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UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES

COMMENTS AND AMENDMENTS TO THE FINAL DRAFT ARTICLES ON
THE LAW OF TREATIES SUBMITTED IN 1968 IN ADVANCE OF
THE CONFERENCE IN ACCORDANCE WITH GENERAL ASSEMBLY
RESOLUTION 2287 (XXII)

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A. NOTE BY THE SECRETARY-GENERAL

1. In operative paragraph 2 of resolution 2287 (XXII) of 6 December 1967, the General Assembly invited States participating in the United Nations Conference on the Law of Treaties

"to submit to the Secretary-General not later than 15 February 1968, for circulation to Governments, any additional comments and draft amendments to the draft articles prepared by the International Law Commission which they may wish to propose in advance of the Conference;".

2. By letters dated 16 January 1968, the Secretary-General brought the provision quoted above to the attention of the Governments of the States invited to participate in the Conference by operative paragraph 4 of resolution 2166 (XXI) of 5 December 1966. The present document reproduced the comments and amendments to the final draft articles on the law of treaties received so far by the Secretary-General in response to his letters of 16 January 1968.

3. The comments on the final draft articles submitted earlier in pursuance of operative paragraph 9 of General Assembly resolution 2166 (XXI) were circulated in 1967 as documents A/6827 and Corr.1 (English only) and Add.1 and 2. An analytical compilation of those comments may be found in document A/CONF.39/5.

B. COMMENTS AND AMENDMENTS SUBMITTED BY STATES

1. ECUADOR

Transmitted by a note verbale of 14 February 1968 from
the Permanent Representative to the United Nations

[Original: Spanish]

As the delegation of Ecuador will give a full account of all its views in this respect at the conference itself, it is, in the present document, merely setting out a few comments and amendments which it regards as especially pertinent to the formulation of the convention on the law of treaties, an important instrument that will govern this highly sensitive aspect of international law.

Article 2

The Government of Ecuador believes that the definition of a treaty as given in the draft articles prepared by the International Law Commission omits some of the elements which are typical of an international agreement. The definition must be made more complete, for the success of the entire convention will in large measure depend on whether or not this is done.

The distinctive mark of the contractual relationship is that it is a concurrence of wills on the part of two or more persons with regard to the same fact or thing in order to create, modify or extinguish obligations and rights. For the contractual act to be valid, specific requirements of form and substance must be met. The requirements of substance are: capacity, consent, licit object and licit cause. If capacity or consent is defective, the act is null and void; if the defect pertains to the object or cause, the legal act is non-existent, and non-existence goes beyond absolute nullity.

The Government of Ecuador therefore proposes the following wording for article 2, paragraph 1 (a), of the draft articles: "'Treaty' means an agreement concluded in good faith between States with regard to a licit object freely consented to, which establishes between them a legal bond based on justice and equity and which is embodied, in written form and whatever its particular designation, in a single instrument or in two or more related instruments."

In this way there will be incorporated in the definition of a treaty the following elements which are indispensable to its existence: (a) concurrence of wills on the part of two or more States; (b) the fact that this concurrence of wills is freely consented to; (c) the fact that the agreement is concluded in good faith; (d) creation of a legal bond which establishes rights and obligations based on justice and equity; and (e) the fact that the agreement concerns a licit object.

In the comments submitted by the Government of Luxembourg in 1964,^{1/} the need for expanding the definition of a treaty along the lines indicated above was set out in terms somewhat similar to those used by Ecuador in the present document.

Article 23

This article, which upholds the rule of pacta sunt servanda, must be examined in the light of justice, the final and supreme object of law. This principle of customary law must be treated with special care, for while it is true that it retains its full validity in so far as it ensures compliance with obligations assumed by the parties to international treaties, it is also true that its application is both legally and compulsorily subject to the provisions of the Charter of the United Nations, in accordance with Article 2 (2) of that instrument, which states: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

The Charter lays stress on good faith as a fundamental principle in so far as compliance with international obligations is concerned. Good faith is an indisputable principle of contract law. It is an indispensable requirement for the performance of contracts, and it is the indispensable and indivisible condition for the performance of international treaties. If it is lacking in the act which gives rise to the obligations, it cannot be partially invoked to compel compliance with those obligations. Good faith commits the honour of States, and honour, too, is indivisible.

^{1/} Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), Annex, p. 133.

It is apparent from Article 2 (2) of the Charter that the injunction given to the Members of the Organization embodies the condition that the obligations have been contracted in conformity with the Charter. The principles contained in the Charter are peremptory norms of general international law which admit of no exceptions; they are in the nature of jus cogens and have taken on the character of precepts of general constitutional law. Consequently, the rule of pacta sunt servanda may not be adduced in defence of an international agreement which violates the principles of the United Nations Charter.

At the international level, the theory of the sanctity of treaties is not and cannot be absolute. A treaty cannot be sacred if it was signed as a result of the threat or use of force, if its conclusion has been procured through fraud or deceit, if it violates a peremptory norm of general international law, if it cannot be enforced because of supervening impossibility of performance or a fundamental change of circumstances or if, in a word, it is an unjust treaty. The rule of pacta sunt servanda is likewise inapplicable to such treaties unless the international community is willing to uphold the sanctity of injustice.

In the light of these various considerations, the Government of Ecuador proposes the following new text for article 23: "Every valid treaty is binding upon the parties to it and must be performed by them in good faith."

The Government of Ecuador states for the record that the reason why it is proposing this version is to prevent the rule of pacta sunt servanda from being invoked in defence of pacts or treaties which violate the principles of the United Nations Charter.

New article providing for nullity by reason of the non-existence of something provided for at the time of the conclusion of the treaty

The Government of Ecuador takes the liberty of proposing the insertion of a new article in part V of the draft articles. This might follow the present article 50, and it reads as follows: "A treaty is void if its execution is impossible by reason of the non-existence of something provided for at the time of the conclusion of the treaty and essential for the execution thereof."

/...

It is the opinion of the Ecuadorian Government that the convention on the law of treaties should also provide for the case where the execution of a treaty is impossible but this fact is not, of course, known at the time of its conclusion and is only discovered later. Pufendorf has made a distinction between the case where a State assumes an obligation in the belief that it will be able to comply with it but is unaware of circumstances which would make such compliance impossible, and the case where the execution of the treaty was possible when the treaty was concluded but subsequently became impossible.

In the first case, the legal instrument does not exist because of the absence of an essential element, and it consequently does not give rise to any obligation.

Article 49

The Government of Ecuador wishes, with regard to this article, to bring out a point which it considers to be extremely important and pertinent. It believes, for the reasons given below, that the text of this article should be as follows: "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 or of multilateral conventions proscribing the threat or use of force before the Charter came into effect."

The reason for this addition is that the "law of today" and the "law during that era" to which the International Law Commission refers in its commentary on this article originated before the signing of the Charter of the United Nations by virtue of the multilateral instruments which were in force at the time and which contained positive norms binding on the States of the international juridical community.

Article 50

Ecuador proposes the following amendment to article 50: "A treaty is void if it conflicts with, or is the result of acts which conflict with, a peremptory norm of general international law..."

In addition, a second paragraph should be added to this article reading as follows: "The norms of 'jus cogens' contained in the Charter of the United Nations

invalidate not only future treaties but also existing treaties which conflict with, or are the result of acts which conflict with, the said norms."

In proposing this amendment, the Government of Ecuador is merely adopting the words used in the International Law Commission's commentary on article 61.^{2/} It regards its inclusion as necessary in order that there may be a proper and logical connexion between the Commission's views as expressed in the commentary and the provisions of the draft articles.

As is logical, moreover, the invalidity to which these two paragraphs refer would arise only from the time that the rule of jus cogens took effect.

Article 59

The fact that the rule of rebus sic stantibus contained in this article will become part of the law of treaties is heartily welcomed by the Ecuadorian Government. Ecuador does not believe that the rule of pacta sunt servanda is impaired by invoking the invalidity of consent, the jus cogens or the rule of rebus sic stantibus as grounds for invalidating a treaty or as determining factors in terminating a treaty, since the latter principles are merely limitations of the principle of pacta sunt servanda.

There is no reason why a treaty should be sacred in character merely because it is a treaty despite the great injustices it might embody.

Furthermore, Ecuador does not believe that there is any reason at all for the exception provided in paragraph 2 (a) of article 59 because there is no legal argument which justifies the exclusion of boundary treaties from the norm in question. It accordingly requests that paragraph 2 (a) be deleted.

Article 62

The Government of Ecuador suggests that article 62, paragraph 3, should refer not only to Article 33 of the Charter of the United Nations but also to Article 2 (3) and to all of Chapter VI of the Charter, because the convention on the law of treaties should refer to all the provisions of the Charter dealing with the pacific settlement of disputes.

^{2/} Ibid., p. 89, paragraph 1 of the commentary on article 61.

Article 67

Because there is a clear contradiction between article 61, which states that a treaty which is in conflict with the norm of jus cogens becomes void and terminates, and article 67, paragraph 2 (b), which provides 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", Ecuador recommends that paragraph 2 (b) of article 67 should be replaced by the following text: "Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. If it is desired that specific provisions of the treaty which are not in conflict with the new norm of jus cogens should remain in force, it will be necessary for a new treaty to be concluded."

2. FINLAND

Transmitted by a letter of 14 February 1968 from the
Permanent Representative to the United Nations

[Original: English]

The Government of Finland has followed the various stages of this important codification work with keen interest reflected in its written comments submitted to the Secretary-General on 17 April 1964, in January 1965, on 24 September 1965, and 11 July 1967,^{3/} and also from the statements made by the Finnish representatives at the meetings of the Sixth Committee during the twenty-second session of the General Assembly of the United Nations.^{4/} As regards the final draft articles, the Government of Finland notes with satisfaction that although some of its provisions give cause to certain misgivings, both the content and the form of the final draft articles conform better to the wishes expressed earlier by the Finnish Government.

After having examined the reports of the Secretary-General on the law of treaties of 31 August, 27 September and 6 October 1967,^{5/} the Government of Finland wishes to make some additional comments, reserving at the same time the right to finalize its views at the forthcoming diplomatic conference.

Article 1: During the preparation of the draft, it has been suggested that this article should contain a provision according to which the convention only relates to treaties concluded in written form. In the opinion of the Government of Finland it would seem sufficient to have the matter settled by paragraph 1 (a) of article 2. The draft articles have also been criticized on the ground that they do not cover the increasing amount of treaties concluded between international organizations, or between States and international organizations. It appears, on the other hand, from the observations submitted by certain organizations that the

^{3/} Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), Annex, pp. 118-119 and also A/6827, pp. 18-19.

^{4/} Official Records of the General Assembly, Twenty-second Session, Sixth Committee, 980th meeting.

^{5/} Documents A/6827 and Corr.1 and Add.1 and Add.2.

extension of the scope of the draft articles to include these treaties would require many modifications of the draft. As the various organizations differ considerably from each other, i.e., as to their structure, this would obviously further complicate the drafting of a convention relating to both States and international organizations. At this stage, the best approach would be the completion of the codification on the more restricted basis adopted in the draft articles. If, however, the proposed extension of the scope of the convention is deemed to be of fundamental importance and the necessary adoptions can be carried out satisfactorily, the Government of Finland would not oppose such changes.

Article 2

Although it has been suggested that the definition of treaty in article 1 (a) should be defined more precisely, no specific proposals have yet been made in this regard. The Government of Finland considers the definition to be sufficiently complete, but is willing to examine possible later amendments.

Article 4

Various proposals have been made to amend this article enlarging or restricting its scope of application. Since the constituent instruments of international organizations and treaties adopted within an international organization are, in fact, treaties between States, and taking into account all the special features of these organizations, the rules embodied in this article should be maintained.

Article 5

As has already been stated by the Finnish Government, this article is incomplete and lacking in precision, since only sovereign States possess full capacity to conclude international treaties and considering, on the other hand, that members of other types of composite States than federal States may have certain restricted rights in this respect. The Government of Finland renews its earlier proposals to delete the article.

Article 6

The Government of Finland has paid attention to the wide full powers to be accorded to certain government representatives referred to in paragraph 2 (a) by virtue of their special position. It has been proposed that such an extensive right, automatically qualifying a person to represent a State, should only be vested in Heads of State, but not in Heads of Government or Ministers for Foreign Affairs.

On the other hand, since credentials given to the delegates by Heads of Government or Ministers for Foreign Affairs are recognized according to the general practice, it seems difficult to restrict their general representative capacity to conclude treaties by requiring them to produce their credentials. The Government of Finland, being fully aware of the many problems linked with this provision, suggests that further consideration be given to this question.

Article 7

It has been proposed that this article be deleted on the grounds that the provision at the beginning of the article derives directly from the previous article while the latter part of the article may be considered self-evident. Although agreeing with the arguments presented, the Government of Finland considers that the article should be preserved for the sake of clarity.

Article 8

It has been pointed out that the States assembled at an international conference should be allowed to adopt, by simple majority, the rules of procedure.

Paragraph 2 of this article, however, contains a different provision. Since the prevailing practice seems to be that the rules of procedure, failing other agreement, are adopted by simple majority, one solution would be to replace the words "same majority" by "simple majority" or delete the words "by the same majority".

On the other hand, the rule to adopt a treaty text by a two-thirds majority could be preserved, as recent conference practice seems to corroborate this rule. The term "international conference" hardly requires further precision, although this has been suggested.

The paragraph could perhaps be made more complete by providing for the possibility that the voting rules could be agreed upon in connexion with the convening of a conference.

Article 11

The Government of Finland proposes that paragraph 1 be drafted as follows: sub-paragraph (c) would be placed immediately after sub-paragraph (a), replacing the present sub-paragraph (b), while the present sub-paragraphs (d) and (b) would be amalgamated, in that sequence, into a new sub-paragraph (c) by using the conjunction "or".

Article 15

The article introduces an important new element. The Government of Finland considers that these provisions, creating as they do far-reaching responsibilities are too extensive, and reiterates its view that these obligations should be restricted. This could be brought about by substituting the word "intended" for "tending" in the first sentence of the article, thus emphasizing that the action frustrating the object of the treaty must be intentional in order to make the provision applicable. As to the different sub-paragraphs of the article, the Government of Finland continues to hold the opinion, shared by some other Governments, that sub-paragraph (a) should be deleted.

At that stage of negotiating a treaty it may be too early to allege that an action is frustrating the object of the treaty, because the possible conclusion of a treaty and its eventual content are yet unknown, and the aims of the negotiating States might conceivably be widely divergent or even conflicting. At all events it should be clearly stated in sub-paragraph (a) of the article that a State which has agreed to enter into negotiations or to participate in them, will be released from the obligation under article 15, if it withdraws from the negotiations.

According to the comments of the Secretary-General of the United Nations,^{6/} two cases of withdrawal of instruments of acceptance or accession have occurred

in United Nations practice. Thus the Secretary-General proposes an amendment in sub-paragraph (c) providing for this possibility. The Government of Finland finds this proposal acceptable. In this connexion the Government of Finland suggests that the whole problem of the permissibility and the legal effects of withdrawal of the consent to be bound by a treaty should be examined, and that special provisions in this respect should, if necessary, be inserted in the convention.

Articles 16-20

Several amendments have been suggested to these articles. On the whole, the Government of Finland considers this part of the draft and the procedure envisaged satisfactory. Certain improvements could, however, be made. There might, for instance, be reason to reconsider whether articles 16 and 17 could be better linked to each other. In the opinion of the Government of Finland it might be possible to render the proposed system more flexible by providing for wider use of special arrangements (escape clauses).

Replacement of the words "the object and purpose" in paragraph 2 of article 17 by other words, such as "the character", would hardly make the provision any clearer, since the meaning of this word is equally broad and varying. Furthermore, the Government of Finland does not consider it advisable to delete paragraph 3 of article 17 which seems to be a necessary provision.

It has also been proposed to shorten the period of twelve months mentioned in paragraph 5 of this article. The Government of Finland considers that for practical reasons and taking into account the continuously increasing number of treaties, the period should be maintained as proposed in the draft.

As to the raising of objections to reservations, it is true that an objection may only be validly made when reservations are not expressly or implicitly allowed by the treaty. A State should not be permitted to make reservations prohibited by a treaty. Since borderline cases may occur, there should, however, be a right to object to reservations, the acceptability of which depends on interpretation.

Article 20 dealing with the withdrawal of reservations might be amended by inserting a provision providing that the withdrawal, like the reservation itself and the objection to it, must be made in written form.

Part II, section 3

It has been proposed that the draft convention should be supplemented by a provision dealing with the effectiveness of treaties, according to which treaties become effective on the date of their entry into force, if not otherwise agreed. If it is considered necessary to proclaim this self-evident rule established by long-lasting practice, the Government of Finland will not raise any objections.

Article 24

This article is conceivably in contradiction with article 15. Therefore, it may be advisable to amend this article by including a reference to article 15, or to amalgamate the two articles.

Article 25

The article expresses in its present form the main principle of the territorial application of treaties with necessary exceptions according to which certain treaties are applied also outside the territories of the parties, or only to a part of the territory of a party. The Government of Finland concurs with the views expressed in paragraph 5 of the commentary of the ILC on this article.

Although the inclusion of all possible exceptions in this article might lead too far and might only create new problems, the Government of Finland considers it appropriate that not only the intentions appearing from the treaty but also statements on territorial application made by parties in connexion with the conclusion of the treaty should be expressly mentioned in the article.

Articles 27-29

In the opinion of the Government of Finland these articles concerning the interpretation of treaties are satisfactory. They have been criticized because the main emphasis in the interpretation has been laid on the text of the treaty

and because the intentions of the parties and especially the preparatory work of the treaty have not been sufficiently taken into account. It seems, however, natural to consider, in the first instance, the text of a treaty which in most cases best reflects the intention of the treaty and of the parties.

Preparatory work of the treaty can and must be utilized when necessary. However, the intentions of the parties involved in the preparations of a treaty may often vary and may even be diametrically opposed. The Government of Finland also considers paragraph 3 of article 29 important.

Some improvements, mainly concerned with drafting, might, however, be made in paragraphs 2-4 of article 27 and also in article 29.

Part III, section 4

As regards the articles relating to third States, some improvements could also be effected. The latter sentence of article 32, which contains a revocable presumption, could thus be deleted. The Government of Finland has stated earlier that it does not consider article 34 necessary.

Article 38

It has been suggested both to delete the article and to amalgamate it with the articles concerning the interpretation of the treaties, i.e., essentially with paragraph 3 (b) of article 27. The Government of Finland is of the opinion that the latter proposal might be acceptable, considering that the distinction between the two provisions is subtle or almost non-existent.

Part V

The extensive part V of the draft convention including articles 39-68 deals with the most difficult problems of this codification work. It is therefore not surprising that it has given rise to lively discussions and that certain Governments have suggested the deletion of several articles considered premature, and open to different interpretation. It has been stated that if the rules of procedure contained in this part concerning the disputes arising from the application and interpretation of treaties are not made more effective, there is

a danger that the States may abuse the grounds for invalidating and terminating treaties drawn up in too general a form in order to release themselves from inconvenient and heavy obligations or provisions stipulated by the treaty.

The Government of Finland is aware of such possibility and has therefore repeatedly emphasized that the rules of procedure in question should be strengthened. It would be most unfortunate if this important part of the draft would vanish. Nor is there any reason to leave out certain grounds for invalidating and terminating a treaty at present contained in the draft, since parties to treaties could anyway invoke these grounds in the same manner as before, seeing that at least most of them are recognized by international practice and by writers. Since part V comprises all acceptable grounds for invalidating and terminating treaties, the whole system would collapse, if some of these grounds were deleted.

Rather than relying solely on practice as hitherto, it would thus seem preferable to have written rules of the grounds for invalidating and terminating treaties which would provide certain limits for the application of these grounds.

Fully recognizing the difficulties involved, the Government of Finland, on the other hand, shares the views expressed by some Governments that if the whole system of part V could be clarified and completed, it might be easier to reach a consensus of opinion.

Article 41

According to paragraph 5 of this article the principle of separability of treaty provisions does not apply in cases under article 50. The Government of Finland finds this provision too rigid and narrow, since a treaty provision conflicting with a rule of jus cogens may be of such a nature that it can be deleted without affecting the application of the other parts of the treaty.

Article 42

There is no reason to refer to article 58 in this article because if the execution of a treaty has become impossible, the parties to the agreement must recognize this fact.

Article 55

The Government of Finland considers that the intentions of certain parties to suspend temporarily the application of a treaty should also be notified to the other parties.

Article 57

The Government of Finland approves the principles embodied in this article but suggests that the following points should be examined. Attention should not only be paid to the fact whether the violation of a treaty concerns an essential provision of the treaty, but also to the seriousness of the violation in general. Considering the termination or suspension of the application of a treaty resulting from its violation, there might be a reason to examine whether exceptions should be made as regards certain treaties of general importance, such as treaties on human rights. Moreover, it might be appropriate that the principle of separability of treaty provisions could be applied also to multilateral treaties dealt with in paragraph 2 of the article.

Article 59

The Government of Finland feels that the application of the article could be made more flexible by providing for the separability of treaty provisions in some instances.

In order to avoid too far-reaching consequences, the revision or the temporary suspension of the treaty might be considered as alternatives to the termination of the treaty.

Article 61

Although it is expressly stated in the comments on this article that the principle of separability is applicable in cases under this article - unlike the case in article 50 - this does not appear from the text of the article itself. This provision should therefore be given more precision.

Article 62

The Government of Finland refers to its general remarks on part V of this draft and its previous comments.

Article 70

This article seems to be unnecessary, and its wording should at least be improved.

Article 71

The article should be completed in order to cover also the cases when there are more than one depositary.

Article 72

Certain improvements concerning mainly the wording of the article could be made. It should for instance be stated in paragraph 1 (a) that the depositary should also be obliged to keep the custody of the amended treaty text. Further, it should be stated in paragraph 1 (e) that not only the States entitled to become parties to the treaty should be informed, but also those which are already parties to the treaty.

★ ★ ★

The draft convention contains several escape clauses such as "unless the treaty otherwise provides", "unless a different intention appears from the treaty or is otherwise established" and "unless treaty provides or the parties agree that... ". They are used in different connexions, and their meaning and relation to one another is not always clear. These wordings should therefore be revised. In addition it should be considered whether clauses of this nature are necessary in all cases where they are used, bearing in mind that the articles concerning interpretation may in certain cases be resorted to.

At the forthcoming conference attention will be given to questions of drafting. The Government of Finland has therefore in its comments primarily dealt with questions of principle and substance.

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3. ISRAEL

Transmitted by a note verbale of 12 February 1968 from the
Permanent Representative to the United Nations

/Original: English/

The Government of Israel wishes to reiterate its appreciation for the important and useful work achieved by the International Law Commission on the topic of the law of treaties. Now that the whole text is available, its monumental character becomes evident. The observations which follow have to be read against the general background of awareness of the great significance of the work accomplished. In making these observations, the Government of Israel reserves its right to make such additional comments in the Conference of Plenipotentiaries as it might find appropriate.

Articles 1-3

It is believed that articles 1, 2 and 3 should be re-examined in order to establish more clearly the scope of the codification. It is considered that, if possible, one, or at the most two, Articles would be preferable to set forth clearly to what the codification does apply, and to what it does not apply. It is particularly important to bring out the proper inter-relationship between articles 1 and 3.

Article 1

With regard to article 1, bearing in mind that the principal objective was to postulate that treaties between States are governed by the present articles, the question arises whether the present text, in the context of the draft articles as a whole, does not give rise to ambiguities. It is suggested that a more appropriate formulation would be: "Treaties concluded between States are governed by the present articles".

Article 2

With regard to article 2, it is suggested that it would be preferable if some of the explanations of the terms used were incorporated into the article or articles

to which they directly refer, as has already been done in 1965, in the case of the transfer of the explanation of the term "depository" from its original place in the draft of 1962. Other explanations which, it is believed, could be so treated are those of the terms "full powers" and "reservations". It is considered that the resultant condensation of the text would be conducive to greater clarity.

Article 4

With regard to article 4, apprehension is felt at the possible difficulties to which it could give rise, especially in its practical implications. In order to facilitate the work of the diplomatic conference, the suggestion made by the representative of Israel at the 974th meeting of the Sixth Committee on 18 October 1967^{7/} is repeated, namely, that as part of the preparatory work which the Secretariat is to undertake in accordance with paragraph 8 of resolution 2166 (XXI), it should submit a paper which would describe in some detail the practice in this matter, with particular reference to the relevant formal provisions existing in the different international organizations and regulating the making of multilateral treaties within or under the auspices of these organizations.

Article 26

With regard to article 26, difficulty is being experienced over the expression "the same subject-matter" in paragraph 1. That phrase is open to at least two interpretations: (a) "the same subject-matter" may mean the same "object and purpose", an expression which already appears in different parts of the draft, or (b) it may refer to cases such as that of the subsequent revised versions which are essentially of the same arrangements, e.g., the various versions of the 'Paris' or 'Berne' Unions. The three contingencies envisaged in paragraph 4 all assume that at least one of the States is a party "to both treaties". However, the case in which State A is a party to the first version only and State B is a party to the latest version only (and which may be the fourth or fifth version) is not covered. It is assumed that the Bureaux dealing with such matters as the protection of industrial property and the protection of literary and artistic works, dispose of important and relevant experience and that a memorandum on the problems which arise and the texts

^{7/} Official Records of the General Assembly, Twenty-second Session, Sixth Committee, 974th meeting.

which have been evolved to meet them in cases of a chain of related conventions dealing broadly with the same topic, when these are periodically amended, would be useful for the diplomatic conference.

Article 62

With regard to article 62, it is considered that the International Law Commission was right in not going beyond Article 33 of the Charter of the United Nations and leaving further consideration of the question of the settlement of any disputes which might arise to the different procedures there mentioned, in the light of all the circumstances. At the same time it is observed that, as the Commentary to this article makes clear, the Commission had in mind the necessity of achieving a fair balance between what it has called, although perhaps not quite accurately, 'the objecting State' and 'the claimant State'. The question arises whether, when article 62 is read closely and both in the context of general international law and in direct connexion with the various substantive articles dealing with the invalidity and the termination of treaties, this balance is always fairly maintained, and whether the so-called claimant State is not placed at some disadvantage. It is believed that article 62 itself and the substantive articles to which it is related need to be re-examined from this point of view.

4. PERU

Transmitted by the Permanent Mission to the United Nations on
15 February 1968

[Original: Spanish]

One comment of a general nature should be made about the draft articles on the law of treaties: it concerns the way in which the articles are set out.

The articles on the law of treaties consist of a series of provisions applicable to bilateral treaties and to multilateral treaties: but, in preparing the document, the method of dividing up the set of articles into two main sections - one containing the provisions applicable to bilateral treaties and the other those relating to multilateral treaties - has not been adopted.

As a result, the provisions applicable to bilateral treaties and those relating only to multilateral treaties are intermingled, and, owing to the arrangement adopted, all the provisions on reservations, for example, which apply only to multilateral treaties, are to be found in the earlier part of the set of articles.

It would be worth considering a more systematic arrangement for the document. The draft should be divided up into a first part containing all the articles applicable to treaties of every kind, and two special parts, one dealing with bilateral treaties and the other with multilateral treaties.

The present arrangement of the document might cause confusion, in that some of the articles applying solely to bilateral treaties might be taken to apply also to multilateral agreements and vice versa.

A further comment of a general nature is that the position adopted in the International Law Commission's draft is a negative one: it lays down the external and internal conditions required for a treaty to be valid, but it does not take up a clear affirmative stand and say unambiguously when a treaty is valid or "perfect".

An affirmative view can of course be deduced dialectically from the negative position adopted in most of the draft articles which lay down "conditions" for the validity of treaties; but it would be more satisfactory if it were stated precisely "when" a treaty is valid or "perfect", in the absence of proof to the contrary arising from non-compliance with the conditions governing validity.

Article 4

It is noted that article 4 excepts treaties which are constituent instruments of an international organization or are adopted "within" (en el ámbito de) such an organization from the rules of the law of treaties.

There are undoubtedly reasons of practical convenience for making the constituent instruments of international organizations, and agreements adopted within those organizations, subject to certain special rules. But this is not sufficient reason to justify so radical and far-reaching an exception as the one included in the draft. The fact that this absolute and general exception has been provided for might lead one to suppose that two sets of laws of treaties existed simultaneously - one governing treaties concluded by States with other States and the other governing the same States when acting within international organizations, regardless of whether those organizations are world-wide or regional in character or of whether their membership is confined to a few States.

Reference should also be made to the use in the Spanish text of this article of the vague word "ámbito", the exact meaning and scope of which cannot be determined and which could be interpreted in a wide variety of different ways.

Article 11

The traditional and classic purpose of ratification is to convey in terms of contemporary international law the "approval" formerly given by Heads of State. This form of approval, or approval by the executive, has not actually disappeared but has become merely a first step towards ratification, which itself constitutes a new and final form of approval.

Ratification is therefore regarded as conferring validity on defects in the conclusion of a treaty and even on internal defects in international obligations and in the consent to be bound by them.

Strictly speaking, the fact that those who negotiated a treaty did not possess powers to do so or were subjected to external pressure could provide an acceptable reason for refusal to ratify; but in such circumstances it is the State itself, as the possessor of an overriding international legal personality exceeding that of the temporary representatives who signed the treaty, which approves those representatives and thus nullifies those defects or confers legal validity on them.

In fact, defects vitiating consent - apart from those arising from the express provisions of a State's Constitution, which are assumed to be known to all in view of their public character and their status as a basic law governing the personality of the State - are given legal validity through ratification. This is what happens in connexion with legal interpretation, for example, when the legislature, which under most legal systems has power to interpret the law, ratifies a treaty and thus removes ambiguities or objections of an interpretative nature.

It follows from what has been stated above that ratification provides a final decision on matters arising out of participation by representatives of the State and their capacity to bind the State. But there is much more to it than this: the State as such, represented by the authority responsible for the ratification, is alone able to determine its own capacity to be bound with regard to the subject-matter of a treaty.

When under the constitutional or public municipal law of a State the legislature is the body responsible for ratification, this creates an irrevocable situation, because members of Parliament represent the will of the nation as a whole and there is no authority higher than theirs that can determine the capacity of a State to be bound or whether the obligation is in accordance with the law.

Thus, if the text of a treaty, when indicating the procedure required to make it definitively valid, itself stipulates that it must be ratified in accordance with constitutional procedure and if the authority ratifying it is the legislature representing the nation as a whole, then the treaty is definitive and "perfect" from the point of view of international law.

Article 16

Article 16 lists the cases in which reservations are inadmissible, and we consider it necessary to point out that in recent times, in order to ensure that the largest possible number of States accede to or ratify a multilateral treaty, it has often been the practice to permit a reservation stating that acceptance of the treaty by a State acceding to it or ratifying it is "subject to its not being incompatible with the Constitution or laws" of that State or some other declaration to the same effect.

Reservations of this kind are of so broad and general a nature as to constitute a special case and they therefore do not exactly conform to the idea of "incompatibility with the object and purpose of the treaty"; they are outside the scope of that idea. They are wholly inadmissible, since they are a negation of the consent to be bound and can render the whole treaty inapplicable. They should therefore be included in the cases listed in the article.

Article 43

Article 43 is drafted in such a way as to achieve a successful balance - which should be maintained - between the extreme and mutually contradictory views on the question of validity of consent in cases where national constitutional requirements have not been met. By providing that a State may not invoke the fact that its consent has been expressed in violation of a provision of its internal law regarding competence to conclude treaties unless that violation was manifest, the article adopts an intermediate position, and one that is practical and fair, between the views of those who maintain that any violation of internal requirements regarding the capacity to be bound vitiates consent and those who claim that consent expressed by a person internationally competent to bind the State creates an obligation which must be met on demand.

Articles 45 and 46

It is so difficult to apply the notions of fraud and error to international law that there would seem to be no need to dwell on what happens in cases where ratification has taken place between the signing of a document and its execution. Fraud implies bad faith with the deliberate intention of deceiving, either actively through misrepresentation or passively through silence. It is possible to conceive of this in a case where a State or its diplomatic representatives concerned intentionally and fraudulently deceive the other party. One can even accept for the sake of argument the possibility that the persons representing the other party or negotiating on its behalf were so ignorant of the subject of the negotiations and so simple-minded that they did not even suspect that they were the victims of a trick. But it is inconceivable that the fraud should, so to speak, proceed beyond the

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ignorance and ingenuousness of the negotiators and so take hold of the critical faculties of the numerous members of a legislature that, although they are away from the scene of the negotiations and it is some time later, they are the victims of a fraud to such an extent that it might be supposed that they had become privy to it.

It is also hard to conceive of error in relation to the law of treaties. Error is ignorance of which the other party takes advantage and in this respect it is the same as fraud.

Again, it is difficult to imagine a State committing an error with regard to the subject-matter of the negotiations it is conducting. The question of a conceptual error does not arise in this connexion, because, in the last analysis, such an error is a question of opinion. We are referring to the sphere of international treaties as it has been up to now, in all its diverse forms. We are not referring to the new field for international treaty-making opened up by scientific progress; there we are indeed dealing with agreements which have to be concerned not only with technical facts but with technical suppositions, which are subject to change, correction, or error. But such is not the case when it is a question of geography; here, error is unlikely.

A geographic error of some importance or gravity is unacceptable and would be inexcusable. In dealing with a State's territory, it is necessary to allow for the fact that that State, because it is insufficiently developed, may not have extremely detailed knowledge about its territory; but as soon as part of a territory becomes the subject of a dispute, it is impossible to suppose that a State, however modest its financial resources and however limited its administrative capacity or the ability of its experts and officials, would not even study the subject of the discussion. In a way, failure to make such a study is proof of lack of possession or of failure to exercise authority.

When it is a question of minor errors such as those relating to the source of a stream or the bends in a contour line, any resultant differences in territory are usually so insignificant when compared with the area of the territory under discussion that a solution can easily be found by using one of the traditional methods for settling disputes, such as arbitration.

Articles 49, 50 and 61

Articles 49 and 50 should be examined together, since article 49 deals with a specific case in which the general principle laid down in article 50 is applied. The Commission recognizes this when it says:

"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." 8/

Although the Commission states that article 49 "declares the modern customary law", it does in a sense acknowledge that both articles - especially article 50, of course - are de lege ferenda.

In order to examine the scope of these provisions, it appears to be necessary to correlate these articles with article 62 (Procedure to be followed in cases of invalidity), 39 (Validity and continuance in force of treaties) and 23 (Pacta sunt servanda).

It might be argued that it would be more logical to enunciate the general rule contained in article 50 and then to cite what is stated in article 49 as an obvious instance of that rule; by so doing, these draft articles would be placed in their proper perspective, although their content calls for the criticism which appears later in these comments.

The all-important point in both articles should be to establish the date from which the proposed rule is regarded as having come into force and as having thus rendered null and void acts which conflicted with it.

The reference to the Charter in article 49, which uses the words "in violation of the principles of the Charter of the United Nations", implies that the date on which the Charter entered into force is to be regarded as the starting point.

If, instead of "principles" the article referred to "norms" or "rules" or simply said "in violation of the United Nations Charter", the ambiguity would be removed, and the entry into force of the Charter would clearly mark the point from which the new law applied.

8/ Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), paragraph 1 of the commentary on article 50.

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".^{9/} The lack of precision is therefore deliberate and is open to criticism because it introduces an element of uncertainty into a matter of great importance and delicacy.

The Commission describes the rule it lays down in article 49 as "the modern customary law", despite the fact that these words are incompatible with one another and that the expression is therefore completely inconsistent.

Article 50, which by itself would embrace the subject-matter of article 49, is couched in such general terms and is so vague that it is a serious threat to the stability of international agreements.

As several Governments have pointed out, it is unacceptable that the article should refer to the effect of a rule of jus cogens without defining that rule. Merely to say that a treaty is void if it "conflicts" with a rule of jus cogens makes the article so vague that it will be ineffectual.

In recent times - to be more exact, since the two World Wars - it has come to be held, contrary to the international tradition which governed the political organization of the world before the League of Nations and the United Nations, that, in accordance with certain principles which were previously regarded as being of a philosophical or theoretical character, treaties may be void or invalid if they are in fundamental conflict with certain moral precepts which there is a tendency to introduce into law as a result of the prevalence of new ideological and political schools of thought.

As a result to this new situation, it would appear to be necessary, if these new principles are to be accepted or endorsed, to specify exactly when they begin to come into force in such a way as to affect the validity of international agreements.

The trend of certain projects, proposals, or arguments gives the impression that an attempt is being made to introduce into international law the notion of retroactivity. This notion has been accepted only when retroactivity was explicitly permitted or provided for, and not by extension or deduction, and it is contrary to legal stability. There seems to be a tendency to replace or distort

^{9/} Ibid., paragraph 8 of the commentary on article 49.

negotiation - which it has always been open to States to use - by the unilateral notion that, through recourse to a rule, States may claim the existence of some cause of nullity or invalidity and deduce from it de facto or de jure legal consequences. In practice, this means that a State, in the absence of pressure from the other party, can be released from obligations that it has legally assumed. The result is to undermine one of the most solidly established and specific concepts of international law, namely that one party may not declare itself released from contractual obligations which it has pledged itself to observe by ratification in accordance with its Constitution and which in some cases it has irrevocably fulfilled, at all events in part.

An attempt is also being made to introduce into contemporary international law the idea that a treaty is void if a State has been subjected to coercion by the threat or use of force. This doctrine, if clearly and precisely defined, can be accepted as a rule of international law for the future; but it is impossible to escape from the centuries-old fact that political geography and many other realities of international relations have always depended, still depend and will continue to depend on the threat or use of force. Unless it is deliberately intended to bring about international chaos, it is impossible to imagine that such a negative rule can be accepted with retroactive effect.

Nor is it rational to suppose that this idea can be accepted without first defining what is meant by the "threat or use of force". It so happens, however, that the definition of this concept, under the generic name of "aggression", is one of the main problems of modern international law; attempts to solve the problem have been made for years, by jurists and legal institutions, in a desire to render international law precise and to bring about its development, and by international organizations of the present day which are studying the possibility of arriving at a definition, though so far without success.

It is clear from article 49 of the International Law Commission's draft that it is only the threat or use of force "in violation of the principles of the Charter of the United Nations" that would render a treaty void. As Article 51 of the Charter states that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence" until the Security Council

intervenes, it is perfectly clear - indeed, it could hardly be otherwise - that legitimate self-defence does not constitute the aggression condemned and prohibited under other Articles of the Charter. Accordingly, the present situation in the following: legitimate self-defence is permitted by the United Nations Charter and consequently does not constitute the threat or use of force, but these prohibited forms of aggression have not yet been defined, nor does the International Law Commission attempt to provide a definition.

Article 50 states:

"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."

The International Law Commission draft thus provides for two ways in which a treaty can be rendered void; both are innovations so far as customary law is concerned and embody the new trend in international law which is based on the idea that war should be condemned on moral grounds and that the use of force in whatever form should be rejected.

Article 50 refers in so many words to cases where a treaty might be held to conflict "with a peremptory norm of general international law". In addition to the unchallengeable criterion provided by the principle of the non-retroactivity of legal agreements, except in cases where the agreement itself expressly provides to the contrary, there is a further criterion in Article 50 of the existence of a peremptory norm. There are thus two conditions which would make it impossible to apply this provision, even in the unlikely event of its survival, to a treaty concluded prior to the signature of the proposed convention or, to give it as wide and as generous an interpretation as possible, to a treaty concluded prior to the United Nations Charter.

There was no "peremptory norm of international law before the United Nations Charter. It found expression briefly in the Treaty of Paris of 1928 under which war was renounced "as an instrument of national policy". Although there were many signatories to that Treaty, it only lasted a few years. In the nineteen-thirties a number of conflicts occurred which stirred the conscience of the world, but, despite the existence of the League of Nations, they could not be settled, precisely because of the non-existence of the peremptory norm of general international law to which the draft refers.

The International Law Commission's draft supplements or qualifies this reference to a "peremptory norm of general international law" by adding the words "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Assuming that the declaratory and inoperative Treaty of Paris of 1928 were in force, it could not be regarded as "a peremptory norm of general international law from which no derogation is permitted" in view of the fact that the successive armistices and peace treaties which brought those wars to an end were in fact derogations from it.

But it is possible to go much further. According to article 50, any peremptory norm which makes a treaty conflicting with it void would have to be one "which can be modified only by a subsequent norm of general international law having the same character". The United Nations has in fact laid down such a "subsequent norm" which is undoubtedly of a peremptory nature, all the more so as it is universal; it thus banishes the 1928 Treaty of Paris into the realm of legal daydreams. It is Article 107 of the United Nations Charter, which states:

"Nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

This means, first, that the threat or use of force to which article 49 of the International Law Commission's draft refers has recently been admitted in so many words by the very Charter which that article cites and whose principles it uses as a basis for its proposal that certain international treaties should be made void; and, secondly, that the peremptory norm embodied in Article 107 of the Charter has been irrevocably accepted as such by the 123 Member States of the United Nations.

Article 61 of the International Law Commission's draft states:

"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."

There are two ways of looking at this article: if it were applied literally, it would cause international anarchy and chaos, while if it were interpreted it would create confusion. Article 50 made the notion of a "peremptory norm of international law" subject to the condition already referred to, i.e. such a norm

must be of a sacrosanct nature and one from which "no derogation is permitted", but it can be modified by a subsequent norm having the same character.

Those responsible for putting forward this proposition have forgotten that modification would in fact constitute a "derogation" having the same character. This also seems to be the view taken in article 61, which admits the possibility of the emergence of "a new peremptory norm" of the kind referred to in article 50. Nevertheless, the "peremptory norm" in article 50 which can be modified by another of an equally general and peremptory character, is sufficient to bring about the invalidity and termination of a treaty through the application of an automatic principle.

The International Law Commission should be asked what the position would be if a "new peremptory norm" of the kind referred to in article 50 annulled the one in article 61 whereby certain treaties become void. Logic seems to point to one solution which, though apparently surprising, is clear: treaties becoming void as a result of the emergence of a new peremptory norm of general international law would recover their validity through other such norm.

Other comments

In article 2, paragraph 1 (b) of the draft defines "ratification", "approval" and "accession" as being in each case "the international act whereby a State establishes on the international plane its consent to be bound by a treaty". The commentary to the article states that since there is some tendency for the international and internal procedures which establish "the consent of a State to be bound" to be confused, it was thought necessary to lay heavy emphasis on the fact that these terms relate purely to "the international act".

The first three legal institutions defined in article 2 are again referred to in draft article 11, which according to the title is concerned with "Consent to be bound by a treaty expressed by ratification, acceptance or approval". This article is in two parts; the first deals with consent expressed by ratification and the second with consent expressed "by acceptance or approval under conditions similar to those which apply to ratification".

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As the commentary itself indicates, article 11 is concerned with a rather complicated problem of terminology, and it does not clear the matter up entirely. For instance, the commentary states on the one hand that "acceptance" or "approval" can be given with or without prior signature, but it does not explain why the legal institution of accession, which is included in article 2 as one of the methods whereby a State establishes its consent to be bound by a treaty, has been omitted from the list in article 11. And although "accession" is generally held to be an act that applies to multilateral treaties, no answer is given to the question whether accession can be regarded as the final expression of a State's consent to be bound or whether ratification is, or may be, required in addition.

It is clear from the above that there should be a better correlation between article 2, paragraph 1 (b), and article 11, paragraph 2, and those articles should be clarified and if necessary supplemented so as to remove any ambiguity.

Commentaries such as those which accompany the draft of course help to explain the ideas behind the various articles, but they ought not to be necessary to enable the provisions of what may become an international convention to be clearly understood and applied; such provisions should be completely intelligible by themselves.
