with respect to other ratifying States could be changed considerably by reservations without that State's consent. It is doubted that the authors of the provision intend any such result. Such a result would be in serious conflict with the statement in paragraph (4) of the introduction to the Commission's commentary on articles 18, 19 and 20, quoting from the opinion of the International Court of Justice concerning the Genocide Convention, and reading "...no reservation can be effective against any State without its agreement thereto".

Paragraph 4

The phrase "the effect of the reservation" is not clear. It is assumed that the phrase, as well as the paragraph as a whole, is intended to refer to the bearing of the reservation upon the question whether or not the State involved shall be considered as a contracting party to the constituent instrument of the international organization and a member and not to relations between the reserving State and States which object to the reservation.

If it is intended that the paragraph shall mean that the organization shall decide all legal aspects of the reservation and determine what legal relationships shall be established, it would be in conflict with the above-quoted phrase that "...no reservation can be effective against any State without its agreement thereto". When paragraph 4 is read in conjunction with article 21 it would be clear that the rights of the objecting State would be preserved but difficulties may arise and it would be well to avoid them by casting paragraph 4 in more precise terms.

Even if the intention of paragraph 4 were limited to admitting the reserving State to membership in the organization it could create difficulties and confusion. States which objected to the reservation may feel that they should in no manner be bound nor their interests affected by the vote of the reserving State in the making of decisions by the organization.

The example, given in paragraph (25) of the Commission's commentary to article 20, of the handling of the "alleged reser-

vation" to the IMCO Convention appears to be taken as the basis for suggesting the rule of international law proposed in article 20, paragraph 4. The commentary in paragraph (25) concludes:

> "The Commission considers that in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable."

Four questions arise in connexion with the example given and the conclusion reached by the Commission, namely:

1. Was the "reservation" involved in the IMCO case an appropriate one on which to base a rule of international law?

2. In view of the essentially consultative character of the IMCO organization, can an example of a case involving its membership be considered applicable to other international organizations whose character may be considerably different, such as the Statute of the International Atomic Energy Agency, or the Constitution of the International Labour Organisation?

3. As the effect of a reservation is essentially a legal matter, doesn't the rule in paragraph 4 assign to an international organization juridical functions that should more properly be handled by the International Court of Justice?

4. Is it proper to assume that "integrity of the instrument" involves not only the integrity of the organizational structure but also the integrity of commitments by States that ratify without reservations and that the latter is not normally a matter for determination by a body constituted for other than juridical purposes?

Article 21

The acceptability of this article is dependent, at least in part, on the acceptability of the provisions of article 20 to which it refers.

On the assumption that a satisfactory text can be agreed upon for article 20 and articles 18 and 19 to which article 20 is closely related, the following comments are offered on article 21:

Paragraph 1(a)

Sub-paragraph (*a*) reflects a long recognized and widely accepted principle of international law. In this connexion an interesting question would exist where, in the case of a bilateral treaty, one of the parties in giving the approval required by the treaty does so with a condition or reservation that is not expressly accepted or rejected by the other party. The two parties proceed with the application of the treaty but one subsequently asserts that the condition or reservation is of no effect. Should such a condition or reservation be considered as having been accepted by implication? If the entire group of articles under section III is limited to multilateral treaties such a case would not need to be taken into account in articles 19 and 20. However, if section III is not limited to multilateral treaties, consideration should be given to the question of what, if anything, should be provided in articles 19 and 20 with respect to implications arising from acts taken by the parties other than a specific statement of acceptance or objection.

Paragraph 1(b)

The phrase "to claim" in the context of paragraph 1(*b*) is ambiguous. It is assumed that the phrase "to claim" is intended to permit any State *to apply* "the same modification...in its relations with the reserving State". However, without the Commission's commentary, the phrase may be understood as implying that the first State must notify the reserving State of an intention to invoke the reservation before the former could take advantage of the reservation in its relations with the reserving State. The Commission's commentary to article 21 states that "a reservation operates reciprocally between the reserving State and any other party, so that it modifies the application of the treaty for both of them in their mutual relations...".

In view of the lack of clarity in the phrase "to claim" and the purpose of the provision as stated in the commentary, the article would be made clearer and more acceptable if the phrase "to apply" were substituted in place of "to claim".

Paragraph 2

In some instances States have objected to or refused to accept a reservation but have nevertheless considered themselves in treaty relations with the reserving State. Such a situation is unusual but the present wording of paragraph 2 not only makes no allowance for but appears to preclude such a situation. Perhaps such a situation could be more properly referred to as one in which the provisions to which the reservation applies are rendered inoperative between the reserving State and the State objecting to the reservations but nevertheless accepting treaty relations. This could be provided for by a third paragraph to article 21 reading somewhat as follows:

> "3. Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States."

Article 22

This article has considerable merit. It may have the effect of encouraging the withdrawal of reservations and thereby contribute to uniformity in treaty relations among the parties. Its principal merit is the clarification afforded by the provision that "Such withdrawal takes effect when notice of it has been received by the other States concerned". As indicated in the Commission's commentary on the article, a State should not be held responsible for a breach of a term of a treaty, to which the reservation relates, committed in ignorance of the withdrawal of the reservation.

Article 23

This article as a whole is clearly worded and its merit should be self-evident. As indicated in the Commission's commentary, the provisions reflect accepted present-day practices that are recognized as desirable.

Article 24

The provisions of this article are in accord with present-day requirements and practices. Provisional entry into force is required in various circumstances where the urgency of a situation makes it desirable to provide for giving effect to the treaty prior to completion of all the requirements for its definitive entry into force.

It may be questioned, however, whether such a provision in a convention on treaties is necessary.

Article 25

A question might well be raised whether the provisions of this article are appropriate for inclusion in the draft articles or whether it should be left to the United Nations. Under Article 102 of the Charter, Members of the United Nations have the obligation to register their treaties with the Secretariat and the Secretariat is responsible for publishing the treaties registered.

Paragraph 1 of article 25 merely reiterates the obligations imposed on Members of the United Nations and upon the United Nations Secretariat by Article 102 of the Charter. That paragraph would not impose any new obligations upon Members or any obligations upon non-members.

Paragraph 2 would not only impose a new obligation upon non-member States but also a new obligation upon the United Nations Secretariat. It is recognized that it would be highly desirable to have all treaties registered with the United Nations and published by it. However, although the present United Nations regulations on registration permit the "filing and recording" of treaties submitted by States not members of the United Nations,

it is questionable whether the draft articles should seek to impose that function upon the Secretariat as an obligation without some recognition that the United Nations consent is necessary. Perhaps before the texts of the draft articles are finally agreed upon arrangements could be made for a resolution by the General Assembly inviting all non-member States to register their treaties and providing for their publication.

More direct recognition of the United Nations role in the adoption of the regulations on registration could be given by replacing the words "in force" in paragraph 3 by the words "adopted by the General Assembly of the United Nations".

Article 26

This article would serve as a useful guide on procedures for correcting errors in texts. There are a few minor changes in the wording that may be helpful, namely:

Paragraph 1

Although the various procedures outlined would seem to cover all methods that have been followed in the correction of errors, States may wish to follow some other procedure or may not wish to take any action because of the insignificance of the errors involved. In view of this, consideration might well be given to replacing the word "shall" in the phrase "shall by mutual agreement" by the word "may", making the matter of correcting errors and the procedure permissive rather than mandatory.

Paragraph 1(b)

The word "of" in the phrase "notes of similar instrument" should be replaced by the word "or".

Paragraph 4

Since Article 102 of the Charter of the United Nations and the regulations on registration do not provide for registration of a treaty until after it has entered into force, the communication to the Secretariat of corrections to texts should not be required before the treaty is registered. As the paragraph stands States may feel obliged to communicate the corrections to the Secretariat even though the treaty has not entered into force and has not been registered or may never enter into force and never be registered.

In view of these circumstances, consideration should be given to the revision of paragraph 4 along the following lines:

> "Notice of any correction made under the provisions of this article to the text of a treaty that has entered into force shall be communicated to the Secretariat of the United Nations."

It is assumed that a correction embodied in a text at the time the text is registered would require no special mention or separate communication.

Article 27

These provisions would serve as a useful guide in the correction of errors in multilateral treaties for which there is a depositary.

Paragraph 6, article 27, as in the case of paragraph 4 of article 26, may result in notifications of corrections being communicated to the Secretariat prior to registration of the treaty. In view of this, consideration might well be given to the revision of paragraph 6 of article 27 along the lines of the suggested revision of paragraph 4 of article 26 above.

Article 28

This article is declarative of well-accepted practice and its inclusion in the draft articles would serve as a useful guide.

Article 29

This article as a whole should serve as a useful guide with respect to the functions of a depositary. There are, however, several provisions of the article that are questionable.

The provisions of paragraph 3(*a*) requiring the preparation of any further texts in an additional language as may be required "under...the rules in force in an international organization" may result in an unusual burden being placed upon the depositary if the organization involved should adopt a new rule that the text of a treaty should be prepared in many additional languages. Accordingly, rather than impose an obligation that might be vague in scope, it is suggested that the following phrase be added between the word "organization" and the semicolon: "at the time the depositary is designated".

The provisions of paragraph 3(*b*) may impose an unnecessary burden upon the depositary if they are construed as meaning that the depositary is required to transmit certified copies to all States to which a treaty "is open to become parties" regardless of the interest in the treaty on the part of such States. Such a provision may result in certified copies of a treaty being sent to States that not only had no interest in the treaty but would become offended and protest the communication of the copies. In view of this it may be advisable to revise the provision to read:

> "(*b*) To prepare certified copies of the original text or texts and transmit such copies to all signatory, ratifying or acceding States, and any other States mentioned in paragraph 1 that request copies;"

The revised provision would not prevent a depositary from transmitting certified copies to any State or group of States but it may avoid unnecessarily burdening the depositary and possibly also embarrassment in some instances.

Paragraph 3(*c*) gives rise to two questions, namely:

(1) The relationship between these provisions and the provisions of paragraphs 4, 5 and 6 of article 29 is not clear. It may be assumed that paragraphs 4, 5 and 6 would be applied before the signature takes place, particularly if it is with a reservation, or before an instrument of ratification is considered as deposited. This relationship is not clear, however, and serious differences and confusion might arise with respect to the precedence to be given the provisions involved. If, for example, an instrument contains a serious error, the submitting Government would expect the depositary to give it an opportunity to correct the error before the instrument is deposited. There may also be reservations which should be considered by the other States concerned before the deposit is considered as completed.

In view of the foregoing, it is suggested that sub-paragraph (*c*) of paragraph 3 be amended by revising the first part thereof to read:

> "(*c*) Subject to the provisions of paragraphs 4, 5 and 6 of this article, to receive in deposit..."

(2) The phrase "and to execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument relating to the treaty" seems to require a formality that is unnecessary and perhaps in many cases would serve no useful purpose. For example, where a treaty remains open for signature and each signatory writes in the date of signature, the treaty itself is sufficient evidence of the action without the execution of any further formal document.

The execution of a *procès-verbal* of the deposit of instruments would also appear to be an unnecessary requirement. In many instances this requirement would be understood as requiring the execution of a document by both the depositary and the State submitting the instrument, imposing on each a requirement that they felt unnecessary. The United States has served, and continues to serve, as depositary for many important multilateral treaties with respect to which the formality of *procès-verbaux* in connexion with deposits has been dispensed with and no problems or complaints appear to have arisen from this practice.

The provisions of paragraph 3(*d*) would appear to be adequate and make the requirement of a *procès-verbal* unnecessary in all cases unless the State depositing felt otherwise. Such cases could be taken care of as they arise.

In view of the apparent lack of any real need for *procès-verbaux* in such cases it is recommended that the words "and to execute a *procès-verbal* of any instrument relating to the treaty" be deleted from paragraph 3(*c*).

Paragraph 3(*d*) reflects the procedures followed with respect to multilateral treaties in general and is a helpful guide and clarification.

The remaining provisions of article 29 appear to be declaratory of existing practices and procedures that are widely accepted and effective. Those provisions constitute useful guides on the matters they cover.

[PART II]

Transmitted by a note verbale *of 11 February 1965 from the Permanent Representative to the United Nations*

[*Original: English*]

The Government of the United States of America commends the International Law Commission and expresses appreciation for the Commission's efforts and major contributions in the development of the law of treaties.

The following comments are submitted by the United States Government on the group of draft articles (30-54) on the invalidity and termination of treaties submitted by the Commission in its report to the General Assembly. These comments are submitted with the understanding that they do not express the final views of the United States Government regarding the articles involved.

Article 30

This article states a conclusion that is normally self-evident, namely, that a treaty concluded and brought into force shall be considered as being in force and in operation with regard to any State that has become a party to the treaty in accordance with its terms, unless the rules spelled out in later articles concerning nullity, termination, suspension, or withdrawal apply. Article 30 has merit in that it places, in the articles as a whole, a formal presumption which might otherwise be deviated from for reasons beyond those permitted by other articles. On the other hand, article 30, by stating what is readily assumed, seems to imply that *every* aspect of treaty law is covered by the convention, or series of conventions, which may be adopted on the law of treaties. Article 30 might well be omitted if the convention, or conventions, could be simplified to state only those aspects of the law of treaties which require statement.

Article 31

The provisions of article 31, when considered along with the commentary thereon, should prove to be self-enforcing in the course of time. Those provisions should encourage States to take account of the need for precision in meeting the requirements of their internal law. On the other hand, a State which invokes such a provision to withdraw, on the ground that the violation of its internal law was manifest, may very likely—as a political matter—find that in subsequent negotiations, even with different States, it will be required to give assurances that all necessary municipal requirements have been fulfilled.

Article 32

Paragraphs 1 and 2 of article 4 of the Commission's text on the law of treaties provides that Heads of State, Heads of Government, Foreign Ministers, Heads of a diplomatic mission and Heads of a permanent mission to an international organization are not required to furnish evidence of their authority to negotiate or sign a treaty on behalf of their State. Paragraph 3 of that article provides that any other representative shall be required to furnish written credentials of his authority to negotiate. In considering this provision of article 4, we have pointed out that the word "*shall*" in paragraph 3 could well be replaced by "*may*". In many instances, the appointment of a representative to negotiate and draw up a text is preceded by an agreement at high levels on substance. Also, the surrounding circumstances may make clear that a given individual or mission is fully authorized. For these reasons, we do not think that article 4, paragraph 3, should use mandatory terminology.

Also, the reference in article 32 to article 4 is somewhat ambiguous in that it seems to ignore the fact that a representative may be furnished with some credentials as required under the existing wording of paragraphs 3-6 of article 4.

Accordingly, we would suggest the following revision of article 32:

"1. If the representative of a State, who cannot be considered under the provisions of article 4 *or in the light of the surrounding circumstances* as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative *may* be considered by any of the parties to be without any legal effect, unless it is afterward confirmed, either expressly or impliedly, by his State."

Paragraph 2 of article 32 deals with the situation in which a State places restrictions upon the authority of its representative. The Commission quite properly provides that a treaty shall not become invalid by reason of failure of the representative to observe those restrictions "unless the restrictions upon his authority had been brought to the notice of the other contracting States". The only reasonable meaning of this exception to the rule is that effect shall be given to such notice only if it is received *before* his unauthorized consent to the treaty in the name of his State has been given. The words "prior to his expressing the consent" thus might well be added at the end of paragraph 2.

Article 33

Article 33, which deals with the relationship between fraudulent conduct and invalidity, could be a source of controversy and disagreement. It might very well create more problems than it would solve. One of the difficulties which the Commission faced in preparing these articles on invalidity and termination was the paucity of State practice in this area. The absence of State practice is reflected in article 33. A serious question arises as to when an injured State is required to assert the existence of the fraud or of any other disabling factor in order to take advantage of it. Suppose, for example, a State becomes aware of a fraud with regard to a given treaty but waits two, or ten years before asserting it. Should that State have the benefit of this provision? It seems extremely doubtful that it should. If article 33 is retained it might be well to add a clause at the end of paragraph 1 reading somewhat as follows, "provided that the other contracting States are notified within ———— months after discovery of the fraud". We also believe it would be highly desirable to include in the article a requirement that the fraud be determined judicially.

Article 34

The point about limit of time is relevant also to article 34, which deals with error. Some limitation as to the time within which the error must be asserted after its discovery, or after ample time to discover the error, should be included in this provision. Also, as in the case of article 33, provision should be made for judicial determination.

Article 35

Paragraph 1 perhaps goes too far in providing that an expression of consent attained by means of coercion "shall be without any legal effect". It would seem that it would be better to provide that "such expression of consent may be treated by the State whose representatives were coerced as being without any legal effect". This revision would accomplish three things. First, it would prevent the State which applied the coercion from asserting that coercion as a basis for considering the treaty invalid; we do not think that the coercing State would have this right. Second, the State against which coercion was applied should not be *required* to take the view that the treaty is "without any legal effect"; the coerced State conceivably may wish to avail itself of the option of ignoring the

coercion if its interest in maintaining the security of the treaty is dominant. Third, a revision along the lines suggested would tend to prevent third States from attempting to meddle in a situation where the parties immediately involved were satisfied to continue with the treaty.

Article 36

Article 36 states that a treaty whose conclusion is procured by the threat or use of force in violation of the principles of the United Nations Charter shall be void. This article, if agreed upon, with certain safeguards, would constitute an important advance in the rule of law among nations. One can agree with the Commission that this rule should be restricted to the threat or use of physical force; it is this threat or use of force which is prohibited by Article 2, paragraph 4, of the Charter. But the Commission should deal in its commentary with the important question of the application of this provision in terms of time. As the Commission points out, the traditional doctrine prior to the League Covenant was that the validity of a treaty was not affected by the fact that it had been entered into under the threat or use of force. With the Covenant and the Pact of Paris, this traditional doctrine came under attack. With the Charter, this traditional doctrine was overturned. It was thus only with the coming into effect of the Charter that the concept of the illegitimacy of threats or uses of force in violation of the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, was accepted. It is accordingly doubtful whether invalidity due to an illegitimate threat or use of force should be retroactively applied. If it were, the validity of a large number of treaties, notably peace treaties, would be thrown into question. There is even a question whether such a provision should have effect from 1945 or, alternatively, from the conclusion of a convention on the law of treaties incorporating this rule. Retroactivity of the article would create too many legal uncertainties.

Article 37

The concept embodied in these provisions would, if properly applied, substantially further the rule of law in international relations. The provisions should be supported if it can be made certain that they will not conduce to abuse and create undesirable disruption in treaty relations.

The examples given in paragraph (3), points (*a*), (*b*) and (*c*), of the commentary on article 37 are readily acceptable. However, even the application of those examples, if applied retroactively, might possibly result in injustices to one or more of the parties concerned and disrupt beneficial relations on the basis of clearly acceptable treaty provisions included among others that have long been recognized by the parties as obsolete and inapplicable but which, under the concept stated in article 37, would render the entire treaty void.

Without derogating from the merit of the concept embodied in article 37, it is suggested that the Commission reconsider the provisions of that article and all aspects of the manner in which it might be applied, particularly the question as to who would decide when the facts justify application of the rule.

Article 38

The rules spelled out in article 38 seem self-evident and axiomatic. It would appear that this article could well be omitted if the convention on the law of treaties were to be simplified. However, if it should be the consensus that an article of this character is desirable, its terms as written appear to be satisfactory.

Article 39

Article 39 has the distinct merit of overcoming the alleged presumption that a treaty may be denounced unilaterally where there is no provision for denunciation. However, the intention of the parties to permit denunciation or withdrawal should be a clear intention and this should be emphasized by including the word "clearly" before the word "appears".

Article 40

The provisions of paragraph 1 of article 40 are declaratory of existing principles of international law. The requirement that the agreement for termination be by *all* the parties emphasizes the cardinal principle that a State cannot be deprived of its legitimate treaty rights without its consent.

On the other hand, paragraph 2 embodies a new concept. It provides that the parties to a multilateral treaty can, by unanimous agreement among themselves, terminate the treaty only if at least two thirds of all the States which drew up the treaty consent to termination if that termination is to be effected before the expiration of a stated number of years. This provision would permit parties to a multilateral treaty to terminate it by agreement, without regard to any of the provisions in the treaty regarding termination, if—after the expiration of the given period of years—they were to find it not feasible to continue applying the treaty because of the failure of other States to join or for other reasons. There might be great difficulty in reaching agreement upon the number of years which would be practical with respect to all treaties. (Such a figure is to be inserted in paragraph 2.) Therefore, it is suggested that consideration be given to amending the final clause in the following manner: "however, after the expiry of ———— years, or *such other period as the treaty may provide*, the agreement only of the States parties to the treaty shall be necessary".

Article 41

Article 41 concerns the termination of an earlier treaty which is implied from entering into a subsequent treaty. The provision is sound in principle. Although its concept is self-evident, it would be helpful in resolving apparent questions in this area.

Article 42

Paragraph 1 of article 42 states that a material breach of a bilateral treaty by one party entitles the other party to invoke that breach as a ground for terminating the treaty or suspending its operation in whole or in part. This concept is widely supported but, apparently, seldom invoked. It should be crystallized as a rule of conventional law. To do so would go far toward eliminating much controversy in this area.

Paragraph 2 of article 42 likewise has merit in that it would discourage treaty violators but it requires some clarification. The paragraph seems to a certain extent to ignore the differing varieties of multilateral treaties. Paragraph 2 could well be applied to law-making treaties on such matters as disarmament, where observance by all parties is essential to the treaty's effectiveness. But we question whether a multilateral treaty such as the Vienna Convention on Consular Relations—which is essentially bilateral in its application—should be subjected to the provisions of paragraph 2 as it is now worded. Let us take an example. If part A refuses to accord to part B the rights set forth in the Consular Convention, should parties X, Y, and Z—in addition to party B (the wronged party)—have the right to treat the convention as suspended or no longer in force between themselves and party A? Another example: an international convention for the exchange of publications. Assume that a first party violates the convention in its relations with a second party. Should a third party have the right to suspend or terminate the convention in its relations with the first party? We think that these examples show that certain of the provisions of article 42 could have an undesirable effect.

Termination or suspension in the case of a multilateral treaty should follow the rule applicable to bilateral treaties. That is, an injured party should not be required to continue to accord rights illegally denied to it by the offending party. This could be accomplished by revising paragraph 2(*a*) to provide that a material breach of a multilateral treaty by one party entitles: "Any other party,

whose rights or obligations are adversely affected by the breach, to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State". Similarly, we would suggest revising paragraph 2(*b*) to read: "The other parties whose rights or obligations are adversely affected by the breach, either...", and so forth.

It is hoped that Governments and the Commission will review this matter with care.

Article 43

Article 43 concerns supervening impossibility of performance. Although this provision may be highly desirable as far as it goes, a question exists as to what rules should govern in a case in which certain provisions of the treaty have been executed, while others remain executory. For example, suppose that State A makes a cession of land to State B on the condition that State B will forever maintain and permit the use of a navigable channel in the river. Now if the river dries up, or its course is seriously altered by a flood rendering the river permanently useless for the purposes of the agreed navigation, should State B continue to enjoy the benefits of the cession while State A is deprived of its rights under the treaty or does the cession simply become revoked? This question leads to the suggestion that article 43 might contain a new, a fourth, paragraph, somewhat along the following lines:

"4. The State invoking the impossibility of performance as a ground for terminating the treaty or suspending the operation of a treaty may be required to compensate the other State or States concerned for benefits received under executed provisions."

Article 44

The concept of *rebus sic stantibus* embodied in article 44 has long been of so controversial a character and recognized as being so liable to the abuse of subjective interpretation that the United States has reservations about its incorporation in the draft, at any rate in its present form. In the absence of accepted law, it seems highly questionable whether this concept is capable of codification. Moreover, we doubt whether its incorporation, at least in its present form, would be a progressive development of international law. The doctrine of *rebus sic stantibus* would have unquestionable utility if it were adequately qualified and circumscribed so as to guard against the abuses of subjective interpretation to which it lends itself. If it is applied with the agreement of the parties to the treaty, so as to give rise to a novation of the treaty, it would certainly be acceptable. If, failing that, an international court or arbitral body were entrusted with making a binding, third-party determination of the applicability of the doctrine to the particular treaty, that, too, would be acceptable. But, while there is opportunity to consider the question further, particularly in the light of comments of other Governments, the United States desires at this juncture to place on record its opposition to article 44 as it is now drafted.

Article 45

Article 45 provides that a treaty becomes void and terminates when a new peremptory norm of general international law is established in conflict with the treaty. The Commission's commentary notes that this is a logical corollary of the *jus cogens* rule of article 37. But considerable further study is needed to decide whether this "logical corollary" is workable as well as to decide whether, as suggested in the comments on article 37, the *jus cogens* rule as presently embodied in the draft is workable. The determination as to just when a new rule of international law has become sufficiently established to be a peremptory rule is likely to be extremely difficult.

Furthermore, it appears that under the provisions of article 37 peremptory norms developed after the conclusion of many early treaties may void the provisions of those treaties if, as appears to be the case, the provisions of that article apply retroactively. It appears that the article could not be accepted unless agreement is reached as to who is to define a new peremptory norm and determine how it is to be established.

Article 46

The provisions of article 46 would seem useful in clarifying, to some extent, the manner in which the articles to which it refers are to be applied. However, the expressions "33 to 35" and "42 to 45" may be somewhat misleading, even though their meaning can be ascertained by a study of the text of the articles to which they refer. It would seem that in order to clearly express the intention of the drafters, expressions such as "33 through 35" and "42 through 45" would be more appropriate.

It also is believed that, if the general concept of article 37 is to be retained, it will be found after some consideration of its implications that a second paragraph like that in article 45 should be added, and that article 37 should be among the articles referred to in article 46.

Article 47

Provisions along the lines of article 47 are essential to prevent abuses of the rights set forth in the articles to which it refers. It cannot prevent all abuses which may arise, but it does help to support the principle that a party is not permitted to benefit from its own inconsistencies.

There are two matters of drafting in connexion with article 47.

First, it would seem that the references involved would be clearer if the articles were referred to as "articles 32 through 35" and "articles 42 through 44".

Second, it would seem advisable to (*a*) either place article 47 ahead of the other articles to which it refers or (*b*) include in each of those articles a reference to article 47 in order to avoid those articles being considered out of context.

Article 48

The United Nations, as a party in interest, will recognize that article 48 of the draft has particular importance. The text concerns the very special case of treatics which are the constituent instruments of international organizations or which have been drawn up by international organizations. The text recognizes that an international organization must proceed in accordance with its established rules in reaching decisions and taking action. The United States emphatically agrees with this principle. But considerable study is apparently necessary to determine whether, and to what extent, a general convention on the law of treaties can easily include a provision such as article 48. The phrase "subject to the established rules of the organization" might, for example, be construed as meaning that the organization was completely free to ignore the provisions covered in section III if it chose to do so on the basis of some established rule of the organization.

Article 49

Article 49 constitutes a useful clarification. It should have the effect of removing any uncertainty or doubt concerning the authorization, or evidence of authorization, for taking the actions mentioned in the article.

Article 50

Paragraph 1 of article 50 provides that notice of termination of a treaty under a right expressly or impliedly provided for in that treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty, either directly or through the depositary. This provision is sound. It correctly states the procedures and principles normally applied. Paragraph 2 of article 50 states that notice to terminate, for example, may be revoked at any time before the date on which it takes effect *unless* the treaty otherwise provides. It should be pointed out that the reason for specifying a given period of time before a notice of termination becomes effective is to allow the other party or parties to adjust to the new situation created by the termination.

Accordingly, the State receiving the notice in the case of a bilateral treaty is entitled to proceed on the basis that the notice will stand and will prepare to make such readjustments as may be necessary. Perhaps the other party to the bilateral treaty would have given a notice of termination if the first party had not done so.

In the latter circumstances a party to a bilateral treaty might prevent the giving of a notice of termination by the other party by giving such notice itself and then withdrawing the notice with a view to prolonging the treaty beyond the period contemplated by the other party. Such a situation should not be encouraged.

The most reasonable rule would appear to be that, where notice of the termination would bring the treaty to an end with respect to all other parties, the withdrawal of the notice must be concurred in by at least a majority of the other parties to the treaty. For this reason, it is suggested that paragraph 2 of article 50 be revised to read: "Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect, except in a case in which the notice would have caused the treaty to terminate with respect to all parties." We would then add a new sentence to paragraph 2, namely: "Where the notice would cause the treaty to terminate with respect to all parties, the notice of withdrawal will not be effective if objected to by the other party in the case of a bilateral treaty, or if objected to by more than one third of the other parties in the case of a multilateral treaty."

Article 51

The International Law Commission considers in its commentary that this is a key article. It points out that a number of the members of the Commission thought that some of the grounds under which treaties could be considered invalid or terminated could involve real danger for the security of treaties if allowed to be arbitrarily asserted in face of objection by other parties. It is regretted that the Commission did not find it possible to incorporate a rule subjecting the application of these articles to compulsory judicial settlement by the International Court of Justice. It would appear that the rule of law—particularly in an area such as the law of treaties—argues most strongly for compulsory reference to the Court. The Commission did not dispute "the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles". As it is, it is not certain that the provisions of article 51 will supply the safeguards that may be required in connexion with some of the articles to which they apply. A requirement of compulsory arbitration or judicial settlement in the absence of settlement of differences by other means seems necessary. It is hoped that further consideration will be given to this matter.

Article 52

The provisions of article 52 would appear to be a useful clarification of the consequences resulting from the nullity of a treaty.

Article 53

The provisions of article 53, like those of article 52, would appear to be a useful clarification of the consequences of the termination of a treaty.

Article 54

There may be a question whether article 54 is intended to apply as broadly as it appears. For example, if one party to a multilateral treaty suspends the application of the treaty with respect to one other party, only the latter party should be relieved of the obligation to apply the treaty unless the nature of the treaty were such that the suspension affected the immediate interests of all parties. In view of this, it is recommended that consideration be given to the rewording of paragraph 1(*a*) along the following lines:

"(*a*) Shall relieve the parties affected from the obligation to apply the treaty during the period of the suspension."

[PART III]

Transmitted by a note verbale *of 10 January 1966 from the Permanent Mission to the United Nations*

[*Original: English*]

The following comments are submitted by the United States Government on the group of draft articles, numbers 55-73, on the application, effects, modification and interpretation of treaties submitted by the International Law Commission in its report to the General Assembly. These comments are submitted with the understanding that they do not express the final views of the United States Government regarding the articles involved.

Section I. The application and effects of treaties

Article 55

Pacta sunt servanda

The United States is in full agreement with the Commission's comment that 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. This rule is the foundation stone upon which any treaty structure must be based. Without this rule and its faithful observance by parties to treaties the remaining rules would be of little value. It is the keystone that supports the towering arch of confidence among States. We feel that this cardinal rule is clearly and forcefully defined in article 55.

Article 56

Application of a treaty in point of time

Article 56, which deals with the application of a treaty in point of time, is helpful in clarifying a rule that should be obvious but which, history has shown, is not always followed. The first paragraph of the article will not only be helpful to governments in the correct consideration of treaty rights and obligations in point of time but will also remind the drafters of new treaties that a retroactive effect can be accomplished by a provision specifically designed or clearly intended for that purpose.

Paragraph 2 of article 56, like the provisions of article 53 in part II, seems to state a self-evident rule. However, the Commission points out in paragraph (7) of its commentary regarding article 56 that "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". There is a further need for adjustment which arises with respect to acquired rights resulting from the operation of the treaty. For example, a treaty right to property received by inheritance, together with the right to sell the property within three years and withdraw the proceeds, should not be defeated by the termination of a treaty if the right to the property was acquired prior to such termination. Part of this adjustment might be accomplished by replacing the phrase "unless the treaty provides otherwise" as used at the end of paragraph 2, by the phrase "unless the contrary appears from the treaty".

Article 57

The territorial scope of a treaty

The definition of the scope of application of a treaty as extending to the entire territory of each party unless the contrary appears from the treaty seems to be a rule that is self-evident.

An important question raised by the wording of the provision is the effect of such a provision upon treaties recognizing rights and imposing obligations with respect to such areas as the high seas. And although it is clear from the Commission's commentary that the application of a treaty is not necessarily confined to the territory of a party, the provision standing alone may imply that such is the intention. It would seem that this question would be resolved by wording the article as follows:

"1. A treaty applies throughout the entire territory of each party unless the contrary appears from the treaty.

"2. A treaty also applies beyond the territory of each party whenever such wider application is clearly intended."

Article 58

General rule limiting the effect of treaties to the parties

The general rule stated in article 58 limiting the effects of treaties to the parties is, as stated in the Commission's commentary, the fundamental rule governing the effect of a treaty upon States not parties. The existence of a difference of views among the learned members of the Commission on the matter of a treaty of its own force conferring rights upon third parties is evidence of the need for a precise provision on the subject.

Article 59

Treaties providing for obligations for third States

Article 59 regarding treaties providing obligations for third States wisely includes the important proviso that a State in question has expressly agreed to be bound. A question might exist, however, as to whether the concept embodied in paragraph 3 of the Commission's comment on article 59 is apparent in the text of that article, namely, that treaty provisions imposed upon an aggressor State would fall outside the principle laid down in that article. The commentary makes the intended scope of article 59 clear in this respect but, without the commentary, the present text of the article may be somewhat misleading. There exists also an open problem as to the time at which assent by the third party must be indicated.

Article 60

Treaties providing for rights for third States

The provisions of the first paragraph of article 60 as presently worded might be understood as preventing two or more States from dedicating, by a treaty, a right to all States in general without such dedication being subject to the condition that each State wishing to exercise the right has first assented thereto. In view of this possible implication, it is suggested that consideration be given to rewording the first paragraph of article 60 somewhat along the following lines:

1. A right may arise for a State from a provision of a treaty to which it is not a party if the parties intend to accord that right either (*a*) to the State in question or to a group of States to which it belongs and the State expressly or impliedly assents thereto, or (*b*) to States generally.

Paragraph 2, requiring that a third State exercise a right in accordance with the conditions for its exercise provided in the treaty or established in conformity with the treaty, expresses a self-evident rule. The inclusion of such a rule as part of the provisions would seem highly desirable as a useful guide both in the formulation of treaties and in their application. However, further consideration of the over-all effect of the article is required.

Article 61

Revocation or amendment of provisions regarding obligations or rights of third States

Such a rule may give rise to more problems than it would resolve. It may, for example, seriously hamper efforts of original parties to revise or even terminate a treaty in its entirety. Changes in circumstances may result in the principal benefits flowing almost wholly or completely to the third State. The parties primarily concerned should not be impeded in their desire to reach a new agreement between themselves, especially if the third State has undertaken few, if any, reciprocal obligations under the treaty. A question arises as to what the situation would be if one of the parties to the treaty gives a notice of termination of the treaty in accordance with its provisions. Would the provision in the treaty permitting termination be evidence of the revocability of the provision regarding an obligation or a right for a State not a party? Considerably more study of this rule is required.

Article 62

Rules in a treaty becoming generally binding through international custom

The disclaimer in article 62 that the rules in articles 58-60 do not preclude rules in a treaty from becoming generally binding through international custom seems desirable. Articles 58 through 60 standing alone might be looked upon as a digression from the well established practice of recognizing that rules contained in a treaty sometimes extend beyond the contracting States. Such recognition is in no manner in conflict with the concepts embodied in articles 58 through 60 because, as stated in the Commission's commentary, the rules embodied in a given treaty may come to be generally accepted as enunciating rules of customary law. Once the rules have been generally accepted they extend beyond the parties to the treaty and are no longer subject to the requirements of treaty law.

Article 63

Application of treaties having incompatible provisions

This article as a whole enunciates rules long and widely accepted in the application of incompatible treaties and is a valuable clarification. Paragraph 5 is especially important in calling attention to the fact that by entering into a later treaty a State cannot divest itself of treaty obligations under an earlier treaty with a State that does not become a party to the later treaty. Although a multilateral treaty may provide that it replaces and terminates an earlier multilateral treaty as between States parties to the later treaty, it cannot justify those parties taking action with respect to each other that is incompatible with their obligations to parties to the earlier treaty which have not become parties to the later treaty.

Article 64

The effect of severance of diplomatic relations on the application of treaties

Paragraph 1 of article 64 states a rule that is of long standing and widely accepted but is sometimes overlooked. It is a valuable clarification and reminder of a necessary rule for the effective maintenance of the obligations and rights embodied in treaties.

The rule enunciated in paragraph 2 requires careful study. Although the normal means necessary for the application of the treaty may be lacking in a case where diplomatic relations are severed, there may be other avenues for satisfying, in part at least, the requirements of the treaty. In paragraph 3 of the commentary on the article, the expression "supervening impossibility of performance" is used. It is questionable whether that concept is clearly reflected in either paragraph 2 or in paragraph 3 of the article. A further paragraph reading as follows may more fully reflect the intention of the Commission as set forth in its commentary and serve to avoid abuse of the provisions of paragraphs 2 and 3:

"4. The suspension may be invoked only for the period of time that application is impossible."

It is questionable, however, whether this addition would avoid the abuses that might occur under paragraphs 2 and 3. The better solution would be to retain only the paragraph numbered 1, leaving the subject-matter of the remaining paragraphs to be governed by other provisions of the draft articles, such as paragraphs 2 and 3 of article 43. However, further consideration of the over-all effect of the rules in paragraphs 2 and 3 is required.

Section II. Modification of treaties

Article 65

Procedure for amending treaties

The first sentence of this article expresses a rule that seems self-evident but should serve as a useful guide in reminding those considering the amendment of a treaty that the amending process involves the same substantive principles as the making of a new treaty, namely, agreement between the parties.

The second sentence applies the rules set out in part I to a written agreement between the States, intended to amend a treaty between them, with two exceptions: (1) if the treaty provides otherwise and (2) if the established rules of an international organization provide otherwise. Where the treaty "provides otherwise" the parties to it have made express provision concerning the amendment of the treaty and it follows that their intent in this respect should govern. The element of agreement with respect to amendment is fully satisfied because in the treaty itself the parties have agreed upon the manner in which amendment may be effected. The reasons for the inclusion of the second exception is not, however, apparent from the text of the provision nor from the commentary.

Questions may arise whether the first or the second of the two exceptions shall prevail where a treaty concluded under the auspices of an international organization contains express provisions regarding the manner of amendment and the rules of the international organization subsequently provide for some other manner of amendment.

It is recognized that, where the constituent instrument of an international organization embodies rules regarding the amendment of that instrument or of treaties concluded under the auspices of that organization, those rules represent agreement of the parties upon the manner in which such instrument or treaties shall be amended. New treaties drawn up under the auspices of international organizations or any other new treaties may contain express provisions with regard to their amendment which, under the exception with respect to the provisions of a treaty, would properly govern amendment of those treaties. The substance of those provisions may be based, at least in part, upon the established rules of one or more international organizations. It may also be agreed that, by reference in a treaty to the rules of an international organization, certain rules shall govern the amendment of the treaty. In all such cases the crucial requirement is the *agreement* of the parties that certain rules shall govern amendment of the treaty.

Difficulty may arise, however, in the case of treaties that have been concluded outside an international organization and are to be amended by agreements concluded under the auspices of an international organization, and in the case of treaties which contain no provision for amendment and are concluded under the auspices of an international organization which subsequently develops rules that would permit amendment without agreement of all the parties. A question arises whether the provisions of article 65 with respect to international organizations would prevail over the provisions of article 67 regarding agreements to modify multilateral treaties between certain of the parties only.

Under the provisions of article 65 it might be contended that, because of the inclusion of the reference therein to "the established rules of an international organization", an amendment of a treaty, under the auspices of an international organization, could deprive some of the parties to that treaty of rights under it and relieve States that became parties to the amendment from obligations to parties to the treaty that did not approve the amendment. Although it is not believed that any such result is intended, the inclusion of the reference to international organizations seems to imply that a separate body of treaty law has been and can continue to be formulated and applied by those organizations, not only with respect to the amendment of treaties concluded under the auspices of those organizations but other treaties as well.

In view of the foregoing comments regarding the inclusion of the reference to international organizations in the second sentence of article 65, the Government of the United States must reserve its position with respect to that sentence.

Article 66

Amendment of multilateral treaties

The provisions of article 66 as a whole may serve as a useful guide in the consideration of the formulation of amendments to a multilateral treaty.

The proviso in paragraph 1 reading "subject to the provisions of the treaty or the established rules of an international organization" is appropriate so far as it applies to treaties but the same comments apply with respect to the inclusion of the phrase "established rules of an international organization" in article 66 as are mentioned in connexion with its inclusion in article 65 above. The same applies to the use of the phrase in paragraph 2. The Government of the United States must, accordingly, reserve its position with respect to the inclusion of that phrase in paragraphs 1 and 2 of article 66.

The provision in paragraph 3 that a State which signs an amendment is precluded from protesting against the application of the amendment may be too severe. At the end of paragraph (13) in the Commission's commentary on paragraph 3, the statement is made, with reference to a State signing but not ratifying an amendment, that "It is precluded only from contesting the right of other parties to bring the amendment into force as between themselves". Paragraph 3 seems to go much further. It addresses itself to the "application of an amending agreement". "Application" would include the giving of effect to provisions in the amending agreement that derogate from or are otherwise incompatible with the rights of parties under the earlier agreement. Under such circumstances the rule would have the effect of discouraging States from signing the amendment if they were not certain that they could ratify it. In some instances the application of the rule may lead States to consider it necessary to go through their entire treaty-making procedures, including approval by a legislature or parliament, before proceeding to sign. Signature, under such a rule, would constitute a waiver of treaty rights, a matter that normally requires considerably more time and study than is involved in signing subject to or followed by ratification.

Article 67

Agreements to modify multilateral treaties between certain of the parties only

This article appears to serve the useful purpose of further developing the principle that two or more parties to a multilateral treaty cannot, by a separate treaty, derogate from their existing obligations to the other parties to the multilateral one. It is a useful rule that should serve as a guide to parties contemplating a special treaty as well as a guide to other parties who are interested in protecting their rights under an existing multilateral treaty.

Article 68

Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

Both paragraphs (*a*) and (*b*) of this article reflect long-standing and widely accepted practice. Paragraph (*c*), although literally accurate and in keeping with the long-recognized principle that treaties are to be applied in the context of international law and in accordance with the evolution of that law, may lead to serious differences of opinion because of differing views on what constitutes customary law. In view of this it may be advisable to omit paragraph (*c*), leaving the principle to be applied under the norms of international law in general rather than to have it included as a specific provision in a convention on treaty law.

Section III. Interpretation of treaties

Articles 69-71

The provisions of articles 69 through 71 regarding the interpretation of treaties would seem to serve a useful purpose. There are, however, a number of questions that arise from the consideration of those articles. There is, for example, a question whether the provisions should be stated as guidelines rather than as rules. There is the question whether the provisions should enumerate other means of interpretation in addition to those mentioned. It is assumed that the order in which the means of interpretation are stated in those articles has no significance respecting the relative weight to be given to each of those means.

However, as presently drafted the ordinary meaning rule apparently is given primacy, even though there may be, for example, an agreement between the parties regarding interpretation which requires that terms be given some special or technical meaning. This possible conflict could be avoided by listing in paragraph 1 six rules of interpretation *seriatim*: (*a*) ordinary meaning; (*b*) context; (*c*) objects and purposes; (*d*) rules of international law; (*e*) agreement regarding interpretation; (*f*) subsequent practice in application. This would eliminate paragraph 3. If context is to be defined, it is suggested that the present paragraph 2 could be improved. It is unclear, for example, whether a unilateral document is included in the phrase or one on which several but not all of the parties to a multilateral instrument have agreed.

With respect to the formulation of the six rules, the present texts, *mutatis mutandis*, appear satisfactory except that use of the term "general" before "international law" could add an element of confusion and should be eliminated. The comment refers to "the general rules of international law" which may or may not be the same concept.

The use of the word "all" in the phrase in paragraph 3(*b*) reading "establishes the understanding of all the parties regarding its interpretation" could be construed as requiring some affirmative action by each and every party. A course of action by one party which is not objected to by other parties would appear worthy of consideration as a substantial guide to interpretation.

Article 70 may be unduly restrictive with respect to recourse to preparatory work and other means of interpretation. A treaty provision may seem clear on its face but, if a dispute has arisen with respect to its meaning, recourse to other means of interpretation should not be made dependent upon the existence of the conditions specified in (*a*) and (*b*) of that article. It is suggested that in the event of a dispute on interpretation of a treaty provision, recourse to further means of interpretation should be permissible if the rules set forth in article 69 are not sufficient to establish the correct interpretation.

The use of the word "conclusively" in the provisions of article 71 may be unnecessary. The word "established" standing alone is definite and precise. Adding the word "conclusively" may cause confusion in many cases.

A general comment with respect to the articles on interpretation is that further study should be given to the relationship of these articles with certain other draft articles which, while they may not technically be rules of interpretation, nevertheless have, at the least, interpretive overtones. These articles include 43 on supervening impossibility of performance, 44 on fundamental change of circumstances, and 68 on modification of a treaty by a subsequent treaty, by subsequent practice or by customary law.

Article 72

Treaties drawn up in two or more languages

Paragraph 1 of this article states a widely accepted rule that has proved effective. Clause (*b*) of paragraph 2 may be of questionable utility. When the negotiators have an opportunity to examine and concur in, or disagree with, a version which they personally authenticate, there is a basis for considering them as having accepted it as accurate. However, a provision that a version drawn up separately, and with respect to which the negotiators have no opportunity to make suggestions shall also be authoritative, would introduce a new factor that should not be crystallized as a part of the law of treaties. If any such non-authenticated version is to have authenticity it should be made so by the provisions of the treaty to which that version applies or by a supplementary agreement between the parties.

Because of these considerations, it is recommended that the whole of sub-paragraph (*b*) regarding "the established rules of an international organization", be deleted.

Article 73

Interpretation of treaties having two or more texts

Although the use of the word "texts" is becoming more frequent in the wording of treaties written in two or more languages, it is questionable whether that word aptly describes the parts involved. A treaty as such is more properly conceived of as a unit, consisting of one text. Where that text is expressed in two or more different languages, the several versions are an integral part of and constitute a single text. The use of the word "texts" seems, on the contrary, to derogate from the unity of the treaty as a single document.

It is suggested accordingly that the heading for article 73 be replaced by one based upon the heading of article 72 and reading somewhat as follows:

"Interpretation of treaties drawn up in two or more languages."

In line with the foregoing, it is suggested that paragraph 1 of article 73 be revised to read as follows:

"1. Each of the language versions in which the text of a treaty is authenticated is equally authoritative, unless the treaty itself provides that, in the event of divergence, a particular language version shall prevail."

This rewording avoids the use of the word "texts" in referring to the various language versions in which a treaty is done and avoids the use of the word "different" when the emphasis should be upon similarity and equality.

Similarly, it is suggested that paragraph 2 of article 73 be revised to read as follows:

"2. The terms of a treaty are presumed to have the same meaning in each of the languages in which the text is authenticated. Except in the case referred to in paragraph 1, when a comparison between two or more language versions discloses a difference in the expression of a term or concept and any resulting ambiguity or obscurity is not removed by the application of articles 69-72, a meaning which so far as possible reconciles the two or more language versions shall be adopted."

27. Yugoslavia

[PARTS I AND II]

Transmitted by a letter of 31 December 1965 from the Chief Legal Adviser of the Ministry of Foreign Affairs

[*Original: French*]

[Part I]

Article 0

In view of the importance and scope of international agreements concluded by international organizations, which were taken duly into account in part I of the draft convention as adopted in 1962, the Government of the Socialist Federal Republic of Yugoslavia considers it desirable that the future convention on the law of treaties should not be confined exclusively to treaties concluded between States, but should cover also agreements concluded by other subjects of international law, such as international organizations.

As is well known, States and international organizations are linked by more than 1,000 treaties; these, therefore, are of great significance, particularly having regard to the fact that it is realistic to expect such a large number of contractual relationships to give rise to problems and difficulties which will have to be resolved within a reasonable period of time.

Finally, the Commission itself, recognizing the importance of treaties concluded by international organizations, deals in its article 2 with the legal force of treaties concluded between international organizations and other subjects of international law.

Article 1

The Yugoslav Government considers that it would be advisable to broaden the definition of the term "treaty" so that it would specifically include also the cases covered by article 1(*b*) of the earlier draft, namely treaties in simplified form.

The provisions regarding the definition should perhaps be re-examined.

Articles 8 and 9

With regard to the participation of States in general multilateral treaties, the Yugoslav Government considers that such treaties should be open to signature by all States, since this is in the interests not only of the international community but also of the States parties to the treaty.

The exclusion of various States from participation in general multilateral treaties is not only contrary to the generally recognized principle of the sovereign equality of States but would also constitute discrimination inconsistent with the principles and purposes of the United Nations Charter.

Article 12

The Yugoslav Government considers that the ratification of treaties is based on democratic principles and that it would be desirable to provide for ratification as a residuary rule in the convention on the law of treaties.

It would, indeed, be desirable that the principle that ratification is unnecessary should only be applied in exceptional cases, where the particular treaties contain an express provision to that effect or if such was the intention of the signatory States.

However, if the treaty contains no special provisions concerning ratification, it should be considered that ratification is necessary; article 12 of the draft should therefore be supplemented accordingly.

[Part II]

The substance of the provisions concerning defects in the consent given by contracting parties, provisions which appear in articles 33, 34 and 35 of the draft and seek to ensure that the genuine will of the contracting parties is expressed under the conditions of normal negotiations, is in conformity with the present-day needs of the international community.

Articles 37 and 45

In the Yugoslav Government's view, the International Law Commission was right to proceed from the hypothesis that there exist peremptory norms of international law (*jus cogens*).

The two articles mentioned above underline the fact that there exist peremptory norms of international law which must be respected by States when they conclude treaties.

Nevertheless, as members of the international community, States participate in the creation of the international legal order, which changes, evolves and progresses, as do the peremptory norms.

Within the framework of a given international order, treaties which are incompatible with this order should be regarded as contrary to law, and in the same way treaties which are incompatible with a new peremptory norm of general international law, within the meaning of article 45 of the draft, should be void.

Article 39

It would be desirable for the provisions of this article relating to treaties containing no denunciation clause to be worded more precisely.

It is difficult to imagine that in the circumstances of the world today, there could be treaties extending in perpetuity. It would therefore be appropriate not only to provide for the possibility of denouncing treaties of this kind but also to lay down the procedure for their denunciation, in view of the historical experience connected with contractual relationships of a perpetual nature.

[Part III]

Transmitted by a letter of 9 April 1966 from the Chief Legal Adviser of the Ministry of Foreign Affairs

[*Original: French*]

Article 55

The Government of the Socialist Federal Republic of Yugoslavia considers that the text of article 55 of the draft convention on the law of treaties which embodies one of the fundamental principles of international law—*pacta sunt servanda*—is satisfactory.

However, the commentary on this article should include more detailed explanations concerning the substance and effects of the *pacta sunt servanda* principle in relation to other fundamental principles of international law laid down in the United Nations Charter and other international instruments, particularly where *jus cogens* is concerned.

Application of the *pacta sunt servanda* principle would not in fact suffice to ensure observance of an international treaty in a case where peremptory norms of international law or other accepted general rules of international law were not observed: e.g., in case of nullity, absence of mutual agreement of the contracting parties, etc. Accordingly, the conscious performance of international treaties means the application of international treaties that are concluded in conformity with the Charter of the United Nations and the other general principles of international law.

It would be desirable also to determine the relationship between the universal *jus cogens* and a regional *jus cogens*.

Article 56

The wording of this article should be clearer concerning the non-retroactive effect of international treaties.

The Government of the Socialist Federal Republic of Yugoslavia considers that, in order to avoid uncertainty as to the intention of the contracting parties, the same verb should be used in both paragraphs of the article, and that that verb should be "provide" rather than "appear".

Article 57

In the view of the Government of the Socialist Federal Republic of Yugoslavia, this article is incomplete.

The contracting parties have rights and obligations under a treaty even outside the national territory in the narrow sense of the word, e.g., in the case of the high seas, the epicontinental zone, outer space, international administrations, etc.

Hence it would be desirable to complete this article in the sense indicated, on the assumption that the scope of application of an international treaty extends to the entire territory of each contracting party, wherever the territory is linked to, and subject to the State, unless the contrary appears from the international treaty.

Articles 58, 59 and 60

The Government of the Socialist Federal Republic of Yugoslavia considers that these three articles could be combined in one article which would be drafted in more precise and consistent terms.

The commentary should perhaps distinguish between the establishment by an international treaty of rights and obligations for a particular State or generally for several States, and, for example, the creation of a new rule by means of an international convention.

If these three articles are still deemed necessary, however, it would be advisable to delete in article 58 the words "without its consent" and to insert "subject to the rights and obligations referred to in articles 59 and 60".

Articles 63, 66 and 67

In the final draft of these articles relating to the modification of multilateral treaties either in relation to all the parties or in relation to certain of the parties only, a single, comprehensive and clearer solution should be provided.

Indeed, it would be desirable, in so far as possible, to place on an equal footing the consequences that may arise under article 63, paragraph 5, and article 67, paragraphs (*a*) and (*b*), in connexion with the modification of a treaty.

Article 68

The expressions used for international customary law in the French and English texts of this article must be made consistent.

Articles 69, 70, 71, 72 and 73

In the opinion of the Government of the Socialist Federal Republic of Yugoslavia, the provisions concerning the interpretation of treaties should also be expanded.

There should be a special provision excluding the possibility of depriving a treaty of its real force and effect through a process of interpretation.

Moreover, in the case of accession to multilateral treaties, States ordinarily have in mind the actual text of the treaty and not the preparatory work which preceded the adoption of the text. That point also should be covered.

The solution whereby the preparatory work may be used as further means of interpretation of international treaties only in the cases specified in article 70 is acceptable. Indeed, it is only proper to specify explicitly that, when the text of a treaty is clear and unambiguous, there can be no reference to provisional understandings in the course of negotiations during which exclusive positions were necessarily taken by the contracting parties and compromise solutions followed. In other words, the contracting parties are authorized in such cases to refer in good faith only to the compromise solution finally adopted.

Consideration must also be given to the case where an international instrument is the work of several States having different legal systems and conceptions and where the interpretation of a solution must be in conformity with the juridical conceptions of all the contracting parties.

APPENDIX

Table of references indicating the correspondence between the numbers allocated to the articles, sections and parts of the draft articles on the law of treaties in the reports of the Commission since 1962

Note. The following table is intended to show the correspondence between the draft articles provisionally adopted by the Commission in 1962, 1963 and 1964, which are the subjects of the comments of Governments reproduced in the annex of the present report, and the revised and final texts of the draft articles adopted by the Commission respectively at the first part of its seventeenth session in 1965 and at its eighteenth session in 1966. The table is arranged in the order of the articles in the 1962, 1963 and 1964 reports; to find the earlier texts corresponding to articles in the final draft, use may also be made of the foot-notes relating to each article which are given in chapter II of the present report.

1962 Draft (A/5209)			*1963 Draft (A/5509)*			*1964 Draft (A/5809)*			*1965 Draft (A/6009)*			*1966 Final Draft (A/6309)*		
Article	*Section*	*Part*	*Article*	*Section*	*Part*	*Article*	*Section*	*Part*	*Article*	*Section*	*Part*	*Article*	*Section*	*Part*
1	I	I	—	—	—	—	—	—	1	I	I	2	Introduction	I
2	I	I	—	—	—	—	—	—	2	I	I	3	Introduction	I
3	I	I	—	—	—	—	—	—	3	I	I	5	I	II
4	II	I	—	—	—	—	—	—	4	II	I	6	I	II
5	II	I	—	—	—	—	—	—	Deleted			Deleted		
6	II	I	—	—	—	—	—	—	6	II	I	8	I	II
7	II	I	—	—	—	—	—	—	7	II	I	9	I	II
8	II	I	—	—	—	—	—	—	Decision postponed			Deleted		
9	II	I	—	—	—	—	—	—	Decision postponed			Deleted		
10	II	I	—	—	—	—	—	—	Substance incorporated in article 11			Substance incorporated in article 10		
11	II	I	—	—	—	—	—	—	11	II	I	10	I	II
12	II	I	—	—	—	—	—	—	12	II	I	11	I	II
13	II	I	—	—	—	—	—	—	Decision postponed			12	I	II
14	II	I	—	—	—	—	—	—	Substance incorporated in article 12			Substance incorporated in article 11		
15	II	I	—	—	—	—	—	—	15	II	I	13	I	II
15, 1(*b*) and (*c*)	II	I	—	—	—	—	—	—	16	II	I	14	I	II
16	II	I	—	—	—	—	—	—	15	II	I	13	I	II
17	II	I	—	—	—	—	—	—	17	II	I	15	I	II
18, 19 and 20	III	I	—	—	—	—	—	—	18, 19 and 20	III	I	16, 17 and 18	II	II
21	III	I	—	—	—	—	—	—	21	III	I	19	II	II
22	III	I	—	—	—	—	—	—	22	III	I	20	II	II
23	IV	I	—	—	—	—	—	—	23	IV	I	21	III	II
24	IV	I	—	—	—	—	—	—	24	IV	I	22	III	II
25	IV	I	—	—	—	—	—	—	25	IV	I	75	—	VII
26	V	I	—	—	—	—	—	—	26	IV	I	74	—	VII
27	V	I	—	—	—	—	—	—	Substance incorporated in article 26			Substance incorporated in article 74		
28 and 29 (1)	V	I	—	—	—	—	—	—	28	IV	I	71	—	VII
29 (2) to (8)	V	I	—	—	—	—	—	—	29	IV	I	72	—	VII
—	—	—	30	I	II	—	—	—	—	—	—	39	I	V
—	—	—	31	II	II	—	—	—	—	—	—	43	II	V
—	—	—	32 (1)	II	II	—	—	—	—	—	—	7	I	II
—	—	—	32 (2)	II	II	—	—	—	—	—	—	44	II	V

—	—	—	33	II	II	—	—	—	—	—	—	46	II	V
—	—	—	34	II	II	—	—	—	—	—	—	45	II	V
—	—	—	35	II	II	—	—	—	—	—	—	48	II	V
—	—	—	36	II	II	—	—	—	—	—	—	49	II	V
—	—	—	37	II	II	—	—	—	—	—	—	50	II	V
—	—	—	38	III	II	—	—	—	—	—	—	51	III	V
—	—	—	38 (3)(*b*)	III	II	—	—	—	—	—	—	52	III	V
—	—	—	39	III	II	—	—	—	—	—	—	53	III	V
—	—	—	40	III	II	—	—	—	—	—	—	54	III	V
—	—	—	41	III	II	—	—	—	—	—	—	56	III	V
—	—	—	42	III	II	—	—	—	—	—	—	57	III	V
—	—	—	43	III	II	—	—	—	—	—	—	58	III	V
—	—	—	44	III	II	—	—	—	—	—	—	59	III	V
—	—	—	45	III	II	—	—	—	—	—	—	61	III	V
—	—	—	46	IV	II	—	—	—	—	—	—	41	I	V
—	—	—	47	IV	II	—	—	—	—	—	—	42	I	V
—	—	—	48	IV	II	—	—	—	3(*bis*)	I	I	4	Introduction	I
—	—	—	49 and 50 (1)	V	II	—	—	—	—	—	—	63	IV	V
—	—	—	50 (2)	V	II	—	—	—	—	—	—	64	IV	V
—	—	—	51	V	II	—	—	—	—	—	—	62	IV	V
—	—	—	52	VI	II	—	—	—	—	—	—	65	V	V
—	—	—	53	VI	II	—	—	—	—	—	—	66	V	V
—	—	—	53 (4)	VI	II	—	—	—	—	—	—	Substance incorporated in article 40		
—	—	—	54	VI	II	—	—	—	—	—	—	68	V	V
—	—	—	—	—	—	55	I	III	—	—	—	23	I	III
—	—	—	—	—	—	56	I	III	—	—	—	24	II	III
—	—	—	—	—	—	57	I	III	—	—	—	25	II	III
—	—	—	—	—	—	58	I	III	—	—	—	30	IV	III
—	—	—	—	—	—	59	I	III	—	—	—	31	IV	III
—	—	—	—	—	—	60	I	III	—	—	—	32	IV	III
—	—	—	—	—	—	61	I	III	—	—	—	33	IV	III
—	—	—	—	—	—	62	I	III	—	—	—	34	IV	III
—	—	—	—	—	—	63	I	III	—	—	—	26	II	III
—	—	—	—	—	—	64	I	III	—	—	—	60	III	V
—	—	—	—	—	—	65	II	III	—	—	—	35	—	IV
—	—	—	—	—	—	66	II	III	—	—	—	36	—	IV
—	—	—	—	—	—	67	II	III	—	—	—	37	—	IV
—	—	—	—	—	—	68	II	III	—	—	—	38	—	IV
—	—	—	—	—	—	69	III	III	—	—	—	27	III	III
—	—	—	—	—	—	70	III	III	—	—	—	28	III	III
—	—	—	—	—	—	71	III	III	—	—	—	27 (4)	III	III
—	—	—	—	—	—	72	III	III	—	—	—	29	III	III
—	—	—	—	—	—	73	III	III	—	—	—	29	III	III
—	—	—	—	—	—	—	—	—	0	I	I	1	Introduction	I
—	—	—	—	—	—	—	—	—	29 (*bis*)	IV	I	73	—	VII
—	—	—	—	—	—	—	—	—	—	—	—	40	I	V
—	—	—	—	—	—	—	—	—	—	—	—	47	II	V
—	—	—	—	—	—	—	—	—	—	—	—	55	III	V
—	—	—	—	—	—	—	—	—	—	—	—	67	V	V
—	—	—	—	—	—	—	—	—	—	—	—	69	—	VI
—	—	—	—	—	—	—	—	—	—	—	—	70	—	VI