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FIFTH REPCRT ON THE LAW OF TREATIES*

by

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Special Rapporteur

* This document contains section 1 and articles 31-35 of section 2 of Part II of the draft articles.

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Introduction

1. At the first part of its seventeenth session[1] the Commission re-examined the articles on the conclusion, entry into force and registration of treaties contained in Part I of its draft articles on the law of treaties, which it had prepared at its fifteenth session[2] and submitted to Governments for their observations. The Commission provisionally adopted revised texts of twenty-five articles. One of these (article 3 (bis)) was an article in Part II (article 48), relating to treaties which are constituent instruments of international organizations or which have been drawn up within international organizations, which it decided to include among the "general provisions" at the beginning of the draft articles. The Commission deleted four articles and postponed its decision on articles 8, 9 and 13, relating respectively to participation in a treaty, opening of a treaty to the participation of additional States and accession, until the resumption of its seventeenth session in January 1966.

2. At the first part of the session the Commission also had before it the Special Rapporteur's observations and proposals regarding the revision of the first three articles of Part II, articles 30-32.[3] Owing to shortage of time, however, the Commission was unable to begin its re-examination of these articles.

3. At the second part of the session, therefore, the main task of the Commission will be to re-examine the whole of Part II of the draft articles and to conclude its re-examination of articles 8, 9 and 13.

The Basis of the Present Report

4. The basis of the present Report is the same as that set out in paragraph 5 of the Special Rapporteur's fourth report, namely, the written replies of Governments, the comments of delegations in the Sixth Committee of the General Assembly and the observations and proposals of the Special Rapporteur resulting therefrom. The comments of Governments and delegations on Part II of the draft articles are contained in the Secretariat document A/CN.4/175 and in addenda 1-4 of that document.

1/ Official Records of the General Assembly, Twentieth Session, Supplement No. 9 (A/6009).

2/ Yearbook of the International Law Commission, 1962, Vol. II, p. 159.

3/ A/CN.4/177/Add.2.

5. The Commission, for reasons of convenience, is re-examining the draft articles in the same general order as they were provisionally adopted at the fourteenth, fifteenth and sixteenth sessions. In its Report[4/] on the work of the first part of its seventeenth session, however, the Commission has recognized that in rearranging the draft articles as a single convention it will be necessary to give further consideration to the order in which the various articles should be placed. The Special Rapporteur in paragraph 7 of his fourth report has already expressed the view that in the final draft the articles concerning "observance", "interpretation" and "application" of treaties should be placed before those concerning "invalidity" and "termination", i.e. before the present Part II. This view is based on a number of different considerations. First, to place the rules concerning "invalidity" and "termination" immediately after "conclusion", "entry into force" and "registration" may seem to give too much importance to grounds of nullity and termination and to give "pacta sunt servanda" the appearance almost of a residuary rule. Secondly, "termination" ought logically to follow, not precede, "application" of treaties, and it is at the same time convenient to deal with "invalidity" in juxtaposition to "termination". Thirdly, "termination" has affinities with "modification" of treaties, which also should logically follow, not precede, "application". Fourthly, there is some advantage in stating the rules regarding "interpretation" of treaties early rather than late in the draft articles, since these rules affect the meaning to be given to certain other articles.

6. The final structure and order to be given to the draft articles was not a matter of great moment in re-examining Part I, because the articles contained in that Part for the most part find their natural place at the beginning of the draft. The Commission may prefer not to arrive at any settled conclusions on this matter until its re-examination of the draft articles is further advanced. Nevertheless, in approaching the re-examination of Parts II and III it seems desirable for the Commission to have in its mind a general perspective, however provisional, of the probable structure and order of the articles which it will ultimately adopt; for in these Parts the arrangement of the different topics may in some cases influence the drafting of the articles.

4/ Paragraph 27.

7. The general arrangement of the draft articles which the Special Rapporteur tentatively envisages for their ultimate form is as follows: Part I - "General Provisions", consisting of articles 0, 1, 2 and 3 (bis); Part II - "Conclusion, Entry into Force and Registration of Treaties", consisting of articles 3, 4 and the remaining articles of the existing Part I; Part III - "Observance and Interpretation of Treaties", consisting of article 55 (pacta sunt servanda) and articles 69-73; Part IV -"Application of Treaties", consisting of articles 56-64; Part V - "Invalidity, Termination and Suspension of the Operation of Treaties", consisting of articles 30-54 (except article 48, which is now article 3 (bis), and subject to certain other qualifications; Part VI - "Modification of Treaties", consisting of articles 65-68.

Structure, Title and Arrangement of the present Part II

8. Structure. In paragraph 7 of his fourth report, the Special Rapporteur had tentatively suggested that "invalidity" and "termination", procedure for invoking a ground of nullity, termination, etc., and the legal consequences of termination, nullity, etc., should be divided into four separate Parts. After further reflection and after studying the comments of Governments on Part II, the Special Rapporteur considers it preferable to adhere to the present structure under which these four topics are all included in one Part. In the first place, although "invalidity" and "termination" are quite separate topics, they raise a number of common problems, e.g. "separability", "preclusion", procedure for invoking a ground of invalidity or termination and the legal consequences which follow; and it is accordingly convenient for purposes of drafting to deal with the two topics in one Part. In the second place, a number of Governments have expressed concern regarding the danger to the security and stability of treaties which the articles on "invalidity" and "termination" may involve; and to devote four separate Parts to these topics may seem to exaggerate their role in the law of treaties. It therefore seems better to combine "invalidity" and "termination" in one Part as at present.

9. Title. The existing title of the present Part II which reads "Invalidity and Termination of Treaties" does not fully cover the contents of the Part, which also deals with the suspension of the operation of treaties. Accordingly, it seems preferable to call the Part: "Invalidity, Termination and Suspension of the Operation of Treaties".

10. Arrangement of the articles. The emphasis placed by Governments in their replies - and indeed by members of the Commission during the fifteenth session - on the need to safeguard the security and stability of treaties leads the Special Rapporteur to think that it may be advisable to place certain of the articles which limit or regulate the right to invoke grounds of invalidity, termination or suspension before, rather than after, the substantive articles dealing with these grounds. It will then be made apparent at the outset of the Part dealing with "invalidity" and "termination" that specific rules restrict the freedom of States to have recourse to grounds of invalidity and termination for the purpose of resiling from their treaty obligations. The desirability of putting these rules before rather than after the substantive articles dealing with the grounds of "invalidity" and "termination" is also indicated by the fact that in their comments on "fraud" and "error" certain Governments have advocated the imposition of a time-limit on invoking these grounds without apparently taking into account the relevance of article 47 regarding the loss of a right to allege grounds of invalidity or termination as a result of waiver or "préclusion".

11. The Special Rapporteur accordingly suggests that the present Part should begin with a section entitled "General rules" and comprising: article 30 (presumption as to the validity, continuance in force and operation of a treaty); article 49 (authority to denounce, terminate or withdraw from a treaty or suspend its operation); article 46 (separability of treaty provisions); article 47 (loss of a right to invoke a ground of invalidity, termination or suspension).

12. A number of Governments have underlined the importance which they attach to the possibility of independent adjudication with regard to the matters dealt with in certain of the articles. This question was much discussed at the fifteenth session and ultimately the Commission adopted in article 51 a general provision regarding the procedure for invoking a ground of invalidity, termination, etc.,

which represented the highest measure of common agreement in the Commission on the solution of disputes concerning the application of the articles in the present Part. The question therefore arises whether to transfer this article also to section 1. There is, however, a larger question as to whether the procedure laid down in article 51 should be given a more general application to all disputes concerning the application of the present article. This question is examined in the Special Rapporteur's observations on article 51, which he has preferred not to deal with among the general articles in section 1.

REVISION OF PART II OF THE DRAFT ARTICLES IN THE LIGHT OF THE COMMENTS OF GOVERNMENTS

Title - Invalidity, Termination and Suspension of the Operation of Treaties

Proposal of the Special Rapporteur

The Special Rapporteur, for the reason given in paragraph 9 of the Introduction to this report, proposes that the title of the Part should be enlarged so as to cover "suspension of the operation of treaties" which is one of the topics dealt with in this Part.

Section 1: The Title

Proposal of the Special Rapporteur

The existing title to section 1 is "General Provision" and the sole article which the section contains is article 30. The Special Rapporteur, in accordance with his observations in paragraphs 9 and 10 of the Introduction, proposes that the section should now be entitled "General Rules" and should include four articles (articles 30, 49, 46 and 47). The title "general rules" is proposed because there is already a title "General Provisions" at the beginning of the draft articles.

Article 30

Presumption as to the Validity, the Continuance in Force and Operation of a Treaty

The observations and proposals of the Special Rapporteur regarding this article are contained in addendum 2 to his fourth report (A/CN.177/Add.2).

Article 49

Authority to denounce, terminate or withdraw from a treaty or suspend its operation

Comments of Governments

Portugal. The Portuguese Government expresses its general acceptance of the principle that the power of a person to represent his State for denouncing,

terminating, withdrawing from or suspending the operation of a treaty should be governed by the same rules as those laid down in article 4 for concluding a treaty.

United Kingdom. The United Kingdom Government observes that article 4 made a distinction in certain circumstances between, on the one hand, authority to negotiate, draw up and authenticate a treaty and, on the other, authority to sign; but that it did not employ the word "conclude", which is found in article 49. The result, in its view, is to leave it uncertain whether under article 49 the rule applicable to authority to denounce is that relating to authority to negotiate, draw up and authenticate or that relating to authority to sign.

United States. In the view of the United States Government, article 49 constitutes a useful clarification of the position regarding authorization, or evidence of authorization, in the cases covered by the article.

Cyprus Delegation. The delegation agrees that the rules laid down in article 4 should also apply to evidence of authority to perform acts with regard to the nullity of a treaty.

Observations and Proposals of the Special Rapporteur

1. The point made by the United Kingdom as to the lack of precision in the present formulation of article 49 appears to be well founded. Moreover, article 4, which article 49 applies *mutatis mutandis*, has itself undergone extensive revision at the first part of the seventeenth session, so that article 49 would in any event require reconsideration.

2. The rules governing the authority of a person to represent the State in the negotiation and conclusion of treaties are now expressed in article 4 in terms of the cases in which the production of an instrument of full powers is required. This does not, however, appear to make them any less suitable for application in the context of article 49. The real problem, as the comment of the United Kingdom indicates, is whether to apply the rules governing negotiation or those governing signature - or perhaps those governing the expression of consent to be bound.

3. The Special Rapporteur suggests that it may be necessary to differentiate between: (a) evidence of authority to *invoke* a ground of invalidity, termination, etc., which may be regarded as an opening of negotiations for the converse purpose of annulling or terminating a treaty, and (b) evidence of authority to carry out the

definitive act of annulling; terminating, etc., a treaty which may be regarded as the expression of the State's will not to be bound. In other words, it may be necessary to make the parallel between article 49 and article 4 even closer by providing different rules for the negotiation of the annulment, termination, etc., of a treaty and for the performance of the act expressing definitely the will of the State not to be bound. This would seem to be at once more logical and more consistent with principle.

4. Accordingly, the Special Rapporteur proposes that article 49 should be revised to read as follows:

"Evidence of authority to invoke or to declare the invalidity, termination or suspension of the operation of a treaty

"1. The rules laid down in article 4 regarding evidence of authority to represent a State for the purpose of negotiating a treaty apply also to representation for the purpose of invoking a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty.

"2. The rules laid down in article 4 regarding evidence of authority to represent a State for the purpose of expressing its consent to be bound by a treaty apply also to representation for the purpose of expressing the will of a State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty."

Article 47

Loss of a Right to Allege the Nullity of a Treaty as a Ground for Terminating or Withdrawing from a Treaty

Comments of Governments

Israel. The Government of Israel makes four points with regard to this article. First, it observes that the word "nullity", which occurs in the opening phrase, is not in fact used in any of the articles to which reference is made in the present article. Secondly, it draws attention to the fact that the case of a right to require the suspension of the operation of a treaty is omitted from the article. Thirdly, it expresses the view that, the principle of article 47 being one of general application, the article should distinguish between that general principle and the specific concept of tacit consent as employed in Part I of the draft

articles (see paragraph 2 of its comments on Part I). Fourthly, it feels that the drafting of the opening phrase of the article could be simplified by being worded more positively on the following lines:

> "A State may not rely upon articles 31[5/] 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 would also, it suggests, have the advantage of making redundant the specific reference to "waiver", which it feels to be a complicating factor in the article, and of avoiding the phrase "debarred from denying", which it feels to be awkward. It further suggests that the commentary should make it clear that the "election" of the State under the article would be presumed after the lapse of a reasonable period of time, the period being dependent on all the circumstances of the case.

Jamaica. Although not making any point in regard to the present article, the Jamaican Government in its comments upon article 33 expresses the opinion that a defrauded party should take steps to invalidate its consent to the treaty within a stated time after the discovery of the fraud; and that, if it does not, it should be deemed to have subsequently acquiesced in the fraud.

Netherlands. The Netherlands Government considers that this article should be made applicable also to article 31 (failure to comply with provisions of internal law). In its view, restricting the plea of invalidity follows inherently from the primacy of international law. It further queries whether article 47 should not also apply to cases under article 36 (coercion of a State by the threat or use of force). On the assumption, however, that the word "force" in article 36 means only "armed aggression", the Netherlands Government is prepared to concur in the view that article 36 should not be brought within the rule in article 47.

Portugal. While generally approving the principle contained in the article, the Portuguese Government calls attention to what it feels must be an inexactitude in the text where the draft refers to articles 32 to 35 rather than to articles 31

5/ In its comments on article 31 the Israeli Government suggests that that article also should be subject to the application of the general rule contained in the present article.

to 34. Having noted that the principle can be relevant only when the application of a treaty is dependent on the attitude of the parties, it points out that article 35 (personal coercion of a representative) provides for the absolute nullity of the treaty, not for a right to invoke the fact of coercion; and it does not see how article 35 can be affected by the principle in the present article. At the same time, since article 31 (provisions of internal law regarding competence to enter into treaties) provides that the validity of consent may be disputed by a State whose representative acted in manifest violation of its domestic law, it does not understand why that article should be excluded from the operation of the principle.

Sweden. The Swedish Government considers that this article is an indispensable complement to the rest of the draft; and that it should be extended to cover cases falling under article 31.

United States. The United States Government expresses the view that provisions along the lines of article 47 are essential to prevent abuses of the rights set forth in the articles to which it refers. Indeed, it suggests that the article should be placed earlier in the draft, in front of the articles to which it applies, or, alternatively, that each of those articles should contain an express reference to article 47, in order to avoid any risk of their being interpreted out of context. It also suggests that the text would be clearer if it used the phrases "articles 32 through 35" and "articles 42 through 44" instead of "articles 32 to 35" and "articles 42 to 44". In addition, in its comments on articles 33 (fraud) and 34 (error) it suggests the desirability of laying down specific time-limits for invoking those grounds of invalidity.

El Salvador Delegation. The delegation remarks that in the Spanish text the word "perdida" used in the title has no specific legal meaning and should be replaced. It further draws attention to paragraph 5 of the commentary, where the Commission states that the governing consideration for the application of the principle contained in the present article would be that of good faith, and that 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. The delegation thinks that this consideration requires careful study if it is not to give rise to serious errors.

Observations and Proposals of the Special Rapporteur

1. Place and scope of the article. The Special Rapporteur, in paragraph 10 of the Introduction to this Report, has suggested that the present article should be placed in Section 1 as a "general rule". The reason is that the article appears to affect the operation of all the articles which recognize rights to invoke particular grounds of invalidity or termination. If it does not affect cases of "jus cogens" falling under articles 36, 37 and 45, that is only because these articles provide for the automatic avoidance of the treaty in those cases. One advantage of transferring article 47 to Section 1 is that it will indicate at the outset that a right to invoke the invalidity or termination of a treaty is not unrestricted and that the security and stability of treaty relations are also to be taken into account. Otherwise, it might be desirable, as one Government has suggested, to make express reference to the rule in article 47 in each of the articles which are subject to it.

Article 47, as at present formulated, does not apply to article 31, which relates to invalidity on the ground of a failure to comply with a provision of internal law. A number of Governments, in comments on this article or on article 31, have questioned the omission of article 31 from the operation of the rule in article 47, and the Special Rapporteur is of the opinion that article 31 clearly ought to be brought within that rule.

2. The Israeli Government's objection to the use of the word "nullity" is well-founded, since the Commission in drafting articles 31-35 decided to speak of "invalidation" of the consent rather than the "nullity" of the treaty. It is therefore desirable here, as in article 30, to replace the word nullity in the title and in the opening phrase by invalidity in order to bring the language into line with that used in the substantive articles. The same Government's point that the article omits to cover cases of "suspension of the operation of a treaty" is also well-founded and has to be taken into account in revising the text.

3. The Israeli Government's suggestion that the article should distinguish between the general principle which it contains and "the specific concept of tacit consent as employed in Part I" seems, however, to raise unnecessary problems. Admittedly, the rule formulated by the Commission regarding "tacit consent" to reservations, which now appears in paragraph 5 of article 19 of the revised draft, may be viewed

as a rule concerning the loss of a right to object to a reservation. It is also true that the rule in the present article can be viewed as one concerning implied consent to accept a treaty (or part of a treaty) which might otherwise not be binding by reason of a ground of invalidity, termination, or suspension. But although similar legal concepts may underlie paragraph 5 of article 19 and the provisions of the present article, that does not seem to call for nice distinctions of principle to be drawn between the two cases in the present article, however appropriate it might be to do so in a "code". Article 19, paragraph 5, formulates a special rule for the special context of "reservations", and there seems to be no need to refer to it or distinguish it when formulating an analogous but not identical rule in the different contexts of "invalidity" and "termination".

4. The Special Rapporteur also has doubts about the same Government's suggestion for simplifying the drafting of the opening phrase of the article. If this suggestion were adopted, it would be necessary, before the rule would operate, to establish affirmatively that the State in question had "elected by conduct or otherwise to consider itself bound by the treaty". Although the broad scope of the rule might not be very different, its content would have been slightly modified. It is not quite the same thing to be required to show affirmatively that a State has by its conduct actually elected to accept something as it is to be required to show that it is precluded by its conduct from denying that it has so elected. Article 47 was intended by the Commission to apply to certain grounds of invalidity and termination a rule giving effect to the principle of "préclusion" (estoppel) found in cases such as that of the Temple of Preah Vihear.[6] In the Temple case the rule was expressed by the Court in negative form: "Thailand is now precluded by her conduct from asserting that she did not accept it". The effect of the principle of "préclusion" may equally be stated in positive form in terms of an implied agreement to be bound notwithstanding a right originally to invoke a particular ground of invalidity or termination. In some cases there may be evidence of an actual agreement.[7]

6/ I.C.J. Reports, 1962, at page 32.

7/ In the Temple case, in addition to applying the principle of "préclusion", the Court held that there had been an actual acceptance of the erroneous map.

But, having regard to the nature of the principle of "préclusion", it seems desirable, if the article were to be framed in an affirmative form, to refer specifically to cases both of express agreement and of agreement implied from conduct. The term "waived the right" used in sub-paragraph (a) - a term familiar in this context in common law systems - was, of course, designed to cover cases of express agreement. Though no "complicating factor" is thought to be introduced by this term, it may be preferable to use a more mundane expression.

5. Two Governments, in their comments on articles 33 (fraud) or 34 (error), have suggested that a specific time-limit should be stated within which the right to invoke the ground of invalidity must be exercised; and the Israeli Government has suggested that the commentary should make it clear that the election of a State to be bound would be presumed after the lapse of a reasonable period of time, the period being dependent on all the circumstances of the case. The Commission, it is true, has thought it appropriate to lay down a specific time-limit of one year in the particular case of the right to object to reservations. But there the context within which the principle of "préclusion" or tacit consent operates is well-defined and limited. Article 47, however, covers a variety of cases in which the context for the operation of the principle may differ widely; e.g. the case of a fundamental change in circumstances is quite different from that of fraud or error. Moreover, even within each class of case the circumstances may vary almost infinitely. Accordingly, it does not seem either possible to lay down a general time-limit for all cases or advisable to attempt to lay down a particular time-limit for each ground of invalidity, termination or suspension. No doubt, as the Israeli Government implies, the fundamental concept is that a State must invoke a ground of invalidity, termination or suspension within a reasonable period of time, having regard to all the circumstances of the particular case. But the Commission has manifested a certain aversion to formulating rules expressly in terms of what is "reasonable". On the other hand, in article 17 it has had recourse to the concept of "undue delay", and may find this expedient an appropriate solution also in the present article.

6. The basic problem is whether the rule should be stated in the terms of a "préclusion" or in terms of an implied agreement. The Special Rapporteur is inclined to think that, if article 47 is tranferred to section 1 as a "general

rule", it may be better to formulate it in terms of an implied agreement. In that event and in the light of the foregoing observations the title and the text might be revised to read as follows:

"Relinquishment of the right to invoke a ground of invalidity, termination, withdrawal or suspension

"A State may not invoke any ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 31 to 35 inclusive or articles 42 to 44 inclusive if, after becoming aware of the facts giving rise to such ground, the State:

"(a) shall have agreed to regard the treaty as valid or, as the case may be, as remaining in force; or

"(b) must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid or, as the case may be, as remaining in force."

Article 46

Separability of Treaty Provisions for the Purposes of the Operation of the Present Articles

Comments of Governments

Israel. The Government of Israel considers that article 32 should be included among the articles covered by the rule laid down in the present article.

Netherlands. The comments of the Netherlands Government are set out in an annex to its reply, and they are expressed in a form which makes it difficult to present an exact analysis of them. While approving of the inclusion of the article, it appears to make the following main points. First, it considers that the rule in article 46 should be made applicable to further articles, e.g. articles 31, 32, 36, 37 and 39. Secondly, it considers that both the "objective" and the "subjective" tests of separability contained in paragraph 2 of the article involve certain difficulties. As to the "objective" test in paragraph 2 (a), it says that cancellation of part of a treaty, although it might not "interfere with the operation of the remaining provisions", might nevertheless run counter to the object and purpose of the treaty. As to the subjective test, it interprets paragraph 2 (b) as requiring the fact that acceptance of the clauses

in question was not an essential condition of the consent to the treaty as a whole to be proved either from the text of the treaty or from statements made by both parties; and maintained that this is not very rational. It says that what may be essential to one party may be precisely the opposite to the other; that 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; and that the parties may well change their minds during the period of the treaty's operation regarding the value they attach to particular clauses. It further says that, if difficulties arise after a treaty has been concluded, a solution will either be found by the parties themselves or it will not; and that no provisions of a Convention on the law of treaties (if they are just and not merely designed to cut Gordian knots) could ever be so clear-cut as to exclude the possibility of each party's invoking them in support of its contentions. In its view, therefore, the question is whether the Courts should be given directives in the draft articles as to the solution of difficulties.

The Netherlands Government suggests that a broadly worded article on the following lines might meet the case:

> "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."

It observes that paragraphs 1 and 3 of the suggested article are largely modelled on the Commission's draft, and are accordingly open to the same objections as it

has raised to the corresponding parts of the Commission's text. However, it believes that these objections are practically eliminated by paragraph 2 of its text, which makes the whole matter subject to the rules of good faith between the contracting parties.

Portugal. On the basis of the balance established by the conditions set out in paragraph 2 the Portuguese Government has no fundamental objection to the principle of indivisibility provided for in the article.

Sweden. The Swedish Government feels that the article is on the whole a most useful and necessary complement to the exposition of grounds of nullity and termination. At the same time, it draws attention to the apparent - and presumably inadvertent - reference in sub-paragraph 1 to the possibility of a treaty's containing provisions about its own nullity.

United States. The United States Government thinks that the article is useful in clarifying, to some extent, the manner in which the articles mentioned in it are to be applied. However, it finds the expressions "articles 33 to 35" and "42 to 45" somewhat misleading, even although their meaning can be ascertained by studying the articles in question. It would prefer the text to read "articles 33 through 35" and "42 through 45". In addition, it considers that article 37, if it is retained, should be made subject to the present article.

Bulgarian Delegation. The Bulgarian delegation considers that the Commission was quite right, while taking the principle "pacta sunt servanda" into account, to subject the severability of clauses to the double condition set forth in paragraph 2 of the present article.

Cyprus Delegation. The delegation notes that paragraph 1 makes it clear that the principle of severability does not apply in cases of coercion of the State (article 36) or jus cogens (article 37).

Syrian Delegation. After noting the effect of the Commission's proposals regarding severability the delegation observes that there is no reason why the parties to a treaty should be deprived of the benefit of provisions to which no one objects. It further calls attention to its proposal that the operation of the principle should be extended to article 20, dealing with the effect of reservations.

Uruguayan Delegation. In so far as the article is directed towards fostering respect for treaty obligations, it has the support of the delegation.

Observations and Proposals of the Special Rapporteur

1. Place and scope of the article. The Special Rapporteur, in paragraph 10 of the Introduction to this Report, has suggested that this article should be included in section 1 as a "general rule". It is true that the article, as at present formulated, is expressed to govern only cases falling under articles 33 to 35 and 42 to 45. However, the suggestion made by two Governments that the rule contained in the present article should be extended so as to cover article 32 appears to be sound. There may also be a case, as the Netherlands Government considers, for extending the rule to cover article 31, because certain types of failure to comply with a provision of internal law might relate to a particular clause of a treaty and not to the conclusion of the whole treaty. If article 46 is transferred to section 1, it will have the advantage of making it unnecessary to make express reference to the "separability" rule in the substantive articles setting out grounds of invalidity, termination, etc.

Both the Netherlands and the United States Governments maintain that the rule in article 46 should be made applicable to cases falling under article 37 (conflict with a norm of jus cogens). Some members of the Commission expressed the same view at the fifteenth session during the discussion of article 37.[8/] The majority, however, considered that in the case of a conflict with a norm of jus cogens, the invalidity should attach to the whole treaty and that it should be left to the parties to bring the treaty into harmony with international law by making the necessary changes in its terms. That being so, the Special Rapporteur confines himself to drawing attention to the opinion of the two above-mentioned Governments. The Netherlands Government maintains that yet another article, namely article 39, which deals with denunciation or withdrawal under a right implied from the

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8/ See paragraph 5 of the commentary to article 37; Yearbook of the International Law Commission, 1963, Vol. II, p. 199.

character of the treaty or from the circumstances of its conclusion, should be brought within the rule. This may perhaps be thought to introduce an extra complication into an already delicate problem of interpretation. On the other hand, there does not seem in principle to be any reason why the rule of separability should be excluded in these cases. Accordingly, in preparing his revised draft the Special Rapporteur has included within the rule cases falling under article 39.

2. The Special Rapporteur feels considerable doubt regarding the reformulation of the article proposed by the Netherlands Government. It may be true that the so-called "objective" and "subjective" criteria contained in paragraph 2 (a) and (b) of the Commission's text are not so clear-cut as to exclude the possibility of each party's invoking them in support of its contention. This may also be said of some other provisions of the draft articles and, indeed, of many rules both of international law and municipal law. But it does not diminish the value of laying down as exact criteria as possible which, when applied in good faith by the parties, may provide the basis for determining their legal rights. The Netherlands Government appears to go too far in implying that the "directives" contained in article 46 can only serve a useful purpose when the question of separability comes before a court. The Commission, in formulating the draft articles, is entitled to assume that the parties will respect the rule "pacta sunt servanda" and will interpret and apply the treaty in good faith. It is also entitled to assume that in applying the provisions of the present articles the parties will equally act in good faith. This being so, the Special Rapporteur believes that the criteria laid down as the test of separability in the Commission's text of article 46, if not so precise as to exclude any possibility of dispute, are nevertheless meaningful and useful.

3. The new provision - paragraph 2 - which is the basis of the Netherlands Government's proposal appears for the same reason to be open to question. Its chief purpose is to make explicit the element of good faith in the application of the rule of separability. As stated in the previous paragraph, this element is already present, and doubly present, in article 46: first because the rule pacta sunt servanda governs the application of the treaty between the parties; and secondly because it also governs the application of the present articles. If, on

the other hand, the reference to "good faith" is intended to add a further requirement additional to the two criteria laid down by the Commission, then it seems to introduce an element of "ex aequo et bono" into the rule which might deprive those criteria of much of their value. Other Governments appear to have considered paragraph 2 (a) and (b) of the Commission's text to be satisfactory.

4. The Special Rapporteur suggests, however, that the formulation of article 46 needs reconsideration from a different point of view. At present the rule regarding separability of treaty provisions is stated partly in article 46, which specifies the general conditions necessary for separation to be possible and partly in the individual articles which lay down whether separation is admissible with respect to each particular ground of invalidity, termination, etc. Clearly, if the rule of separability is to be transferred to section 1 and formulated as a general rule, the new article will have to state both the general conditions and the specific cases in which separation is or is not admissible. At the same time, the existing provision in the individual articles appears to the Special Rapporteur to be formulated in a way which is a little equivocal on the question whether separation is in each case an option or the rule. For example, in article 34 (error) and article 44 (fundamental change of circumstances) it is provided that, under the conditions specified in article 46 (the separability conditions) an error or a fundamental change which relates to the particular clauses may be invoked with reference to those clauses alone. It is not clear what will be the position if one party invokes the error or fundamental change as invalidating or terminating particular clauses while the other claims that it affects the whole treaty; nor what will be the position in the reverse case where one party invokes it with reference to the whole treaty and the other then claims to limit it to particular clauses. In short, the question is whether, when the conditions for it exist, separation is a matter of law or discretion.

5. The Special Rapporteur considers that, in the interests of the security and stability of treaties, the general principle should be that, whenever the conditions for separability exist, the scope of a ground of invalidity, termination, etc., should be limited to the particular clauses to which it relates. To this principle, however, there would be some exceptions. Thus, in cases of fraud by one party (article 33) or of personal coercion exercised by one party on the

other's representative (article 35) the party whose confidence has been thus gravely abused by the other party should, it is thought, have the option to invalidate, terminate, etc., the whole treaty or the clauses to which the other party's misconduct particularly relates. In addition, the Commission decided at the fifteenth session that in cases of the coercion of the State itself by the threat or use of force (article 36) or of conflict with a rule of jus cogens (article 37) the principle of separability should not be applicable at all. Subject to these exceptions, it would seem logical that separation should be the rule, not a mere option.

6. The Special Rapporteur thinks it desirable, however, to draw attention to the possible impact of the separability rule on one other article, namely, on article 41, which deals with the termination of a treaty by implication from entering into a subsequent treaty. At both the fifteenth and sixteenth sessions the Commission gave careful consideration to the relation between the question of implied termination through entering into a subsequent incompatible treaty and that of the application of treaties having incompatible treaty provisions. It concluded that, although they may overlap to a certain extent, the two questions are distinct; and in consequence the "termination" aspect has been dealt with in article 41 and the "application" aspect in article 63. The problem is whether the provisions of article 63 make it either unnecessary or undesirable to apply the separability rule to the cases of implied termination dealt with in article 41. The Commission's conclusion as to the distinction between "implied termination" and application of incompatible provisions seems to hold good for particular clauses as well as for the whole treaty. Accordingly, it seems logical to admit the operation of the separability rule in cases of implied termination under article 41; and, in consequence, the revised draft of article 46 formulated in the next paragraph does not except article 41 from its provisions.

7. In the light of the above-mentioned considerations, the Special Rapporteur suggests that the present article should be transferred to section 1 and revised to read as follows:

"Grounds for invalidating, terminating, withdrawing from or suspending the operation only of particular clauses of a treaty

"1. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty which relates to particular clauses of the treaty may be invoked only with respect to those clauses when:

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

(b) it does not appear from the treaty or from the circumstances of its conclusion that acceptance of those clauses was an essential basis of the consent of the other party or parties to the treaty as a whole.

"2. However, in cases falling under articles 33 and 35 the State entitled to invoke the fraud or the personal coercion of its representative may do so with respect either to the whole treaty or only to the particular clauses as it may think fit.

"3. Paragraph 1 does not apply in cases falling under articles 36 and 37."

Section 2: Invalidity of Treaties

Article 31

Provisions of Internal Law regarding Competence to Enter into Treaties

The observations and proposals of the Special Rapporteur regarding this article are contained in addendum 2 to his fourth report (A/CN.177/Add.2).

In his observations on articles 46 and 47 the Special Rapporteur has also proposed that the application of the provisions of the present article should be made subject to those articles.

Article 32

Lack of Authority to Bind the State

The observations and proposals of the Special Rapporteur regarding this article are contained in addendum 2 to his fourth report (A/CN.177/Add.2).

In his observations on articles 46 and 47 the Special Rapporteur has also proposed that the application of the provisions of the present article should be made subject to those articles.

Article 33

Fraud

Comments of Governments

Israel. The Government of Israel suggests that the article should be placed 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". In paragraph 1 it suggests that in lieu of "fraudulent conduct" it would be better to say "fraudulent act or conduct". In paragraph 2 it suggests the omission of the word "only". Otherwise the paragraph might, it feels, be open to the interpretation that it excludes any option for the injured State to invoke the fraud as invalidating its consent to the whole treaty or to the particular clauses to which the fraud relates, as it may prefer. At the same time it notes that the Commission's intention, as appears from paragraph 6 of its commentary, was to allow such an option.

Jamaica. The Jamaican Government considers that a defrauded party should take steps to invalidate its consent to the treaty within a stated time after the discovery of the fraud; and that, if it fails to do so, it should be precluded from invoking the fraud as a reason for the termination of the treaty, unless the conditions for its termination are agreed upon by both parties.

Netherlands. The Netherlands Government suggests that in paragraph 2 the reference to "the State in question" is not sufficiently clear; and that the phrase "the injured State" should be used instead. Paragraph 2 should, it believes, be deleted if its proposals for the revision of article 46 are adopted (see its comments upon that article).

Portugal. The Portuguese Government examines the provisions of the article seriatim and appears to agree with the Commission's treatment of the question of fraud. As to paragraph 2, it appears to consider the Commission's proposals as providing a reasonable rule regarding partial nullity in cases of fraud.

Sweden. The Swedish Government observes that this article, like article 34 concerning error, deals with contingencies that must be very rare, and that for this reason there may be a question whether the article is really needed at the present stage. At the same time, it says that the actual formulation of the article appears to be unobjectionable.

United Kingdom. The Government of the United Kingdom doubts the need for this article. If the article is included, it believes that provision should be made for independent adjudication on its interpretation and application.

United States. The United States Government feels that the article might create more problems than it would solve. In its view, a serious question arises as to when an injured State is required to assert the existence of the fraud in order to take advantage of it. If it waits two or ten years after discovering the fraud, the United States Government thinks it extremely doubtful whether the State should be entitled to invoke the fraud. It suggests that, if the article is retained, a clause should be added to the following effect "provided that the other contracting States are notified within - months after discovery of the fraud". It also suggests that it would be highly desirable to include a requirement that the fraud should be determined judicially.

Brazilian Delegation. Stressing the difficulty of finding a satisfactory definition of fraud and the absence of recorded instances of fraud, the delegation thinks it inadvisable to give approval to provisions which might raise more difficulties in practice than they would solve.

Bulgarian Delegation. The delegation regards the separate treatment given to fraud and error by the Commission as a remarkable innovation not always admitted in the opinions of international jurists.

Colombian Delegation. In view of the diversity of meanings attributed in internal law to fraud as a ground for invalidating consent, the delegation considers that the term fraud should be given as precise and uniform a definition as possible for purposes of international law.

Ecuador Delegation. The delegation considers the article to be generally acceptable, but feels that its scope should be extended to cover a fraudulent act as well as conduct. It does not believe that the failure of States in the past to invoke absence of consent on the ground of fraud is a sufficient reason for omitting the article.

El Salvador Delegation. The delegation observes that the article does not specify whether the fraudulent conduct of a third party may be invoked as invalidating consent. It also suggests that the expression "fraudulent conduct" should be replaced by "fraudulent act".

French Delegation. The delegation takes the view that in including the principle which is the subject of the present article the Commission is acting in accordance, and not in conflict, with article 15 of its Statute.

Iraqi Delegation. The delegation considers that the fact that fraud is very rare is no reason for failing to declare that it vitiates consent. It also considers that fraud does not necessarily consist of fraudulent conduct but may arise from one fraudulent act.

Pakistani Delegation. The delegation is of the opinion that a time-limit should be placed on the right to invoke fraud, as otherwise the question of determining when the injured State is required to assert the defect in the consent will give rise to difficulties.

Peruvian Delegation. The concept of fraud is not thought by the delegation to be applicable in international law.

Syrian Delegation. The delegation approves the Commission's decision to draw up separate articles on fraud and error in order to demonstrate the differences in the effect of these two defects in the consent.

Thai Delegation. The delegation appears to consider that, despite the Commission's explanations in paragraph 3 of its commentary, the influence of English private law is predominant in the drafting of the article.

Venezuelan Delegation. The delegation thinks that the Commission was wise not to attempt to define the word "fraud" in view of the difficulty of establishing a satisfactory definition.

Observations and Proposals of the Special Rapporteur

1. Although some Governments and delegations are against making fraud a distinct ground of invalidity separate from error, the majority are either in favour of it or do not voice any objection to it. At the fifteenth session[9] some members of the Commission would have preferred to amalgamate fraud and error in a single article, and the Commission will, no doubt, now re-examine this question in the light of the comments of Governments. At that session the Commission concluded that, on balance and despite the rarity of fraud, it is advisable to keep it distinct from error in a separate article. It said:

> "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 nullify the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties."

2. If the article is retained, the Special Rapporteur considers that the Israeli Government's suggestion of reversing the order of articles 33 and 34 so as to place "fraud" after "error" should be adopted. "Fraud" is, as it were, an "aggravated" ground of invalidity more akin to coercion than to innocent forms of misrepresentation and mistake.

3. One delegation considers that in paragraph 1 the term "fraud" should be given as precise and uniform a definition as possible for purposes of international law. In general, however, Governments and delegations appear to share the view expressed by the majority of the Commission at the fifteenth session[10] that "it would be better to formulate the general concept of fraud applicable in the law of treaties in as clear terms as possible and to leave its precise scope to be worked out in practice and in the decisions of international tribunals". On the other hand, a number of the comments make the point that it is not enough to mention "fraudulent conduct", because a single act may suffice to accomplish a fraud. Although the Commission is thought by the Special Rapporteur to have

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9/ 1963 Report, paragraph 2 of the Commentary to Article 33; Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509), p. 6.

10/ Commentary to Article 33, paragraph 3.

been justified in thinking that the phrase "fraudulent conduct" covers a single act as well as a series of acts of fraud, it seems desirable in the light of the comments of Governments and delegations to expand the phrase to read "fraudulent act or conduct".

4. In paragraph 2 the Israeli Government suggests the deletion of the word "only" in order to remove any possibility of the paragraph's being interpreted as obliging the defrauded State to invoke the fraud as invalidating its consent only to the particular clauses without giving it the option to claim that its consent to the whole treaty is affected. If paragraphs 1 and 2 are read together, as they must be, the Special Rapporteur does not think that paragraph 2 is really open to the suggested interpretation; nor does he think that, if it is regarded as open to that interpretation, the deletion of the word "only" would have the effect of removing the difficulty. On the other hand, the comment of the Dutch Government that the phrase "the State in question" is not sufficiently clear appears to be justified, as two States are mentioned in paragraph 1. However, if the Special Rapporteur's proposals for the revision of article 46 and its transfer to section 1 are accepted by the Commission, it will not be necessary to retain paragraph 2 as the question of separability will have already been covered in article 46. If the Commission were to decide to retain paragraph 2, it would seem advisable to reformulate it on the lines of the corresponding paragraph in article 34 concerning "error", because from a purely drafting point of view it would be more elegant for this provision to be formulated in the same way in both articles.

5. As to the suggestion of the Jamaican and United States Governments that a specific time-limit should be laid down for invoking the invalidity of a treaty on the ground of fraud, this has been examined in the Special Rapporteur's observations and proposals regarding the revision of article 47.

6. In the light of the above observations the Special Rapporteur suggests that the article should be revised to read as follows:

> "If a State has been induced to enter into a treaty by the fraudulent act or conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty."

Article 34

Error

Comments of Governments

Israel. The Government of Israel observes that paragraph 1 speaks of an error relating to "a fact or state of facts", whereas paragraph 7 of the commentary does not appear to take so limitative a view of errors which may vitiate consent. It suggests that the text of the article should be brought into line with the commentary. In paragraph 4 it suggests that the words "mistake" and "error" should be transposed, so that the paragraph would then 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."

Commenting further on paragraph 4, the Israeli Government cites the judgement of the International Court in the Frontier Land case as authority for the view 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 also from the view that in any event such a mistake can be cured by subsequent ratification of the treaty, its publication, and by acquiescence (p. 227). The Israeli Government suggests that the language of paragraph 4 and, if necessary, also of articles 26 and 27, should be adjusted accordingly. If paragraph 4 is redrafted in the manner which it proposes, the Israeli Government notes that, by way of consequential amendment, it would be necessary to amend the title to section V of Part I and articles 26 and 27 by substituting the word "mistake" for the word "error" wherever the latter appears.

Netherlands. The Netherlands Government merely observes that, if its proposed amendment to article 46 is adopted, this will affect the drafting of paragraph 2 of the present article.

Portugal. The Portuguese Government interprets paragraph 7 of the commentary as stating that an error of law is admissible on the same footing as one of fact and, on that basis, it questions the statement. It also maintains that, in making the treaty void ab initio, the article clashes with "the theory most in vogue which even in cases of annulment on the ground of error does not allow such effects".

Sweden. The Swedish Government observes that this article, like article 33 concerning fraud, deals with contingencies that must be very rare, and that for this reason there may be a question whether the article is really needed. At the same time, it says that the actual formulation of the article appears to be unobjectionable.

United Kingdom. The United Kingdom Government considers that independent adjudication would be necessary for the interpretation and application of this article; and it invokes the cases referred to in the Commission's commentary as underlining this need.

United States. In this article, as in the previous article dealing with fraud, the United States Government considers it essential to impose some time-limit within which the defect in the consent - the error in this case - must be asserted after its discovery. It also considers that provision should be made for judicial determination of cases of "error".

Brazilian Delegation. The notion of error, which is so important in matters of contract, is thought by the delegation to lose much of its force in contemporary international law, particularly as treaties are now frequently formulated at international conferences in which a large number of countries take part. The delegation thinks it inadvisable to give approval to provisions which might raise more difficulties in practice than they would solve.

Bulgarian Delegation. The delegation appears to think that error and fraud should be dealt with together (see its comments upon article 33).

Ecuador Delegation. The delegation thinks it difficult to determine precisely the practical scope of the provisions of paragraph 1.

El Salvador Delegation. The delegation commends the drafting of the article. At the same time, it expresses the view that it may be necessary to determine not only whether there has been an error on the part of a contracting State, but also whether that error relates to a state of facts involving a third State.

Iranian Delegation. The delegation observes that the article deals with errors of fact, but not errors of law.

Iraqi Delegation. The delegation considers that it is logically necessary to include an article dealing with "error" in a body of rules relating to the validity of treaties; and that the fact that error is infrequent is no reason for failing to declare that it vitiates consent.

Pakistani Delegation. The delegation is of the opinion that a time-limit should be placed on the right to invoke an error, as otherwise the question of determining when the injured State is required to assert the defect in the consent will give rise to difficulties.

Peruvian Delegation. The concept of "error" is not thought by the delegation to be applicable in international law.

Syrian Delegation. The delegation approves the Commission's decision to separate "error" from "fraud".

Thai Delegation. The delegation considers the scope of the exception provided for in paragraph 2 to be too wide and to have the effect of rendering paragraph 1 ineffective. It also observes that the map in the Temple of Preah Vihear[11/] case, mentioned in paragraph 4 of the commentary, was neither a treaty nor part of a treaty because it had been drawn up by one party and not authenticated by the other party. In its view, therefore, the treaty could not be considered a treaty within the meaning of Part I of the draft articles.

Observations and Proposals of the Special Rapporteur

1. Two Governments express doubts as to the advisability of including an article on error. But cases of error in the conclusion of treaties are by no means rare and, whatever view may be taken as to the need to devote a specific article to "fraud", the Special Rapporteur feels that the omission of any provision regarding cases of "error" would leave an unacceptable gap in the draft articles.

2. The statement of the main rule in paragraph 1 speaks of cases where the error related to a "fact or state of facts" assumed to exist at the time when the

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11/ I.C.J. Reports, 1962, p. 26.

treaty was entered into. In paragraph 7 of its Commentary to the article the Commission said:

> "The Commission did not intend the requirement that the error must have related to a 'fact or state of facts' to exclude any possibility that an error of law should in some circumstances serve to nullify consent. Quite apart from the fact that errors as to rights may be mixed questions of law and fact, the line between law and fact is not always an easy one to draw and cases are conceivable in which an error of law might be held to affect consent. For example, it may be doubtful how far an error made as to a regional or local custom is to be considered as one of law or of fact for the purposes of the present article, having regard to the pronouncements of the Court as to the proof of a regional or local custom. Again, it would seem clear on principle that an error as to internal law would for the purposes of international law be considered one of fact."

The Israeli Government suggests that the text of the article ought to be brought into line with the commentary, by which it presumably means that paragraph 1 should be expanded so as to deal explicitly with the points mentioned in the above passage from the commentary. The Portuguese Government, on the other hand, interprets that passage as putting errors of law on the same footing as errors of fact and questions its correctness.

3. The Commission, according to the Rapporteur's understanding, had no intention of putting errors of law on the same footing as errors of fact. Its intention in paragraph 7 of the commentary was rather to enter a caveat that, in certain circumstances, an error which may be said to involve an error as to a matter of law may constitute an "error related to a fact or state of facts" and for that reason fall within the article. As each case will tend to depend on its own special facts, the Special Rapporteur doubts whether it would be advisable to attempt to expand paragraph 1 of the article in the manner apparently suggested by the Israeli Government. It seems preferable to state the basic rule contained in paragraph 1 and leave the special cases to be determined by reference to that general rule. On the other hand, when the final text of the commentary is drawn up, it may be desirable to modify paragraph 7 so as to leave no possibility for misunderstanding.

4. One Government considers the scope of the exceptions provided for in paragraph 2 to be too wide and to have the effect of largely nullifying paragraph 1. The formulation of paragraph 2, as stated in the commentary, was

taken from the Court's judgement in the Temple case. The language of the exception is certainly strict and the words "or could have avoided it" have, no doubt, to be reasonably interpreted as meaning no more than "or could with due diligence have avoided it".

5. If the Special Rapporteur's proposals for the revision of article 46 and for its transfer to section 1 as a general rule are accepted by the Commission, paragraph 3 will become unnecessary as the question of separability will have already been covered in article 46.

6. In paragraph 4 two suggestions of the Israeli Government require consideration. The first is that the words "error" and "mistake" should be transposed. The idea presumably is that as in the English text of article 26 the word "error" is used in connexion with the correction of errors in texts of treaties the same word should also be used in the present article in that connexion and the word "mistake" be employed for errors of substance. Although the words "error" and "mistake" are synonymous, the Special Rapporteur agrees that uniformity in the terminology is desirable. He thinks it preferable, however, to use the same word "error" throughout rather than to appear to make a distinction in the use of the two words which is not found in the terminology of English-language legal systems. Another consideration is that in the French and Spanish texts the same word - "erreur", "error" - is used both in article 26 and throughout the present article.

7. The second suggestion is that paragraph 4, and if necessary also article 26, should be adjusted so as to give effect to the following propositions:

(a) A mistake in transcription can vitiate the treaty (as opposed to invalidating a party's consent), subject to the necessary proof being forthcoming; and

(b) A mistake in transcription may be cured by subsequent ratification of the treaty, its publication and by acquisition.

Both these propositions are said to be involved in the Court's judgement in the Frontier Land case on pages 222-6. Both these propositions, in the view of the Special Rapporteur, oversimplify and in a certain measure distort the judgement of the Court in the Frontier Land case. The facts of that case were very special. A "Minute" - the so-called Communal Minute - was drawn up between the Communes of Baarle-Duc (Belgium) and Baarle-Nassau (Netherlands) purporting to record their

agreement as to the commune to which two plots of land appertained. The Belgian-Netherlands Mixed Boundary Commission then purported in a so-called "Descriptive Minute" to transcribe word for word the agreement in the Communal Minute. Then the Descriptive Minute was incorporated by reference in the Belgian-Netherlands Boundary Convention of 1843. The Netherlands Government claimed that the terms of the Communal Minute had been wrongly transcribed in the Descriptive Minute and ought to have attributed the two plots to the Netherlands, not Belgium. The Court found as a fact that there had been two versions of the Communal Minute, one attributing the plots to the Netherlands and the other to Belgium. It further found that the version which the Mixed Boundary Commission had intended to transcribe was the one attributing the plots to Belgium, not the one relied on by the Netherlands; and that in consequence there was no mistake in the Descriptive Minute and no mistake in the Convention of 1843. It is true that the Court added that the Convention had been "confirmed by the Parliament of each State and ratified in accordance with their constitutional processes"; and that its terms had been "published in each State". But it did so only by way of finding confirmation for its conclusion that no case of mistake had been made out by the Netherlands Government. Accordingly, the Special Rapporteur does not feel that the case supports the propositions which are drawn from it in the comments of the Israeli Government.

Moreover, independently of the Frontier Land case, the inclusion of the two propositions does not appear to be advisable. To lay down that a mistake in transcription may, as such, vitiate a treaty is to obscure if not eliminate the distinction which the Commission has been so careful to draw - and rightly - between cases of error under article 26 and those under the present article. Again, while it may be possible for an erroneously transcribed agreement to be accepted and acted on by the Parties as the treaty binding upon them, this will not be a case of "curing" an error but of substituting a new agreement for the original one. So far as it may involve any element of error, it will be an error as to the substance of the treaty; and so far as any curing of an error is involved, the case will fall under article 47.

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8. In the light of the above observations the Special Rapporteur proposes that the article should be revised to read as follows:

"Error

"1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

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

"3. When there is no error as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply."

Article 35

Personal Coercion of Representatives of States

Comments of Governments

Czechoslovakia. The Czechoslovak Government notes with satisfaction that article 35 declares null and void ab initio treaties concluded through personal coercion of representatives of States. Its delegation recalls the tragic events which had followed the imposition on Czechoslovakia of the Munich Agreement.

Israel. The Government of Israel observes that there is a possible inconsistency between the absolute expression "without any legal effect" in paragraph 1 and the relative, partial, invalidation of the consent under paragraph 2; and that it is not clear whether any difference is intended between the expression "shall be without legal effect" in paragraph 1 of this article and the expression "shall be void" in article 36. It suggests that paragraph 1 should be revised to read 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."

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In paragraph 2, it suggests the omission of the word "only". Otherwise the paragraph might, it feels, be open to the interpretation that it excludes any option for the injured State to invoke the coercion as invalidating the consent to the whole treaty or to the particular clauses to which the coercion relates, as it may prefer.

Netherlands. The Netherlands Government merely observes that, if its proposed amendment to article 46 is adopted, this will affect the drafting of the present article.

Portugal. The Portuguese Government comments upon the legal principles underlying this and the following article. Although stressing the novel character of this article, it considers the Commission's approach to the question of personal coercion to be praiseworthy. It also considers paragraph 2 to provide a reasonable rule regarding partial nullity in cases of personal coercion.

Sweden. The Swedish Government observes that, like articles 33 (fraud) and 34 (error), the present article deals with a contingency that is most unusual. However, as there have been some well-known cases of the kind contemplated by the article, and as the rule proposed has a good deal of support in "doctrine", it thinks that an express provision on the matter may be desirable.

United Kingdom. The United Kingdom Government observes that it is not clear whether paragraph 1 would cover the case of signature of a treaty which is subject to ratification and, if so, whether a signature procured by coercion is capable of being ratified.

United States. The United States Government feels that paragraph 1 goes too far in providing that an expression of consent obtained by means of coercion "shall be without any legal effect"; and that it would be better to provide that it may be treated by the injured State as being without legal effect. This would prevent the coercing State from asserting the invalidity of the treaty on the basis of the coercion. Nor, in the opinion of the United States Government, ought the injured State to be required to take the view that the treaty is without any legal effect; for it may conceivably wish to ignore the coercion if its interest in maintaining the security of the treaty is dominant. Furthermore, if paragraph 1 is revised in the way it suggests, the United States Government thinks that it will have the advantage of helping to prevent third States from attempting to meddle in a situation where the parties immediately involved are content to continue the treaty.

Colombian Delegation. The delegation endorses the distinction drawn by the Commission between personal coercion of representatives and coercion of the State itself.

Ecuador Delegation. The delegation suggests that the provisions of article 35 should be extended to cover members of the families of representatives.

Iraqi Delegation. The delegation approves the position adopted by the Commission on the present article.

Pakistani Delegation. The delegation suggests that in paragraph 1 the word "shall" should be replaced by "may".

Spanish Delegation. The delegation opposes the amendment suggested by the United States Government that the treaty should not be invalid unless the injured State invokes the coercion as a ground for considering the treaty to be invalid.

Thai Delegation. The delegation welcomes the progressive character of the article.

Venezuelan Delegation. The delegation thinks that it would be better to include in the article itself a provision that "representatives" include families of representatives instead of leaving this point to be covered in the commentary.

Observations and Proposals of the Special Rapporteur

1. Four Governments suggest that paragraph 1 should be revised so as to give the State the right to invoke the coercion as invalidating its consent rather than automatically to render the expression of consent obtained by coercion "without legal effect". The Spanish Government, on the other hand, opposes this suggestion. The Commission at the fifteenth session took the view 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".

2. The Special Rapporteur is inclined to doubt whether the absolute nullity of the consent is necessarily called for in cases covered by the present article. Cases of the coercion of the State itself are dealt with in article 36, under which any treaty procured by the threat or use of force in violation of the principles of the Charter is declared to be void. Those are indeed cases of the utmost gravity. But, although they may sometimes also involve direct coercion of high officers of the State, it is the forcible compulsion of the State in which the extreme gravity of those cases consists. The cases of personal coercion exercised upon a

representative in his individual capacity with which the present article deals appear, on the other hand, to be more akin to cases of "fraud" than to the cases under article 36. Accordingly, the Special Rapporteur feels that it would be quite justifiable to accept the suggestion that, as in cases of "fraud", the State whose representative had been subjected to personal coercion should have the option to accept the treaty as valid, or to reject it as invalidated by the coercion or, in appropriate cases, to regard as invalid only the particular clauses to which the coercion relates. In that event, it would seem natural to use the same formula as in previous articles, i.e. "the State may invoke the coercion as invalidating its consent to be bound".

3. If paragraph 1 is revised in the manner just indicated, the problem posed by the United Kingdom as to whether a signature procured by coercion is capable of ratification will become comparatively easy of solution. Ratification of such a signature would then be possible, as in the case of a signature procured by fraud, but it would not preclude the State from afterwards invoking the coercion as invalidating its expression of consent unless the ratification were effected or were confirmed after the State had become aware of the coercion. In other words, ratification would be definitive and bind the State only if the case came within the provisions of article 47. In order to cover this point, however, it will be necessary to speak not of an "expression of consent to be bound" but of a signature's having been procured by coercion.

4. If the Special Rapporteur's proposals for the revision of article 46 and its transfer to section 1 as a general rule are accepted by the Commission, paragraph 2 of the present article will become unnecessary, since the question of separability will already have been covered in article 46.

5. The Special Rapporteur accordingly proposes that the article should be revised to read as follows:

> "If the signature of a representative of a State to a treaty has been procured by coercion, through acts or threats directed against him in his personal capacity, the State may invoke such coercion as invalidating its consent to be bound by the treaty."
