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INTERNATIONAL LAW COMMISSION  
Seventeenth session, second part

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE  
WORK OF THE SECOND PART OF ITS SEVENTEENTH SESSION

Monaco, 3-28 January 1966

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 in 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.<sup>1/</sup> 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

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<sup>1/</sup> 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. 54-56, and Chapter V, para. 65.

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:

<u>Name</u>	<u>Nationality</u>
Mr. Roberto AGO	Italy
Mr. Gilberto AMADO	Brazil
Mr. Milan BARTOS <sup>V</sup>	Yugoslavia
Mr. Mohammed BEDJACUI	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 Maria 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

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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 at the second part of the seventeenth session of the Commission, all other 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:

<u>Chairman:</u>	Mr. Milan Bartoš
<u>First Vice-Chairman:</u>	Mr. Eduardo Jiménez de Aréchaga
<u>Second Vice-Chairman:</u>	Mr. Paul Reuter
<u>Rapporteur:</u>	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:

<u>Chairman:</u>	Mr. Eduardo Jiménez de Aréchaga
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Members: Mr. Roberto Ago, Mr. Herbert W. Briggs, Mr. Taslim O. Elias, Mr. Manfred Lachs, Mr. Paul Reuter, Mr. Shabtai Rosenne, Mr. José Maria 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 of 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,<sup>2/</sup> 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.

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<sup>2/</sup> Official Records of the General Assembly, Twentieth session, Supplement No. 9 (A/6009), Chapter IV, para. 55.

10. In the course of the second part of the seventeenth session the Commission held twenty-three public meetings.<sup>3/</sup> 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;<sup>4/</sup> 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, which for the sake of convenience are annexed to the mimeographed version of this report. As explained in its last report,<sup>5/</sup> 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 thereon, 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.

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<sup>3/</sup> 822nd to 844th meetings.

<sup>4/</sup> Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509), Chapter II.

<sup>5/</sup> Official Records of the General Assembly, Twentieth Session, Supplement No. 9 (A/6009), Chapter II, paras. 27-28.

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 Ranier 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 844th 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,<sup>6/</sup> 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, noted that proposal with approval. At its 837th meeting of 21 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

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<sup>6/</sup> Ibid., Chapter IV, para. 54, and Chapter V, para. 66.

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 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 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,<sup>7/</sup> 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.

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<sup>7/</sup> The subject of a report (A/CN.4/176) by Mr. Eduardo Jiménez de Aréchaga to the Commission at the first part of the seventeenth session.

## 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 in 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 that 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.

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ANNEX

DRAFT ARTICLES ON THE LAW OF TREATIES

Articles adopted by the Commission during the second part of its  
seventeenth session. 3-28 January 1966

Article for inclusion in Part I, Section II

Article 4 (bis)

Subsequent confirmation of act performed without authority

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 4 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

PART II: INVALIDITY, TERMINATION AND SUSPENSION  
OF THE OPERATION OF TREATIES

Section I: General Rules

Article 30

Validity and continuance in force of treaties

1. The invalidity of a treaty may be established only as a result of the application of the present articles.
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.

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Article 30 (bis)

Obligations of parties 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 party to a treaty to fulfil any obligation embodied in the treaty to which it is also subjected under any other rule of international law.

Section II: Invalidity of Treaties

Article 31

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 32

Specific restriction 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 notice of the other contracting State prior to his expressing such consent.

Article 33

Fraud

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

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Article 34

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 26 then applies.

Article 35

Coercion of a representative of the State<sup>1/</sup>

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 36

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 37

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.

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<sup>1/</sup> The Commission decided to reserve until its eighteenth session the question of the corruption of a representative of a State.

Section III: Termination and Suspension of the Operation of Treaties

Article 38

Termination or the suspension of the operation of a treaty  
by application of its own provisions

[Deleted]

Article 39

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 otherwise appears that the parties intended to admit the possibility of denunciation or withdrawal.
2. A party shall give not less than twelve month's notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article.

Article 39 (bis)

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

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 40

Termination or suspension of the operation of treaties by agreement<sup>2/</sup>

[The Commission decided to postpone the decision on this article until its eighteenth session]

2/ The text proposed by the Drafting Committee reads as follows:

- "1. A treaty may at any time be terminated by agreement of all the parties.
- "2. The operation of a treaty may at any time be suspended by agreement of all the parties.
- "3. The operation of a multilateral treaty may not be suspended as between certain parties only except under the same conditions as those laid down in article 67 for the modification of a multilateral treaty."

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Article 41

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 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 that such was the intention of the parties when concluding the later treaty.

Article 42

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 any of the objects or purposes of the treaty.

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

#### Article 43

##### 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 44

##### 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 45

##### Establishment 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 37 is established, any existing treaty which is incompatible with that norm becomes void and terminates.

Article 46

Separability of treaty provisions<sup>3/</sup>

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 42.
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 separably 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. In cases falling under article 33 the State entitled to invoke the fraud may do so with respect either to the whole treaty or to the particular clauses alone.
5. In cases falling under articles 35, 36 and 37, no separation of the provisions of the treaty is permitted.

Article 47

Loss of a right to invoke a ground for invalidating, terminating,  
withdrawing from or suspending the operation of a treaty <sup>3/</sup>

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 31 to 34 inclusive or articles 42 to 44 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

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<sup>3/</sup> The Special Rapporteur proposed the inclusion of these articles in section 1 (General Rules) of this Part. The Commission reserved the question of the order of the articles until its eighteenth session.

(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.

Article 48

Treaties which are constituent instruments of international organizations  
or which have been drawn up within international organizations

[Deleted, in view of the inclusion of article 3 (bis) in Part I of the draft  
articles]

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