UNITED NATIONS
GENERAL
ASSEMBLY

Distr.
GENERAL

A/CN.4/175
23 February 1965
ENGLISH
ORIGINAL: ENGLISH/FRENCH

INTERNATIONAL LAW COMMISSION
Seventeenth session

LAW OF TREATIES

Comments by Governments on parts I and II of the draft articles on the law of treaties drawn up by the Commission at its fourteenth and fifteenth sessions

65-03334

(309 p.)

/...

TABLE OF CONTENTS

Page

NOTE BY THE SECRETARY-GENERAL 6

SECTION I - WRITTEN COMMENTS BY GOVERNMENTS

1. Afghanistan 8
2. Australia 9
3. Austria 13
4. Burma 22
5. Canada 24
6. Czechoslovakia 27
7. Denmark 29
8. Finland 41
9. Israel 46
10. Jamaica 63
11. Japan 65
12. Luxembourg 84
13. Malaysia 104
14. Pakistan 105
15. Poland 106
16. Portugal 109
17. Sweden 138
18. Turkey 145
19. Uganda 149
20. United Kingdom of Great Britain and Northern Ireland 150
21. United States of America 157

SECTION II - COMMENTS IN THE SIXTH COMMITTEE

Part I: Conclusion, entry into force and registration of treaties

Section I: General provisions 194

Article 1. Definitions 195
Article 2. Scope of the present articles 199
Article 3. Capacity to conclude treaties 200

/...

TABLE OF CONTENTS (continued)

	Page
Section II: Conclusion of treaties by States	202
Article 4. Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty	202
Article 5. Negotiation and drawing up of a treaty	203
Article 6. Adoption of the text of a treaty	204
Article 7. Authentication of the text	205
Article 8. Participation in a treaty	205
Article 9. The opening of a treaty to the participation of additional States	
Article 10. Signature and initialling of the treaty	214
Article 11. Legal effects of a signature	214
Article 12. Ratification	214
Article 13. Accession	215
Article 14. Acceptance or approval	216
Article 15. The procedure of ratification, accession, acceptance and approval	216
Article 16. Legal effects of ratification, accession, acceptance and approval	216
Article 17. The rights and obligations of States prior to the entry into force of the treaty	217
Section III: Reservations	217
Article 18. Formulation of reservations	
Article 19. Acceptance of and objection to reservations	
Article 20. The effect of reservations	217
Article 21. The application of reservations	
Article 22. The withdrawal of reservations	
Section IV: Entry into force and registration	227
Article 23. Entry into force of treaties	227
Article 24. Provisional entry into force	227
Article 25. The registration and publication of treaties	227

A/CN.4/175
[illegible]

TABLE OF CONTENTS (continued)

Page

Section V: Correction of errors and the functions of depositaries 228

Article 26. The correction of errors in the texts of treaties for which there is no depositary. . . 228

Article 27. The correction of errors in the texts of treaties for which there is a depositary . . . 228

Article 28. The depositary of multilateral treaties . . . 228

Article 29. The functions of a depositary 229

Part II: Invalidity and termination of treaties 230

Section I: General provision 230

Article 30. Presumption as to the validity, continuance in force and operation of a treaty 230

Section II: Invalidity of treaties 232

Article 31. Provisions of internal law regarding competence to enter into treaties 232

Article 32. Lack of authority to bind the State 244

Article 33. Fraud 246

Article 34. Error 250

Article 35. Personal coercion of representatives of States 252

Article 36. Coercion of a State by the threat or use of force 254

Article 37. Treaties conflicting with a peremptory norm of general international law (jus cogens). . . 267

Section III: Termination of treaties 279

Article 38. Termination of treaties through the operation of their own provisions 279

Article 39. Treaties containing no provisions regarding their termination 279

Article 40. Termination or suspension of the operation of treaties by agreement 281

Article 41. Termination implied from entering into a subsequent treaty 284

Article 42. Termination or suspension of the operation of a treaty as a consequence of its breach. . . . 284

Article 43. Supervening impossibility of performance . . . 286

Article 44. Fundamental change of circumstances 288

Article 45. Emergence of a new peremptory norm of general international law

TABLE OF CONTENTS (continued)

Page

Section IV: Particular rules relating to the application of sections II and III 302

Article 46. Separability of treaty provisions for the purposes of the operation of the present articles 302

Article 47. Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty 303

Article 48. Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations. . 304

Section V: Procedure 304

Article 49. Authority to denounce, terminate or withdraw from a treaty or suspend its operation 304

Article 50. Procedure under a right provided for in the treaty 305

Article 51. Procedure in other cases 306

Section VI: Legal consequences of the nullity, termination or suspension of the operation of a treaty 308

Article 52. Legal consequences of the nullity of a treaty 308

Article 53. Legal consequences of the termination of a treaty 309

Article 54. Legal consequences of the suspension of the operation of a treaty 309

NOTE BY THE SECRETARY-GENERAL

1. At its fourteenth session in 1962 and its fifteenth session in 1963, the Commission adopted parts I and II, respectively, of a preliminary draft of articles on the law of treaties. Part I (articles 1-29) covered the conclusion, entry into force and registration of treaties, while part II (articles 30-54) dealt with the invalidity and termination of treaties. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit its draft articles, through the Secretary-General, to Governments for their observations.[1/]

2. Pursuant to this decision the Secretary-General, by circular letters of 23 October 1962, 10 October 1963, 3 July 1964 and 13 November 1964, communicated the Commission's request to the Governments of Member States.

3. By 23 February 1965, the Governments of Afghanistan, Australia, Austria, Burma, Canada, Czechoslovakia, Denmark, Finland, Israel, Jamaica, Japan, Luxembourg, Malaysia, Pakistan, Poland, Portugal, Sweden, Turkey, Uganda, the United Kingdom of Great Britain and Northern Ireland, and the United States of America had submitted their comments on part I or II, or on both parts, of the draft. These comments are set out in section I of the present document. Any comments received after 23 February 1965 will be circulated later as addenda to this document.

4. At the seventeenth and eighteenth sessions of the General Assembly, the Sixth Committee considered parts I and II, respectively, of the draft articles during its discussion of the item on the report of the International Law Commission. The views expressed by representatives on specific articles of the draft are reproduced in section II of the present document for the convenience of the Commission. Comments of a more general scope will be found in the summary records of the Sixth Committee.[2/]

1/ Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209), para. 19, and Eighteenth Session, Supplement No. 9 (A/5509), para. 13.

2/ Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 734th to 752nd meetings, and Eighteenth Session, Sixth Committee, 780th to 793rd meetings.

SECTION I

WRITTEN COMMENTS BY GOVERNMENTS

1. AFGHANISTAN

/Parts I and II/

Transmitted by a note verbale of 5 August 1964 from the Permanent Mission to the United Nations

/Original: English/

...

The Government of Afghanistan wishes to extend its congratulations to the International Law Commission for the preparation of the first draft of parts I and II of the draft articles on the law of treaties. In the view of the Government of Afghanistan, both parts I and II are generally acceptable. The Afghan Government will prepare its detailed comments and observations when the preparation of part III of the draft articles on the law of treaties is completed by the Commission. Since the whole draft on the law of treaties and its various articles need rearrangement, the Afghan Government will reserve its observations for the final position in the light of the second reading by the International Law Commission.

The Government of Afghanistan looks forward to the completion of the codification of this important field which is the cornerstone of international law whose conclusion and acceptance will serve the cause of peace and understanding between nations.

...

2. AUSTRALIA

/Parts I and II/

Transmitted by a note verbale of 12 February 1965 from the Permanent Representative to the United Nations

/Original: English/

Article 1

Definition of "treaty". This is of course a problem of long standing and complexity. It is considered that the present definition may embrace a great quantity of informal understandings reached by exchange of notes, understandings between States which are not intended to give rise to legal rights and whose registration with the United Nations might cause the system of registration to break down. It may be thought that the phrase "governed by international law" restricts the scope of the definition; but the commentary gives a limiting explanation of this phrase, and it is considered that the definition should also include a reference to the intention of the parties to create legal obligations between themselves.

Article 9

The wording of paragraphs 1 and 2 is rather obscure, but it is understood that these two paragraphs are intended to be mutually exclusive. The expression "a small group of States" is particularly vague. It is not clear, for example, whether regional collective defence treaties would be included in paragraph 1 or paragraph 2; such treaties, by their nature, must be entitled to restrict their membership narrowly if they so wish. Accordingly, it is considered undesirable that paragraph 1 should apply to many multilateral treaties which seem to be included in its scope, and that paragraph 1 would be better restricted to general multilateral treaties only.

In paragraphs 1 and 2, the number of years is left blank. It is considered that this number should be high, perhaps 25.

Paragraph 3 (a) might be better worded, since it is presumed paragraphs 1 and 2 are mutually exclusive. Paragraph 3 also raises the difficulty for the depositary of determining what is a "State". This might be avoided (at some theoretical inconvenience) by substituting some other wording in the second line.

Paragraph 4 is inadequate on two grounds: (a) such a notification might be considered to have the effect of recognition, and notification to the depositary should be an alternative; and (b) this provision should apply also to article 8, paragraph 1.

Article 17

The Commission states in effect that it is extending an existing principle in this matter, to include States which participate in treaty-making even if they do not sign the treaty. This seems to go too far: if a State leaves a conference or votes against adoption, for example, it can have no moral obligation for the outcome. It is considered that the words "negotiation, drawing up or adoption of a treaty or which" should be deleted from paragraph 1.

Article 19

Paragraph 3 may in practice be unworkable. A non-party to the treaty should not be obliged to formulate objections within twelve months of the making of a reservation if the reservation is made before the treaty is in force; indeed it is considered no State should be obliged to make a reservation before it becomes a party itself. Nor is it State practice to do so. The proposal might lead to many "interim" objections, put in to safeguard a State while its final position is determined. It is considered that paragraph 3 as it stands should apply to existing parties only; any other States should be regarded as accepting a reservation if they do not object, either on becoming parties or within some reasonable time thereafter.

Paragraph 4 seems undesirable. There are a number of reasons why a State might delay its own ratification, and its objection should still be enforceable at whatever later date it acts. It is true that delay in ratification would cause difficulty with treaties under article 20, paragraph 3 (or if the majority system were used, which the Commission does not propose); it is considered that article 19, paragraph 4 should be moved to be article 20, paragraph 3 (c) with consequential amendment; alternatively, our suggested amendments to paragraph 3 would make paragraph 4 unnecessary altogether, and this seems much the preferable solution.

/...

Article 20

There seem to be two problems here. Paragraph 2 (a) appears to make the reserving State a party vis-a-vis an accepting State at a stage when the reserving State may not be a party generally, because a reservation can be made at time of signature. Moreover, on its face, paragraph 2 (a) means that failure to object to a reservation by an unrecognized State would specifically create a bilateral treaty relationship with that State. We wonder if the paragraph might read: "constitutes the reservation a part of the treaty in its application between the reserving State and the accepting State", or some similar wording. Finally, it might be desirable, in this article or in some other article, to make some reference to the effect of a reservation on the status of the reserving State as a party to the treaty, both before and after acceptance of the reservation.

Paragraph 2 (b) appears to exclude any effect for an objection to a reservation which the objecting State does not consider "incompatible with the object and purpose of the treaty" but which is still objectionable. If the intention is that such an objection should be ineffective, this seems unacceptable in principle. Furthermore, it leads to a conflict with article 18, paragraph 1 (d), because (assuming good faith) any reservation which is "incompatible with the object and purpose" is excluded from the beginning and paragraph 2 (b), if limited to such reservations, should therefore have no effect. It is not understood why a State should be forced to accept any reservation which falls short of such incompatibility: such a rule appears to put the reserving State in a more advantageous position than the objecting State. Moreover, it seems undesirable to drive an objecting State into declaring a reservation to be incompatible so that its objection can be sustained. Finally, the 1951 decision of the International Court of Justice appears to refer to the status of a reserving State as a party to the treaty, and not to its treaty relationship with an individual objecting State. It is considered that the qualifying words "which considers it ... purpose of the treaty" should be deleted.

Article 40

It is considered that twenty-five years would again be a suitable period: there are a number of cases of multilateral treaties which for years have languished with few parties, and have then proved more popular.

Article 42

Paragraph 2 (b) (ii) seems to give a very large power, which might be out of proportion to the breach; the commentary mentions the case only of a treaty which provides for termination. It might be better to use a longer form of words, which would circumscribe the right more precisely; but if by "common" is meant "unanimous" this should be a sufficient safeguard. It is considered the clearer word should preferably be used.

Article 44

It is considered that paragraph 3 (a) should at least extend also to any other determination of territorial sovereignty: all such territorial determinations need to be final, and not boundary determinations alone. It might also be worth discussing whether in paragraph 2 (b) a word such as "continuing" might be added before "obligations", on the ground that if a treaty has been carried out completely on both sides, so that no obligations under it remain, it would be contrary both to common sense and to the need for stability and certainty if an attempt could be made to bring such a treaty within article 44.

3. AUSTRIA

[Part I]

Transmitted by a note verbale of 11 November 1963 from the Permanent Representative to the United Nations

[Original: English]

The views of Austria on the draft articles on the law of treaties, prepared by the International Law Commission at its fourteenth session, are as follows:

1. General principles

The Austrian Government fully appreciates the work done by the International Law Commission.

The work of the Commission in the field of the law of treaties has led to the proposal of concrete articles and provisions. This result was possible only because of the extensive preparatory work and exhaustive discussions in the Commission. In fact, the law of treaties is complex and not easy to codify, despite the uniformity of the underlying legal concepts and the relative clarity of the existing norms of customary law. A special difficulty is that these are not problems of substantive law, but problems of adjective law, since the norms to be codified will govern the establishment of a rule of international law, or in other words, will define the procedure by which a rule of international law is legally created.

The particularly detailed preparatory work of the Commission, which has been dealing with the law of treaties since 1949, is commensurate with the breadth and importance of the subject. Four Special Rapporteurs have devoted their learning and experience to a number of reports, the importance of which to international law itself and to the knowledge of international law is beyond question.

However, the very importance of the subject matter makes it necessary to raise the question of the form of codification. On this question of external form, the Commission decided at its thirteenth session in 1961 "that its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention"; but only two years earlier, the Commission, endorsing the well-founded opinion of Sir Gerald Fitzmaurice, summed up their reply to the same question in the

statement that "it seems inappropriate that a code on the law of treaties should itself take the form of a treaty". In the view of Austria, the latter opinion should prevail.

It must be borne in mind, in connexion with the codification of the law of treaties, that the task is to codify adjective law of a universal character. The norms of the law of treaties need to be codified, clarified, elucidated and progressively developed, but not to be enshrined in a treaty. A code on the law of treaties would be a kind of constitutional norm, laying down for the future the procedure for the creation of a norm - in other words, a norm ranking above others, or at least taking precedence over norms of equal rank. A code on the law of treaties in the form of a convention would, however, be concluded in the same manner as any other multilateral treaty. There is no way of distinguishing it from the other law-making treaties, to which, nevertheless, it will always thereafter be applicable.

In addition, a problem which will be difficult to solve would arise at the time of concluding such a convention on the law of treaties. As the Commission points out in paragraph 22 of the introduction, the draft articles on the law of treaties contain some "elements of progressive development". Wherever, therefore, the draft articles deviate in the direction of progressive development - which Austria welcomes - from the currently valid rules of customary law, the question will arise, when concluding a convention on the law of treaties, whether the rules of customary law valid at the time of concluding the convention or the new rules created by the convention itself should apply to it.

Other difficulties might arise in cases where, after the conclusion of such a convention on the law of treaties, States which have accepted the convention conclude treaties with States which have not accepted it. There is no possibility in law of giving precedence to such a convention and, as it were, forcing its provisions upon third States which have not accepted the convention by inducing them to observe the rules laid down in the convention when concluding treaties. Thus, such cases must again give rise to the question which law is to apply to specific treaties concluded in the future - the rules of customary law in that field, or the norms of the convention. In either case one of the contracting

parties will be prevented from applying the norms (of the convention or of customary law) which it considers valid.

Finally - and this, in the view of Austria, appears to be a weighty argument against the conclusion of a convention on the law of treaties - such a convention, in all probability, will for a long time lack the universality which must be inherent in the "law of treaties" as the norm governing the creation of norms and which is needed in this field of law as in no other. Indeed, it is questionable whether such a convention can ever achieve true universality. Even if all subjects of international law eventually accede to the convention, they will almost certainly do so only with a variety of overlapping reservations. The consequence would be that the conclusion of treaties on a bilateral or multilateral basis between subjects of international law would become considerably more difficult than it is now, when the norms of the existing customary law in this field have the sanction of the whole international community.

Austria wished to point out these difficulties, which are mentioned to some extent in the introduction to the report (A/5209, chap. II, para. 16). Austria considers a code on the law of treaties, perhaps in the form of a General Assembly resolution, more beneficial than the conclusion of a convention on the subject.

2. Definitions

In the view of Austria, the definition of "treaty" given in article 1, paragraph 1 (a), is not complete, in that it omits an essential characteristic, namely, the intention to create between the contracting parties rights and obligations under international law, and the fact that such rights and obligations are indeed created by a treaty.

This significant point is mentioned in, for instance, article 2, paragraph 1, of the text of articles of code (Yearbook of the International Law Commission, 1956, vol. II, p. 107) prepared by Sir Gerald Fitzmaurice, where the definition states, inter alia, that a "treaty" is "intended to create rights and obligations, or to establish relationships, governed by international law".
Sir Hersch Lauterpacht puts it even more precisely when he defines treaties as "agreements between States, including organizations of States, intended to create legal rights and obligations of the parties". (Article 1 of text of articles, Yearbook of the International Law Commission, 1953, vol. II, p. 93).

Some such terminology should be added to the definition of "treaty" in article 1, paragraph 1 of the International Law Commission's latest draft.

Furthermore, there seems to be no real definition of "treaties in simplified form" ("accords en forme simplifiée"). The definition given in article 1, paragraph 1 (b), does not differ in content from the definition of "treaty" in paragraph 1 (a). The list of the ways of concluding a treaty ("exchange of notes... agreed minute, etc.) appears in paragraph 1 (a) also. It is difficult to see what constitutes the difference between the two kinds of treaties. The commentary (paragraph (11)) begs the question by stating, in the French version: "La Commission a défini cette forme de traités (i.e., "en forme simplifiée") en prenant pour critère sa forme simplifiée."

Austria would suggest that "accord en forme simplifiée" should be defined by saying that this group of agreements between States does not require ratification. The requirement of ratification is, in fact, the essential characteristic which distinguishes the "traité" from the "accord en forme simplifiée".

The definition of "general multilateral treaty" in article 1, paragraph 1 (c), seems to refer to rather indefinite characteristics, such as "matters of general interest to States as a whole". Here it might be wise to consider taking as the sol criterion the establishment of general norms by the treaty (law-making treaty).

Finally, it might be useful also to define the terms "signature", "ratification", "accession", "acceptance" and "approval", listed baldly in article 1, paragraph 1 (d).

3. Capacity to conclude treaties

Article 3, paragraph 1, correctly points out that capacity to conclude treaties under international law is possessed by States and by other subjects of international law. The commentary explains that the phrase "other subjects of international law" is primarily intended to cover international organizations and the Holy See but also includes other legal persons regarded by traditional doctrine as subjects of international law. In the view of Austria, this provision is fully in accord with existing international law.

/...

Paragraph 3 of this article, however, contains a restriction with respect to international organizations, stating that "in the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned".

In the view of Austria, this restriction does not appear absolutely necessary. Rather, the starting point might well be that capacity to conclude treaties must be an inherent right of any international organization, if it is at the same time a subject of international law. Indeed, capacity to conclude treaties even appears to be the essential criterion of the status of a subject of international law. An international organization lacking the capacity to conclude treaties would not be a subject of international law.

As may be seen in practice, the constitutions of many international organizations do not mention the question of the capacity of the organization in question to conclude treaties. In most of these cases, however, the organs of the organization in question have considered themselves competent to conclude treaties on behalf of the organization, either with other international organizations or with States. If, on the other hand, the constitutions do contain provisions concerning the conclusion of treaties, they either relate to the question which organs are competent for the purpose - in which case they are of a procedural nature - or limit the extent of freedom to conclude treaties, which in principle is all-embracing, by stipulating that only treaties on certain subjects are permitted. Constitutional restrictions do not, however, affect in principle the capacity to conclude treaties as such.

In the view of Austria, it would not be correct if the capacity to conclude treaties, as such, of an international organization were to be derived solely from the constitution of the organization. If the constitution does not contain any provisions concerning capacity to conclude treaties, it would have to be assumed, from the existing text of paragraph 3, that the organization would not possess the capacity to conclude treaties. Without such capacity, however, the organization would not be a subject of international law.

The judgements of the International Court of Justice dealing with the structure of international organizations, and in particular the opinions in the "reparation case" (I.C.J. Reports, 1949, pp. 174 et seq.) and the "expenses case" (I.C.J. Reports, 1962, pp. 151 et seq.), do not conflict with this interpretation if they concede to

/...

an international organization the competence which, though not provided for in the constituent treaty, is essential to the performance of its functions. According to the constitution of an international organization, such a reference to those functions of the organization which are mentioned in the constitution means primarily that the organization's freedom to conclude treaties is constitutionally limited by its prescribed field of activities. The Commission is therefore correct when it says, in the commentary to article 3, paragraph 3, that the provisions of the constituent treaty of an organization determine "the proper limits of its treaty-making activity", whereas the statement that "it is the constitution as a whole ... that determines the capacity of an international organization to conclude treaties" appears to be inadequate, in that organizations lacking the capacity to conclude treaties cannot be regarded as subjects of international law and are therefore not covered by article 3.

It is therefore suggested that article 3, paragraph 3, might be deleted altogether; at the very least, the wording "depends on the constitution" should be changed in such a way as to indicate that the constitution can only contain restrictions on the freedom to conclude treaties.

4. Organs competent to conclude treaties

In the view of Austria, article 4 raises an important problem.

For the most part, international law ascribes the question of the competence to conclude international treaties to domestic law. Thus, international treaties are created by organs authorized under domestic law and subject to constitutional provisions. "It is clear," says Charles Rousseau (Droit International Public, 1953, p. 21) "that, international law being silent on the subject, the conditions for the exercise of competence to conclude treaties are determined, at discretion, by the domestic law of each State. Constitutional prescripts are decisive in this respect."

This principle - namely, that the determination of the organs competent to conclude treaties is ascribed to domestic law - is not mentioned at all in the existing text of article 4. Reference is made to it only in the commentary. In the view of Austria, a corresponding general reference should be included in the text of article 4 also.

/...

The Commission previously took this into account in the text of articles tentatively adopted by the Commission at its third session, which included the following provision: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose" (Yearbook of the International Law Commission, 1951, vol. II, p. 73, article 2; Yearbook of the International Law Commission, 1952, vol. II, p. 51, article 4).

Perhaps, therefore, it would be appropriate, in article 4, to refer to a legal presumption that the organs mentioned there are duly authorized representatives. However, this legal presumption would have to be a praesumptio juris and not a praesumptio juris ac de jure, thus allowing for the possibility of a disclaimer. Guggenheim, for example, says: "There is a refutable presumption of competence to conclude international treaties in the case of Heads of State and Foreign Ministers" (Lehrbuch des Völkerrechtes, 1948, p. 61).

5. Subsequent opening of treaties

Austria whole-heartedly welcomes the opening of multilateral treaties to as many States as possible, as their acceptance strengthens the legal community and leads to a wider application of international law. In the view of Austria, article 8 is in this respect fully in accord with the present situation in international law and the present practice of States. In particular, it seems proper that multilateral treaties, unless the treaties provide otherwise, should be open to accession by all States.

Article 9, on the other hand, contains some formulae which deviate greatly from the prevailing concept of international law. If a multilateral treaty includes precise provisions on the question which States may accede to it, a more extensive opening of this treaty - outside the group of States to which the treaty was open from the beginning - means an amendment of the treaty. If, however, the treaty does not contain an amendment clause, so that no special procedure is laid down for possible amendments, the consent of all the contracting parties is needed for any legally valid amendment of the treaty. In the case of treaties concluded

between a small group of States, the present draft explicitly recognizes the principle that the consent of all the parties is required (para. 2). Where other multilateral treaties are concerned, however, paragraph 1 (a) makes it possible for other States to accede against the will of some of the contracting States and contrary to the explicit wording of the treaty (which expressly restricts the right of accession).

This provision seems to go too far, because it violates the principles of sovereignty. Paragraph 1 (a) should therefore be amended, if not entirely deleted.

It may be emphasized in this connexion that the problem under consideration will not arise if the treaty contains an amendment clause along the lines of Article 108 of the United Nations Charter, providing that any amendment - including an extension of the right of accession - would be subject to the consent of a two-thirds majority. In such cases, the treaty can be opened to other States simply with the consent of two-thirds of the contracting States.

6. Ratification

Austria fully agrees that, as stated in article 12, treaties in principle require ratification. It is true that Sir Gerald Fitzmaurice thought otherwise (article 32 of articles of code, Yearbook of the International Law Commission, 1956, vol. II, p. 113), but the two earlier Rapporteurs supported the principle now advocated by the Commission.

It is unfortunate that the term "ratification" (cf. article 1, para. 1 (d) of the draft, and para. 2 of these comments) is not defined. In the view of Austria, such a definition, which should be included in article 1, could easily be based on the wording of article 6, paragraph 1, of the text of articles prepared by Sir Hersch Lauterpacht (Yearbook of the International Law Commission, 1953, vol. II, p. 112).

7. Reservations

The question of reservations raises difficult legal problems. The Austrian Government particularly appreciates the fact that the Commission, in codifying this part of the law of treaties, was guided by the idea of progressive development,

/...

although admittedly the traditional concept that reservations should, in principle, be restricted still enjoys wide support. The Commission accepted, by and large, the system recognized by the International Court of Justice in its opinion concerning the Genocide Convention.

The question may arise whether it is in keeping with the basic ideas of the law of treaties that very far-reaching reservations to multilateral treaties should be permitted and made possible, since the integrity of the text of the treaty in question may thereby be impaired, which is certainly not desirable. In addition, acceptance of and objections to reservations by individual States create relations of constantly different content and different scope between the States parties to one and the same multilateral treaty.

A flexible attitude towards reservations may perhaps result in the accession to multilateral treaties of a maximum number of States. Whether the practice of recent years justifies any encouraging conclusions in this respect is open to question.

Austria, therefore, fully shares the view of those members of the Commission who argued that, while an objection by a single State to a reservation could not prevent the accession of the reserving State, reservations objected to by a larger number of States - perhaps even the majority - were not admissible, and accession would not be possible unless the reservations were withdrawn (cf. commentary to articles 18-20, para. (11)). If the majority of the contracting States insists on the integrity of the text of the treaty, the reservation cannot be accepted.

In addition, Austria would consider it necessary to make it clear, in connexion with the provisions on reservations, in article 20 in particular, that even where a State accepts, explicitly or otherwise, a reservation by another State, the consequence is that the treaty comes into force as between the two States in question, but not in respect of those provisions to which the reservation related. The present wording leaves some room for doubt as to whether, in such a treaty relationship between two States, those provisions of the treaty to which the reservation relates would apply to the State that has accepted the text of the treaty in its entirety but not, because of the reservation, to the other party to the treaty. This should be clarified by means of a reference to the principle of reciprocity.

4. BURMA

[Part I]

Transmitted by a letter of 29 March 1963 from the Permanent Mission to the United Nations

[Original: English]

The Revolutionary Government of the Union of Burma consider, as a matter of principle, that the draft articles on the law of treaties drawn up by the International Law Commission should be acceptable as codification of international law in the form of multilateral treaty is a major step towards greater understanding of international law and fulfilment of the object of assuring the coexistence of different interests which are worthy of legal protection.

The Revolutionary Government of the Union of Burma, however, reserve their position as to the actual contents of the draft articles till the time they become a signatory to the Convention of the said articles.

[Part II]

Transmitted by a note verbale of 28 May 1964 from the Permanent Mission to the United Nations

[Original: English]

The Government of the Union of Burma is in general agreement that the principles embodied in the draft articles reflect prevailing international law and practice on the subject. While reserving the right to make further remarks when the draft articles come up for fuller discussion, the Government would, at this stage, offer the following suggestions.

While the commentary following draft article 31 is illuminating and persuasive, the principle of the article may need further consideration. Treaties, as well as international law itself, draw their force and strength from free consent, and the validity of a treaty must be derived from that consent given by the competent sources within a State in due and proper form. The contracting parties should perhaps use the usual gap between signature of a draft

or preliminary agreement and its ratification to examine carefully and assure themselves that the conditions are satisfied. The draft afticle may, as it now stands, give the parties a feeling of false security in entering into treaties, in the belief that the burden of showing "manifest" lack of competence or defect in procedure would fall on the party which wishes to withdraw.

It may also be useful to consider whether the doctrine of rebus sic stantibus should not be included in an additional clause to draft article 38. This doctrine, clear enough in theory, has often given rise to difficulties of interpretation in international relations.

5. CANADA

[Part I]

Transmitted by a letter of 26 November 1963 from the Under-Secretary of State for External Affairs

[Original: English]

1. In its commentary on article 4, paragraph 6, the Commission has expressed the desire to have information from Governments as to their practice with regard to instruments of full powers. In Canadian practice, the Prime Minister and the Secretary of State for External Affairs are considered to have general authority to bind the Government and full powers are therefore not issued for them. If full powers are requested and the representative of Canada is other than the Prime Minister or the Secretary of State for External Affairs, particular full powers are issued by the Secretary of State for External Affairs. While it has not been Canadian practice to issue general full powers, it is realized that circumstances might arise in which it would be advantageous to do so and accordingly, the Canadian Government favours a provision recognizing such powers.

2. It is noted that in paragraph (7) of the commentary on article 4, it is stated that instruments of ratification, accession, acceptance and approval "are normally signed by Heads of State, though in modern practice this is sometimes done by Heads of Government or by Foreign Ministers". The Commission might wish to be apprised that the usual Canadian practice in this regard is for such instruments to be executed by the Secretary of State for External Affairs.

3. It is noted that in article 8 the Commission has recommended that where a general multilateral treaty as defined in article 1, paragraph 1(c), is silent concerning participation, it is to be assumed that the parties intended the treaty to be open to participation by all States. It is noted that the Commission is not recommending a derogation of the fundamental principle of international law that contracting parties are free to determine for themselves the extent to which they are prepared to enter into treaty relations with one another. It is observed that the current practice with regard to treaties concluded under the auspices of the United Nations, as well as many other multilateral treaties, is to open them to

participation by Members of the United Nations, the specialized agencies, parties to the Statute of the International Court of Justice and frequently, to such other States as may be invited by the General Assembly. In article 8 the Commission is recommending the establishment of a presumption of intention on the part of contracting States that the treaty is to be open to all States in a limited and very clearly defined case, namely where the parties to certain types of treaties have not expressed themselves on the question of participation. It is assumed that the new rule is not to have retroactive effect.

4. It is noted that in article 9, paragraph 3(b) and in article 19, paragraph 3, the Commission has proposed that silence should constitute a presumption of a State's consent after the expiry of a given period. The arguments against such a presumption of consent are well known as is the very real difficulty that occasionally exists at present of eliciting any expression of opinion from States. It is observed that under the rule formulated by the Commission, were a non-recognized State to enter a reservation, the consent of a non-recognizing contracting State to the reservation would be implied by the latter's silence. If the non-recognizing State were to object to the reservation, its position on recognition would seem to be jeopardized but it would presumably be open to the State to preface its objections with a denial of intent to recognize. In the course of the Commission's review of article 19, it might however wish to consider excluding from that article the presumption of a State's consent to reservations entered by States it does not recognize.

5. It is noted that under the rule set out in article 17 concerning obligations prior to the entry into force of a treaty, a State which has taken any part in the drafting process is obliged to refrain from acts calculated to frustrate the treaty. The Commission might wish to consider whether it is appropriate that this rule should be so broad as to cover States which, although participating in the negotiation of a treaty, have done so reluctantly expressing the strongest reservations about it.

6. It is noted that in articles 18, 19 and 20 concerning reservations, the Commission has adopted the so-called flexible approach by which reservations to multilateral treaties are admissible providing they are compatible with the object and purpose of the treaty. A reservation is to be regarded as accepted by

a contracting State if the latter has raised no objection to it within twelve months. It is noted however that as phrased at present, some question might arise as to whether compatibility with the object and purpose of the treaty is to be the basis on which a State may make a reservation (article 18, paragraph 1(d)) or the basis on which a State may object to a reservation (article 20, paragraph 2(b)). If the former, it would seem to be still open to contracting States to object to reservations on other grounds. However, it seems to be the Commission's intention to make compatibility with the object and purpose of the treaty a prerequisite for the admissibility of reservations as well as the only grounds on which an objection can be taken to a reservation. The Commission might find it desirable to state this intention unequivocably in order to remove any basis for an argument that States may still object to reservations on other grounds. It is also noted that the Commission is recommending the establishment of this rule concerning the compatibility of the reservation with the object and purpose of the treaty, only where the treaty is silent on the question of reservations (article,18, paragraph 1(d)). Treaties which permit reservations to some or all of their articles do not generally indicate standards of admissibility, and the effect of the Commission's recommendations would therefore seem to be the creation of separate criteria for the admissibility of reservations in the case of a treaty which is silent in this regard, and in the case of a treaty which permits them. The Commission might accordingly wish to consider the desirability of extending the standard of admissibility it has formulated to reservations made pursuant to express treaty provisions.

6. CZECHOSLOVAKIA

[Part II]

Transmitted by a note verbale of 23 September 1964 from the Permanent Representative to the United Nations

[Original: English]

... The Government of the Czechoslovak Socialist Republic has closely followed and supported the activities of the United Nations International Law Commission in the field of the codification and progressive development of international law, which significantly contribute to the promotion of peaceful coexistence among States with different social and economic systems. The Czechoslovak Government appreciates the progress achieved by the Commission in the codification of the law of treaties, and as far as part II of the draft articles on the law of treaties is concerned, it associates itself in principle with the approach of the Commission to the solution of the question of invalidity and termination of international treaties.

The Czechoslovak Government agrees with the ideas underlying article 31 concerning provisions of international law regarding competence to enter into treaties, which reflect the appropriate and just balance between internal and international laws and ensure both the respect for the sovereignty of a State and the right of nations to self-determination as well as the necessary legal security in treaty relations.

The Czechoslovak Government devotes special attention to articles 35, 36 and 37 and notes with satisfaction that those draft articles - in conformity with justice and international legality - declare to be null and void, ab initio international treaties concluded through personal coercion of representatives of States or through coercion of a State by the threat or use of force, and treaties which are contrary to peremptory norms of international law.

In connexion with draft article 37 and draft article 45, which supplements the former, the Czechoslovak Government shares fully the view of the Commission contained in the commentary to article 45 that "there are a certain number of fundamental rules of international public order from which no State may derogate

even by agreement with another State". The Czechoslovak Government believes that the codification of legal principles of peaceful coexistence which has been taken up by the United Nations General Assembly during the consideration of principles of international law pertaining to friendly relations and co-operation among States in accordance with the Charter of the United Nations will contribute to the stipulation of those rules which must be considered as peremptory norms of general international law.

The Czechoslovak Government does not doubt that the rules contained in articles 36 and 37 also declare the invalidity of unequal treaties which, as one of the instruments of modern colonialism, constitute a serious obstacle for the attainment of complete independence and sovereignty of a number of developing countries and a source of conflicts and situations endangering international peace and security.

Furthermore, the Czechoslovak Government is of the opinion that the final formulation of article 36 should also contain explicitly the principle of invalidity of international treaties imposed by such forms of coercion as, for example, economic pressure.

The Czechoslovak Government reserves the right to submit more detailed observations to the draft articles on the law of treaties during their final consideration.

7. DENMARK

/Parts I and II/

Transmitted by a note verbale of 2 March 1964 from the Permanent Representative to the United Nations

/Original: English/

Article 4

Article 4, paragraph 3, provides that a representative of a State other than the Head of State, Head of Government, Foreign Minister and the accredited head of a diplomatic mission, shall produce written credentials of his authority to negotiate, draw up and authenticate a treaty.

In the opinion of the Danish Government, this text does not correspond to general practice, nor does it seem adequate as a new rule of international law. In cases where two Governments wish to conclude a treaty on a given subject, the normal procedure is that they agree, through diplomatic channels, to open negotiations. The time and place of such negotiations are likewise agreed upon, and the parties inform each other of the names of the officials designated to represent them in the negotiations. This is considered to be a sufficient introduction of the representatives of the respective Governments, and the question of credentials does not arise until the treaty is to be signed, and sometimes not even then.

With the possible exclusion of treaties drawn up at general international conferences, it is therefore suggested that the article should be modified so as not to require credentials for the negotiation, drawing up and authentication of a treaty.

As to the authority to sign a treaty, whether or not subject to ratification, the Danish Government agrees that Heads of State or Government and Foreign Ministers shall never be required to produce full powers (article 4, paragraph 1). It is also accepted that full powers shall not be required, even of other representatives, in cases of treaties in simplified form, unless called for by the other negotiating State (paragraph 4 (b)), and that full powers shall be produced in other cases (paragraph 4 (a)). The question is, however, whether the

definition of "treaties in simplified form" as contained in article 1, paragraph 1 (b), is adequate for the purpose. After enumerating certain examples, this definition refers to the procedure ("other instrument concluded by any similar procedure"). In current practice an essential part of the simplified procedure is the omission of full powers. This obviously leads into circular reasoning: full powers are not required for treaties in simplified form; treaties in simplified form are those for which no full powers are required.

It would appear to be in better conformity with current practice and more consistent with the requirements of logic to adopt a rule which would not provide for the production of full powers to sign a treaty, except where the other party so requires. A practical indication of such a requirement would be to insert in the text the classical clause about full powers having been produced and found to be in good and proper form.

Articles 8 and 9

The Danish Government shares the unanimous view of the International Law Commission to the effect that general multilateral treaties should be open to participation on as wide a basis as possible.

With regard to other treaties, the Danish Government is inclined to think that the proposals of the Commission go too far towards opening such treaties to the participation of other States than the original parties. In some cases where treaties are concluded by a small group of States, or between States belonging to a particular region, other States should not be allowed to become parties except by invitation of the original parties. In such cases, it should not be open to an outside State to present a request which would have the effect that the consent of the original parties would become automatic after the expiry of a certain period. A non-participating State should not be able to intrude, and possibly bring pressure to bear on the original parties to refrain from objecting. The initiative should belong to the original parties, and article 9, paragraph 3, would consequently not apply to such cases.

In general, article 9 should not apply to treaties which are the constituent instruments of international organizations. It should not be possible under the procedure laid down in article 9 to modify or circumvene the provisions concerning the admission of a new member to an international organization.

/...

Article 11

The legal effects which under paragraph 2 are attributed to signature subject to ratification have no significance per se. In most cases the signature of a treaty subject to ratification is a formality which unduly complicates the treaty-making procedure and which has little rational justification in modern international relations. The necessary authentication of the text may well take place in other ways, as proposed in article 7, paragraph 1. The Danish Government recognizes, however, that the formal signature is so deeply embedded in international practice that proposals for a reform would have little chance of being accepted.

Article 12

In the opinion of the Danish Government, this article, which requires ratification of a treaty unless an exception is made, is not in conformity with international practice. Moreover, the article is drafted in unduly complicated terms. The article should be simplified by reversing the presumption on which it is based.

It should be presumed that a treaty which has been duly signed by representatives of States should need no ratification. In other words, ratification should be required only if the necessity appears from the text, from the full powers issued to representatives of the signatory States, from statements made in the course of the negotiations, or from other circumstances evidencing an intention to that effect. The constitutional necessity of ratification may be included in such circumstances.

This reversal of the basic principle would bring the article in line with international practice as understood and followed by the Danish Government.

Furthermore, it is submitted that the question whether or not ratification is required should not necessarily be answered in the same way with respect to both parties. In the practice followed by the Danish Government for the conclusion of bilateral treaties it has occurred that the signature of one party has been considered to be immediately binding, while the signature of the other party has been subject to ratification (acceptance or approval). This procedure may have practical advantages in certain cases, and it should not be precluded by the wording of the article.

/...

Articles 18-20

The Danish Government welcomes the constructive proposals of the International Law Commission for the solution of this intricate problem which has caused so many difficulties and so great uncertainty in recent years. Without committing itself definitely to the solution proposed, the Danish Government is ready to examine the proposals as a possible basis for achieving that general agreement on the subject which is so urgently needed.

Experience seems to suggest that no short and simple formula can solve the problem. The Commission has therefore chosen the right approach in distinguishing between different aspects of the problem and between different situations in which the problem arises. It is only on the basis of such a differentiation that realistic proposals can be drafted. But this approach has the inevitable consequence that the proposed rules will be lacking in that simplicity and clarity which should be aimed at in the process of codifying international law.

While thus admitting that the nature of the problem justifies complicated formulas, it may be asked whether the drafting methods chosen by the Commission - proposing separate articles concerning the conditions under which reservations are permissible (article 18) and the effect of reservations (article 20) - have not unduly complicated the wording of the articles. Before going further into this question, the Danish Government wishes to make a few comments on the text as it stands.

In article 18, paragraph 1, the words "when signing, ratifying, acceding to, accepting or approving a treaty" seem to be redundant, as they are spelled out by paragraph 2 of the same article.

As stated by the Commission in the commentary to article 20, paragraph 1 (d) of article 18 implies a subjective appreciation of the compatibility of a reservation with the object and purpose of the treaty. As this question may therefore be subject to divergent interpretations, it does not seem appropriate to deal with it as a case of inadmissibility of reservations. As the rule now stands, it may cause difficulties for the depositary who would not be under a strict obligation to communicate a reservation which is clearly inadmissible under the rule, although it is not the function of the depositary to adjudicate upon the validity of a reservation (Commentary to article 29, paragraph 5).

/...

Article 19 concerning acceptance of or objection to reservations may, on the face of it, give the impression that it applies to any reservation, even reservations which are inadmissible. It seems evident, however, that in cases where a reservation is prohibited, explicitly or implicitly, it cannot be accepted by any other party, and an objection is not required to prevent the reservation from becoming effective in relation to another State.

The provisions of article 19, paragraph 2, seem to be self-evident, and may be omitted if a simplification of the article is attempted.

Article 20, paragraph 2 (a), deals with acceptance of reservations and paragraph 2 (b) with objections to reservations on the ground of alleged incompatibility with the object and purpose of the treaty. It leaves open the question what will be the effect of an objection to a reservation which is not considered to be incompatible with the object and purpose of the treaty, but which is objected to on another ground, in particular the importance attached by the objecting State to the provision to which the reservation relates. In its introductory commentary, paragraph (13), the Commission mentions a well-established rule to the effect "that a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State". It would seem preferable to include this rule in the draft articles.

Furthermore, article 20, paragraph 2, deals with the question whether or not the reserving State becomes a party to the treaty in relation to other States which either accept or object to the reservation. The question whether or not the reserving State is a party to the treaty may, however, present itself in a more general and objective manner. Is its ratification to be included in the number of ratifications required for the treaty to enter into force? Is the reserving State entitled to ask for revision of the treaty, if such right is granted to any contracting party or to a specified number of contracting parties? The answer to these and other similar questions should presumably be in the affirmative, provided that the reservation has not been objected to by all other contracting parties. It would be preferable, however, to insert provisions dealing explicitly with this question.

Article 20, paragraph 3, concerning treaties between a small group of States does not distinguish between express and implied acceptance. The considerations expressed in the commentary seem to warrant the conclusion that an express acceptance should be required in these particular cases.

Article 20, paragraph 4, deals with constituent instruments of international organizations. In its commentary, the Commission rightly attaches decisive weight to the integrity of such instruments. This would imply that the reservation should be submitted to the competent organ for decision in all cases - not only when an objection has been raised. In other words, the possibility of an implied or tacit acceptance of the reservation should not be left open in these cases.

In the light of the preceding observations and in an attempt to simplify the general structure and economy of the articles, the following redraft is offered for consideration:

Redraft	Corresponding provision in the ILC draft
Article A	
1. In cases where the terms of a treaty or the established rules of an international organization prohibit the making of a reservation, no such reservation shall be admissible. No act or instrument - signature, ratification, accession, acceptance or approval - to which such a reservation is attached shall have legal effect.	Article 18, paras. 1(a) and (b)
2. In the case where a treaty expressly authorizes the making of a specified category of reservations, any other reservation shall be excluded.	Article 18, para. 1 (c)
Article B	
In the case where a reservation is made to the constituent instrument of an international organization, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty provides otherwise.	Article 20, para. 4

Article C

Where a reservation is expressly or impliedly permitted by the terms of the treaty, the reservation shall be admissible, and the act or instrument to which it is attached shall have its usual legal effects, as limited or modified by the terms of the reservation. — Article 20, para. 1 (a)

Article D

1. Where the treaty is silent in regard to the making of reservations, a reservation shall not be considered inadmissible, but other States may object to the reservation, either because they consider it to be incompatible with the object and purpose of the treaty, or for any other reason. Any such objection precludes the entry into force of the treaty between the objecting and the reserving States, unless a contrary intention shall have been expressed by the objecting State. — Article 18, para. 1 (d)

2. Objection to a reservation may be raised by any State which is, or to which it is open to become, a party to the treaty. An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty. — Article 19, para. 4

3. An objection to a reservation shall be formulated in writing and shall be notified: — Article 19, para. 5

(a) In the case of a treaty for which there is no depositary, to the reserving State and to every other State party to the treaty or to which it is open to become a party; and

(b) In other cases, to the depositary.

4. The right to object to a reservation shall be precluded by expressed or implied acceptance. A State shall be considered as having accepted a reservation implicitly if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation. Article 19, para. 3

5. Acceptance of a reservation by a State which is bound by the treaty shall constitute the reserving State a party to the treaty in relation to such State as well as for general purposes not connected with the relations to any other particular State. The same applies to an acceptance by a State to which it is open to become a party to the treaty as soon as the treaty has entered into force with respect to such State.

Article E

Notwithstanding the preceding article, a reservation to a treaty, which has been concluded between a small number of States, shall be conditional upon the express acceptance by all the States concerned, unless: Article 20, para. 3

(a) The treaty otherwise provides; or

(b) The States are members of an international organization which applies

/..

a different rule to treaties concluded under its auspices.

Article F

Reservations which are not inadmissible under the preceding articles must be in writing and may be formulated:

Article 18, paras. 2 and 3

(i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

(ii) Upon signing the treaty at a subsequent date; or

(iii) Upon the occasion of the exchange or deposit of its instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a procès-verbal or other instrument accompanying it.

(b) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving State, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation.

2. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated:

(a) In the case of a treaty for which there is no depositary, to every other State party to the treaty or to which it is open to become a party to the treaty; and

(b) In other cases, to the depositary which shall transmit the text of the reservation to every such State.

Article 25

The wording of this article does not seem entirely satisfactory. Treaties between a Member of the United Nations and a non-member State are covered both by paragraph 1 and paragraph 2.

It would seem preferable to provide that any Member of the United Nations shall register treaties which it concludes, in conformity with Article 102 of the Charter, and that any non-member State party to the present articles shall be under a similar obligation.

It might be added that the parties may, in conformity with current practice, agree between themselves that registration shall be effected by one of them, or by the Secretariat of an international organization under whose auspices the treaty is concluded.

Article 31

In paragraph (1) of the commentary to this article it is pointed out that constitutional limitations upon the treaty-making power may take various forms. One group of provisions relate to the power of a Government to enter into treaties, while another group of provisions merely limit the power to enforce a treaty within the internal law of the State.

In the opinion of the Danish Government, this latter group of provisions does not raise any special problem distinct from the general problem of giving effect to a treaty in national law. Whether the treaty requires amendment of administrative decrees, statutory acts or constitutional provisions, the problem is essentially the same from the point of view of international law. If its consent has been validly expressed, a State cannot rely on its internal law, not

/...

even its constitution, as an excuse for not giving effect to a treaty. Consequently, the second group of provisions should not be given special consideration in this context. The wording of article 31 seems to be entirely compatible with this point of view in so far as it refers to provisions of the internal law regarding "competence to enter into treaties".

The main problem dealt with in this article is one of considerable theoretical and dogmatic interest. As pointed out in the commentary, however, experience seems to indicate that the practical importance is less significant.

Although it is felt desirable, in States having a system of government based upon principles of parliamentary democracy, to safeguard the powers of representative bodies against encroachments by the executive, there is an equally strong and legitimate interest in being able to rely on the consent given in due form by a foreign Government. The point of balance between these conflicting interests is difficult to determine exactly.

The Danish Government has previously had an occasion to state its views on one particular aspect of this problem. In the course of the oral proceedings of the Eastern Greenland case before the Permanent Court of International Justice the Danish agent stated with reference to constitutional provisions limiting the power of a Foreign Minister:

> " ... the Danish standpoint is that such internal constitutional restrictions are of no importance in international law, in any case unless they are expressed in an absolutely clear and unequivocal manner in the Constitution of the State in question." (P.C.I.J., Series C, No. 66, pp. 2758-59)

It appears from the written pleadings that the point at issue was the international relevance of Norwegian constitutional provisions concerning the procedure to be followed for the adoption of a decision by the Government, in particular the question whether such a decision should necessarily be adopted by the King in Council. The question of parliamentary approval or countersignature of a Royal Resolution by a Minister did not arise in the case (P.C.I.J., Series C, No. 63, pp. 880-84). The statement contained in paragraph (9) of the commentary of the International Law Commission does not appear to reflect quite accurately the Danish position.

Although the proposal of the Commission seems to deprive constitutional provisions of their international relevance to a somewhat greater extent than

recognized by the opinion which prevails in the doctrine of international law, the Danish Government is ready to accept the proposal as a basis for solving this intricate problem. It is essential, however, to maintain the safeguarding clause of the proposal according to which a State is not bound by the declaration of its representative if the violation of its internal law was manifest.

The last sentence of article 31 calls for an additional comment. This provision seems to be based on the juridical construction that the consent is valid even in cases of manifest violation of internal law, although the State is entitled in such cases to withdraw the consent thus expressed by its representative. It would seem preferable to consider the consent as not validly expressed from the point of view of international law. Consequently, the formula in articles 33 and 34 ("may invoke ... as invalidating its consent to be bound by the treaty") should be employed in the present article also. The theoretical objections mentioned in paragraph (5) of the commentary do not seem to be decisive. As the question of invalidity under international law is considered to be distinct from the question of invalidity under national law, there does not seem to be any reason why the invalidity in international law should not be made dependent upon a criterion which is not necessarily relevant under national law, such as the manifest character of the violation of constitutional limitations.

Article 44

The Danish Government agrees that fundamental changes of the circumstances may be invoked as a ground for terminating or withdrawing from a treaty under the conditions specified in paragraph 2.

It must be borne in mind, however, that this is a field in which contracting parties are likely to evaluate factual circumstances differently and draw different legal conclusions from the facts. If the principle of the binding force of treaties is not to be unduly weakened, it seems essential to include an additional provision to the effect that a State should not be entitled to withdraw from a treaty under this article unless it is ready to submit any controversy on this point to the decision of an arbitral or judicial tribunal. Even if no general clause concerning the judicial settlement of disputes is ultimately added to the draft articles, it seems advisable to attach such a clause to this specific article.

/

8. FINLAND

[Part I]

Transmitted by a letter of 17 April 1964 from the Permanent Representative to the United Nations

[Original: English]

Part I of the Draft Articles on the Law of Treaties drawn up by the International Law Commission constitutes, in the opinion of the Government of Finland, an adequate basis for the codification of this branch of law.

With regard to some specific articles, however, the Government of Finland would wish to submit the following observations:

Article 1

Since the definitions contained in article 1 considerably affect the subsequent articles every effort should be made to formulate these definitions as clearly and unequivocally as possible. As the definition contained in paragraph 1 (a) of article 1 is given for the purposes of this Convention only and since the Convention deals exclusively with treaties concluded between States, there appears to be no need in this connexion to touch upon other subjects of international law. Consequently, the words "or other subjects of international law" could be deleted from sub-paragraph (a).

Article 3

For the same reason as stated above under article 1, the whole of paragraph 3 concerning international organizations could be deleted from article 3 as well as the words "and by other subjects of international law" from the end of paragraph 1. These words could perhaps be replaced by the words "which are subjects of international law", as all States do not possess international sovereignty. Another possibility would be to delete the whole of article 3 as superfluous, as suggested by some members of the International Law Commission.

The Government of Finland wish, in this context, to point out that, although the draft treaty deals only with States, nothing would prevent the inclusion, if

desired, in the commentaries on certain articles, of statements indicating that these articles should ex analogia be applied to, for example, the Holy See and certain international organizations, and that a new draft agreement regarding this question could be worked out later.

Paragraph 2 of this article does not seem quite satisfactory, as it only mentions the federal State and its member states, although there exist several other types of composite States where the member states possess the capacity to conclude treaties in certain fields. The said paragraph might, therefore, read for example as follows: "In a union of States, the capacity of its members to conclude treaties depends on its constituent treaty or its constitution".

Article 12

The contents of the proposal of the International Law Commission on this article call for no comments, but its form invites some remarks. In the draft the two types of treaties, the formal treaties and those in simplified form, are not always dealt with separately. For instance, the principle embodied in paragraph 1 regarding the necessity of ratification applies to all treaties. Paragraph 2 of the same article contains so extensive exceptions, that they in fact cancel the principal rule, especially since most treaties are treaties concluded in simplified form. Paragraph 3, again, contains counter-presumptions, i.e. exceptions, which in part are contradictory to the preceding paragraph. This unnecessarily complicated and in a technical sense unsatisfactory article could be simplified, for instance, as follows: "All treaties which are not concluded in simplified form require ratification, unless the treaty otherwise provides or a contrary intention of the signatory States clearly appears from statements made in the course of negotiations or the signing of the treaty, from the credentials, full powers or other instrument issued to the representatives of the negotiating States, or from other circumstances evidencing such an intention".

Article 16

In article 16 regarding the legal effects of ratification, accession, acceptance and approval, it would perhaps have been possible to deal with the question as to whether and on what conditions such acts could be revoked. Reasons

/...

can be given as well for as against the inclusion of such a possibility. Revocations may have a harmful effect on the position of other signatory States. But in some cases it may be unjust to prohibit revocation unconditionally. Such would be the case, for example, if a signatory State would be compelled to wait until the treaty enters into force and only then be able to denounce it, provided that this is allowed by the terms of the treaty.

Article 17

The view that a State, which has ratified a treaty (that has not yet entered into force) and which subsequently commits acts contrary to the objectives of the treaty, thereby violates its obligations, is quite acceptable. One may even accept the presumption that the mere signing of a treaty puts the signatory State under obligation of good faith. It is, however, doubtful whether such an obligation should also ensue in respect of States which have only taken part in the negotiation of a treaty or in the drawing up or adoption (authentication) of its text.

Article 18

Paragraph 1 of article 18, which deals with the formulation of reservations, could be made simpler by combining - as has been suggested - sub-paragraphs (a), (b) and (c) into one single paragraph. Another possibility would be to regard sub-paragraph (a) alone as sufficient.

Article 27

Although the provisions contained in article 27, paragraph 2, are in compliance with the practice of the Secretariat of the United Nations, it would appear sufficient to transmit the copy of the procès-verbal only to the State which has received the incorrect copy of the treaty, while the other States would be only notified of the action taken.

/Part II/

Transmitted by a letter of January 1965 from the Permanent Representative to the United Nations

/Original: English/

In the opinion of the Government of Finland, the draft articles, submitted by the International Law Commission, constitute an entirely satisfactory basis for the future work on the codification of the part of the law of treaties relating to the validity and termination of treaties.

With regard to certain of the draft articles, the Government of Finland would wish to make the following specific observations, which the Commission may wish to take into account in its further work.

In the title of Part II of the draft articles as well as in the title of section II, it would perhaps be more appropriate to speak not of the invalidity but of the validity of treaties, since in article 30 the emphasis is placed on the validity of treaties in general and since the articles contained in section II deal both with the validity and the invalidity of treaties.

Article 38

The main part of the provisions contained in article 38 seem self-evident. Hence it would appear possible to delete them altogether. The last sentence of sub-paragraph (b) of paragraph 3, on the other hand, embodies an important principle which deserves to be explicitly recognized in the draft articles.

Article 40

The Government of Finland concur in the conclusion that a decision on termination and suspension of the operation of multilateral treaties requires, in addition to the agreement of all parties to the treaty, also the consent of not less than two thirds of all States which participated in the drawing up of the treaty in question. As to the length of time during which this principle should apply, a period of three to five years after the entry into force of the treaty would not seem unreasonable.

Article 51

The acceptance of that procedure contained in article 51 would undoubtedly be of great importance. However, the draft article still fails to establish the means which could be resorted to in the event negotiations and other efforts for the settlement of a dispute prove to be unsuccessful. This should not be interpreted to imply that unilateral measures for withdrawing from treaty obligations are permissible.

A particular difficulty arises from the fact that some States do not accept compulsory settlement of disputes, for instance, through arbitral or judicial procedure. For those States which in principle accept such compulsory settlement of disputes, there remains only the possibility to agree - for example, through a separate protocol, as was done in connexion with the Geneva Conventions on the Law of the Sea, 1958, and with the two Vienna Conventions on Diplomatic and on Consular Relations, 1961 and 1963 respectively - to submit disputes arising out of the application or interpretation of a particular treaty or convention to this kind of procedure. As a compromise one may also accept the status quo, however, with an additional stipulation to the effect that, if the contracting party which wishes to withdraw from the treaty obligations proposes to the other parties to settle the dispute by judicial or arbitral procedure and this offer is rejected, the first party has the right of denunciation.

As to the details of this draft article, sub-paragraph (b) of paragraph 1 appears inadequate in so far as it does not fix any period of time within which an answer must be given in urgent cases. This period could suitably be two weeks or one month.

9. ISRAEL

/Part I/[1]

Transmitted by a note verbale of 26 April 1963 from the Permanent Mission to the United Nations

/Original: English/

1. The Government of Israel is pleased to note the progress which has been made in connexion with the law of treaties. In general, the practical approach which has been adopted is seen to be adequate to present needs, and the Commission's general decision that its draft articles on the law of treaties shall serve as the basis for a convention on the topic is acceptable. Particular satisfaction is felt at the manner in which the problems of reservations to multilateral conventions and the functions of the depositary authority have been dealt with, thereby responding to requests which have been made by the General Assembly during recent sessions, and with the question of treaties in simplified form. It is noted that this progress is the consequence of the conscientious preparatory work which has been undertaken by the present Special Rapporteur on the law of treaties and by the previous Special Rapporteurs on the topic, and the Government is happy to express its appreciation for their work.

I

2. It is observed that several of the articles refer to tacit consent as a method by which various stages of the treaty-making process can be accomplished. Examples of this are found in articles 9, 19 and 27. The question of tacit consent appears to be of increasing practical significance; and it is believed that further consideration might be given to all its implications. Furthermore, it is being adopted in some domestic constitutional practices in connexion with the parliamentary ratification of treaties. The notion of tacit consent raises the question of the length of time which has to lapse before the presumption of consent

---

1/ Additional observations on part I are included in the comments on part II.

may be inferred. Article 9, paragraph 3 (b), and article 19, paragraph 3, refer to a period of twelve months. Article 19, paragraph 4, refers to a period of two years and article 27, paragraph 1, simply to a "specified time-limit". This Government feels that under certain circumstances a period of twelve months might prove too brief for such a presumption and therefore suggests that its extension be considered. At all events, it is believed that closer consideration might be given to the question of uniformity for the different periods of time involved.

II

The following specific observations are put forward.

3. With regard to paragraph (5) of the commentary to article 1, attention is called to the fact that in United Nations practice the designation "declaration" is used with increasing frequency for the purpose of distinguishing certain quasi-normative texts from instruments which are intended to be international treaties. This has been pointed out in the memorandum of the Office of Legal Affairs published in document E/CN.4/L.610. Without taking any position on the precise legal characterization of such declarations, it is suggested that appropriate mention of this aspect should appear in the final text of the commentary.

4. It is believed that the last member of the final sentence of paragraph (8) of the commentary to article 1 may be open to misconstruction. In a set of articles dealing with the conclusion, entry into force and registration of international treaties, it is probably unnecessary to consider whether individuals or corporations created under national law do or do not possess capacity to enter into agreements governed by public international law, or what is the proper law of such instruments. There are a number of such agreements which purport to be governed by public international law, or at least by Article 38 of the Statute of the International Court of Justice. Perusal of the summary records of the Commission's fourteenth session suggests that this particular phrase may not adequately reflect the Commission's discussions on this matter.

5. The English and French texts of the draft articles do not fully correspond to one another in their definition of "reservation" (Article 1, paragraph 1 (f)). While the English text speaks of "a ... statement ... [purporting]... to exclude ... the legal effect of some provisions", the French text refers to "certaines dispositions". Paragraph (13) of the commentary to this article would appear to

/...

support the view that the French text, in fact, reflects more precisely the Commission's intention that a true reservation relates to a specific provision of a treaty. An appropriate modification of the English text is therefore suggested.

6. It is felt that article 1, paragraph 2 ("Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State") might give rise to difficulties on the internal level, especially in the countries in which duly ratified international treaties become part of the law of the land. While accepting the principle, therefore, doubts are felt whether the provision itself is fully appropriate to an international treaty, and whether the idea would not better be expressed should it appear in the commentary.

7. With regard to article 3, it is suggested that for the present purposes the question of capacity would be adequately covered if paragraph 2 of this article were eliminated.

8. (a) With regard to article 4, it is suggested as a matter of principle that full powers to conclude a treaty in simplified form should not normally be dispensed with. On the other hand, it is believed that the transaction of international business would be facilited were the representatives referred to in paragraph 2 (a) and (b) to be regarded as normally having implied authority to conclude all treaties of the type referred to in that paragraph, whether in solemn form or in simplified form. It is accordingly suggested that in paragraph 4 (a) the word "shall" be substituted by "may" and that sub-paragraph (b) be eliminated.

(b) It is noted that no reference is made to the language of full powers, and other like instruments, used in connexion with the making of treaties. It is assumed that each State is free to follow its own inclinations in this regard.

(c) With regard to paragraph (8) of the commentary to this article, by Government decision the Minister for Foreign Affairs has a standing Commission which covers the complete exercise of the treaty making power. It has not hitherto been this Government's practice to clothe its diplomatic representatives abroad or its permanent representatives at the headquarters of international organizations with comparable full powers. However, it sees no objection to adopting this practice in the future.

/...

(d) With regard to paragraph (9) of the commentary, it is suggested that, owing to developments in contemporary treaty making practice, two types of precautionary signature, whether or not technically designated signature ad referendum, have to be contemplated. The first type is that dealt with by the Commission, concerning which no observations are made. The second type is exemplified by the 1958 Conference on the Law of the Sea. The four Conventions adopted by that Conference specifically state that they are each subject to ratification, whereas the Optional Protocol of Signature concerning the compulsory settlement of disputes provides that it is "subject to ratification, where necessary, according to the constitutional requirements of the signatory States". The representative of Israel signed that Optional Protocol ad referendum in order to establish on the international level that ratification of any of the Conventions would not in itself imply ratification of the Optional Protocol. (Cf. doc. A/CN.4/121, sect. A, para. 1: Yearbook of the International Law Commission, 1959, vol. II, p. 82). It is suggested that the Commission consider whether its articles adequately deal with that type of precautionary signature.

(e) With regard to provisional full powers also referred to in paragraph (9), the addressee of the letter or telegram is not indicated. It is the practice of this Government to address such letters to the Minister for Foreign Affairs of the other party, or the Secretary-General of the organization concerned, and to transmit them through the diplomatic channel. On the other hand, telegrams are normally despatched to the Israel diplomatic mission concerned and handed over by it to the other party.

9. (a) With regard to article 5, despite its apparently descriptive character it relates to an essential phase of the treaty making process. The negotiating phase may also be of importance for other aspects of the law of treaties. Its retention is accordingly urged.

(b) Attention is, however, drawn to a discrepancy between the English and French texts of this article. Whereas the English text refers to "some other agreed channel", the French text speaks of "une autre voie officielle". It is suggested that the French text be brought into line with the English.

10. Article 6 (b) of the English text speaks of "a treaty drawn up within an organization". From paragraph (6) of the commentary to this article it appears that article 6 (b) is intended to refer to treaties drawn up within an international

organization. It is accordingly suggested that the word "international" be added in the text of article 6 (b), thus making it conform more closely to the French text.

11. With regard to article 9, it is believed that a period of five years from the date of the adoption of the treaty would be sufficient for the purposes of paragraphs 1 (a) and 2.

12. With regard to the expression "concluded between a small group of States" appearing in paragraph 2 of article 9, and again in paragraph 3 of article 20, it is observed that in paragraph (12) of the commentary to article 1 a different expression is used, namely "limited number of States". The distinction which the Commission seeks to draw between general multilateral treaties as defined in article 1 and treaties concluded between a small group of States is appreciated. However, it is felt that the smooth application of the law would be facilitated were the commentary to introduce more precision with regard to the concept of "small group of States".

13. The Government wishes to express its reservations to article 12 which, if it has been correctly understood, introduces doctrinal considerations alongside its practical rules. It is not considered necessary, for the purpose of drawing up practical rules, to adopt a position in principle on the controversial question of the necessity or otherwise in general international law for ratification of treaties which themselves are silent on the question. In the view of this Government, it is essentially for the negotiators of the treaty to establish whether ratification is necessary or not. The question of the necessity for ratification may itself be part of the negotiation, or it may be conclusively determined by the terms of the full powers of one or both of the negotiators. It is suggested that a pragmatic point of departure such as this could lead to a simplification of the article which, in its present form, is unduly complex.

14. With regard to the withdrawal of reservations dealt with in article 22, it is suggested that in respect of those treaties for which there is a depositary, the State wishing to withdraw its reservation will comply with the necessary requirements if it employs the depositary as the channel for the transmission of the necessary notification. This would appear to conform more to the general character of the multilateral treaty for which there is a depositary, as it emerges from the draft article as a whole, than the present wording which is open to the interpretation that the State concerned is obliged to inform the other

/...

interested States individually. If the depositary is employed in these circumstances, the withdrawal of the reservations should normally take effect in accordance with the general provisions of the treaty, or the residual provisions of the draft articles (in the event of the silence of the treaty), for the taking of effect of communications transmitted by or through the depositary, unless of course the notice of withdrawal specifies otherwise.

15. (a) With regard to article 25, it is correct to include in the draft articles a reference to the registration of treaties. However, this Government hesitates to agree that the articles are the proper place for introducing any change in existing practices which distinguish between registration in implementation of Article 102 of the Charter and filing and recording in accordance with the regulations made by the General Assembly thereunder. It is recalled that the distinction between obligatory registration and voluntary filing and recording was deliberately maintained when the regulations were first drawn up in 1946. It may also be pointed out that the Charter is not the only international constitution which calls for the registration of treaties. Reference may be made, for instance, to Article 81 of the Constitution of the International Civil Aviation Organization.

(b) It may be the case that upon the completion of the work on the law of treaties it will be necessary for the General Assembly to re-examine and consolidate the practices in connexion with the registration of treaties, and to co-ordinate them with the practices of the specialized agencies. The Commission therefore might well consider whether, in due course, the General Assembly's attention should not be drawn to this aspect.

16. With regard to article 29, it is suggested that in enumerating the functions of the depositary special reference should be made to the depositary's duty to register international treaties and related documents. In this connexion attention is called to the discussions which preceded General Assembly resolution 364 B (IV) of 1 December 1949 and also to relevant inter-agency agreements such as that of 17 February 1949 between the United Nations and the International Labour Organisation (United Nations, Treaty Series, vol. 26, p. 323).

17. It is believed desirable to clarify de lege ferenda that as a residual rule phrases such as "promptly", "as soon as possible", etc. appearing in paragraphs 3 (d), 6 and 7 (a) of article 29, as well as in paragraph 3 of article 15, should, unless the treaty itself provides otherwise, be interpreted in such a way

as to allow for the observance of the normal administrative processes customary in the depositary authority for the preparation of the relevant communications, and for the receipt of those notifications through the normal channels by the home authorities of the individual States. This mitigates against equating the concept of "promptness" with that of "immediacy", which was applied by the International Court in the Right of Passage case (preliminary objections), with particular reference to the terms of Article 36, paragraph 4, of the Statute of the International Court of Justice.

18. It appears that the expression "any such matters" which occurs in article 29, paragraph 3, of the English text has a rather wider meaning than "autres actes similaires" of the same article of the French text. It is accordingly suggested that the term "acts" be replaced by another expression which more accurately accords with the English text.

19. This Government specifically welcomes the inclusion of the Annex in the report of the fourteenth session of the Commission's work and suggests that it should also be included in the final text of the draft articles, when these are adopted.

[Part II][1]

Transmitted by a note verbale of 15 May 1964 from the Permanent Representative to the United Nations

[Original: English]

I

1. The Ministry wishes again to express its appreciation to the Commission, and the Special Rapporteur on the law of treaties, for the remarkable progress which has been achieved in placing the law of treaties upon the widest and most secure foundation, as desired by the General Assembly.

2. Careful reconsideration of the consistency of the terminology is desirable. The following instances are given:

1/ Including certain additional observations on part I.

(a) The expression "conclude a treaty" appears in articles 1 (1) (a), (b) and (e), 3, 30, 36 and 49 of the draft, as well as in Articles 43 (3) and 80 of the Charter. On the other hand, the expression "enter into a treaty" is used in articles 25 (2), 31, 33, 34, 41 and 44 of the draft, and in Articles 63 and 102 of the Charter.

(b) Different expressions are used in draft articles 12 (2) (c), 12 (3) (b), 39 and 46 (2) (b) in referring to the "travaux préparatoires" of a treaty, without it being clear whether this differentiation is intentional.

(c) The word "nullity" appears in the title of article 47, in the text of articles 30 and 46, in the title to section VI, and in the title and text of article 52. However, the terminology of the substantive articles dealing with "nullity" is more differentiated, since it distinguishes between relative voidability and absolute voidness. Thus: Article 31 refers to "invalidate the consent" and "withdraw the consent". Article 32 uses the expressions "without any legal effect" and "invalidate the consent". Articles 33 and 34 use the expression "invalidating its consent". Article 35 uses the expression "without any legal effect" and "invalidating its consent". Articles 36 and 37 use the word "void". Article 45 uses the expression "becomes void and terminates". While it is recognized that absolute uniformity of terminology is not possible, it is felt that the many variations employed may become a source of difficulty.

(d) The word "instrument" is being used in many different senses. Cf. articles 1 (1) (a), 1 (1) (b), 1 (1) (e), 4 (4), 4 (5), 4 (6), 12 (3) (c), 15, 16, 18, 19, 23, 24, 26, 29, 40 and 52.

(e) There is inconsistency in the terms used to express a residuary rule, without it always being clear whether this is intentional. Thus:

(i) "Unless another procedure has been prescribed in the text or otherwise agreed upon" in article 7;

(ii) "Unless it is otherwise prescribed by the terms of the treaty itself" in article 8;

(iii) "When ... the treaty specifies ..." in article 13, and "provides" in article 14;

(iv) "Unless the treaty itself expressly contemplates" in article 15;

(v) "Unless the treaty /itself/ otherwise provides /prescribes/" in articles 20 (3), 29, 40, 50, 53;

(vi) "Where the treaty does not specify ..." in article 23;

(vii) "Except as provided in the treaty itself ..." in article 46;

/...

(viii) "Subject to the provisions of the treaty ..." in article 54.

This multiplicity of terms might become a source of confusion.

II

3. The following observations are made on article 30:

(a) The French text ("est réputé être en vigueur") may introduce an element of legal fiction which is not present in the English text ("shall be considered as being in force").

(b) Doubt is felt over the use of the word "nullity" in the absence of corresponding usage in the substantive articles.

(c) This article does not foresee the operation of the rules for separability.

4. The following observations are made on article 31:

(a) It is suggested that it would be preferable for the second member of the first sentence to refer to "competence to enter into the treaty" rather than "competence to enter into treaties", and that the end of the sentence should read "unless the violation of that law, etc.", in order to take into account a situation such as exists sometimes in Israel, where, without prejudice to the general treaty-making power, the exercise of the treaty-making power for a given treaty (e.g. a treaty of extradition) is subjected to specific conditions.

(b) The first sentence of this article uses the expression "shall not invalidate the consent" and may be inconsistent with the second sentence, which uses the expression "may not withdraw the consent".

(c) It appears that the general principle which underlies article 47 is operative as regards the subject matter of article 31. Accordingly, it is suggested that appropriate expression should be given to this inter-relation, a matter which, it is considered, would permit of a more concise text for article 31.

(d) It is understood that the word "manifest" is to be taken in an objective sense, and it is suggested that this should find expression in the text.

5. The following observations are made on article 32:

(a) Redraft the first part of paragraph 1 so that it should refer to the "consent ... to be bound by the treaty ...".

/...

(b) Redraft the conclusion of paragraph 1 to read:

"... the act of such representative shall have legal effect if it is afterwards confirmed ..."

(c) Redraft paragraph 2 to read:

"In cases where the authority conferred upon a representative to express the consent of his State to be bound by the treaty has been made subject to particular instructions, his omission to observe those instructions ..." (This redraft is based on paragraph (5) of the commentary, and assumes that article 4 will continue substantially in its present form.)

(d) It is assumed that the particular instructions should be brought to the notice of the contracting States prior to the termination of the negotiation, and it is suggested that this should find expression in the text.

(e) It is believed that, subject to article 46, an appropriate provision for voluntary separability should be introduced into this article.

6. The following observations are made on article 33:

(a) Place this article after article 34, in order to distinguish the reprehensible from the non-reprehensible vices de consentment, and place the former in ascending order of calumny.

(b) In lieu of "fraudulent conduct" it would be preferable to refer to "fraudulent act or conduct".

(c) Paragraph 2 as at present drafted can be interpreted as excluding the option of the injured State, contrary to what is stated in paragraph (6) of the commentary. That is the effect of the word "only" which, it is suggested, would be better omitted.

7. The following observations are made on article 34:

(a) The error to which this article refers is described, in paragraph 1, as an error relating to a "fact or state of facts". However, paragraph (7) of the commentary is not so limitative and it is suggested to bring the text of the article into line with the commentary.

(b) Redraft paragraph 4 to read:

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

(c) Paragraph 4 is understood as intended to apply only to the case in which the parties are in agreement, or are presumed to be in agreement, as to the existence of the mistake. This appears from the commentary to article 10 of the Special Rapporteur's second report (A/CN.4/156). The judgement of the International Court in the Frontier Land case indicates that a mistake in transcription can vitiate the treaty (as opposed to invalidating a party's consent), subject to the necessary proof being forthcoming (I.C.J. Reports, 1959, pp. 222-6), and that in any event such a mistake can be cured by subsequent ratification of the treaty, its publication, and by acquiescence (p. 227). It is suggested, therefore, that the language of paragraph 4, and if necessary articles 26 and 27, be adjusted accordingly.

(d) The proposed redraft of paragraph 4 will require consequential amendments to the title to section V of Part 1, and to articles 26 and 27, by substituting the word "mistake" for the word "error" wherever appearing therein (the same adjustment to be made in the final text of the commentary to those articles).

8. The following observations are made on article 35:

(a) There is a possible inconsistency between the absolute expression "without any legal effect" found in paragraph 1 and the relative partial invalidation of the consent according to paragraph 2.

(b) It is not clear whether any difference is intended between the expression "shall be without any legal effect" in paragraph 1 of article 35 and the expression "shall be void" appearing in article 36. Perhaps, therefore, it would be better to draft paragraph 1 as follows:

> "If an individual representative of a State is coerced ... the State whose representative has been coerced may invoke the coercion as invalidating its consent to be bound by the treaty."

(c) For the reasons stated in observation (c) to article 33, the word "only" should be omitted from paragraph 2. The provisions of articles 33 and 35 regarding severability should remain substantially identical.

9. It is suggested to complete article 36 by adding a provision to the effect that the article also applies where the participation of a State in an existing treaty was procured by the threat or use of force.

/...

10. The only comment to article 37 is that it should be made quite clear in the commentary that for a rule of jus cogens to exist, the two elements, as set out in this article, must subsist simultaneously. This is already implicit in paragraph (4) of the commentary.

11. In order to clarify the significance of article 38 as determinative not of the manner but of the time of termination, it is suggested that the factor of "time" be mentioned specifically in the title and in the opening part of paragraph 1. In its present form, the article is open to the misconstruction that it states the obvious, but it is considered that this clarification of the time element would be useful.

12. It is suggested that article 39, while unobjectionable in itself, should open the possibility of suspending the operation of the treaty, as an alternative to terminating it, in the circumstances mentioned in the article. This could be achieved by an addition along the lines of article 40, paragraph 3.

13. The following observations are made on article 40:

(a) There is a possible inconsistency between paragraph 1 of the text and the reference to "new 'treaty'" in paragraph (1) of the commentary, in view of the formal definition of "treaty" contained in article 1, paragraph 1 (a). The text of the article is acceptable, on the assumption that it includes the possibility of a tacit agreement of all the parties to terminate an existing treaty.

(b) After the words "A treaty" in paragraph 1, add "in whole or in part".

(c) It is suggested that in paragraph 2, the period should correspond to that adopted for article 9 (see paragraph 11 of the Government's observations on Part I).

(d) Consideration should also be given to the question whether articles 9 and 40 should not refer to two thirds of the States which drew up the treaty including two thirds of the parties.

(e) In order to accommodate the functions of the depositary to the function sought to be conferred upon it by article 40, paragraph 1 (a), appropriate modifications will be required in article 29.

14. With regard to article 41, in the light of what is stated in paragraph 15 of the Commission's report and paragraph (2) of the commentary, it is believed that the article contains an inherent contradiction. If the later treaty was intended to terminate the earlier treaty, then the termination of the later treaty would not bring about the revival of the earlier treaty. But if the later treaty was intended

to suspend the operation of the earlier treaty, the termination of the later treaty will, following article 54, bring about the revival of the earlier treaty. In either event, the whole matter depends upon the interpretation of the intention of the parties to the later treaty. If the article is retained, it is suggested that the element of suspension (with the omission of the word "only" in paragraph 1) should precede the element of termination. A reconstruction of the article along these lines might facilitate the problem of the placing of this provision.

15. With regard to article 42, paragraph (8) of the commentary seems to suggest that the definition of breach in paragraph 3 is not exclusive.

16. The following observations are made on article 43:

(a) Redraft paragraph 2 to read:

> "If it is not clear that the disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty will be total and permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty."

(b) It should be clarified that this provision does not apply in the case where the impossibility is the consequence of breach of the treaty by the party invoking the impossibility.

17. The following observations are made on article 44:

(a) It is suggested that the expression "fact or situation" appearing in paragraph 2 should coincide with whatever expression is used in article 34, which at present reads "fact or state of facts". Cf. Observations on article 34 above.

(b) It is suggested that the article could also envisage the suspension of the operation of the treaty, in whole or in part.

18. In view of the problems of intertemporal law which arise, observations on article 45 are reserved until the Commission has completed its first draft of Part III of the Law of Treaties.

19. Article 32 should be included among the articles mentioned in article 46.

20. It is believed that article 47 requires careful reconsideration to take account of the following aspects:

(a) The word "nullity" does not appear in any of the articles mentioned in article 47.

(b) No reference appears to the effect of the general principle on the exercise of the right to require the suspension of the operation of the treaty, despite the fact that suspension is included in one of the articles mentioned in article 47 (Article 42).

/...

(c) Since the principle itself is one of general application, article 47 should distinguish carefully between the general principle and the specific concept of tacit consent as it is employed in Part I of the draft articles (cf. paragraph 2 of the Government's observations on Part I).

(d) The drafting of the introductory part of the article could be simplified were it to be worded more positively. The following redraft is therefore suggested (also taking account of observation (c) to article 31):

> "A State may not rely upon articles 31 to 35 and 42 and 44 if that State, after having become aware of the facts giving rise to the application of those articles, shall have elected by conduct or otherwise to consider itself bound ..."

This text also makes redundant the specific reference to "waiver", which, in the context, may be a complicating factor, and avoids the awkwardness of the phrase "debarred from denying". The commentary should make it clear that the election will be presumed after the lapse of a reasonable period of time, such time depending, of course, on all the circumstances.

21. Consideration should be given to whether article 48, which is in principle correct, should not be framed in more general terms covering also sections III, IV, V and VI of Part II, and placed after the present article 2. That could lead to a simplification of Part I, similar to that intended for Part II by article 48. In fact, similar provisions already appear in articles 5, 6, 7, 9, 18 (1) (a), 20 (4), 27 (4), 28 and 29 (8). Such generalization would correspond, it is believed, to existing practice as regards the two types of treaties to which article 48 applies. Nevertheless, it might be more satisfactory to draft two separate provisions, one relating to a treaty which is the constituent instrument of an international organization, and one relating to a treaty which has been drawn up within an international organization. It should, however, be indicated that sections I and II of Part II are fully applicable to both these classes of treaties. In the penultimate phrase of the article, the words "to that treaty" should be inserted after "the application".

22. There are no observations on article 49.

23. The following observations are made on article 50:

(a) The notice should correspond in principle, and subject only to the rules of separability, to the requirements for the instrument regarding participation contained in article 15, paragraph 1 (b).

(b) It is believed that paragraph 1 should likewise be framed as a residual rule, operative in the event of the silence of the treaty.

(c) It is further suggested to substitute "to the depositary" for "through the depositary".

(d) A corresponding modification to article 29 will be required, in order to complete the enumeration of the functions of the depositary.

24. There are no observations on article 51.

25. The following general observations are made on section VI:

(a) It is assumed that all three articles will require reconsideration in the light of the conclusions to be reached by the Commission on the question of the effects of treaties on third States (pacta in favorem and in detrimentum tertii).

(b) Each one of the three articles deals with the treaty as a whole. Some provision should be added regarding the consequences of the operation of article 46 on the matters dealt with in section VI.

(c) The use of the word "nullity" in the title of section VI raises the question of terminology referred to generally in observation 2 (c) above.

(d) Article 29 will require adjustment in order to authorize the depositary to perform functions which are the consequence of section VI.

26. The following observations are made on article 52:

(a) This article attempts to deal with two distinct matters, namely: treaties which are a "nullity" ab initio, and treaties the consent to which may be invalidated subsequently at the initiative of one of the parties. It is suggested that these two aspects should be brought more sharply into focus.

(b) It is suggested that these difficulties, as well as those of a terminological character, would be reduced were the text to be reconstructed by referring not to the general concept of "nullity", but more specifically to the legal consequences of the application of the different articles of section II of Part II to which it relates.

(c) Subject to the foregoing, it is suggested that paragraph 1 (a) should refer to the "legal consequences of acts performed in good faith by a party in reliance on the void treaty". While it is true that omnia pro rite praesumuntur, the invalidation of the consent to be bound by a treaty ought not in itself to impair claims based upon the alleged illegality of acts performed in reliance on

/...

that treaty. A passage of the Judgement of the International Court of Justice in the Northern Cameroons case (I.C.J. Reports, 1963, p. 34) alludes to this, in the case of termination of a treaty.

(d) It is suggested to commence paragraph 1 (b) by a connecting word such as "Nevertheless".

(e) In paragraph 3, it would be better to substitute "invalidation of a State's participation in a multilateral treaty" for "nullity of a State's consent to a multilateral treaty", thus corresponding more closely to the language of articles 8 and 9.

27. The following observations are made on article 53:

(a) It is suggested to redraft paragraph 1 (b) to read:

> (b) Shall not affect the legal consequences of any act done in conformity with the provisions of the treaty while that treaty was in force or ...

(b) For reasons similar to those given in observation 26 (b), it would probably clarify matters if the article were to specify the articles of Part II to which it relates.

(c) For reasons given in observation 18, paragraph 2 is reserved.

(d) The commentary should make it clear that once a treaty is terminated, it can only be revived, in the future, by some formal treaty (in the sense used in the draft articles). This is necessary because of differences of approach of different legal systems on the effect of the repeal of a statute which itself repeals an earlier statute. There is a statutory provision in force in Israel to the effect that where any enactment repealing any former law is itself repealed, such last repeal shall not revive the law previously repealed unless words be added reviving such law. It is assumed that the same principle applies in international law.

28. The following observations are made on article 54:

(a) It is assumed that this article does not refer to the consequences on the operation of a treaty of the suspension of diplomatic relations between the parties (in the case of a bilateral treaty), or between some of the parties (in the case of a multilateral treaty).

(b) The suspension of the operation of a treaty is mentioned in articles 30, 40, 41, 42, 43, 46, 49 and 50. Articles 42 and 43 also raise the possibility of

the suspension of the operation of a part of a treaty. It is accordingly suggested that article 54 should specify the substantive articles to which it refers.

(c) It is suggested, having regard to the peremptory effect of the termination of a treaty, to extend the option to suspend the operation of a treaty also to the matters covered by articles 39 and 44, and thus facilitate the possibility of a later resumption of the operation of the treaty.

10. JAMAICA

/Part II/

Transmitted by a letter of 22 September 1964 from the Permanent Representative to the United Nations

/Original: English/

Article 33

Where fraud is subsequently discovered, the defrauded Party should take steps to invalidate its consent to the treaty within a stated time after the discovery of the fraud. In other words, a Party who has discovered fraud at the hands of the other Party and continues for an indefinite time to act upon the relevant clauses of the treaty should thereupon be deemed to have subsequently acquiesced in the fraud and be consequently precluded from invoking such fraud as a reason for the termination of the treaty unless the conditions of termination are agreed upon by both Parties.

Article 36

The scope of the article could be extended to include circumstances where the threat or use of force does not necessarily involve any strict violation of the principles of the Charter of the United Nations but was nonetheless a material factor in bringing about the conclusion of a treaty.

It should be readily recognized that an improper use of force can be so manipulated as to avoid violation of the principles of the Charter. Such improper use of force (or concealed threat) tends to violate the essential elements of consent in much the same way as fraud may be taken to violate such consent with reference to article 33.

Possibly, when the threat or use of force does not constitute a violation of the principles of the Charter, the treaty could be regarded not as void ab initio but voidable at the instance of the other State concerned.

Article 44

(a) The exceptions under paragraph 3 could possibly be extended to include "fundamental change of circumstances which the Parties could reasonably have foreseen and the occurrence of which they impliedly undertook not to regard as affecting the validity of the treaty".

(b) On 14 October 1963, the Jamaican delegation mentioned in the Sixth Committee, inter alia, the desirability of making allowance in this article for fundamental change of circumstances which may sometimes arise out of State succession. This aspect of the matter is sufficiently important to be again mentioned in this memorandum.

Fundamental change of circumstances is not necessarily an inevitable consequence of State succession. There may be, however, instances when a newly independent State finds the terms of a treaty so manifestly unjust or inequitable that that State may be justified in not recognizing such a treaty as one which it should inherit. This situation will perhaps be dealt with by the International Law Commission when it considers succession of States, but it is considered appropriate that article 44 should provide for such a situation notwithstanding the possibility that it may again be dealt with by the Commission under "Succession of States".

General

The Jamaican delegation also raised in the Sixth Committee the advisability of making provision for the individual in the draft articles on the law of treaties.

Whilst the law of treaties is primarily concerned with States relationship, the individual is increasingly being made subject to rights and duties established under treaties and conventions. The Nürnberg Trials, the Genocide Convention and the draft covenants on human rights being considered by the General Assembly are but few examples of the increasing role of the individual in international law (and more precisely in the law of treaties).

The subject, therefore, is considered as deserving "special mention" in any contemporary codification of the law of treaties.

/...

11. JAPAN

/Part I/

Transmitted by a note verbale of 4 February 1964 from the Permanent Representative to the United Nations

/Original: English/

I. General observations

1. The Government of Japan is of the opinion that the draft articles in their ultimate form should be a "code" rather than a "convention". In its view, much of the law relating to the conclusion of treaties is not very suitable for framing in conventional form, for two reasons. First, the conclusion of treaties always involves procedures on two different planes, internal and international. Although the draft articles profess to be concerned only with the international aspect of treaty making, this will inevitably bring repercussions on the internal aspect of treaty making. If it were decided that the draft articles should form conventional norms from which in principle no derogation is permitted, it would in effect be putting an unduly tight strait jacket on the procedural formalities of treaty making in each State. Second, an attempt to prescribe procedures of treaty making in great detail will entail the undesirable results of not being able to cope with the actual needs of finding mutually acceptable procedures by the contracting parties.

2. This is not to suggest that the code as proposed should be another addition to the already numerous codifying attempts of the past, none of which have been endowed with the authority of an official code. It would seem possible to employ a procedure through which the draft articles could be adopted, after full examination and discussion by all the Governments, as an authoritative recommendation regarding the procedures to be followed in concluding international agreements, but not in the form of a convention in the technical sense. This could be done, for instance, by an insertion in the draft articles of a provision of a general character along the following line:

General Provisions

States parties to the present code recognize that the provisions of the present code are generally declaratory of established principles of international law and practice, and declare that they shall endeavour to conform themselves to these provisions as a common standard of conduct.

3. In case the draft articles were to take the form of a "convention", the Government of Japan would like to see the convention formulated on the basis of the following two principles:

(a) That the provisions of the convention should be as concise as possible, leaving out all the detailed technicalities to the decisions of the parties to each individual international agreement.

(b) That the convention should include a provision of general character, which would enable States to derogate from any of the provisions of the convention by mutual agreement between the parties to each individual international agreement (see article 2 bis. of the annexed Japan draft).

4. The Government of Japan has no strong view on the title given to such code or convention. Nevertheless it is suggested that the term "treaties" in the present title might more appropriately be replaced by the term "international agreements". Though the former is clearly used here in the generic sense and not in the specific sense, it might still lead to misunderstanding, as the discussions in the Commission in its second and third sessions have revealed. In spite of the proviso in article 1, paragraph 2, it would seem more appropriate to employ a neutral term like "international agreements".

5. In the view of the Government of Japan, the three parts of the draft articles as envisaged by the Special Rapporteur should ultimately be amalgamated in one. As distinct from the case of the four conventions on the law of the sea, the three parts of the law of treaties are so closely interrelated with one another that it would serve no useful purpose if they form three separate conventions independent of one another.

II. Observations on individual articles

The Government of Japan submits its observations on individual articles as follows. These observations are made, however, with an eventual convention in view, and not a code, for which different considerations would apply.

The draft articles as amended in accordance with these observations are annexed hereto for reference.

Article 1

The definitions given in paragraph 1 should be kept, subject to the following observations:

(a) The enumeration of categories of international agreements by designation in paragraph 1 (a) is not very useful, as it could not hope to be exhaustive in any case.

(b) The term "treaty in simplified form" in paragraph 1 (b), though current in use, seems to be superfluous in the context of the present draft articles.

(c) The term "general multilateral treaty" in paragraph 1 (c) cannot be precisely defined, and will cause a great difficulty in application. It had better be dispensed with.

(d) The distinction between "full powers" and "credentials" as used in article 4 is not very clear. It is suggested to standardize the terminology by employing the term "instrument of full powers" in paragraph 1 (e).

(e) It would seem better to replace the word "vary" in paragraph 1 (f) by the word "restrict", since only such statement as would restrict the legal effect of the provisions of the international agreement will properly fall under the term "reservation".

Article 3

1. Paragraph 2 should be deleted, since it does not appear to add much to the provisions of paragraph 1. It is even misleading in that it does not refer to the other element of international capacity to conclude international agreements - the requirement of recognition of such constitutional capacity by the other contracting party or parties concerned.

2. The same could be said of paragraph 3, which therefore should also be deleted.

Article 4

1. The requirement of furnishing evidence of authority referred to in paragraphs 3 and 4 (a) could no doubt be waived by the other negotiating State

or States, whatever the international agreement in question might be. This should be made clear in the article.

2. It would perhaps be too strict, in view of the current practice, if the requirement of subsequent production of the instrument of full powers were to be made absolute, in the contingency envisaged under paragraph 6 (b) and (c).

3. The rule stated in paragraph 6 (a) is no doubt correct, but it is doubtful whether this needs express provisions.

Article 5

The article would not have much utility in practice and is to be deleted in its entirety.

Article 6

The subject dealt with in this article does not appear to be directly relevant, though certainly related, to the procedure of treaty-making. It belongs rather to the problem of conference procedures and had better be left with the decision of the conference or of the States concerned.

Article 7

A general rule on authentication applicable both to bilateral and multilateral agreements is not easy to formulate. The precise legal nature of the acts enumerated in paragraph 1 may not be exactly the same. To illustrate the point, the rule stated in paragraph 3 would prove to be too strict in practice for bilateral agreements, if it excluded the possibility of subsequent modification, not of wording (the matter covered by articles 26 and 27), but of substance. It is not very unusual for the negotiating parties to add minor changes of substance to the text already authenticated. For this reason, the article had better be dispensed with, while the substance of paragraphs 1 and 2 of this article may be incorporated into the provisions of articles 10 and 11.

Articles 8 and 9

It is believed best to leave the matter to the decision of the States participating in the conference. The articles should therefore be deleted in their entirety.

/...

Article 10

There are cases where initialling is equivalent to signature (Cf. article 21, paragraph 1, of Sir Gerald Fitzmaurice's first report). It seems desirable to take into account this eventuality (see article 10, paragraph 3 (c) of the Japan draft).

Article 12

1. The principle adopted in paragraph 1 should in our view be stated in the reverse, i.e. that the international agreement does not require ratification unless it expressly provides for the requirement of ratification.
2. The only exception to the principle stated above seems to be the one referred to in paragraph 3 (c), and this can be formulated in a new paragraph.
3. The same rule should be applicable, mutatis mutandis, to approval, which in practice is employed as a simplified procedure of ratification in most cases. For this reason, provisions on approval in article 14 should rather be amalgamated with the provisions in this article, and not with those in article 14.

Article 13

Since articles 8 and 9 are to be deleted, it will be necessary to incorporate provisions of paragraph 2 of article 9.

Article 15

1. Paragraphs 1 (b) and 1 (c) are perhaps too technical and trivial to merit inclusion here.
2. Paragraph 2 is stating the obvious and could be dispensed with.
3. The proper place for paragraph 3 would appear to be section V rather than here.
4. The article in its entirety could therefore be deleted, while the essence of paragraph 1 (a) could be combined with the provisions of article 16.

Article 17

1. This article would seem to impose a great obligation, admittedly of good faith, upon a State which has not decided to become a party to the international

/...

agreement. The obligation of the nature stated in this article, if any, should not in principle accrue to the State referred to in paragraph 1. For this reason paragraph 1 should be deleted.

2. The wisdom of having an article of this character may legitimately be doubted, since the whole idea underlying it would appear to be too legalistic in approach. Moreover, the criterion given in this article for refraining from certain kinds of acts is in any case too subjective and difficult of application. A better solution would seem to be to leave the matter entirely to the good faith of the parties.

Articles 18, 19 and 20

1. The Government of Japan takes exception to the rules proposed by the International Law Commission on the question of reservation to multilateral international agreements. In its view, the basic principle governing the question of reservation should rather be the reverse, that a State may make a reservation only if the intention of the parties is not against the reservation in question. There is no inherent right of a State to become a party to an international agreement with whatever reservation it pleases.

2. An international agreement is almost always the result of a compromise among various conflicting interests, arrived at through a series of negotiations. If it were allowed to upset this balance of interests, after the agreement has been established, through the loophole of reservations, then it is feared that the whole system under the agreement in question might fall to the ground. The parties to the agreement are entitled to protect this integrity of the agreement.

3. From the standpoint de lege ferenda, the rule proposed by the Commission is to be rejected in that it would in effect encourage the making of reservations by States parties to the international agreement. Since the reservation is the means through which a derogation from the principles established under the agreement is sought, its abuse should be carefully guarded against.

4. It must also be borne in mind that the rule to be proposed in these articles are residual by nature, and applicable only to those cases where the international agreement in question is silent on this point. The parties are always free to choose whatever rule they like on this question by agreement among themselves.

/...

5. According to the provisions of article 18, paragraph 1 (d), a State may not formulate a reservation which is incompatible with the object and purpose of the agreement, which, in consequence, would seem to be null and void. Nevertheless, article 20, paragraph 2 (b) provides that the application of this test of compatibility with the object and purpose of the agreement is left entirely to individual parties, who are entitled to draw its legal consequences. It would seem more logical to set up a system under which the general intention of the parties is ascertained, be it by a certain majority decision or by unanimity.

6. The opinion of the International Court of Justice in the case concerning reservations to the Genocide Convention is certainly to be respected. But it is submitted that the rule enunciated by the Court is not to be regarded as a sacred rule capable of universal application. The Court itself made it abundantly clear that "the replies which the Court is called upon to give to the questions asked by the General Assembly are necessarily and strictly limited to the /Genocide/ Convention," and that the Court was seeking these replies "in the rules of law relating to the effect to be given to the intention of the parties /of the Genocide Convention/". Thus the rule to be proposed de lege ferenda need not necessarily follow the line taken up by the Court, which after all was trying to find out what the intention of the parties was in this specific case.

7. It is not very seldom that a declaration attached by a State to an international agreement causes in practice a serious difficulty of determining whether it is in the nature of a reservation or of an interpretative declaration (see, for example, the case of an Indian declaration to the IMCO Convention). For this reason, a new paragraph is suggested in an attempt to eliminate this practical difficulty. Under these provisions, mere silence to a declaration not entitled as reservation will not produce the legal effect of a tacit acceptance of it as provided in article 19 (see paragraph 2 of article 18 of the Japan draft).

Article 21

The principle of reciprocity in the operation of a reservation would seem to require that a non-reserving State in its relations with the reserving State should not merely be entitled to claim, but should be definitively entitled to the same modification effected by the reservation. For this reason it is suggested to delete the word "claim" in paragraph 1 (b).

/...

Article 23

The substance of paragraph 2 is acceptable, but the matter can safely be left to the interpretation of the international agreement in question.

Article 24

The technique of provisional entry into force is in fact sometimes resorted to as a practical measure, but the precise legal nature of such provisional entry into force does not seem to be very clear. Unless the question of legal effect of such provisional entry into force can be precisely defined, it would seem best to leave the matter entirely to the intention of the contracting parties. Provisions of article 23, paragraph 1 could perhaps cover this eventuality.

Article 25

The provisions in this article are on the whole acceptable. However, it is not clear from the letter of paragraph 1 whether the obligation to register under this article concerns the category of international agreements referred to in Article 102 of the Charter of the United Nations, or whether it concerns all the international agreements as defined in these draft articles.

Articles 26 and 27

These two articles will serve a useful purpose in establishing procedures for correction of errors, but they appear to be too detailed for a convention. In the case of a convention, the two articles could better be amalgamated in one article.

Article 29

1. Paragraph 1 is to a great extent redundant with paragraph 1 (g) of article 1. The first sentence should therefore be deleted.

2. Paragraphs 2 to 7 will no doubt provide a useful guide in a code, but it does seem a little out of place as well as proportion to provide for procedural details of a depositary in a general convention on the law of international agreements. The article could be reformulated in a more concise form.

ANNEX

JAPAN DRAFT

Draft articles on the law of international agreements

Part I

CONCLUSION, ENTRY INTO FORCE AND REGISTRATION OF INTERNATIONAL AGREEMENTS

SECTION I: GENERAL PROVISIONS

Article 1

Definitions

1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

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

(b) "Signature", "Ratification", "Accession", "Acceptance" and "Approval" mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by an international agreement. Signature, however, also means according to the context an act whereby a State authenticates the text of an international agreement without establishing its consent to be bound.

(c) "Instrument of full powers" means a formal instrument of whatever designation issued by the competent authority of a State authorizing a given person to represent the State either for the purpose of carrying out all the acts necessary for concluding an international agreement or for the particular purpose of negotiating or signing an international agreement or of executing an instrument relating to an international agreement.

(d) "Reservation" means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving an international agreement, whereby it purports to exclude or restrict the legal effect of some provisions of the international agreement in its application to that State.

(e) "Depositary" means the State or international organization entrusted with the functions of custodian of the text of the international agreement and of all instruments relating to the international agreement.

2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State.

/...

Article 2

Scope of the present articles

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every international agreement as defined in article 1, paragraph 1 (a).

2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law.

Article 2 bis

Derogation from the present articles

Notwithstanding the provisions of article 2, paragraph 1, States parties to the present articles may, by mutual agreement, derogate from any of the provisions of the present articles.

Article 3

Capacity to conclude international agreements

Capacity to conclude international agreements under international law is possessed by States and by other subjects of international law.

SECTION II: CONCLUSION OF INTERNATIONAL AGREEMENT BY STATES

Article 4

Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept an international agreement

1. For the purpose of negotiating, drawing up or authenticating an international agreement on behalf of a State:

(a) The Head of State, Head of Government and Foreign Minister are not required to furnish any evidence of their authority;

(b) The Head of a diplomatic mission is not required to furnish any evidence of his authority in regard to an international agreement between his State and the State to which he is accredited;

(c) The Head of a permanent mission to an international organization is not required to furnish any evidence of his authority in regard to an international agreement drawn up under the auspices of the organization in question to which he is accredited;

/...

(d) Any other representative of the State shall be required to furnish evidence of his authority by producing an instrument of full powers, unless this requirement is waived by the other negotiating State or States.

2. For the purpose of signing an international agreement on behalf of a State, except where the proposed international agreement expressly provides otherwise:

(a) The Head of State, Head of Government and Foreign Minister are not required to furnish any evidence of their authority;

(b) Any other representative of the State shall be required to furnish evidence of his authority by producing an instrument of full powers, unless this requirement is waived by the other negotiating State or States.

3. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of a State other than the Head of State, Head of Government or Foreign Minister, that representative shall be required to furnish evidence of his authority by producing an instrument of full powers.

4. In case of urgency, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned shall be accepted, provided that the instrument of full powers shall be produced in due course unless this requirement is waived by the other negotiating State or States.

Article 5

/Delete/

Article 6

/Delete/

Article 7

/Delete/

Article 8

/Delete/

Article 9

/Delete/

/

Article 10

Signature and initialling of the international agreement

1. Where the international agreement has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the international agreement itself or in a separate agreement:

(a) That signature shall take place on a subsequent occasion; or

(b) That the international agreement shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The international agreement may be signed unconditionally; or it may be signed ad referendum to the competent authorities of the State concerned, in which case the signature is subject to confirmation.

(b) Signature ad referendum, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the international agreement.

(c) Signature ad referendum, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature ad referendum was affixed to the international agreement.

3. (a) The international agreement, before being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the international agreement.

(b) When initialling is followed by the subsequent signature of the international agreement, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the international agreement.

(c) Notwithstanding sub-paragraphs (a) and (b) above, initialling may be equivalent to signature provided that the intention is clearly indicated by the circumstances.

Article 11

Legal effects of a signature

1. Where an international agreement is subject to ratification, approval or acceptance, signature does not establish the consent of the signatory State to be bound by the international agreement.

/...

However, the signature shall:

(a) Operate as an authentication of the text, if the text has not been previously authenticated in another form; and

(b) Qualify the signatory State to proceed to the ratification, approval or acceptance of the international agreement in conformity with its provisions.

2. Where the international agreement is not subject to ratification, approval or acceptance, signature shall establish the consent of the signatory State to be bound by the international agreement.

Article 12

Ratification or approval

1. An international agreement requires ratification or approval when the international agreement expressly prescribes that it shall be subject to ratification or approval, respectively, by the signatory States.

2. In addition to paragraph 1 above, ratification or approval is necessary in cases where the representative of the States in question has expressly signed "subject to ratification" or "subject to approval" respectively.

Article 13

Accession

A State may become a party to a multilateral international agreement by accession when it has not signed the international agreement and:

(a) The international agreement specifies accession as the procedure to be used by such a State for becoming a party; or

(b) The international agreement has become open to accession by the State in question through agreement of the States concerned.

Article 14

Acceptance

A State may become a party to an international agreement by acceptance when:

(a) The international agreement provides that it shall be open to signature subject to acceptance and the State in question has so signed the international agreement; or

(b) The international agreement provides that it shall be open to participation by simple acceptance without prior signature.

Article 15

/Delete/

Article 16

Legal effects of ratification, accession, acceptance and approval

Ratification, accession, acceptance or approval, which must be carried out by means of communication of a written instrument, establishes the consent of the ratifying, acceding, accepting or approving State to be bound by the international agreement.

Article 17

/Delete/

SECTION III: RESERVATIONS

Article 18

Formulation of reservations

1. A State may formulate a reservation to an international agreement, only if:

(a) The making of reservations is authorized by the terms of the international agreement or by the established rules of an international organization; or

(b) The international agreement expressly authorizes the making of reservations to specified provisions of the international agreement and the reservation in question relates to one of the said provisions; or

(c) The international agreement expressly prohibits the making of a specified category of reservations, in which case the formulation of reservations falling outside the prohibited category is by implication authorized; or

(d) In the case where the international agreement is silent concerning the making of reservations, the reservation is not incompatible with the object and purpose of the international agreement.

2. A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as reservation.

3. A reservation may be formulated:

(a) Upon the occasion of the adoption of the text of the international agreement, provided that it must be confirmed at the time of signature, ratification, accession, acceptance or approval of the international agreement; or

(b) Upon signing the international agreement at a subsequent date; or

(c) Upon the occasion of the exchange or deposit of instrument of ratification, accession, acceptance or approval.

Articles 19-20

The effect of reservations formulated

1. The effect of a reservation formulated in accordance with the provisions of article 18 shall be conditional upon its acceptance, express or tacit, by all States parties to the international agreement or to which the international agreement is open to become parties, unless

(a) The international agreement otherwise provides; or

(b) The States are members of an international organization which applies a different rule to international agreement concluded under its auspices.

2. A reservation shall be regarded as having been tacitly accepted by a State if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

3. An objection by a State which has not yet established its own consent to be bound by the international agreement shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the international agreement.

Article 21

The application of reservations

1. A reservation established in accordance with the provisions of article 19-20 operates:

(a) To modify for the reserving State the provisions of the international agreement to which the reservation relates to the extent of the reservation; and

(b) Reciprocally to entitle any other State party to the international agreement to the same modification of the provisions of the international agreement in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the international agreement which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the international agreement inter se.

Article 22

The withdrawal of reservations

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

SECTION IV: ENTRY INTO FORCE AND REGISTRATION

Article 23

Entry into force of international agreements

1. An international agreement enters into force in such manner and on such date as the international agreement itself may prescribe.

2. If an international agreement does not specify the date of its entry into force:

(a) In the case of a bilateral international agreement not subject to ratification, approval or acceptance, it enters into force on the date of its signature or, when the international agreement is embodied in two or more related instruments, on the date of signature of the last instrument; and

(b) In other cases, it enters into force on the date to be determined by agreement between the States concerned.

3. The rights and obligations contained in an international agreement become effective for each party as from the date when the international agreement enters into force with respect to that party, unless the international agreement expressly provides otherwise.

Article 24

/Delete/

Article 25

The registration and publication of international agreements

1. The registration and publication of international agreements entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. The procedure for the registration and publication of international agreements shall be governed by the regulations in force and established practices for the application of Article 102 of the Charter.

3. International agreements entered into by any party to the present articles, not a Member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

Articles 26-27

Correction of errors in the text of international agreements

1. Where an error is discovered in the text of an international agreement for which there is no depositary after the text has been authenticated, the interested States shall by mutual agreement correct the error in either of the following ways, unless another procedure has been agreed upon:

(a) By having the appropriate correction made in the text of the international agreement and causing the correction to be initialled in the margin by representatives duly authorized for that purpose; or

(b) By executing a separate protocol, a procès-verbal, an exchange of notes or similar instrument, setting out the error in the text of the international agreement and the corrections which the parties have agreed to make.

2. Where an error is discovered in the text of an international agreement for which there is a depositary, after the text has been authenticated:

(a) The depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to the attention of any other States which may subsequently have signed or accepted the international agreement, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction; and

(b) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the

/...

text of the treaty, initialling the correction in the margin, and shall draw up and execute a procès-verbal of the ratification of the text and transmit a copy of the procès-verbal to each of the States which are or may become parties to the international agreement.

3. Whenever the text of an international agreement has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date on which the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of an international agreement made under the provisions of this article shall be communicated to the Secretariat of the United Nations if that international agreement has been registered therewith under article 25.

Article 28

The depositary of multilateral international agreements

1. Where a multilateral international agreement fails to designate a depositary of the international agreement, and unless the States which adopted it shall have otherwise determined, the depositary shall be:

(a) In the case of an international agreement drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

(b) In the case of an international agreement drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating States shall consult together concerning the nomination of another depositary.

Article 29

The functions of a depositary

1. A depositary of an international agreement shall act impartially in the performance of his functions as custodian of the original text of the international agreement and of all instruments relating thereto.

2. In addition to any functions expressly provided for in the international agreement and unless the international agreement otherwise provides, a depositary shall have the duty:

(a) To prepare certified copies of the original text or texts and transmit such copies to all States parties to the international agreement or to which the international agreement is open to become parties;

(b) To furnish to the State concerned an acknowledgement in writing of the receipt of any instrument or notification relating to the international agreement and promptly to inform the other States, mentioned in sub-paragraph (a) above, of the receipt of such instrument or notification, or when appropriate, of the fulfilment of the conditions laid down in the international agreement for its entry into force;

(c) On a reservation having been formulated, to communicate the text of such reservation and any notification of its acceptance or objection to the interested States as prescribed in articles 18 and 19-20;

(d) On receiving a request from a State desiring to accede to the international agreement, to communicate the request to the States whose consent to such participation is specified in article 13 as being material; and

(e) On an error having been discovered in the text of the international agreement, to inform all States concerned of such error, and the objection, if any, to the correction of such error, raised by any of them and, on proceeding with the correction thereof under the provisions of article 26-27, draw up and execute a procès-verbal of such correction and furnish them a copy thereof.

3. The depositary shall have the duty of examining whether a signature, an instrument, a notification, a reservation, or an objection to a reservation is in due form under the provisions of the international agreement in question or of the present articles, and, if need be, to communicate on the point with the States concerned. In the event of any difference arising between a State and the depositary as to the performance of these functions, the depositary shall, upon the request of the States concerned or on its own initiative, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

12. LUXEMBOURG

[Part I]

Transmitted by a note verbale of 14 December 1964 from the Permanent Representative to the United Nations

[Original: French]

Part I: Conclusion, entry into force and registration of treaties (articles 1-29)

Before dealing in detail with the twenty-nine articles which make up the first series of provisions drawn up by the International Law Commission on the law of treaties, the Luxembourg Government would like to stress the importance it attaches to this part of the Commission's work and to express its very deep appreciation of the value of the draft articles.

The Luxembourg Government hopes that the Commission's work will soon result in the conclusion of a world-wide convention on this fundamental subject. It is with that object that the Luxembourg Government takes the liberty of submitting herewith a number of critical comments and proposals. Those articles or parts of articles on which no observations have been made are fully approved by the Luxembourg Government.

Article 1

The expression "treaty". Paragraph 1 (a) of this article assigns the following meaning to the expression "treaty": "Treaty means any international agreement in written form ... concluded between two or more States or other subjects of international law and governed by international law." It is obviously difficult to define a notion so fundamental as that of an international treaty: indeed, a point has been reached beyond which ideas can no longer be defined in strictly juridical terms. The question therefore arises whether it is advisable to give a legal definition of the term "treaty" or whether it might not be better simply to state the idea and leave it to doctrine to define it.

The essence of the paragraph quoted lies in defining a treaty as "any international agreement". But the term "agreement" is nothing else than a synonym of "treaty". If the International Law Commission wished to maintain a

provision of this nature, it appears to the Luxembourg Government that a valid definition of the idea of a treaty should concentrate on three elements:

(a) the consensual nature of a treaty, which represents an agreement between two or more parties;

(b) the nature of the parties, who are either States or other subjects of international law;

(c) the binding effect sought by the parties, in the sense that the treaty (unlike a mere declaration of common purpose, of a political nature) has always as its purpose a legal commitment entered into by the parties.

On the other hand, there might be some question whether it is correct to include in the actual definition of the treaty two elements stated in the International Law Commission's text, namely, the written form and the reference to international law.

According to the draft text (which should be clear in itself, without reference to the commentary), the question may well arise whether the written form should be regarded as a matter of substance, that is, whether it ought to be a factor in determining the validity of treaties or whether it is simply a way of saying that the future convention shall apply only to treaties in written form. If the second interpretation is the correct one, it would be preferable to eliminate that element from the definition and to add at the end of the article a provision stating that

> "The rules laid down by these articles relate only to international treaties in written form."

Further, the question arises whether it is really necessary to say that the draft articles refer exclusively to treaties "governed by international law". That qualification seems to be implied by the very nature of the contracting parties; hence, the rules of international law could only be made inapplicable as an exception by inserting a specific reference to another system of juridical rules or possibly by virtue of the very special subject of a particular agreement. That is such an exceptional case that it would be better not to complicate the general definition of a treaty by a reference to that unlikely assumption.

In the opinion of the Luxembourg Government, if the term "treaty" is to be defined, the definition might read somewhat as follows:

/...

"The expression 'treaty' means any agreement between two or more States or other subjects of international law designed to create a mutual obligation for the parties, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation etc."

"Treaties in simplified form". The term "treaty in simplified form", as stated in paragraph (11) of the commentary, could be defined by the form, or rather the absence of form of the treaty. Actually, the indications under sub-paragraph (b) of article 1, paragraph 1, do not constitute a definition, but are merely an enumeration of the various formal procedures characteristic of this category of agreements.

The term described in this sub-paragraph recurs twice in the articles which follow: in article 4, paragraph 4 (b), which states that treaties in simplified form may be signed without requiring the representatives of the parties to produce instruments of full powers; and in article 12, paragraph 2 (d), which states that such treaties shall be presumed not to be subject to ratification. Juridically, a treaty in simplified form is therefore characterized by the absence of full powers and the waiving of ratification. The use of certain procedures, such as those indicated in article 1, paragraph 1 (b), appears to betoken a determination to waive such formalities. That being the case, the real definition of "treaty in simplified form" would be something like the following: "a treaty concluded in circumstances which indicate as regards the parties the willingness to enter into a commitment without observing the formalities of full powers and ratification".

The foregoing shows that the term "treaty in simplified form" does not describe a category of agreements which is sufficiently precise to constitute a normative idea; in reality, it is a purely descriptive term, certainly interesting from the point of view of juridical doctrine, but only with difficulty usable in framing a legal definition. For the purposes of these draft articles, it should be sufficient to indicate at the appropriate places in what circumstances the parties should be regarded as having renounced the production of full powers and ratification.

Consequently, the Luxembourg Government proposes the deletion of this part of the definitions.

/...

"General multilateral treaty". Paragraph 1 (c) defines the term "general multilateral treaty" to mean a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole. Subsequently, this term is used in only one other place in the draft articles, namely in paragraph 1 of article 8, which states that "every State" may become a party to such a treaty. The Luxembourg Government reserves its right to express its views on the substance of this question in its commentary on article 8. For the time being, confining itself to the matter of definitions, it would like to make the following comments.

(a) This specific term is introduced without the text having previously defined the term "multilateral treaty" in general.

(b) In the opinion of the Luxembourg Government, "of general interest to States as a whole" is much too vague a criterion to form the substance of a workable definition. Since the use of the term defined in this sub-paragraph will actually govern the question of the participation of States in multilateral treaties, the application of such a debatable criterion might give rise to insoluble conflicts concerning the general nature of the norms established by a multilateral treaty, or whether they are of interest to States as a whole.

For the reasons given, the Luxembourg Government considers that this sub-paragraph should be deleted from the article on definitions.

The term "approval". "Approval" is one of the many terms enumerated in paragraph 1 (d). As it is commonly understood, the term means the internal formalities to which an international treaty is subject and, more particularly, parliamentary approval of treaties. It is only as a result of an unfortunate confusion of terms that "approval" has come to be used in international affairs as the equivalent of the term "ratification"; the converse is also true, moreover, since the term "ratification" is also frequently used in municipal law to mean parliamentary approval.

The Luxembourg Government invites the Commission to consider whether it should not take advantage of this opportunity to perfect the terminology once and for all; in these draft articles, which are concerned solely with the external and international aspect of the problem, references to the term "approval" of international treaties should be systematically eliminated and only the terms "ratification" and "accession" should be maintained.

Article 4

This article seeks to define the powers of the different organs of the State - Heads of State, Heads of Government, Ministers for Foreign Affairs, Heads of Missions - with regard to the different operations leading to the conclusion of international treaties. According to their position in the national and international hierarchy, these officials can, to a greater or lesser degree, act qualitate qua, i.e., without being required to furnish the other party or parties with evidence of their authority to perform the various acts designed to bring international treaties into being and into force. This conception, which is based on the idea that trust should prevail in international relations, must be fully approved.

Since the norms defined in this article do not, however, necessarily coincide with the powers granted by the municipal law of various States - in fact, they attribute to Heads of Government, Ministers for Foreign Affairs and Heads of Mission wider powers than those which they possess by virtue of the internal laws and usages of certain countries - it would be advisable to make it quite clear that article 4 concerns only mutual relations between States, and is not intended to modify the powers accorded to external organs by municipal law. A clarification of this type would be extremely useful, and even indispensable, for States, such as Luxembourg, which accept the principle that international treaties become an integral part of municipal law.

In practice, it would be a question of completing this article by a final sub-paragraph, worded as follows:

> "The provisions of this article do not have the effect of modifying national constitutions, laws and usages as regards the powers of organs of the State in foreign relations."

Moreover, paragraph 4 (b) of this article provides that in the case of "Treaties in simplified form", it shall not be necessary for a representative to produce an instrument of full powers, unless called for by the other party. This provision opens the door to great uncertainty, for it would be practically impossible to distinguish between treaties which are invalid owing to lack of full powers and treaties which are valid as a result of the utilization of the "simplified form".

/...

In reality, in the text as drafted it is a question of establishing the cases in which a treaty can be validly negotiated, drawn up, authenticated and signed without it being necessary for the person executing these formalities to possess an instrument of full powers executed in good and due form. Observation of practice shows that the so-called "treaties in simplified form" are most frequently concluded either within the established diplomatic relations between two countries (this is the case of "exchanges of diplomatic notes"), or within an existing international organization (this is the case of the "agreed minute" mentioned in article 1, paragraph 1 (b)). If full powers are dispensed with in such cases, it is because the negotiation and signing of the agreement take place on the basis of an established and well-tested relationship of trust. It is for this reason that in such cases it is not necessary to call for full powers.

This being so, it would seem dangerous to adopt provisions which would have the effect of encouraging the practice of treaties in simplified form beyond the limits so defined. The Government of Luxembourg therefore proposes that sub-paragraph 4 (b) should be deleted.

In fact, it believes that the problem is already solved by paragraph 2, except that in this provision the idea of a "Head of a permanent mission to an international organization" would have to be replaced by the more general idea of "representative". Indeed, it sometimes happens that a country is represented in an international organization by a member of its Government or by other persons designated ad hoc as representatives.

Article 5

The International Law Commission rightly notes that the contents of this article are more descriptive than normative. It is indeed difficult to formulate precise juridical rules for the first phase when drawing up treaties: this is governed by simple usages, but from the juridical point of view it is subject to the principle of liberty.

At the most, the period of negotiation could only give rise to juridical problems involving the responsibility which participating States might incur as a result of their actions during the negotiations. The Government of Luxembourg feels that article 5 in its present form should be deleted.

/...

Article 6

This provision is of capital importance to the structure of the whole. The article prepared by the International Law Commission is based on the following system:

(a) The text of treaties drawn up by an international conference convened by the participating States themselves or by an international organization is adopted by a two-thirds majority;

(b) The text of treaties drawn up within an international organization is adopted by the voting rules applicable in that organization;

(c) The text of other treaties is decided upon by the mutual agreement of the States participating in the negotiations. In the commentary it is specified that there "other cases" include bilateral treaties and multilateral treaties concluded between a small group of States otherwise than at an international conference.

This systematization elicits an initial comment. It is difficult to conceive how a multilateral treaty, even between a small group of States, could be concluded otherwise than at an international conference. Any negotiations designed to result in the signing of a multilateral treaty assume, by the force of circumstances, the character of a meeting of representatives of several Governments, which is itself the definition of an international conference, even if such a conference is constituted and operates in an informal manner. Thus, a great number of multilateral treaties which, although the number of parties is more or less limited, play a role of the greatest importance in the European and Atlantic regions, have been drawn up in international conferences. Such is the case of the Conventions which established Benelux, the European Communities, the Council of Europe, the Organization for European Economic Co-operation, the Atlantic Alliance, the Organization for Economic Co-operation and Development, the European Free Trade Association, the Treaty of Brussels and the Treaty establishing the Western European Union, etc. This shows that sub-paragraph (c) of article 6 in reality concerns only the case of bilateral treaties, whereas the general rule regarding multilateral treaties is the clause of sub-paragraph (a) which subjects "international conferences" to the principle of the two-thirds majority.

/...

This rule appears to be based on the general practice at conferences convened under the auspices of the United Nations. It must be recognized that this rule is totally unsuited to the conditions prevailing at conferences of a regional character, where it is inconceivable for negotiations to be undertaken otherwise than on the basis of mutual agreement, that is, unanimity.

The Government of Luxembourg believes that the only principle which is truly consistent with the consensual character of treaties, whether bilateral or multilateral, is the principle of mutual agreement. It must be recognized that as soon as this principle is abandoned, the transition is made from the contractual plane to the institutional plane. For this reason, the Government of Luxembourg believes that a derogation from the principle of unanimity between the contracting parties is conceivable only when a multilateral treaty is drawn up within the framework or under the auspices of an international organization. It recognizes, moreover, that there is a growing tendency for the negotiation of international conventions to take place within an organized structure and consequently in accordance with the voting rules applicable in the various organizations. For this reason it believes that article 6 could without disadvantage be composed as follows:

(a) At the beginning, it would be necessary to affirm as a general principle that the adoption of the text of treaties takes place by mutual agreement of the States participating in the negotiations.

(b) On the other hand, when a treaty is drawn up within or under the auspices of an international organization, establishment of the text would be governed by the voting rules applicable in the organization. Even this position cannot be affirmed without reservations, for it is known that there are examples of international institutions which make decisions according to the majority principle whose constitutions explicitly refer certain questions to subsequent agreements, precisely in order to guarantee the application of the principle of unanimous agreement. (See, as an example, articles 220, 236 and 237 of the Treaty establishing the European Economic Community.)

(c) Finally, at international conferences the voting rules unanimously adopted by those conferences would be applicable.

The Government of Luxembourg therefore has the honour to submit the following draft to the International Law Commission:

"1. The adoption of the text of a treaty takes place by the unanimous agreement of the States participating in the negotiations.

2. In the case of a treaty drawn up at an international conference, the adoption of the text takes place according to the voting rule established by the rules of procedure of that conference.

3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place according to the voting rule applicable in the competent organ of the organization, except in the case of a derogation resulting from the constitution of the latter."

Article 8

This article distinguishes between "general multilateral treaties", that are, generally, open to "every State", and other treaties that are only open to States which took part in the adoption of its text, States to which accession to the treaty was made open by its terms, or States which were invited to attend the conference at which the treaty was drawn up.

It will be recalled that the "general multilateral treaty" is defined in article 1 as being a treaty which establishes "general norms of international law" or "deals with matters of general interest to States as a whole". In its commentary on article 1, the Government of Luxembourg has already explained why it does not think that this definition can be used, in view of the uncertainties that are inherent in the notions it employs.

With regard to the provisions of article 8 itself, the Government of Luxembourg considers that the parties to any multilateral convention have the sovereign right to decide on the participation of States which were not among the original parties. It is not possible to find an a priori solution to this question, since the solution depends very much on the purpose of each individual treaty and on the political and juridical aims of the original parties. The Government of Luxembourg therefore considers that paragraph 1 of this article should be deleted, since the three hypotheses contained in sub-paragraphs (a), (b) and (c) of paragraph 2 give a complete and satisfactory ruling on the matter.

Article 9

This article is based on the following distinction: Multilateral treaties may be opened to the participation of other States:

in the case of most multilateral treaties, either by a two-thirds majority decision by participating States - or, as the case may be, by a decision of the competent organ of an international organization;

in the case of multilateral treaties "concluded between a small group of States", by mutual agreement of all the parties.

We first wish to draw attention to the debatable nature of the notion of "a small group of States" to which is subordinated the distinction, a very important one in view of its consequences, between treaties that may be made open by a majority decision and treaties that may be made open by a unanimous decision. But whenever a multilateral treaty is not simply opened to any State whatsoever it could be claimed that one is dealing with a "small group of States".

In accordance with the views just expressed regarding article 6, relating to the adoption of the text of a treaty, the Government of Luxembourg considers the procedure suggested in article 9, paragraph 1, to be inadmissible. Such a procedure would enable third States to accede in spite of the objections that might be raised by a minority of the parties. It would also make it possible to introduce subsequent alterations to the instruments of accession of multilateral treaties. In reality, the opening of a multilateral treaty to the participation of States other than those to which it was originally open is equivalent to altering the accession clauses of a multilateral treaty or to introducing such clauses into a treaty where it did not exist. Such a provision should therefore in principle be subject to the same requirements as the revision of the treaty.

The Government of Luxembourg therefore proposes replacing article 9 with a clause which could be combined with paragraph 2 of article 8 to form a new article, stating simply that:

"A multilateral treaty may be opened to the participation of States other than those to which it was originally open, subject to the provisions regarding revision of the treaty."

Having established this principle, the question arises as to whether it might not be appropriate to introduce to that effect a simplified procedure which would

/...

obviate the need for another international conference. The provisions of article 9, paragraph 3, could, mutatis mutandis, provide the model for such a solution: When the depositary of a treaty receives a request for admission from a third State, he shall consult the original parties in order to discover whether the provisions regarding revision of the treaty are being complied with. Provision could also be made that, at the expiry of a specified time-limit, consent of a party shall be presumed if it has not notified the depositary of its objection.

The Government of Luxembourg considers that this solution, while respecting the consensual nature of international treaties, would provide enough flexibility to allow multilateral conventions to be opened to the accession of other States, without undue inconvenience, subject to the agreement of all the original parties.

Article 10

This article gives rise to two questions which are intended to clear up certain doubtful points.

In paragraph 1, the meaning of the words "in the treaty itself or in a separate agreement" does not seem very clear. International treaties are often set out in a number of documents, including "annex protocols" and "signature protocols". But the treaty in the legal sense of the word is represented by all these documents put together. The words quoted therefore seem superfluous in this context.

Further, in the text of this article the distinction is not drawn very clearly between a signature "ad referendum" and a signature "subject to ratification". It seems certain that a signature ad referendum followed by a confirmation only has the effect of a signature within the meaning of article 11, and that such a signature, even if confirmed, can still be subject to ratification, should the occasion arise. In order to avoid any misunderstandings in this matter, it would seem advisable to delete the word "full" in paragraph 2, sub-paragraph (c), as this wording could give the impression that, once a State had confirmed a signature ad referendum, it would be fully committed to the terms of the treaty. This does not, however, seem to be the scope of the confirmation: it simply has the effect of transforming the signature ad referendum into a signature pure and simple, which, in accordance with the provisions of the treaty, will have one of the effects defined in article 11.

/...

Article 11

The Government of Luxembourg would like to make a remark regarding the terminology employed in connexion with this article. As was pointed out with regard to article 1, the use of the word "approval" should be forbidden in any instrument referring exclusively to the international operation of treaties.

Article 12

In accordance with the lengthy explanation given earlier, the Government of Luxembourg proposes deleting paragraph 2, sub-paragraph (d) relating to treaties "in simplified form". The assumption contained in this sub-paragraph is already implicit in sub-paragraph (c), referring to the intention to dispense with ratification resulting from "other circumstances evidencing such an intention". Now the form in which an agreement is concluded is one such circumstance.

The deletion of sub-paragraph (d) would have the added advantage of making it possible to delete the whole of paragraph 3 which, in any case, is merely a repetition of the provisions of paragraph 2. Once the assumption contained in paragraph 2, sub-paragraph (d) is eliminated, paragraph 3 will no longer refer to treaties which themselves expressly provide that they shall come into force upon signature (paragraph 2 (a)). Now it is difficult, if not impossible, to see how the hypothetical cases mentioned in paragraph 3 can arise when a treaty expressly provides that it shall come into force upon signature. The cases referred to in this connexion in paragraph (8) of the commentary are not sufficiently representative to warrant inserting an actual provision in the draft articles.

The question raised in the same paragraph of the commentary regarding treaties that come into force provisionally is another matter. In such cases, application will be subject to the treaty subsequently coming into force and will still be made only within the limits of the powers normally held by the Governments of the contracting parties.

Article 14 et seq.

In this article - and the same holds true for articles 15, 16 and 17 - the International Law Commission attempted to clear up an unfortunate confusion in

/...

terminology resulting from replacing the ideas of ratification and accession by those of "acceptance" and "approval", respectively. As stated in paragraph (2) of the Commission's commentary, this terminology seems to be due to considerations connected with the internal constitutional structure of certain States; from the international point of view, it creates confusion.

The Luxembourg Government, for its part, proposes that the expressions "acceptance" and "approval" in articles 14, 15, 16 and 17 should be eliminated entirely. Regarding the idea of approval, it has already been said that it is an expression peculiar to the internal juridical structures which should be completely banished from international practice. On the other hand, account could be taken of terminology using the idea of "acceptance" by means of an additional article, inserted after article 17, saying that the provisions concerning ratification and accession shall be applicable to "acceptance", according to whether acceptance follows prior signature or not. That article could be worded as follows:

> "The provisions of the foregoing articles concerning ratification shall be be applicable to treaties signed subject to acceptance; the provisions concerning accession shall be applicable to treaties containing the provision that they shall be open to participation by simple acceptance, without prior signature."

Article 15

This article calls first of all for two comments concerning terminology. In paragraph 1, sub-paragraph (c), it would be preferable to say "two alternative texts" rather than "two differing texts". In paragraph 2, sub-paragraph (a), the word "certifié" (French text only) refers to the exchange of instruments, and therefore should be in the singular.

The Luxembourg Government also considered the relationship between the provisions of article 15, paragraph 2, and the provisions of article 23, respecting the entry into force of treaties. Not only does article 15 define the procedures applicable to ratification, accession or acceptance, it also determines the time at which the instruments shall enter into force. Article 23, in its turn, determines the entry into force of treaties, which it is difficult to dissociate from the effect of the instruments mentioned in article 15.

/...

It would seem necessary to distinguish here between two things: firstly, the time at which the mutual undertaking between the parties begins (from that time on, the parties can no longer withdraw unilaterally); secondly, the time at which the treaty enters into force - that is, becomes effective. When a treaty makes no provision in this respect, those two effects (the mutual undertaking and the entry into force) take place at the same time. On the other hand, some treaties provide that the entry into force shall take place later than the mutual engagement.

This analysis reveals that we must distinguish between the procedure for bringing about ratification, accession or acceptance (the subject of article 15) and the question of the time at which the treaty will enter into effect (the subject of article 23). As for such effect, we must distinguish, in accordance with the foregoing, between the time of the commitment of the parties (which takes place at the time agreement is documented by the exchange or deposit of the formal documents) and the time of the entry into force of the treaty (which may take place later).

In view of these distinctions, the Luxembourg Government considers that articles 15 and 23 should be redrafted.

New provision

The Luxembourg Government now proposes the insertion of a new provision stating that, owing to the effect of the entry into force of a treaty, the parties shall be obliged to take all appropriate measures to ensure the effectiveness of the treaty, specially by ensuring its publication and by taking the necessary measures for it to be carried out. Such a provision would remind States that the first obligation they incur in becoming bound by an international treaty is to take the measures necessary to ensure the effectiveness of the treaty in their national territories. Sometimes clauses of this type appear in some treaties (for example, one could cite article 86 of the Treaty to establish the European Coal and Steel Community and article 5 of the Treaty to establish the European Economic Community), but the same obligation is implicit in any international treaty.

The provision proposed above could be drafted as follows:

/...

"By the entry into force of the treaty, the parties thereto shall be bound to take all measures, both general and particular, and above all measures of publicity, that are necessary to secure the application in full of the treaty in their territories".

Article 25

The Luxembourg Government fully approves the provisions of this article, but queries whether paragraph 2, as drafted, is not, in fact, an amendment to the United Nations Charter. In order to overcome this difficulty, it would be sufficient to redraft the paragraph as follows:

"States which are parties to the present article and are not Members of the United Nations shall undertake to register with the Secretariat of that Organization the treaties which they have concluded."

[Part II]

Transmitted by a note verbale of 23 December 1964 from the Permanent Representative to the United Nations

[Original: French]

The Luxembourg Government approves the solution adopted by the International Law Commission with respect to failure to observe a provision of the internal law of a State regarding competence to enter into treaties. The rule drafted by the Commission, however, leaves another question open: viz. failure on the part of the representatives of a State to comply with other rules of internal law (more specifically of constitutional law), beside the provisions regarding competence to enter into treaties.

The following might be quoted as examples: a treaty of alliance concluded by a State that is constitutionally neutral; a military treaty concluded by a constitutionally demilitarized State; a treaty modifying the structure and competence of internal authorities as a result of the transfer of sovereign powers to an international organization, (this difficulty led to discussions in various European countries at the time when the treaties setting up the European communities came into force); a treaty containing clauses contrary to the guarantees of fundamental freedoms granted under the constitution, etc. There is no need to

/...

point out that to subordinate the validity of international treaties to the observance of such rules, even if included in the constitution of a State, might lead to great uncertainty in international relations. A treaty must be presumed valid once it has been concluded by the organs competent to represent a State internationally; the violation of constitutional provisions - except those relating to the competence to enter into treaties, in the exceptional case referred to in this article - should not therefore be adduced as justification for questioning the validity of a treaty duly entered into.

It would perhaps be advisable for the International Law Commission in its commentary to deal more fully with the question we have just mentioned.

Article 37

The clause proposed by the International Law Commission is likely to create a great deal of legal uncertainty.

From a formal point of view one should ask first of all what "peremptory norms of general international law" mean here. Does it mean international usage, certain general principles of law, or can it also mean peremptory norms defined by international treaties? If the latter assumption is correct - and such would indeed appear to be the case from the commentary to the article - we should then ask, starting from what general level could an international treaty be regarded as validly establishing a peremptory norm which would be binding on other treaties. Moreover, the proposed clause would have the effect of introducing the whole question of the conflict of rules resulting from successive international treaties, whenever the source of a norm regarded as peremptory was an international treaty concluded previous to the treaty in dispute. By combining with this article the rule pacta sunt servanda (which is undoubtedly a peremptory norm), any international treaty incompatible with a previous treaty could be claimed to be null and void, except where the authors of the later treaty unquestionably have the power to abrogate the first treaty.

The uncertainty would be no less great from the substantive point of view. Indeed, as the Commission itself has pointed out, there is no authority in international life that is competent to define which norms are peremptory in relations between States and which are not. Precisely because of the contractual nature of all international treaties, it may even by claimed that all rules

formulated by treaty are peremptory, since each one represents an undertaking of a State towards other States. Indeed, a law which has its origin in a contract, owing to the mutual undertaking which it implies, is always more coercive than the law which is simply the law of a country, certain provisions of which allow wider freedom to the subjects to whom they relate.

It appears to the Luxembourg Government that the International Law Commission wished to introduce here a cause of nullity similar to the criteria of morality and "public policy" which in internal law are used to assess the compatibility of private contracts with certain fundamental conceptions of the social order. It is questionable whether such conceptions are suitable for transfer to international life, which is characterized by the lack of any authority, political or judicial, capable of imposing on all States certain standards of international justice and morality. Consequently, the proposed clause, far from serving its purpose, is likely only to have the effect of creating uncertainty and confusion. Much to its regret, the Luxembourg Government concludes that in the present state of international relations it is not possible to define in juridical terms the substance of peremptory international law.

Lastly, the question arises who would be qualified to claim the nullity contemplated by this article: could such nullity be claimed only by the States parties to the treaty held to be incompatible with a peremptory norm? In that case the application of the provision would imply a contradictory attitude of the party claiming nullity, since that party itself would have contributed to the preparation and entry into force of the treaty disputed by it; it would be a kind of venire contra factum proprium. On the other hand, if it was assumed that third parties could claim the nullity of a treaty which they regarded as incompatible with a peremptory rule, this would be inconsistent with the principle of relativity, which, in the absence of any supra-national authority, continues to dominate the entire subject of international treaties.

Article 39

The Luxembourg Government proposes that the part of the text concerning "statements of the parties" should be clarified by the insertion of the word "concordant". This addition would prevent a party from invoking its own unilateral statements in order to secure the right to denounce a treaty or withdraw from it.

Article 40

The situation contemplated by the International Law Commission as justification for the provisions of paragraph 2 is not sufficient reason for the introduction of such a complicated rule. If it was really desired to safeguard against the - in fact highly improbable - inclinations of a small number of States which were the first to accede to a multilateral convention and wished to terminate it by mutual agreement, paragraph 2 might be replaced by a provision to the effect that States that had taken part in drawing up a treaty, but had not become parties to it, could still bring that treaty into force among themselves, even after the original parties had terminated it by mutual agreement.

It would certainly be preferable, however, to delete paragraph 2 of this article altogether.

Article 45

In accordance with its comments on article 37, the Luxembourg Government proposes that article 45 too should be deleted.

Article 48

The distinction drawn in the commentary between treaties drawn up "within" and those drawn up "under the auspices" of an international organization is too vague to serve as the criterion for the application of this provision. The Luxembourg Government considers that the clause in article 48 - the fundamental idea of which it fully approves - should apply only in cases where a connecting link is established between a treaty and the statute of the organization concerned. Such a link should be considered to exist, for example, whenever there is a necessary relationship between the position of a State as a party to a treaty and its position as a member of the organization within which the treaty was negotiated and concluded. On the other hand, this clause should not apply when an international treaty, although concluded under the auspices of a specified organization, is open to States which are not also members of that organization.

Thus, to give some specific illustrations, the Treaty instituting the Benelux Economic Union provides that the States parties should conclude supplementary conventions on various matters (e.g. freedom of movement and legal co-operation)

/...

included in the Union's aims; in this case the connecting link is clearly established. The same is true of the conventions envisaged in article 220 of the Treaty establishing the European Economic Community, the object of which is the protection of persons and their rights, the elimination of double taxation, the mutual recognition of companies and the reciprocal recognition and execution of judicial decisions. The same is also true of the European convention on human rights, which is intimately linked to the aims and operations of the Council of Europe.

The difficulty is to define this connecting link between a treaty and the law of an international organization in a sufficiently specific and precise way. For this purpose, a second sentence worded as follows might perhaps be added to the article:

> "This provision shall not apply when a treaty drawn up within an international organization is open to States which are not members of that organization".

General comments on grounds of nullity and the termination of treaties

Articles 33 to 37 and 42 to 43 indicate a number of grounds the effect of which is either to make a treaty void ab initio (fraud, error, coercion, conflict with a peremptory norm) or to terminate its operation (breach, impossibility of performance, fundamental change of circumstances, emergence of a new peremptory norm). These rules are not without analogy in certain civil law provisions. But unlike internal law, where there is always a judge competent to settle disputes arising out of contracts concluded between individuals, there is no authority at the international level capable of determining if the nullity or termination of a treaty on one of the grounds indicated, is invoked with good reason by a particular State. As the International Law Commission has repeatedly brought out in its commentary, this state of affairs entails a real danger for the permanence of international treaties. The danger is particularly marked in the case of a ground of nullity as vague as that of conflict with a peremptory norm of general international law, and, as far as the termination of treaties is concerned, in cases of breaches of undertakings, impossibility of performance, and even more, fundamental changes of circumstances.

The Luxembourg Government considers that it is not possible in practice to embody in a formal treaty the various grounds of nullity, and particularly the

/...

motives for termination of treaties, if the various States do not undertake at the same time, to submit, as far as the application of those provisions is concerned, to a jurisdiction or compulsory arbitration. Since it is illusory to believe that such a state of law can be reached in the foreseeable future, the Luxembourg Government ventures to propose the following solution.

At the end of the articles, a new provision should be inserted authorizing States parties to make a reservation, under which the provisions mentioned could not be invoked against them by States which were not bound in regard to them by the acceptance of arbitration or a compulsory jurisdiction. The effect of such a clause would be that the provisions of these articles could be taken in two ways:

In relations between States bound by an undertaking of an arbitral or judicial nature, the provisions relating to the nullity and termination of treaties would have full legal force;

In relation with other States, only the general rules of international law would be applicable. That would not mean that the provisions drawn up by the International Law Commission would be unimportant; but between such States they would be for guidance only, and not have the force of legal rules proper. The article proposed by the Luxembourg Government might be worded as follows:

> "Upon acceding to these articles, States parties may, without prejudice to the general rules of international law, exclude from the application of the provisions relating to the defect in validity and the termination of treaties any State that has not accepted in their regard an undertaking concerning compulsory jurisdiction or compulsory arbitration, with respect to a treaty of which a defect in validity or the termination is alleged."

Article 51

The provisions of this article would not apply to the extent that a State had made use of the reservation proposed in the new article given above. In fact, as no legal obligation would then exist between such a State and any other State which had not undertaken with regard to the former State an obligation to submit to arbitration or a jurisdiction, the procedure laid down in the article would no longer serve any purpose.

13. MALAYSIA

[Part I]

Transmitted by a note verbale of 26 July 1963 from the Ministry of External Affairs

[Original: English]

The Ministry of External Affairs, Federation of Malaya presents its compliments to the Office of the Secretary-General of the United Nations and ... has the honour to inform the latter that the Government of the Federation of Malaya has no objection to part I of the draft articles on the law of treaties of the report of the International Law Commission issued at its fourteenth session held from 24 April to 29 June 1962.

[Part II]

Transmitted by a note verbale of 15 September 1964 from the Ministry of External Affairs

[Original: English]

... the Government of Malaysia has no objection to Part II of the draft articles on the law of treaties ...

14. PAKISTAN

/Part I/

Transmitted by a note verbale of 7 January 1963 from the Permanent Representative to the United Nations

/Original: English/

The Permanent Representative of Pakistan to the United Nations ... has the honour to state that all the draft articles contained in chapter II of the report of the International Law Commission covering the work of the fourteenth session are in accordance with settled principles of international law and the Government of Pakistan are in full agreement with all the provisions thereof.

...

15. POLAND

[Part I]

Transmitted by a note verbale of 25 October 1963 from the Permanent Mission to the United Nations

[Original: English]

1. It is the view of the Polish Government that since general international treaties relate to universal norms of international law or refer to problems of interest to the entire international community, they should be opened for accession to all States without exception.

Any limitation of the participation in such treaties would be contrary to their universal character and might result in discrimination of some States, which is contradictory with the universal character of international law.

Therefore, the second part of article 8, paragraph 1, which follows the just principle that "in the case of a general multilateral treaty, every State may become a party to the treaty", should be deleted as being restrictive in relation to that very principle.

2. The expression "a small group of States", used in several articles of the draft, raises serious doubts, for it is too general, and it allows for different, sometimes even contradictory, interpretations, which in the future can bring about considerable difficulties of practical nature.

3. Too far-reaching obligations of States participating in international negotiations are contained in article 17, paragraph 1.

It seems unjustified and inconsistent with international practice to extend the obligation specified in this article to States which only participated in the elaboration of the draft treaty or only took part in the negotiations. Acceptance of such a concept could lead, in certain cases, some States to refrain from participating in the negotiations of international treaties.

4. It might be advisable to consider whether the adoption of such a wide formula as "incompatible with the object and purpose of the treaty", contained in article 18, paragraph 1 (d), would not lead in practice to a considerable restriction of the right of States to make reservations to treaties. Such a restriction might consequently reduce the possibility of their participation in certain treaties. This would be particularly undesirable with regard to general international treaties.

[Part II]

Transmitted by a note verbale of 21 July 1964 from the Permanent Mission to the United Nations

[Original: English]

In the view of the Government of the Polish People's Republic, part II of the draft articles on the law of treaties constitutes a considerable contribution to the codification and progressive development of international law and, in general, is acceptable. The following provisions, however, rouse some reservations:

Article 36

Coercion as defined in this article should include not only "the threat or use of force" but also some other forms of pressure, in particular economical pressure, which in fact represents quite a typical kind of coercion exercised sometimes on concluding treaties.

Article 39

In the phrase "from the character of the treaty and from the circumstances..." the conjunction "and" should be replaced by "or". For it seems sufficient that the appropriate intention of the parties should result only from the character of the treaty or only from the circumstances accompanying its conclusion, or from the statements made by the parties.

Article 40, paragraph 2

In order to avoid any excessive dependence of the future operation of a treaty upon the will of countries that have not undertaken any obligations under that treaty, the term provided for under this paragraph should be as short as possible and at any rate should not exceed four years. Such a period of time is in general quite sufficient for carrying out in the countries concerned the procedure connected with the ratification or adoption of the treaty.

Article 50, paragraph 2

The revocation of the notice by a party to the treaty should be subject to the agreement of the remaining parties. For their interests should be safeguarded, taking into consideration the fact that after the notice of termination, etc., has been communicated by the country concerned, the other parties to the treaty frequently take appropriate steps in order to adjust themselves to a new situation that will arise if that country ceases to be a party to the treaty. Moreover, it may happen that in connexion with a notice communicated by a country, another country withholds its own intended notice and, after the revocation of the notice by the former country, the latter country would be unable to communicate its own notice on account of the expiration of the period of time provided for under the relevant agreement for giving such a notice.

16. PORTUGAL

/Part II/

Transmitted by a note verbale of 27 August 1964 from the Permanent Mission to the United Nations

/Original: English/

Article 30

This article contains a general provision affirming the principle of the validity of treaties and of their continuance in force and operation, provided that the prerequisite conditions laid down in Part I are complied with.

At the same time the exceptions it mentions give a concise notion of the structure of Part II, since it foresees the nullity, termination or suspension of the operation of the treaty or the withdrawal of one of the contracting parties.

Our observations on this principle and the various exceptions will be found in the commentaries on the articles under these specific headings.

Article 31

The subject matter of this article is of the highest importance, as is apparent not only from its possible practical implications but also from the special attention devoted to it as a matter of doctrine. The object is to determine the scope of the constitutional provisions of each State governing its competence to conclude treaties, or more precisely to find out if these provisions can affect the validity, in international law, of the consent given to a treaty by the representative of a State, if it is apparent that he was qualified to express such consent.

Logically, the position to be taken must be based upon consideration of the constitutional texts in question. In the case of Portugal, these do not solve the problem. Article 81, paragraph 7 of the Portuguese Constitution empowers the President of the Republic to negotiate international conventions and treaties, submitting them through the Government to the National Assembly for its approval.

This approval is expressly mentioned in article 91, paragraph 7, as being among the powers of the Assembly.1/

This approval enables the President of the Republic to ratify the treaties.

The question has arisen with regard to similar constitutional provisions whether they should be considered as determining whether the State can be deemed to be bound by the consent given by a representative who was apparently authorized to give it.

Two opposing currents of opinion have come to light concerning the doctrine of the powers of representatives of contracting States, one upholding the pre-eminence of internal law and the other that of international law.

According to the first, international juridical validity ought to be attributed only to a treaty concluded by representatives who are fully (plenamente) authorized by internal law to contract the obligations in question. The provisions of internal law concerning the limitations placed upon the competence of the State organs to conclude treaties must be considered as part of international law. Hence if the agent of a State purports to represent it in violation of its constitutional law, that State is bound neither under its internal law nor under international law.

On the other hand, the second group maintains that internal constitutional law should be resorted to only for the purpose of determining which organ or person has the power to represent the State; but that when this representative has definitively bound himself in the name of the State in question, this obligation subsists in international relations, even if an excess has been committed in the exercise of the powers of representation. International law lays down only the procedure and the conditions which permit States to express their consent to treaties, as well as the conditions which must be fulfilled by the different organs and agents in order to be recognized as authorized to act under these procedures in the name of the State. Again, while internal law determines the organs and the procedures by which the will of the State to conclude treaties is formed, international law only takes into account the external manifestations of that will

---

1/ Only in urgent cases is the Government permitted to approve international conventions and treaties (article 109, paragraph 2). The existence of an urgent situation is assessed at his discretion by the President of the Republic (Cf. Prof. Marcelo Caetano, Curso de Ciencia Política e Direito Internacional, 3rd ed., vol. II, p. 182).

on the international plane. It is thus possible that a treaty may be valid in international law, while remaining invalid in internal law, a situation which may render the agent responsible under domestic law, because of the juridical consequences of his actions.2/

The growing complexity of the constitutional provisions in each State and the difficulties of their interpretation, even without underrating recourse to internal law, have in the meanwhile increasingly emphasized the need in international law for placing treaties under the shelter of the juridical questions thus raised. That is the reason why restrictions designed to ensure stability in the application of treaties are placed in the way of referring back to internal law - a point on which there are an important number of opinions both in theory and in international practice.

Whether one speaks of incorporating national law into international law as regards the competence of the organs acting in representation of the State, or of the mere conformity of international law with national law in this respect, it is certain that, leaving aside those two opposing trends, an attempt is made to formulate a rule which should, without refusing to apply constitutional law, appropriately safeguard the position of the contracting States. A principle of good faith is thus invoked, by virtue of which, where the organ acting in the name of a certain State did so in such a way as to convince the opposing State in good faith that it was competent to enter into the contract, the treaty will be binding upon the State thus represented, even if the representative exceeded the powers conferred on him by his internal law.3/

On the other hand, it is taken as generally recognized that a treaty concluded in disregard of the provisions of the constitutional law governing the formation of the will of a State does not bind the latter, if such provisions are expressly laid down and have a "sufficiently notorious character".4/

2/ Cf. Julio Diena, Diritto Internazionale Pubblico, Spanish transl., p. 401; Balladore-Pallieri, Diritto Internazionale Pubblico, 7th ed., pp. 126 et seq.; D. Anzilotti, Corso di Diritto Internazionale, vol.I, pp. 305 et seq.

3/ See Balladore-Pallieri, op.cit., p.130.

4/ Charles De Visscher, Théories et réalités en droit international public, 2nd ed., p. 311.

Thus, as a result of this preoccupation with safeguards in concluding a treaty, and principally in executing it, a doctrine has emerged which, without affecting the applicability of constitutional restrictions, formulates reservations with regard to their indiscriminate application, centred as it is, above all, on the apparent powers of the organs representing the States in accordance with their constitutional laws.

It is precisely this doctrine that article 31 seeks to establish. Naturally, in order to achieve a proper understanding of this article, it is not possible to think only of cases where a representative of the Portuguese State may conclude a treaty in violation of constitutional rules. If it is advantageous to invoke such a violation in order to consider the treaty as not binding, it is also necessary to bear in mind, and perhaps with greater reason, those other cases of treaties in which Portugal may intervene in good faith, in the rightful belief that the intervention of the organ of the other State or States is in conformity with their domestic laws.

From this point of view it appears to be more in conformity with the requirements of the international community to regard as valid the intervention of an organ having authority as set forth in article 4, and only to accept that the State may declare itself not bound when the violation of its internal law is manifest.

This exceptional hypothesis is couched in rather vague terms, but it does not seem appropriate, or even possible in the present stage of international law to substitute a different wording with a more limited and stricter connotation. We might speak of a violation that is "absolutely manifest", as in paragraph (12) of the commentary on the draft, or of one that is "sufficiently notorious", as preferred by De Visscher, without achieving appreciably greater precision. It is even necessary to underline that cases in which a binding treaty results, despite disregard of constitutional norms, are exceptional. And it would seem that a vague expression such as that in article 31 will make it possible to decide, according to the circumstances of each case, whether knowledge of the rule or rules of the internal law of another State regarding competence to conclude treaties could be demanded from a State about to enter into a contract with that other State.

Hence, while recognizing the imprecise nature of the limitation contained in this article, we do not see any juridical disadvantage in accepting the proposed

text, which appears otherwise to conform best to international practice and jurisprudence.

Finally, it should be stated that what is perhaps the most flagrant instance of a failure to bind a State - namely, that in which the representative does not fulfil the conditions laid down in article 4 and is nevertheless permitted to express the consent of his State - is regulated by article 32 in terms which in practice amount to an important limitation within this exception. And this is one more reason for rendering it acceptable.

Article 32

Once it is pointed out that this article has in view only those cases where an unauthorized representative claims to express the consent of his State definitively so as to produce a binding effect and where consequently there is no possibility of a subsequent ratification or approval, it becomes obvious that the only solution can, in principle, be that the treaty is not binding upon the State: the representative has failed to comply with the conditions laid down in article 4 necessary to express the consent of his State, and nevertheless has expressed it.

This solution becomes inescapable not only in view of the principles regulating representation in national and international law, but also because of the exigencies of the very structure of the draft, which in article 4 sets out the qualifications which the representative should have in order to be accepted as such.

It would be stretching this consequence too far, however, if we refused to concede that the State can ratify the action of its representative, expressly or implicitly. It is on this basis that the exception contained in the last part of paragraph 1 of this article is understood.

Paragraph 2 contains a principle related to the preceding article - the external appearances of consent are relevant in international law - but which naturally gives way when the limitations imposed upon the powers of the representative have been communicated in due form to the other contracting States. Since the latter cannot allege ignorance of these limitations, it must strictly be held that they entered into the contract with the representative in the precise terms in which he was empowered to do so. It would, therefore, be unjustifiable that despite this knowledge these States should be able to take advantage of the circumstance that the representative expressed consent unconditionally.

Article 33

The theory of vitiated consent has not been studied in international law with the same precision and to the same extent as in domestic law. This has been prevented by the circumstances in which international agreements have developed, allowing the contracting parties to obtain a more profound knowledge of each other, and requiring as a rule safeguards as to the manner of action. For this reason the list of cases where such flaws have existed and produced an effect is restricted. On the other hand, a complete theory concerning these vitiations has been considered in international law as a possible cause of conflicts, and a dangerous weapon enabling States to refuse compliance with obligations assumed.5/

This does not in any way imply the irrelevance of error, fraud and coercion in international law, which in this regard avails itself of many of the principles in force in domestic law on this question. And it must be stressed that, despite the rare occasions on which these vitiations are found to occur in practice, they occasion certain scruples in this field for two reasons which we must set out: firstly, because international law, following in this aspect the less evolved juridical orders, contents itself with the external manifestation of the will, making it correspond, in principle, to the real will; and secondly, because as a rule the declaration of the will is imputed, not to its physical author, but to the juridical community in representation of which the organ has acted. For this reason, the vitiation normally occurs only when the will expressed by the representative does not correspond with the real will of the competent internal organ. Lack of accord between the declaration of the organ of representation and its own will is an exceptional situation.6/

Now, passing over these particular aspects which we may call internal, article 33 only refers, in the Commentary, to the "fraudulent conduct" of a contracting State as having induced a State to give consent to a treaty.

The difficulty, stressed in the Report, of being unable to arrive at a universally accepted notion of deceit, led to the use in the various texts of the draft of the French word "dol", the English word "fraud" and the Spanish

---

5/ Cf. Balladore-Pallieri, op.cit., p. 212.

6/ See in this respect Paul Guggenheim, Traité de droit international public, tome I, pp. 92-93.

word "dolo". In the absence of any precedents that would help to elucidate the precise scope of the notion of fraud, it was thought best to leave it to be worked out in practice and in the decisions of international tribunals. This appears to be reasonably prudent.

On the positive side, article 33 lays stress upon deceit as vitiating the will, just as in domestic law, and considers it as a cause of nullity of a treaty. This nullity is relative, and this corresponds to the present state of theory: that is to say, only the State whose will has been so vitiated can invoke and avail itself of the nullity.7/

We note that this article omits aspects that are doubtful in theory, for instance, the question who is to decree the annulment. It is, however, understandable that the draft should not make allusion to it, this being a matter to be regulated if necessary in texts regarding arbitration or the competence of international tribunals.

Paragraph 2 makes it possible to apply the allegation of fraud only to the clauses affected by it. The mere statement of this possibility would soon provoke the objection that partial nullity of a treaty is in some cases impracticable, because the clauses which have been the object of the fraud are not separable from the instrument. Nevertheless, the reference to article 46 restricts partial nullity to cases in which such clauses are clearly separable from the rest of the treaty with regard to their application, or in which the acceptance of these clauses has not been made an essential condition of the consent of the parties to the treaty as a whole.

This being so, partial nullity is restricted in reasonable terms.

The consequences of nullity are set out in article 52.

Article 34

Regarding error as vitiating consent, the considerations set out above in regard to fraud are valid mutatis mutandis. Further error is seldom proved and the solutions given in the present article are based on the rare cases which become obvious.

Paragraph 1 formulates a general principle regarding an error as it may affect the substance of a treaty. It attributes to it the same effects of relative nullity

7/ Cf. in this respect, Guggenheim, op.cit. p. 92; Louis Cavaré, Le droit international public positif, tome II, p. 56.

as in the case of fraud; it is permissible to conclude that only essential error was contemplated. No distinction is made between unilateral and mutual error, although it seems that both kinds are included.

The statement in the report that an error of law is admissible on the same footing as one of fact does not seem satisfactory to us. This is because the expression "error related to a fact or state of facts" in the text does not imply exclusion of an error of law. But these terms do without doubt designate an error of fact. The report recognizes this since it subsequently seeks to show that the line between law and fact is not always an easy one to draw and that an error as to internal law would for the purposes of international law be considered an error of fact.

This effort at interpretation could easily have been omitted (on the basis of elements outside the draft) had it been provided that an error alleged as the ground of annulment can be an error of fact just as much as an error of law, the admissibility of which is not otherwise placed in doubt by the authorities.[8/]

It is also interesting to record that in the report one is given to understand that the effect of invalidating consent will be to make the treaty void ab initio, that is to give it a retroactive effect. There is thus a clash with the theory most in vogue, which even in cases of annulment on the ground of error does not allow such effects.[9/] Article 52, however, seeks to mitigate the application of this principle.

Paragraph 2 excludes from nullity cases in which the party led into error has contributed to it up to a point. This exception finds a precedent in a decision of the Permanent Court of International Justice, according to which it is not permissible for a party to enter a plea of error when it has contributed to that error by its own conduct, or where it could have avoided it, or even where the circumstances were such as to put the party on notice of a possible error.

As has been seen, there is complete accord between the content of this decision and the exceptions laid down in paragraph 2.

8/ Cf. Louis Cavaré, loc.cit.

9/ See P. Guggenheim, loc.cit.

/...

An identical principle is to be found in article 659 of the Portuguese Civil Code. Also articles 217 to 222 of the Draft Civil Code, Book I, General Part (1st Ministerial Revision), now in hand, are in our view based on it.

Paragraph 3 refers to article 46, as in cases of fraud, for the permissibility of partial annulment in cases where the error related to particular clauses only of the treaty.

Finally, paragraph 4, which deals with errors in the wording of the text, does not permit the invalidation of the treaty, but provides for correction of these errors in accordance with articles 26 and 27 of Part I. This is another application of the principle of stability of treaties, which permits their invalidation, even if only partial solely in extreme cases.

Articles 35 and 36

These two articles deal with matters the importance and novelty of which we are bound to emphasize. An attempt is here made to assign juridical effects to coercion exercised in order to secure consent to the conclusion of a treaty.

From ancient times to present days, international law has moved in the direction of considering as valid treaties that are concluded under coercion, thus departing from the theory of vitiation of consent applied in private law. This departure is due to the favouring of the use of force for the settlement of international disputes and to the absence of a supra-national body which could take up these disputes and find a solution for them. The result has been that the tenacious defence of treaties concluded under coercion has come to base itself on the right of the strongest and on the anti-juridical ground that the weakest can only choose one of two alternatives, either total ruin or signature of the treaty - and the latter is considered the more favourable! This reasoning has been opposed as being manifestly devoid of foundation. Therefore, it remained for the advocates of this view to support the validity of these treaties on grounds of the social order, or rather the desirability of establishing a general stability which demanded that there should be an end to conflicts - an end which, it is claimed, would be secured precisely by a respect for such international instruments.[10]

10/ See in Louis Cavaré, op. et vol. cit., p. 54, the series of arguments supporting this thesis of the irrelevance of coercion in regard to treaties. This irrelevance is supported in relation to moral and material coercion by Paul Fauchille in his Traité de droit international public, tome I, p. 298.

Although it is recognized that this solution in no way satisfies our sense of justice, it has been persistently supported on the ground that it is in conformity with the nature of positive law, which has to limit itself to a realistic basis and to achieve a modus vivendi acceptable among States.

The establishment of the United Nations, however, and the acceptance of its Charter, Article 2, paragraph 4 of which prohibits any recourse to the threat or use of force in the solution of international disputes, ought to have opened new perspectives in this field, with a corresponding and necessary influence on the positive law of treaties, as indeed had previously been brought about by the old League of Nations.

What has just been stated relates to coercion exercised collectively on the State itself. But this may be very clearly distinguished from the coercion which is brought to bear on the will of the physical person representing the State. If this person is coerced the principles of private law are applied and the consent thus obtained is considered null.[11/]

The most important innovating aspect of these two articles lies in the unification of the rules in the two cases. Whether the coercion is exercised upon the subject of the law or upon his agent, it is always relevant: in the first case it annuls the treaty, and in the second, the consent on which its conclusion was based.

This nullity is absolute, for it does not need to be invoked by the State concerned as in the cases of fraud and error which have been examined above. Also, in accessing the gravity of the consequences resulting from coercion, the two articles are in accord with the most modern theory, which admits in international law both kinds of nullity, absolute and relative, but upholds only the latter in cases of consent procured under coercion.[12/]

We may thus see the gravity which is attributed in the draft to procuring consent by coercion, since it is given a unique position, that of the more rigorous of those two kinds of nullity.

11/ See Diena, op. cit., p. 409; Balladore-Pallieri, op. cit., p. 213; Prof. A. Marques Guedes, Direito Internacional Público, Tomo II, p. 293-294. It is clear that this problem is not acute in normal cases where ratification by the Head of State, on whom the effects of coercion are not felt, is a means of impeding the effects of the treaty. But there are still cases where the organ coerced is the same that ratifies and cases in which the coercion is not known by the ratifying organ.

12/ Cf. Guggenheim, op. cit., p. 92.

This approach is praiseworthy as being the best calculated to ensure the rule of morality in international relations.

Article 35, which deals with coercion of the representative of a State refuses juridical protection of any kind to consent thus expressed and, as can be seen, adopts the line of traditional doctrine.

Its paragraph 2 is similar to articles 33, paragraph 2, and 34, paragraph 2, already examined when dealing with fraud and mistake, and does not call for observations different from those made in those cases.

The doctrine expressed in article 36 is also an innovation; it lays down the law concerning the coercion of a State by the threat or use of force. The Report states that it was thought desirable to go back to the principles of the Charter of the United Nations and that it was considered that the precise scope of the acts in question should be determined in practice by interpretation of the relevant provisions of the Charter.

Given the close connexion between this subject of coercion in the conclusion of treaties and the above-mentioned principle of the Charter, which is of almost universal validity, it is judged best, as a precaution, not to go more deeply into details respecting the methods of this coercion.

Article 37

Even in our times it is still stated that the rules of international law are not of a peremptory character, and that treaties may have a wide content, without limitations of any sort. The reason for this is seen in the absence of any norm prohibiting treaties which are contra bonos mores or contrary to a fundamental principle of international law. However, it may be stated that mainly from the coming into force of article 20 of the Covenant of the League of Nations, it has come to be understood that there are limitations to the juridical objects of a treaty. Under article 20 members of the League agreed that in future they would not undertake obligations contrary to the Covenant. And doctrine has been moving with increasing force towards acceptance of the rule that every convention violating international law, rules of universal morality and fundamental human rights must be considered null owing to the unlawful character of its purpose. Even those authors who, keeping in mind the possibility of a treaty modifying international custom, recognize the difficulty of solving the question, and ask if all treaties

which affect principles which are essential to the structure of international society should not be considered null, as for example, those providing for recourse to piracy or disrespect for the human person.13/

Today, under Article 103 of the Charter of the United Nations, it is accepted that the obligations of Member States under the Charter shall prevail over those under any international agreement if there is a conflict between the two.

Article 37 of the draft seeks to confirm this new trend in positive international law. But it is evident that we are still in the early phase of producing a positive rule, compatible with the evolution of this branch of law. That this is so is shown by the allusion made to "a peremptory norm of general international law", without singling out from among these rules those from which no derogation is permitted and which can be modified only by a subsequent norm having the same character. A mere enumeration of examples, as emphasized in the report, would incur the risk of rendering interpretation difficult in regard to other cases of incompatibility not expressly mentioned.

Nor would it profit much, as far as the certainty of this provision is concerned, to include in it, according to some suggestions, acts constituting crimes against international law, such as genocide, or other offences constituting violations of human rights or the principle of self-determination. It is well known how much these notions have become corrupt in reality, so that any reference to them would in no way contribute in practice towards removing them from the confusion existing with regard to them. Again, any reference would not in any way add to the clarity or efficacy of this article.

We are of the opinion, therefore, that the position adopted by the Commission regarding article 37 is a balanced one, and that it will be difficult to go further in the definition of jus cogens and its effect on treaties which appear to be incompatible with it.

13/ See, in defence of the first point of view, Guggenheim, op. cit., p. 57; and in support of the second, which would limit the juridical object of treaties, or at least expressing doubts regarding the unlimited scope of that object, Fauchille, op. cit., p. 301 et seq.; Diena, op. cit., p. 409; Madame Paul Bastid, Cours de droit international public approfondi, 1959-1960, p. 127.

Article 38

Section III of the draft contains a series of articles relating to the duration of treaties. Although it would be possible to evaluate them as a whole, it is more convenient to study each one of the cases, or groups of cases, provided for in each rule.

Article 38 mentions the most frequent of the relevant cases, generally deemed in international affairs to be causes of termination intimately connected with the nature of the treaties. This makes detailed comments superfluous.

Paragraph 1 deals with the termination of treaties through the operation of their own provisions. Such clauses are currently applied in international instruments and fulfil the function of resolutory conditions.

Paragraph 2, which refers to denunciation of bilateral treaties, points out the special advantage of fixing a date on which the denunciation is to take effect. The formula used is not very clear, since reference is made to the date of denunciation of the treaty, a circumstance which can in certain cases lead to difficulties in interpretation. However, it would be difficult to lay down a more precise principle. It is understood that denunciation is effected by the normal procedure, that is through notification of the desire to exercise the right of denunciation.

The same can be said of clause (a) of paragraph 3, which deals with the application of the principle of the denunciation of bilateral treaties to multilateral treaties.

The ground for termination of a treaty provided in clause (b) of paragraph 3 - reduction of the number of parties below a minimum number agreed upon as being necessary for the treaty to continue in force - covers the application of a clause like those in some recent treaties, for example, that on the political rights of women. The final part of this clause, which states that termination does not result from the mere fact that the number of parties falls below the number initially fixed as a condition for the treaty to enter into force, represents in reality a restrictive interpretation of the first part of the clause. It might, indeed, be understood that to fix the number of parties necessary to enable a treaty to enter into force showed a belief that this number was a requisite and paramount condition for its continuance in force. It was sought to do away with this condition, for a plausible reason: a treaty may be terminated by agreement,

by denunciation or by withdrawal of the contracting parties. This means that when it is desired to terminate a treaty by reason of the reduction of the number of the parties it is necessary to state this in an express clause inserted in the instrument.

This rule is commendable since it ensures a greater certainty in application.

Article 39

If a treaty contains no provisions regarding its termination, then it is possible to lay down two principles: either to make its denunciation upon the withdrawal of one of the parties impossible in any event or purely and simply to let the solution of each case depend upon the will of the parties or an appreciation of other factors.

The discussion of this issue, of which the report gives an account, makes fully patent the difficulties experienced in reconciling the need for stability of treaties with the exigencies of a just solution and of a balanced satisfaction of interests. It is conceded that, side by side with treaties the nature of which excludes the supposition that the contracting States had any intention of permitting denunciation or withdrawal of one of the parties, e.g. treaties of peace and of delimitation of frontiers, there are others in which the existence of such an intention may be easily proved. On the other hand, it is necessary to take into account the fact that there is no clause regarding denunciation or withdrawal. It seems therefore reasonable to establish, as is done in article 39, a negative principle, in order later on to admit such a possibility of denunciation or withdrawal on the basis of three factors:

- the character of the treaty;
- the circumstances of its conclusion;
- the statements of the parties, made either before or after conclusion.

This rule is not supplemented by any guidance as to the method for interpreting the joint will of the contracting parties. Once the interpretation of treaties is classified as an operation of juridical technique, the existence of a certain number of general rules is recognized, which make up a logical system very often not coinciding with private law. Any interpretation that may be given to them cannot be separated from their useful effect, expressed in the maxim

ut res magis valeat quam pereat. On the other hand, the express mention of the statements of the parties, which the report explains as including the preparatory work and the subsequent conduct of the parties, gives the required emphasis to this spirit of interpretarion, which De Visscher calls "the politic in the interpretation of treaties".[14]

We think, in brief, that the summary of the basic elements of interpretation contained in article 39 leaves sufficient latitude for the application of those principles, and leads one to believe that the special nature of the subject discussed was kept in mind.

The notice period of at least twelve months for signifying intention to denounce or to withdraw is justified as being a means of duly safeguarding the interests of States which may continue to be parties to the treaty.

Article 40

International theory recognizes as a rule that treaties may be terminated either when an intention of such a possibility is made clear in a clause initially inserted, or when a common declaration to that effect is made later on. It is with this latter manner of terminating a treaty that the present article deals.

There is nothing noteworthy about paragraph 1, which admits three fully justifiable forms of agreement.

Paragraph 2, which relates especially to multilateral treaties, embodies one of the points of view evolved during the discussion of the draft. According to this point of view, it is laid down as a supplementary rule that such treaties may be terminated with the consent of all the parties and, in addition thereto, with the consent of at least two-thirds of the States which drew up the treaty.

This rule is noteworthy because it seeks to give importance to the consent of States which took part in the drafting of the treaty and which still have the right of becoming parties to it. It does not seem reasonable, however, to wait

---

14/ Op. cit., pp. 313 et seq. Regarding the true will of the parties to treaties, the difficult situation of the student is better understood when one recalls the phrase of Paul Valéry: "Les véritables traités sont ceux qui se concluraient entre les arriére-pensées" - cited in Principes de droit international public by Charles Rousseau (Recueil des Cours de l'Académie de Droit International, 1958, p. 501).

indefinitely for them to become parties and in the meantime to continue to require their consent to termination. Their consent will be of importance only up to a certain moment. The draft does not mention the number of years after which their consent will no longer be necessary, but the report states that the points of view of the various Governments consulted are being awaited.

In our view this period should not exceed 5 years. The operation of the treaty over this period appears to us normally sufficient to enable the States to decide whether to become parties to a treaty; and when they are not interested in becoming parties, no principle involving protection of their interests, even potential interests, can render defensible the need for their consent to the termination of the treaty.

But we wish to say clearly that other considerations bearing on international practice may not prevail over this logical reasoning and make advisable a different time-limit. The period would then depend upon the evaluation of factors not placed before us.

The extension of the rules laid down in paragraphs 1 and 2 to cases in which application of a treaty is suspended does not call for any detailed criticism.

Article 41

This article, dealing with the total or partial termination of a treaty by another subsequent treaty, points in clause (a) to an incontestable case, namely that the parties have indicated their intention that the matter should be governed by a later treaty.

But clause (b) is more complex and raises a question of interpretation to which the observations made regarding article 39 could apply. The issue here is to demonstrate the incompatibility of the provisions of the new treaty with those of the old one, and to assess the true intention of the parties as to whether the latter should prevail.

The text of this article indicates that the incompatibility here dealt with is true incompatibility. From this it follows that it is not possible to harmonize the obligations resulting from the new treaty with those resulting from the old one.15/

15/ This case is distinguished from non-authentic incompatibility, which does not render impossible the simultaneous application of the two documents; as the later one limits itself to restricting the rights flowing from the first. Cf. Guggenheim, op. et vol. cit., pp. 144-145.

/...

There is no doubt that where a new treaty is concluded which shows this degree of incompatibility in relation to the old treaty, the will of the parties can only be understood as intending to put an end to the latter. Hence the impossibility of applying the provisions of both treaties simultaneously will lead to the application only of the provisions of the more recent one.

However, in a desire to respect the will of the parties, paragraph 2 lays down that the original treaty must be applied where it appears from the circumstances that the later treaty was only intended to suspend the application of the first. In a very strict construction, this principle is already contained in paragraph 1, since in the case it deals with there was no intention to regulate the matter wholly in the new treaty, nor is there true incompatibility between the two. Thus complete interpretation permits us to find in paragraph 1 the guidelines for the situation dealt with in paragraph 2.

Despite this, this last paragraph is useful, as it stresses the intention of the draft to ascertain the will of the States, and as it gives a greater sureness for asserting that the first treaty is suspended, notwithstanding the fact that the subsequent treaty regulates the same matter.

Article 42

Failure to comply with the obligations assumed in a treaty is generally recognized as a ground for suspending or even for terminating its operation. This is a principle of domestic law at present in force (see article 709 of the Portuguese Civil Code), but it is modified in public international law.

The solution contained in paragraph 1 for bilateral treaties does not raise doubts as to the possibility of one party dissociating itself from a treaty with which the other party has failed to comply, and even less as regards the possibility of simple suspension.

In any case, it appears necessary to recognize this right only when the violation is of a certain gravity, or renders impossible the achievement of the objectives aimed at. This is laid down in paragraph 1 which speaks of "material breach" and in clauses (a) and (b).

When dealing with multilateral treaties, certain aspects will be seen which did not pass unperceived by the Commission. There is indeed a need for distinguishing between cases where only one party reacts to the violation, and

cases where all affected parties by common agreement invoke the breach. In the first case the situation is the same as in bilateral treaties, but the affected party may not go further than suspension of the treaty, wholly or partly.

Where, however, all the affected parties combine to take joint action, they are permitted to suspend the treaty, wholly or partly in relation to the defaulting State, or may even terminate it.

On this point we have two observations to make.

The first observation relates to the terms of the solution given in the draft, for a certain current of opinion among jurists makes a distinction, as far as the rights of the parties affected by the violation are concerned, between contractual treaties and law-making treaties. Although in regard to contractual treaties the principle is applied without hesitation that it is permissible for the injured party to free itself of its obligations under the treaty, in regard to normative treaties - that is to say, treaties which formulate rules of objective international law - it is held rather that the norms continue in force despite the violation, and despite the fact that the injured parties have also for their part temporarily given up complying with them.

Paragraph 2 of this article does not go beyond permitting the injured parties the alternatives of suspending or terminating the treaty, without making any distinction between the categories to which the treaty in question may belong.

In connexion with this, a second observation must be made.

Should the decision to suspend or terminate the treaty be left to the free determination of the parties? Or should not rather a guiding principle be laid down, according to which the party or parties concerned should go beyond suspension only where the violation is of a certain character?

In our opinion, the latter is the preferable solution, in order to ensure greater stability of treaties and better discipline in international relations. The Commission naturally must have also had in mind these requirements, as its report, when alluding to the cessation of application through concerted action of the injured parties, mentions the case where the violation has frustrated or undermined the operation of the treaty as between all parties.

It appears necessary, however, that this should be embodied in an article or at least mention in paragraph 2 (b) (ii). Expressed as a mere observation in

the report, it will not even possess the value given by article 39 to the statements made by the parties before the coming into force of the treaty in relation to that treaty.

Paragraph 4 refers to article 46, as is done by articles 33, paragraph 2, and 34, paragraph 3. On this we have no comment to make.

Paragraph 5 gives emphasis to any provisions in the treaty or in any related instrument which may regulate in a different manner the rights of the parties in the event of a breach. This rule justifies itself.

Article 43

International doctrine has always admitted impossibility of performance as a ground for terminating a treaty.[16/] This impossibility may be either physical or juridical, and both cases are covered by the letter of this article.

As an example of the first, we may mention the submersion of an island, and of the second, the case where the performance of a treaty in relation to one of the contracting parties constitutes per se a breach of that treaty, e.g. a treaty of alliance among three States, two of whom are at war with each other.

It is obvious that the disappearance or the total and permanent destruction of the subject-matter of the rights and obligations agreed upon in the treaty should not involve the same consequences as when such disappearance or destruction are temporary. Permanent impossibility permits the termination of a treaty, but temporary impossibility permits only its suspension (No. 2).

The reference to article 46 regarding impossibility of performance only in respect of a few clauses, contained in paragraph 3, is justified in the same manner as in the case of similar provisions examined by us earlier.

Article 44

Although this article does not mention the principle rebus sic stantibus, it provides for its application. The article is thus in line with theory, jurisprudence and positive international law.

16/ Cf. Marques Guedes, op. et vol. cit., p. 304; Balladore-Pallieri, op. cit., p. 300; Fauchille, op. et vol. cit., p. 378.

The difficulty does not lie in the acceptance of the principle, but in the terms in which it has to be formulated. The great majority of writers accept the principle where there is a substantial alteration of the circumstances which really determined or influenced the conclusion of a treaty.17/

It is considered that it is not logical to presume that this principle is implicit in the generality of treaties. On the contrary, where there are no elements for concluding that there was a will, either tacit or express, as to the consequences of any alteration of the de facto circumstances in regard to the rights of the parties, the most that can be said is that the parties did not foresee this contingency. And if this alteration is liable to affect the treaty to a greater or lesser degree, this is because a norm of international law permits it. This norm, which may be more or less clearly expressed, and which has been accepted since long ago, even in international litigation, is now incorporated in this article 44.

In the interests of the stability of treaties, already mentioned, this principle cannot be accepted without limitations, for it is certain that States are subject to continuous changes of circumstances, and it would not be in any manner justifiable that such changes should serve as a ground for each State to liberate itself, by a unilateral denunciation, from complying with the obligations under a treaty which they had freely concluded. Hence the State should not be able to make indiscriminate use of such changes.

Even more: this principle must be invested with an exceptional character, since it is very important to the international community that undertakings subscribed to in instruments of this kind should be fulfilled. It is this character that is implicitly recognized when speaking of a fundamental change in the de facto circumstances, or of the danger of persisting in a binding obligation that might seriously affect the right of self-preservation of a contracting State (Diena), or of a grave change of circumstances (Cavaré), or of an essential change (Anzilotti), etc.

It is precisely this exceptional character that is recognized in paragraph 1 of article 44.

17/ For all writers, see Balladore-Pallieri, op. cit., p. 301 et seq., and the authors there cited on p. 302, note 22.

Paragraph 2 stresses only the "fundamental change" which has occurred with regard to a fact or situation existing at the time when the treaty was entered into and defines it in terms which, although not indisputable, we deem adequate in the present phase of evolution of this branch of law. Clause (a), when speaking of the essential basis of the consent of the parties to a treaty, goes back in the last resort to the interpretation of the will of the parties. Clause (b), although strictly speaking covered by the preceding clause, should be maintained.

The essential change in the character of the obligations undertaken in a treaty should only be taken as relevant when it is proved that they constitute an essential basis of the consent of the parties to the treaty. But in any event, the usefulness of clause (b) is to be found in its positive reference to the change in the nature of obligations.

It is clear that, with only these two clauses, this article permits some doubts to subsist in regard, for example, to substantial political changes within each contracting State. Nevertheless, we are of the view that it is better to have a somewhat vague formula such as the one on "fundamental change of circumstances", so as to permit consideration in each case of the applicability of the said principle.

The two exceptions contained in paragraph 3 have been justified on unequal grounds. The first - a treaty fixing a boundary - justifies itself more in a negative way; that is to say, as being an exception destined to avoid friction between States on account of the frontier delimitation, tends to reflect the change of circumstances referred to in paragraph 2.

But clause (b) justifies itself in a positive fashion, to the extent that it provides for cases which the parties indirectly agreed would not be subject to the application of the principle rebus sic stantibus, since with regard to the change in certain circumstances of fact they inserted special clauses in the treaty itself, adopting various solutions.

Paragraph 4 makes the principle of the separability of treaty provisions applicable to this article and is fully acceptable.

Article 45

This provision is closely linked to article 37, to such an extent that during the work of the Commission doubts arose as to whether both should not be

incorporated in a single article. Thus, just as a treaty incompatible with jus cogens is null, so too it is inevitable to establish that even where a treaty was concluded under conditions of perfect validity it would lose that validity so soon as an imperative norm begins to take effect, causing the nullity of all treaties concluded in conflict with that norm. Paragraph 2 is yet another reference to article 46, which is reasonable because the new imperative norm of international law may be incompatible with only one or some of the clauses of the treaty.

This article is likewise connected with article 53, paragraph 2, wherein are set out the consequences of the application of a treaty which becomes invalid when a new rule of jus cogens is established. These consequences will be commented on later.

Article 46

The indivisibility of a treaty is established in paragraph 1 of this article as the rule, for the purposes of nullity, termination, suspension or withdrawal by one of the parties.

Paragraph 2 has a double object: it establishes an express relation with the provisions, already examined by us, in which the separability of a treaty is admitted, and on the other hand, it defines the cumulative conditions necessary for a partial utilization of the treaty. The first of these conditions is based on a practical criterion, whether the treaty can be executed if the clauses in question are separated from the rest of the treaty. The second condition rests on an interpretation of the will of the parties and leads to the functioning of the principle of indivisibility, notwithstanding the fact that the clauses are clearly separable from the rest of the treaty as regards performance. For indivisibility it is sufficient that the clauses in question constituted an essential condition of the consent of the parties to the treaty as a whole.

Once the object and the functioning of the principle of indivisibility are understood in these balanced terms, we have no fundamental objection to it.

Article 47

The loss of the right to allege the nullity of a treaty or a ground for terminating it or withdrawing from it is regulated in terms which are in our opinion

reasonable. Clause (a), in recognizing waiver of the right, as a ground for loss seeks to apply a general principle. We are dealing here with a right which does not have an unrenounceable character.

Clause (b) refers to the conduct of the parties and gives importance to it in this context, where its unequivocal result has been that the party has elected to consider itself bound by the treaty.

We wish, however, to call attention to a divergence between the text of this article and the comments which are made on it in the report. Although in the introduction and in clause (b) reference is made to articles 32 and 35, the report refers twice to cases of nullity mentioned in articles 31 and 34 as being the ones provided for in the article.

We suppose that there is an inexactitude in the text of the article, which probably goes back to one of the earlier drafts before the final draft was agreed upon. For when we deal with the loss of that right, the loss is only understandable when the application of the treaty depends on the attitude of the parties, either by waiving the right or by conducting themselves in a manner equivalent to an express waiver.

Article 35, dealing with the consequences of coercion exercised on the person of the representative of a State, has not established that the treaty may be annulled, nor therefore, that the State has the right to invoke the fact of coercion. On the contrary, the solution presented is nullity ipso facto, that is to say absolute nullity of the treaty to which consent was secured in such circumstances. This being so, it is not understood why, in relation to such a rule, article 47 should seek to regulate the waiver of a right to invoke the nullity of a treaty which is considered automatically void.

On the other hand, one does not see the reason why the case covered by article 31, according to which the validity of consent may be disputed by a State whose representative acted in manifest violation of his domestic law, is excluded from the waiver provision.

We think for this reason that it is through error that reference is made in the text of article 47 to articles 32 and 35 and that in reality the intention was to refer to the cases considered under articles 31 and 34.

/...

Article 48

The reciprocal relations between multilateral treaties and international organizations are of particular interest. The latter owe their existence to the former.

These treaties also form the basis of numerous other treaties. Thus the character, structure and working of such organizations owe much to them, as Manfred Lachs points out.[18/]

It is therefore inevitable that when a treaty is the constitutional act on which such an organization is based, or has been drawn up within such an organization, the clauses of the present draft on the termination of treaties should remain subject to the rules established in the organization concerned. If, for instance, the International Labour Organisation is the organization concerned, it will be evident that the treaties which have been or may be concluded under its auspices will have to take into account the rules which govern that organization.

This approach could be extended to Section II of the draft which deals with the grounds of the invalidity of treaties. If as the report suggests the Commission did not think it necessary to make any special provision, it was because the principles embodied in that section appeared by their very nature not to require modification when applied to the treaties with which article 48 deals.

Only on this supposition can the objection be avoided that to refer only to Section III is excessively restrictive.

Article 49

The knowledge which we have of the rules contained in article 4 of Part I of the draft, relating to evidence of authority to conclude a treaty, comes from a copy of the First Report on the Law of Treaties by Sir Humphrey Waldock, a document in the archives of the Office of the Attorney-General (Procuradoria Geral da República) of Portugal.

After examining the text of this article 4 as worded in the above-mentioned report, we do not have any hesitation in accepting the rule that the evidence of authority, therein minutely regulated in regard to the power of a representative

---

18/ In "Le développement et les fonctions des traités multilatéraux" (Recueil des Cours de l'Académie de droit international, 1957-II, p. 328)./...

of a State to negotiate, sign, ratify, accept, or accede to a treaty, should be the same when it is sought to denounce, terminate or suspend the operation of a treaty, or even to obtain a severance of the ties which had been evolved through the treaty.

In all cases, it is sought to ensure that the organ or representative of the State is authorized to execute acts of the nature described.

Article 50

This article seeks to embody in paragraph 1 the international practice regarding the method to be used when it is intended to notify that it is sought to terminate, withdraw from or suspend the operation of a treaty, under a right expressly or impliedly provided for the treaty. At the same time the article denies that public declarations made by the responsible organs have any effect as a notification, and requires a formal notice in all cases.

Paragraph 2 grants the power to revoke the notification at any time before the date on which it takes effect. Once this principle is established, the other contracting States may at their discretion take their stand only as of the effective date, even though notice has been given at the proper time.

We think, therefore, that this principle is acceptable.

Article 51

The procedure to be followed in the cases mentioned in the preceding article, otherwise than under a provision of the treaty is set out in a manner which is somewhat cautious as well as vague. The fundamental purpose is to find a method of settling disputes between States. The Commission has recognized that the obligation to give notice to the other party or parties, and the conditions incumbent upon the State alleging the nullity of a treaty with respect to the States that are notified, constitutes a step forward. If the parties notified should raise objections, the course will lie in searching for a solution of the dispute in conformity with Article 33 of the Charter of the United Nations which as is known, calls upon the parties to any dispute likely to endanger the maintenance of international peace and security, to seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

We are convinced that to go much further in the formulation of this rule in article 39 would be tantamount to considering it a dead letter in anticipation, and we judge paragraphs 1, 2 and 3 acceptable.

As regards paragraph 4, we must observe that, since this draft comes from an organ of the United Nations, the reservation which it makes regarding "the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes" is too broad. We are of the opinion that these rights or obligations should have been reserved only when they are incompatible with the Charter.

It would, in fine, be the application of a principle based on the same grounds as article 48.

Paragraph 5 presents another opportunity, independent of the formalities described above enabling a party to invoke the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging violation of the treaty.

No reason is seen why in such cases such invocation should be impeded. Perhaps in a well systematized discipline of private interests such a solution would not have been the most appropriate. Since, however, we are dealing with relations between States, it is not possible to deny that paragraph 5 shows an exact consideration of the realities involved.

Article 52

Apart from any considerations of doctrine, this article seeks to a criterion of reason to the effects of the nullity of a treaty with regard to acts executed before such nullity was alleged. It would be possible to support views that nullity produces effects ex tunc, since the nullity vitiates not merely acts executed under the aegis of the treaty, but the international instrument itself. It is not possible however, to ignore the good faith with which a party has acted till then, and this consideration compels recognition of the legality of acts done by that party in the conviction that the treaty was valid. This is what results from paragraph 1, clause (a).

In order to prevent the legality of these acts from subsisting beyond the moment when nullity is invoked, clause (b) permits the re-establishment, as far

/...

as possible, of the position which would have existed if the acts had not been performed.

Under paragraph 2 the validity of the said act cannot be invoked by the party whose fraud or coercion has been the cause of the nullity. This position seems to us defensible, on the basis of exactly the same principle of good faith which confers legality on such acts.

There is no reason for refusing to extend these same principles to the legal consequences of nullity of consent given to a multilateral treaty. This is done in paragraph 3 in terms which do not call for any observation.

Article 53

The legal consequences of the nullity of a treaty are summarized in a principle formulated in paragraph 1. The parties are freed from any obligation to continue to apply the treaty; on the other hand, the legality of acts performed in conformity with the treaty, of any situation which may have resulted from the application of the instrument, are preserved.

A reservation is made, however, in paragraph 2 which deals with the case where a rule of jus cogens is the ground for the nullity of the treaty. Whenever this happens, any situation resulting from the operation of the treaty retains its legality only in so far as it is compatible with this rule.

This solution is not free from doubt. It may be considered more equitable to apply in this case the rule of paragraph 1, and respect, therefore, the situations resulting from the treaty, for its nullity of the treaty does not go back to its constitution which was according to rule but to a later moment and to an extraneous fact, that is, to the subsequent coming into existence of a peremptory norm of law. The imperative nature of the latter would have made itself sufficiently felt if it only produced the nullity of the treaty, but respected the situations existing prior to its own date which were brought about legitimately.

It seems to us that this question is linked, to a certain extent, with the lawfulness of the content of treaties, a matter examined already in our comments on article 37. If it is understood, as we have presumed, that contents are limited by imperative norms of international law, it will be easier to maintain that situations brought about in conformity with the juridical order in force at the time might subsist when a change occurs therein through a new rule.

The contrary course laid down in paragraph 2 does not appear to us, in substance, to be completely divorced from the view which does not accept any limitation on the content of treaties, because of a want of norms of international law which could establish such limitations. If this were so, the formulation of one of these rules should refuse legitimacy to prior treaties where they are not in harmony with it. It would then be easy to foresee the existence of treaties contrary to certain structural principles of international society.

We must bear in mind, however, that today, as we have shown, such treaties, where they exist, must be considered null.

For the rest, confronted by the possible formulation of rules of imperative law that have their source in international organizations, which are not representative of the highest principles of social intercourse, it would be advisable to safeguard situations having their origin in the application of treaties lawfully executed.

On the other hand, however, one must recognize that the solution preferred in paragraph 2 adapts itself better to the basic factor of invalidity of a treaty, or rather to the imperative nature of the supervening norm.

Paragraph 3 represents the application of the principle of paragraph 1 to the case where a State withdraws from participation in a multilateral treaty. Clause to the contrary are naturally safeguarded.

Paragraph 4 underlines that, in spite of the provisions of paragraphs 1 or 3, a State is not exempted from its duty to comply with obligations contained in another treaty to which they remain subjected under any other rule of international law. It thus seeks to safeguard the application of general international law, in the absence of a clause stating that the denunciation of a given treaty does not affect the obligations of the parties imposed upon them under this right.

Article 54

This article is clearly consequential upon the preceding one as regards the juridical consequences of the suspension of the operation of a treaty. Paragraph 1 is an adaptation of paragraph 1 of article 53 to this situation; although suspension temporarily affects the obligation of applying the treaty, it does not modify the

/...

juridical relations set up by it between the contracting States, or the legitimate character of acts and situations that are in conformity with the treaty.

Paragraph 2 logically regulates the conduct of the parties during the period of suspension.

17. SWEDEN

[Part I]

Transmitted by a letter of 7 October 1963 from the Royal Ministry for Foreign Affairs

[Original: English]

The law of treaties is of fundamental importance to the regulation of relations between States, and clarification, codification and development of its contents may be expected to facilitate treaty relations and reduce the risk of controversies caused by differing views of the law. It is, therefore, most gratifying that the International Law Commission has devoted much time and energy to this field of international law. The repeated changes of rapporteur on the topic and the Commission's engagement upon other fields of law have delayed the presentation of draft articles on the law of treaties. Although this may be regrettable, there is fair compensation in the fact that the successive reports on the topic have been of great value and, in themselves, useful not only to the scholar but also to the judge and the legal practitioner.

The Commission has now submitted a first group of draft articles for consideration. Without prejudicing the position it will take to the final proposals that the Commission will submit, the Ministry for Foreign Affairs wishes to make the following observations at this stage.

The question whether the codification of the law of treaties should take the form of a convention - or several interconnected conventions - or of a code has been discussed in the Commission. The Ministry for Foreign Affairs has no objection to the decision in favour of a convention. It is of the opinion, however, that this decision must have important consequences for the contents of the convention. A convention is an instrument by which the parties undertake legally binding obligations. It is not a place for describing convenient practices and procedures. Such descriptions might perhaps usefully be made in a code of recommended practices, which may be subjected to such modifications from time to time as the current needs of States indicate.

Much of the contents of a procedural nature that was contemplated by Judge Sir Gerald Fitzmaurice for a code of the law of treaties has rightly been discarded in the draft articles for a convention that are now presented. It seems, nevertheless, that a number of the articles presented are still of this character. In the opinion of this Ministry, it would be wise to omit such provisions. They appear to be unnecessary and may prove to become quickly obsolete and a burden in an instrument that is intended to be legally binding for a long time to come. There is no need for such an instrument to cover all the phases of the conclusion of treaties, if legal rules do not attach to all of them.

The rules of the law of treaties are largely dispositive, i.e. the parties may depart from them by agreement. There is hardly any need to state examples of the various ways in which such departures may be made, or in which the parties may exercise their freedom where no rule exists. What is needed, rather, are statements of the residuary rules of international law which govern a specific question where the parties have not solved the question. In addition, cogent rules - from which the parties may not depart - should obviously be stated, if indeed any are found.

Applied to the present draft, the considerations advanced above lead to the conclusion that certain articles might be omitted, or perhaps transferred to a code of recommended practices.

As there is nothing in the law of treaties to prevent States from issuing full powers either "restricted to the performance of the particular act in question" or more generally, article 4, paragraph 6 (a) seems unnecessary and rather in the nature of a procedural recommendation. Article 5, as the Commission itself recognizes, is only descriptive and seems superfluous unless there be the ambition systematically to present all aspects of the conclusion of treaties.

Similarly, article 6, sub-paragraphs (b) and (c) seem redundant as, in effect, they only state that an agreement between the parties on the manner in which a text is to be adopted shall be governing. They do not appear to lay down any residuary rules.

Article 7 seems to be more instructive as indicating possible procedures than helpful as legal guidance. Legal content may, however, be read into the article if it is meant to lay down that, in case of doubt, signature ad referendum, initialling, incorporation of a text into the final act of a conference, or in a resolution of an international organization amounts to an authentication of the text. This would require also that the act of authentication has any legal effect, which seems very doubtful. The commentary to article 7 suggests that after authentication, any change in the wording of the text would have to be brought about by an agreed correction of the authenticated text. But, it may be asked, can any modifications be made, but for agreement, in a text before authentication?

Article 8 - the substance of which will be discussed below - read along the following lines might be simplified if drafted in accordance with the approach suggested here.

In the absence of express provisions to the contrary in a treaty or in the established rules of an international organization adopting treaties;

A general multilateral treaty shall be deemed to be open to every State;

Other treaties shall be deemed to be open to States which took part in the adoption of the text or which, although they did not participate in the adoption of the text, were invited to attend the conference at which the treaty was drawn up.

As the article reads at present, the impression may be gained by paragraph 2 that a State which took part in the adoption of a treaty text cannot be excluded from participation even by an express clause to that effect, a contingency that is most unlikely, but would hardly be illegal.

While most of the provisions of article 9 contain legal - and indeed seemingly new rules, from which States may not depart even by agreement - the stipulations of sub-paragraph 3(a) relate to procedure, and it is hard to see why they should be non-dispositive. If that is not the intention, they might perhaps be transferred to a code of recommended practices or to a commentary.

Article 10 would be improved and considerably abbreviated if recast as residuary rules, governing only in the absence of agreement between the parties. Paragraphs 1 and 2(a) would be unnecessary. Paragraphs 2(b) and (c) and 3 contain

useful rules. It should be made clear, however, that they operate only in the absence of agreement between the parties. As it reads, paragraph 3(a) gives the impression that initialling can only function as authentication, which is not true in all instances. Under article 10, paragraph 2(b), signature ad referendum is only treated as an act authenticating a treaty. It would perhaps be well if States agreed that this would always be the significance they attach to the reservation. The Commission has not expressed any view on the practice, which nevertheless exists, attributing to this reservation the meaning "subject to ratification".

Given the provisions in articles 8 and 9 and the freedom of States to prescribe in treaties applicable procedures for participation in a treaty, the need for articles 13 and 14 may perhaps be doubted. While some provisions of article 15 contain important legal rules, other parts appear to be exclusively procedural. Illustrative of this is paragraph 1(c). It requires that in case a treaty offers to the participating States a choice between two differing texts, the instrument of ratification must indicate to which text it refers. It does not, however, give any legal guidance in case this procedure is not observed.

Articles 18 and 19, likewise, contain much that simply exemplifies what the parties may prescribe and much that merely amounts to procedural rules, which would fit better in a code of recommended practices. Such a code would also, it seems, be the most appropriate place for the rules contained in articles 26 and 27 relating to the correction of errors. Both article 28 and article 29 regarding depositaries contain legal rules of a dispositive nature. Even so, it may perhaps be questioned whether the rather detailed duties imposed upon depositaries in article 29, paragraphs 3-8 are of such permanent nature that they ought to be included in a convention.

The observations made above are not intended as criticism of the various provisions the omission of which is suggested, but are only prompted by a desire to see the convention limited to basic rules of a strictly legal nature, and to see convenient procedures and rules, possibly subject to frequent modifications, treated only in a special code of recommended practices. In addition to these observations, the Ministry wishes to offer a few comments upon the contents of some of the rules which, in its opinion, should be retained in a convention.

The provision on capacity - article 3, paragraph 1 - is stated in broad terms, and necessarily so. In view of the circumstance that the conclusion of treaties by an entity may perhaps constitute the chief indication of its being a subject of international law, it becomes obvious that the statement that treaty-making capacity is possessed by subjects of international law is not very helpful. However, any elaboration in detail on this point is bound to meet great difficulties. The development of the law on the point might better be left to take place in the practice of States and of international organizations and in the judgements of international tribunals.

The formulation of article 4 is not wholly satisfactory. The point seems to have been lost that the legally relevant question is whether a representative is competent to bind the authority he purports to represent. The procedural rule that the head of a State or a Foreign Minister is not required to produce an instrument of full powers, for instance, is a consequence of the legally more important rule that they are, by their offices, deemed competent to bind at any rate the executive branch of the Government they represent. The rule contained in paragraph 3 gives the impression that States must furnish the representatives concerned with full powers. In practice, this is often dispensed with. To have legal meaning, the paragraph should state that the competence of these agents depends upon their being authorized to bind the Governments they purport to represent, and that the existence of such authorization shall be deemed to be conclusively established by the presentation of full powers emanating from a competent authority. Such formulation would not obligate States actually to make use of full powers, but would indicate that a State which accepts the signature of certain representatives without examining full powers takes the risk of the treaty being denounced as concluded by one who did not have requisite authority or one who has exceeded his authority.

Paragraph 4(b) of article 4 merely reflects and accepts the common practice that States, when concluding treaties of an informal character, often do not ask for full powers. The legally interesting question, however, is whether they do so at their own risk. It is believed that the answer must be in the affirmative. The rationale of such a rule would be that it is easier for a State to ask a foreign representative to present full powers than it is for a State to prevent all its representatives from acting without authority. If the answer were in the negative, the conclusion would ensue that representatives signing this kind of treaties are always competent to bind the authorities they purport to represent. This can hardly be accepted.

The rule embodied in paragraph 6(b) of article 4 regarding telegraphic full powers again merely seems to record what has been thought to be common procedure. In fact, telegraphic full powers are often accepted as sufficient evidence of authority without any requirement of subsequent confirmation. The question is whether they offer adequate guarantees of authenticity. If not, the rule should be that States accepting them do so at their own peril.

The novel provision in article 6, sub-paragraph (a), although in itself perhaps not undesirable, may have complicated consequences at conferences between States some of which are parties to the convention on the law of treaties and others are not. Less than universal adherence to that convention may also very much complicate the application of article 9.

The "all States" formula which has been proposed in article 8, paragraph 1 seeks to establish a right - which does not exist under present customary international law - for every State to participate in general multilateral treaties. Although the effect of the provision may, if so desired, be excluded by express provisions in such a treaty, and although there are arguments in favour of the inclusion of such a residuary rule as is submitted, the objection must be raised that such a rule should preferably not be introduced without a complementary provision on method or machinery for determining which entities purporting to be States shall be deemed to possess statehood. A similar problem, it must be admitted, arises with respect to the question which of two rival governments is competent to bind a State under a treaty. A suggested solution to this problem, too, would be welcome.

Article 12 seeks to solve, in a very complex form, an old problem which the Commission characterizes as largely theoretical. The Commission recognizes that the difference between the elaborate provisions it submits and the simple rule that ratification is not necessary unless expressly agreed upon by the parties is not very substantial. If the same boldness were displayed on this point as on several others, the latter formulation should be preferred, perhaps with the qualification that ratification would also be required in cases where there is a clear implication that the parties intended the treaty to be subject to that procedure. No dangers would flow for States from such a residuary rule, as they may always by express clauses prescribe ratification.

/...

A rule along the lines expressed in article 17 may be usefully included in a convention. It seems, however, that the present draft goes too far in imposing obligations, e.g., upon States which only take part in the drawing up of a treaty text within the framework of an international organization - and perhaps even vote against the adoption of such text.

The legal problem of reservations is admittedly most difficult. The draft provisions submitted in articles 18-20 represent a respectable effort to cover the problem. Further analysis nevertheless seems necessary, and an attempt should perhaps be made to differentiate even more between different types of treaties.

With respect to article 23, it should be noticed that the cases do not seem to be covered where a treaty does not stipulate any date on which or the mode in which it is to enter into force, but is simply signed or simply provides for ratification. The residuary rule of international law would presumably point to the entry into force on the date of signature and ratification, respectively.

The text of draft article 24 seems to require an agreement between the parties to a treaty to terminate provisional application of the treaty. The commentary seems to suggest, however, that termination may occur when it is clear "that the treaty is not going to be ratified or approved by one of the parties" (emphasis supplied). As provisional application is often provided for because internal constitutional procedures have not been completed, and as there is often no absolute assurance that the outcome will be to confirm the provisional acceptance of the treaty, it is believed that the commentary comes closest to the legal position underlying present practice.

18. TURKEY

[Part II]

Transmitted by a note verbale of 15 January 1965 from the Permanent Representative to the United Nations

[Original: English]

1. It is envisaged in article 36 of the draft that treaties concluded under the threat or use of force in violation of the principles of the Charter of the United Nations shall be void. In order to enforce this article, it is essential that the threat or use of force be in violation of the principles of the Charter of the United Nations. The article does not specify what kind of threat or use of force is intended. This has been left to the interpretation of the principles of the Charter of the United Nations. Presumably, it is thought that the evolution resulting from such interpretation will be applied in the field of the law of treaties. It is obvious that this will have certain disadvantages. First of all, as a rule, the principles in question will in general be interpreted in connexion with the solution of political questions. Such a political interpretation can hardly be expected to possess the degree of clarity required in juridical matters. Besides, this interpretation may not be acceptable to countries not members of the United Nations. Furthermore, it is always possible that the principles in question may be changed in the future. Therefore, it would be helpful to define the threat or use of force envisaged in this article in order to eliminate these drawbacks.

2. Article 37 of the draft states that a treaty is void if it conflicts with a peremptory norm of general international law. This article which at first glance appears to be essential and useful, cannot easily be applied without modification. First of all, the examples cited to prove the usefulness of this article are not compatible with reality. It is not customary today for nations to conclude treaties dealing with the use of force, with crime, traffic in slaves and genocide. That is why one should act with caution before including the notion of jus cogens in international law. What is meant by jus cogens is not defined in the article. This will make it possible for every nation to interpret jus cogens

to fit its own needs. As a matter of fact, this is just what has happened. Since the mechanism of compulsory jurisdiction has not been set up in international law, these different interpretations, rather than meeting the needs of the international community, will give rise to new misunderstandings. For this reason, it would be wrong to include the notion of jus cogens unilaterally in the law of treaties without first establishing a competent machinery vested with authority to settle the differences arising between nations over jus cogens or entrusting existing organizations such as the International Court of Justice with this duty.

3. Although article 39 stipulates that a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation, it recognizes exceptions from this principle for certain treaties. These exceptions do not exactly reflect the needs of our times. As the International Court of Justice has observed, the majority of treaties concluded today contain provisions regarding termination or withdrawal. When such a provision is not inserted into a treaty, it means that the parties do not desire to make termination or withdrawal possible. Despite this practice, to recognize exceptions for certain treaties might, in the final analysis, result in ignoring the will of the parties. It is not appropriate to cite as an example the commercial treaties of today which are generally concluded for short durations. In case no exception was recognized, would treaties concluded without limitation last forever? The answer to this question depends upon whether priority should be given to the interest of one party, of both or all parties concerned or to the maintenance of international law and order. We believe that it will be in the benefit of the international community if in exceptional cases envisaged in article 39, each party were to be given the right to request the reviewing of the treaty in question instead of the right of termination or withdrawal.

4. In our opinion, in paragraph 2 of article 40, the period after which a treaty may be terminated with the agreement only of the States parties to it, should be ten years.

5. Article 44 of the draft has accepted the principle that a change in the circumstances existing at the time when the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in the present article. Although it is gratifying that the International Law Commission has taken care to state the essential limitations to the application

of this principle - which happens to be one of the most controversial subjects in international law - the acceptance of this principle without first providing for full guarantees in regard to its application might create conditions harmful to international law and order. Since the commentary on this article does not define the place of this principle in present day international law with sufficient clarity, we will refrain from expressing a detailed opinion on this subject. What we are concerned with here is the end result reached by the article. The article recognizes, under certain limitations, the right to invoke termination of or withdrawal from a treaty because of change of circumstances. Turkey does not concur in this view. Substantial changes in conditions taking place after the treaty has been signed can only entitle the parties to request negotiations for the adaptation of the treaty to changed circumstances. If the parties cannot reach an agreement in this respect, they can always seek arbitration or apply to international juridical organs. Therefore, Turkey suggests that the article be amended in such a way as to provide that the parties concerned should first enter into discussion among themselves and subsequently refer the dispute to the International Court of Justice should they fail to reach an agreement.

6. Regarding article 45 of the draft, Turkey believes that the views expressed in article 37 are valid in respect of this article also. We would like to add as a reminder that in the majority of the present day multilateral treaties, certain clauses are included to show the connexion between these treaties and those signed previously.

7. Article 51 of the draft defines the methods to be followed in determining the nullity or for terminating, withdrawing from and suspending a treaty. Paragraph 3, which sets out the methods to be employed, contains the most important provisions of the article. According to this paragraph, if the parties cannot reach an accord on the points cited above, they shall resort to methods enumerated in Article 33 of the United Nations Charter.

The commentary on article 51 states that in the opinion of some delegations no compulsory settlement is envisaged, with the explanation that no such clause exists in other treaties. Reference is also made to the view expressed by some members that the method of compulsory settlement is not realistic. Turkey believes that this remark holds true in respect of other articles as well.

Provisions which do not enjoy the concurrence of all nations cannot be incorporated in international law without first providing for appropriate guarantees. Therefore, Turkey proposes that paragraph 3 of article 51 should be complemented by the addition of a paragraph to the effect that the parties shall have the right to apply to the International Court of Justice.

19. UGANDA

/Part II/

Transmitted by a letter of 16 October 1964 from the Permanent Representative to the United Nations

/Original: English/

As far as I can see there may be some difficulties in the interpretation of article 31 of the draft. This article stipulates that if a representative who had been given authority to conclude a treaty, signs a treaty the terms of which conflict with any internal legislation of that State, this fact will not invalidate the treaty unless the parties should agree that the internal law is clearly violated. In this respect I feel that the other parties will have to examine the "internal law" which is alleged to be violated by the treaty so concluded, thereby interfering with the sovereignty of that State. Am I right in assuming that the procedures followed in the ratification of treaties will take account of any conflicts between the proposed treaty and internal law? I am aware that the other contracting parties would wish to have some sort of assurance that the treaty they have signed would not be declared null and void, but still it is, I think, a dangerous principle which leaves room for internationally concluded treaties to bypass constitutional procedures of a Member State.

I am very much in favour of article 36 which attempts to depart from the hitherto recognized procedure of coercing States to become parties to a treaty. I understand that before the First World War coercion was an accepted procedure for forcing States to accede to treaties, and we are glad to see that article 36 eliminates this element of coercion which had definitely become out of date.

20. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Part I]

Transmitted by a letter of 20 December 1963 from the Permanent Representative to the United Nations

[Original: English]

Article 1, paragraphs 1(a) and (b)

Her Majesty's Government are not entirely satisfied with the definitions of "treaty" and "treaty in simplified form". In particular, it is doubted whether t list of expressions contained in the definition of the term "treaty" is either necessary or desirable. It would be better to mention any examples in the commentary. The element of an intention on the part of the States concerned to create legal obligations has not been but should be, included in the definition.

Article 3, paragraph 1

In the view of Her Majesty's Government, article 3, paragraph 1, in the Special Rapporteur's draft articles is to be preferred to the International Law Commission's formulation, which does not adequately define the expression "subjec of international law". There exist many States and territories which possess les than full sovereignty. In certain cases, such States and territories have been enabled themselves to conclude treaties with foreign States by treaty entrustment and similar means. The article and commentary do not take account of the exister of these means.

Article 8

In the opinion of Her Majesty's Government, the presumption in paragraph 1 i unsatisfactory and, in any event, the drafting of the article will require furthe attention. Particularly, in paragraph 2 it is unclear to which cases the opening words ("In all other cases ...") relate; what constitutes taking part in the adop of the text; and whether the final expression (" ... unless the treaty otherwise provides") qualifies sub-paragraphs (a) and (b) as well as (c). It is considered that the final expression should qualify at least sub-paragraphs (a) and (c). A

international conference should not be rendered incapable of excluding from participation in a treaty a State which has taken part in the adoption of the text. Economic conditions might for instance justify exclusion in the case of a commodity agreement; or a State may be excluded until it has fulfilled a prior condition, such as the ratification of a related convention.

Article 9

Whilst the underlying idea of this article is acceptable, it may be difficult to operate in practice. For example, it will be many years before a Convention on the Law of Treaties comes into force for all States and during that interim period some States will be parties and others will not. In relation to a particular multilateral treaty, it is likely therefore that some contracting States will also be parties to a Convention on the Law of Treaties and some will not. A proposal to open the multilateral treaty to new States in accordance with this article might be opposed by these latter States who would be under no obligation to comply with the article. Again, it is unclear what effect the provision would have upon a treaty forming the constitution of an international organizations and containing express provisions on membership. The majority of such organizations have comprehensive membership articles.

The expression "a small group of States" is imprecise and should be clarified both here and wherever it occurs in these articles.

Article 12

The principle in paragraph 1 that treaties require ratification unles the contrary intention appears reflects the provisions regarding the ratification of treaties which appear in the constitutions of many States. However, this is a principle which has not been applied by many other States. As a practical matter there is much to be said for the contrary rule that a treaty does not require ratification and comes into force on signature unless the treaty itself provides otherwise. Her Majesty's Government fear that the rather complicated system of presumptions laid down in the present text will give rise to difficulties which do not at present exist.

/...

Article 17

Whilst the principle of this article is sound, its application in practice may cause difficulties unless the drafting is made more precise. Particularly, the expressions "takes part in the negotiation ..." (paragraph 1), "signify that it does not intend ..." (paragraph 1) and "unduly delayed ..." (paragraph 2) are unclear.

Article 18

Her Majesty's Government note that this article deals only with reservations and assumes that the International Law Commission intends to take up the related matter of statements of interpretation in a later report.

Articles 19 and 20

Her Majesty's Government appreciate the effort of the International Law Commission to deal with this difficult and controversial subject. However, they feel that the two articles are not completely satisfactory and there may be difficulties in applying them in detail in practice. This comment relates in particular to paragraphs 3 and 4 of article 19 and to paragraphs 2 and 3 of article 20.

In general, it is considered that a reservation which is incompatible with the spirit and purpose of a treaty should not be capable of being accepted under article 19, and that provisions such as those made in articles 19 and 20 might be more readily acceptable if this interpretation and application were made subject to international adjudication .

Article 22

The article provides that a withdrawal of a reservation shall take effect when notice of it has been received by the other States concerned. Such a withdrawal might, however, necessitate adjustments by these other States to their laws or to their administrative practices and, in the view of Her Majesty's Government, they should be allowed a reasonable time (e.g. three months) before becoming bound by any new obligations resulting from the withdrawal, unless the treaty expressly provides otherwise.

Article 23

Her Majesty's Government consider that an automatic rule would be preferable to that provided in paragraph 3, which depends on the parties reaching a further agreement. The rule should, it is suggested, be that a treaty which is not covered by paragraphs 1 and 2 of the article enters into force on the date of signature or, if it is subject to ratification, acceptance or approval, when it has been ratified, accepted or approved by all the participants.

Article 25

The registration of treaties is already dealt with under Article 102 of the Charter and it is considered unnecessary and undesirable to duplicate those provisions.

[Part II]

Transmitted by a letter of 10 February 1965 from the Permanent Representative to the United Nations

[Original: English]

Article 31

Her Majesty's Government are in general agreement with this article. However, as drafted, the proviso "unless the violation of its internal law was manifest" might be difficult to apply in practice without clarification. It is not clear, for example, to which persons the violation must be manifest; nor whether those persons must, in fact, have had actual knowledge of the violation at the material time.

Article 33

Her Majesty's Government doubt the need for this article, but believe that if it is included there should be provision for independent adjudication on its interpretation and application.

Article 34

Independent adjudication would also be necessary for the interpretation and application of this article. The cases referred to in the commentary underline this need.

Article 35

It is not clear whether paragraph 1 of this article would cover signature of a treaty which is subject to ratification and, if so, whether a signature procured by coercion is capable of being ratified.

Article 36

Her Majesty's Government consider that this article should be subject to independent adjudication.

Article 37

If this article is accepted, Her Majesty's Government consider that its application must be very limited. The article as drafted calls for a great deal of elucidation. In particular, the relationship of the article to Article 103 of the Charter is not clear. It would be useful if examples of peremptory norms contained in the Charter or found in the remainder of the Commission's draft articles on the law of treaties could be given. In any event, Her Majesty's Government consider it essential that the article be made subject to independent adjudication. This observation applies also to article 45 and article 53, paragraph 2.

Article 42

While Her Majesty's Government do not dissent from the principle of this article, they are, however, concerned lest the article be open to abuse in that a State might invoke an alleged breach on the part of another State in order, simply, to provide a ground for terminating a treaty. Whilst recognizing that article 51 provides certain safeguards, Her Majesty's Government consider that a State which is accused of a breach should be able to call upon the other State to establish objectively that a breach has, in fact, occurred before that other State may invoke the breach in the manner proposed in the article. Thus, it is considered that provision for independent adjudication is required.

Article 44

In certain circumstances a fundamental change in circumstances may be invoked as a ground for terminating or withdrawing from a treaty. It is considered, however,

that the article should not apply to all treaties but only to those which contain no provision for denunciation (or which contain a provision which would not permit denunciation within, for example, twenty years of the fundamental change). Moreover, it is doubted whether a subjective change of policy or a change of a government can ever be regarded as a fundamental change of circumstances.

In the view of Her Majesty's Government, the security of treaties would be impaired if procedural steps in addition to those proposed in article 51 were not required. In connexion with the principle of rebus sic stantibus, the view is taken that a party alleging a fundamental change of circumstances is under an obligation, before it may invoke the change in any way, to propose negotiations to the other party and if the negotiations are not successful at least to offer arbitration of the issue. Her Majesty's Government consider that this element of the principle should be retained.

Article 49

Article 4 draws a distinction in certain circumstances between authority to negotiate, draw up and authenticate a treaty, on the one hand, and authority to sign, on the other. It does not, however, use the word "conclude", unlike article 49. It is not certain, therefore, whether the rule which is to apply in similar circumstances, to authority to denounce, etc., is that relating to authority to negotiate, draw up and authenticate or that relating to authority to sign.

Article 51

Her Majesty's Government consider that the fundamental principle underlying the law of treaties is pacta sunt servanda. Paragraph 1 of this article is of great importance and value. With regard to paragraphs 3 and 4, however, Her Majesty's Government consider that whilst the draft articles on the invalidity and termination of treaties, when in force, would mark an advance in the law of treaties, they would, paradoxically, constitute an impairment of the general security of numerous existing and future treaties unless there were provisions for independent international adjudication or arbitration, as appropriate. The possibilities of abuse, in the absence of proper safeguards, exist most plainly

/...

in relation to practically all the articles and, in particular, in relation to articles 36, 41, 42, 43 and 44. Articles such as these would be accepteble only if coupled with the protection of an ultimate appeal to an independent judicial tribunal. This accords with Article 36, paragraph 3 of the Charter by which legal disputes should as a general rule be referred by the parties to the International Court of Justice, and with the intent of resolution 171 (II) of the General Assembly. In general, Her Majesty's Government suggest that the draft articles should be subject to interpretation and application by the International Court of Justice or, if such a provision is not generally acceptable, should only be capable of being invoked against a State which has accepted the compulsory jurisdiction of the Court if the State relying on the article is willing to submit the issue to the Court.

Article 52

The operation of article 52, paragraph 1(b) might be difficult in practice, especially if a treaty had been executed to a large extent or if formal legislative or other internal steps had been taken to give effect to it. It is not clear in what manner and by whom the parties may be required to restore the status quo ante.

Article 53

The article as drafted does not make provision with regard to the accrued obligations of a State under a treaty at the time of its denunciation by that State.

21. UNITED STATES OF AMERICA

/Part I/

Transmitted by a note verbale of 17 February 1964 from the Permanent Representative to the United Nations

/Original: English/

The Government of the United States of America commends the International Law Commission and expresses appreciation for the Commission's efforts and contributions in the development of the law of treaties.

The following comments are submitted by the United States Government on the group of draft articles (1-29) on the conclusion, entry into force and registration of treaties submitted by the Commission in its report to the General Assembly. These comments are submitted with the understanding that they do not express the final views of the United States Government regarding the articles involved.

Article 1

The only parts of this article about which any immediate suggestions are made are paragraph 1 (b) and paragraph 2.

The provisions of paragraph 1 (b), when considered in conjunction with the provisions of article 4, paragraph 4 (b), give rise to the question whether the definition should be based upon and limited to form only. If paragraph 1 (b) is retained as now drafted the result of the application of paragraph 4 (b) of article 4 will be to require full powers in connexion with many informal agreements which at present are signed without any requirement of full powers. Many such informal agreements have the appearance of a formal treaty so far as form is concerned but are not subject to ratification or other subsequent approval. On the other hand, it would seem that agreements which require ratification or other subsequent acceptance, even though in one of the forms specified in the definition, should be excluded from the definition.

In view of the foregoing it is suggested that consideration be given to replacing the definition in paragraph 1 (b) of article 1 by a definition reading somewhat as follows:

/

"(b) 'Informal treaty' means a treaty not subject to ratification or other subsequent approval that is concluded by an exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument."

The disclaimer in paragraph 2 seems to be satisfactory as far as it goes. The characterizations and classifications given in paragraph 1 are undoubtedly useful in international law but they may be misleading in that they might be understood by some as a part of international law that had the effect of modifying internal law. For example, the characterization, or designation, or even the form given an international agreement is often of little legal significance. In many instances the name given an agreement or the form in which it is cast is purely a matter of convenience rather than one of legal significance.

In view of this the suggestion is made that paragraph 2 be expanded to read as follows:

"2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State or affect the requirements of that law regarding the negotiation, signature, and entry into force of such agreements."

Article 2

This article is useful in calling attention to the necessity of considering the articles in their context. It is also useful in avoiding a question whether the absence of a written text affects the legal force of an international agreement.

Article 3

Paragraph 1

It would appear that unless the provisions of the paragraph are given a broader meaning than that assigned it in the Commission's commentary, it would constitute a narrow limitation on areas emerging to independence. The reference to "other subjects of international law" is so general that it may be of little value. On the other hand, to limit its scope to international organizations, the Holy See, and cases such as an insurgent community is too limiting. Colonies and similar entities given some measure of authority in foreign relations,

especially when approaching statehood, should not have to be in a state of insurgency to conclude a valid international agreement. Where the parent State has entrusted a colony or other subordinate jurisdiction with authority to conduct its foreign relations with respect to certain matters, or specifically authorized it to conclude a particular agreement, the new law of treaties should not preclude commitments entered into in such circumstances from constituting valid international agreements. So far as such colony or entity is entrusted with a measure of authority by the parent State in the conduct of its foreign relations it necessarily becomes a "subject of international law" for the purposes of article 3, paragraph 1. It would be a cruel paradox if, in the face of the existing movement of new entities toward full independence, areas approaching independence could not be encouraged by the parent State giving them authority to conclude agreements in their own names.

Paragraph 2

No objection is perceived to this paragraph.

Paragraph 3

The use of the word "constitution" in this paragraph may be too limiting, especially in view of the use of the word "constitution" in an apparently different sense in paragraph 2 in connexion with a federal State and the statement in the Commission's commentary that "... the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instrument of the organization but also on the decisions and rules of its competent organs. Comparatively few constituent treaties of international organizations contain provisions concerning the conclusion of treaties by the organization; nevertheless the great majority of organizations have considered themselves competent to enter into treaties for the purpose of furthering the aims of the organization."

The reference in the commentary to the dictum of the International Court of Justice in its opinion on "Reparation for Injuries Suffered in the Service of the United Nations" would seem to serve as a good measure of the authority of an international organization to conclude international agreements. The statement in the dictum, which refers to the Charter of the United Nations, reads:

"Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

The word "authority" would seem to be less likely to create confusion than the word "constitution" which is generally understood to be a written document.

Considerable further attention should be given to the wording of this paragraph so that its meaning would be clear without reference to the commentary. It would be desirable, for example, to be more specific as to what "international organizations" are being referred to. It is assumed that the intention is to limit the phrase to organizations established by Governments, normally by some form of international agreement, and intended to constitute an international entity between the Governments as such rather than merely a forum for exchange of information or discussion by informal groups.

Article 4

Paragraph 1

The provisions of paragraph 1 seem to be highly desirable. So far as they apply to Heads of State and Heads of Government those provisions are fully consistent with long established practice in relations between nations. The practice is not as fully developed and wide-spread so far as Foreign Ministers are concerned but no objection is seen to applying the provisions to them.

Paragraph 2

This paragraph reflects wide-spread practice and its inclusion should help to clarify those cases where some question may exist particularly in international organizations where treaties are formulated.

Paragraph 3

The requirement imposed by the phrase "shall be required" may be too strong in this provision. In some cases very high-level delegations are sent from one State to another to negotiate or draw up a treaty and the insistence upon any particular credentials may in certain circumstances be out of place and perhaps viewed as a discourtesy, particularly in view of the efficiency of modern

communications which make it possible to check upon the authority of any given individual. In view of this it may be desirable to replace the phrase "shall be required" by "may be required".

Paragraph 4

Sub-paragraph (a)

This provision is simply declaratory of wide-spread practice and it may be helpful in resolving any questions that arise, even though such questions may seem unlikely.

Sub-paragraph (b)

This sub-paragraph, when applied in conjunction with paragraph 1 (b) of article 1, could, as stated above in the comment on article 1, result in full powers being required for many informal agreements that are now signed without any requirement of documentary evidence of authority. Adoption of the revision of paragraph 1 (b) of article 1 as suggested in the comment on article 1 would avoid such a result. If that revision is adopted the phrase "treaties in simplified form" in sub-paragraph (b) should be replaced by "informal treaties".

Paragraph 5

This paragraph may have the effect of encouraging the preparation in the field of many instruments of ratification, accession, approval or acceptance that have long been prepared in foreign ministries. Whether this would be desirable may be questionable because of the likelihood of considerably more mistakes being made in such documents when they are drawn up in the field than when they are prepared in a foreign ministry.

Paragraph 6(a)

The recognition in this provision of full powers of a general or "blanket" character may be very helpful in relieving the pressure imposed upon Heads of State and others by the issuance of numerous full powers. There may be instances, however, where because of the importance of a particular treaty, a State would wish to see a specific authorization. Such special cases could be handled by a request by the State desiring the evidence of specific authorization, a procedure that would not be precluded by paragraph 6 (a).

Paragraph 6(b)

The word "shall" in the phrase "shall be provisionally accepted" should be replaced by "may". The acceptance of a letter or telegram pending the receipt of full powers is a relatively new innovation based purely upon convenience and courtesy and should not be made a requirement of international law.

Article 5

This article is more in the nature of a statement of existing practices. It is purely informative rather than rule-making in its substance. No objection is perceived to the article other than that it may unnecessarily contribute to the length of the convention in which it is included.

Article 6

No objection is perceived to this article. It would seem to serve a useful purpose by stating general rules that may be helpful guidelines and controlling in the absence of agreement upon some other procedure as provided in paragraph (a).

Article 7

It seems questionable whether this article is at all necessary or useful. In its present wording the article may cause more confusion than it would be helpful.

Placing the initialling as the first of the procedures for authentication seems to overemphasize that procedure far beyond the importance heretofore given it. In most instances the initialling procedure is not used at all. Placing the initialling procedure first would have the effect of adding an additional procedure that is usually dispensed with but which would be considered necessary in many more cases simply because it was included in a convention on treaties. Initialling a text does not always have the effect of making a given text the definitive text of a treaty. In some instances initialling merely constitutes agreement by the representatives negotiating the treaty that they have reached agreement upon a particular text to refer to their respective governments for consideration. At the same time it may be understood that the governments concerned may decide whether that particular text shall be the definitive text of

a treaty to be signed, whether it may be modified before it is signed, or whether any treaty will be concluded at all. In making a determination as to which alternative will be adopted, the governments may decide that further negotiations will be necessary before a definitive text can be agreed upon. (Paragraph (4) of the Commission's commentary on article 10 states, in part, "Initialling is employed for various purposes. One is to authenticate a text at a certain stage of the negotiations, pending further consideration by the Governments concerned.")

Article 8

Paragraph 1 of article 8 seems to contemplate that a general multilateral treaty would be open to all States even though it contained no provision for such - that the terms of the treaty or the established rules of an international organization would have to specifically preclude participation by other States.

Such a provision as that in paragraph 1 of article 8 may not come into play very often because most multilateral treaties as such permit additional States to become parties by signature, signature and ratification, or accession. However, the existing rule, and it is one of the fundamental rules of treaty law, is that in the absence of provision for additional parties to participate it is impossible for them to do so in the absence of agreement by the parties.

It is recognized, of course, that the emergence of many new States to independence requires attentive consideration to the matter of opening many existing treaties to their participation. It is believed, however, that such participation can be accomplished just as effectively and in a more orderly manner by procedures more in keeping with established treaty law.

Paragraph 2(a) of article 8 is equally unacceptable. The mere fact that a State participated in formulating and adopting a particular treaty may not necessarily entitle it to become a party. After a considerable period of years has elapsed following the entry into force of a given treaty the parties may find it necessary to make some adjustments with respect to States desiring to become parties. There may be circumstances justifying or requiring such adjustments and it would seem to be a backward step to preclude the parties from taking such action. It may not always be possible to anticipate what change in circumstances may justify a new look at a treaty in connexion with participation by a State

/...

that stood idly by for years while the parties, through their initiative, co-operation, and forbearance brought a particular organization or subject of international law to a fruitful state. Inclusion of such a provision as paragraph 2(a) in a general convention on treaties may have exactly the reverse effect of the apparent intention of the provision. It may result in States entering into certain new multilateral treaties including specific provisions limiting the States that may actually become parties. It may also result in some States approving the treaty with reservations to assure that it would have a voice in later participation by States that did not join in the actual development of the application of the treaty.

No objection is perceived to paragraph 2(b) since it merely states that the intention of the parties is to be given effect. Inclusion of such an obvious rule in a convention on the law of treaties could, however, have the effect of establishing a strong presumption that every possible international problem that could arise in connexion with treaties had been anticipated by the formulators of the convention and covered by the convention. The difficulty of any such far-sighted anticipation is well evidenced by the developments that have taken place in the law of treaties during the past two decades. These developments were not anticipated - they were brought about by changing circumstances.

Paragraph 2(c) would be subject to all the comments made with respect to paragraph 2(a) above.

Article 9

The comments regarding paragraphs 1 and 2(a) of article 8 apply equally to paragraph 1 of article 9.

There are, however, additional objections to article 9, paragraph 1.

The use of the phrase "multilateral treaty" in paragraph 1 is too indefinite to serve as a descriptive term in any rule of law having such new and broad effects as those contemplated by that paragraph. Apparently the words "multilateral treaty" are intended to include "general multilateral treaty" as defined in article 1, paragraph 1(c) and any group of States other than "a small group of States". How small must a group be to constitute "a small group"? Are the members of the Organization of American States, the parties to the Antarctic

treaty, or the parties to the North Atlantic Treaty a "small group" of States? If not, then the provisions of those treaties as to what States could participate would be rendered meaningless by the provisions of article 9, paragraph 1(a).

Sub-paragraphs (a) and (b) of paragraph 1 of article 9 would not only permit - even necessitate - the amendment of a treaty without concurrence of all the parties but would involve another new concept. Sub-paragraph (b) would, in effect, permit the amendment of treaties by international organizations. This new concept, rather than providing flexibility in the negotiation and application of treaties, might have the reverse effect of eliciting reservations by many States in approving a convention on the law of treaties and on other new treaties to be concluded, particularly States whose legislatures must approve treaties before they can become binding.

Paragraph 2 has the obvious defect of uncertainty as to what is meant by the phrase "a small group of States".

Paragraph 3 is consequential upon paragraphs 1 and 2 and procedural for the application of those earlier paragraphs, and could stand as written if the substantive paragraphs were adopted.

Paragraph 4 of article 9 assumes that all treaties are divisible as to parties and can be applied between some of the parties while certain other parties are not in treaty relations with each other. This is not the case in many instances, such as treaties establishing international organizations and treaties for defence. The Charter of the United Nations is a prime example of a treaty where all Members must be in treaty relations with each other.

Article 10

It is assumed that the provisions of paragraph 1 of this article are not intended to exclude the possibility of a treaty being adopted by an international body, authenticated by its officers and opened to ratification without any procedure or requirement for signature, such as the International Labour Organisation Conventions. However, even though the provisions of paragraph 1 are permissive, they might give rise in some instances to a question whether they exclude the procedure of bringing the treaty into force without signature. Such a question could be avoided by inserting the phrase "but with respect to which signature is contemplated", between the words "adopted", and "the States".

Sub-paragraph (c) of paragraph 2 of article 10 may cause some difficulty, particularly if signature alone can bring the treaty into force. A State may have to satisfy certain national requirements before it can agree to be bound by a particular treaty and it may find it undesirable or impossible to have its obligations date from the time of signature ad referendum rather than from the date when its national requirements are satisfied. This difficulty could be overcome by adding after the word "treaty" at the end of the present wording the phrase "unless the State concerned specifies a later date when it confirms its signature".

Paragraph 3(a) of article 10 may give rise to some question in connexion with certain documents, such as memorandums or minutes of interpretation that are intended to be binding solely on the basis of initialling. Such documents sometimes accompany a more formal document that is signed and brought into force by signature.

Although the article addresses itself to the procedures by which a State becomes a signatory to a treaty, it may be advisable to include a disclaimer in a fourth paragraph in the article reading somewhat as follows:

> "4. Nothing in this article shall prevent the initialling of any document, particularly a subsidiary one, from having a final effect when the parties intend that such initialling completes the document without any signature."

Article 11

All of the provisions of this article appear to be in conformity with long and widely accepted practices and procedures on treaty making. The provisions serve a useful purpose in crystallizing principles that are now being followed.

Article 12

As the principal effect of this article is that treaties require ratification in the absence of certain circumstances, it may be more appropriate to list first the requirement for ratification than to begin by enumerating the exceptions. Furthermore, the phrase in paragraph 3(b) reading "other circumstances evidencing such intention" might well be clarified by including as an example the fact that similar treaties concluded by the parties with each other or by either with third

States have been subject to ratification. It is suggested, accordingly, that the second and third paragraphs of article 12 be rearranged and revised to read somewhat as follows:

"2. Ratification of a treaty is necessary where:

(a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

(b) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of negotiations or from other circumstances evidencing such an intention, including, but not limited to the practice of either or both of the States concerned to ratify similar treaties previously concluded between them or concluded by one of them with a third State;

(c) The representative of the State in question has expressly signed 'subject to ratification' or his credentials, full powers or other instruments duly exhibited by him to the representatives of the other negotiating States expressly limit the authority conferred upon him to signing 'subject to ratification'.

3. A treaty shall be presumed not to be subject to ratification by a signatory State where:

(a) The treaty itself provides that it shall come into force on signature and the treaty does not fall under any of the cases provided for in paragraph 1 above;

(b) The credentials, full powers, or other instruments issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty, without ratification;

(c) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention, including in the case of a bilateral treaty, but not limited to, the practice of either or both States concerned to conclude similar treaties previously concluded between them, or with third States, without ratification;

(d) The treaty is informal."

Article 13

The final determination on the wording and acceptability of this article is dependent upon the acceptability of articles 8 and 9 to which it refers. A

question may arise under the provisions of article 13 as now written whether article 11 would permit the admission of new States to membership in the United Nations contrary to the provisions of the Charter, particularly under the provisions of article 9 which may be somewhat broader than, and possibly in conflict in some respects with, article 8. Article 8 appears to be fully in conformity with the Charter of the United Nations. The first paragraph of that article appears to make participation subject to the terms of the Charter. However, paragraph 1(a) of article 9 seems to permit the admission of additional States to participation in a multilateral treaty without regard to the provisions of that treaty. The two-thirds rule in paragraph 1(a) would appear to be in conflict with the provisions of Article 4 of the Charter of the United Nations.

Article 14

The acceptability of this article, like article 13, is dependent upon the acceptability of articles 8 and 9 to which it refers. Like article 13, it is completely silent as to the requirements of the particular treaty involved and makes the rules to be established in a convention on the law of treaties paramount.

Article 15

This article as a whole is a very desirable one that would clarify and crystallize international practices and procedures to a great extent but a few changes seem necessary for achieving that objective.

Paragraph 1(a)

The phrase "a written instrument" in paragraph 1(a) of article 15 should be expanded to read "a signed written instrument" or "a written instrument signed by an appropriate authority". The phrase as written would seem to condone an infrequent practice of submitting a written instrument that merely bears a stamped seal. Such instruments do not appear to be sufficient evidence of a State's intention to become bound by an international agreement that requires an instrument of ratification, acceptance or approval.

Paragraph 3 omits any reference to the date of deposit, a detail sometimes omitted in a depositary's notification to other Governments, and would seem to impose an unnecessary burden on a depositary by the phrase "and the terms of the instrument".

Although the phrase "shall be notified promptly ... of the fact of such deposit" might well be understood by many as necessarily including the date, the failure of some depositaries to mention the date of deposit and the importance of the date justifies a specific reference to the date in the requirement on notification.

The requirement that the depositary shall notify "the terms of the instrument" would seem to require that the depositary transmit to each of the many States concerned a copy of the instrument received or at least a statement of its terms. Such a requirement would seem not only unnecessary but could become quite burdensome to the depositary and delay transmission of the notification.

The practice that appears to be most generally followed by depositaries at the present time is to give the States concerned a notification that a given State deposited its instrument of ratification or accession on a certain date. The text of any reservation or understanding included in or accompanying the instrument when it is deposited is included in the notification. Such a notification seems to be acceptable to most States and no need for any change is perceived.

It is suggested, accordingly, that the final clause of paragraph 3 of article 15 be revised to read somewhat as follows: "shall be notified promptly both of the fact and of the date of such deposit".

Article 16

This provision is declaratory of existing international practices and understandings. It appears to be fully in keeping with the requirements of orderly treaty making. It appears, however, that the reference to "article 13" should be replaced by a reference to "article 15".

Article 17

This appears to be a highly desirable provision. So far as it pertains to action following signature or deposit of an instrument of ratification, accession or approval, it reflects generally accepted norms of international law. Moving the obligation back to cover the period of negotiation and drawing up to the time of adoption appears to be an addition not generally considered. Such additional coverage would, however, seem to be an improvement that would permit the States participating in a given negotiation or drawing up to proceed with confidence that their efforts would not be frustrated without some advance warning.

Article 18

Section III at the outset should specify that it applies to multilateral treaties. The introduction to the commentary on articles 18, 19 and 20 shows clearly that the articles are intended for application only with respect to multilateral treaties. Articles 21 and 22 are equally limited to multilateral treaties. However, if let stand in the general terms in which it is written, it may be misleading and become a source of confusion so far as bilateral treaties are concerned. Accordingly, section III should be entitled not merely "Reservations" but "Reservations to multilateral treaties".

The use of the word "formulate" in the introductory clause in paragraph 1 of article 18 is not clear. The word "formulate" normally means, according to the Webster's New International Dictionary, "To reduce to, or express in or as in a formula; to put in a systematized statement or expression". However, from the provisions that follow the initial clause in article 18 the word "formulate" in paragraph 1 seems to be intended to permit a State to propose a reservation and to become a party to a treaty with that reservation. This meaning is supported especially by the four exceptions, (a)-(d), enumerated in paragraph 1. Viewed in this sense article 18 is intended to specify that a State has the right to become a party to any multilateral treaty with a reservation provided none of the first three of the exceptions in paragraph 1 apply. Paragraph 1(d), the fourth of the exceptions, appears from the commentary to be completely subject to the provisions of article 20. The last sentence of paragraph (15) of the commentary in the Commission's report reads:

/...

"Paragraph 1(d) has to be read in conjunction with article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations."

Under such a construction any State could become a party to a multilateral treaty under the provisions of article 20, paragraphs 2(a) and 2(b), if any State party to that treaty accepts the reservation, regardless of objection by other parties and regardless of the "object and purpose of the treaty". Under such provisions many States could have become parties to the Charter of the United Nations with reservations that could have seriously weakened its structure and created chaos on matters of voting, planning, and similar matters requiring co-operative action based upon each Member being in treaty relations with all the other Members.

The provisions of paragraph 1(d) do not seem to take into account the nature or character of a multilateral treaty which in itself, would preclude ratification with a reservation that was not accepted by all or at least a large majority of the parties.

Consideration should be given to the inclusion in article 18, paragraph 1(d) of a reference to the character of the treaty involved. This could be accomplished by revising paragraph 1(d) to read somewhat as follows:

"(d) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty, or the treaty is of such a character that each party to it must be in treaty relations with every other party."

Article 19

The provisions of paragraph 3 of article 19 regarding tacit acceptance of reservations is of considerable merit so far as concerns admission to a treaty of States making reservations to the treaty. It is questionable, however, whether a State should be presumed to be bound by a new treaty relation that it never expressly approves. At most the State failing to object should be precluded from preventing participation in the treaty by the reserving State but should not be presumed to be in treaty relations with the reserving State unless the specific treaty involved contains provisions on which such an assumption could be based.

Article 20

The provisions of paragraph 1(a) do not clearly take into account the provisions in some treaties that specifically permit reservations and require acceptance by a given number or fraction of the parties. Perhaps the provisions assume that the requirements of the terms of the treaty are to be fulfilled. It would seem desirable to make the provisions more specific by adding to paragraph 1(a) the phrase "unless required by the terms of the treaty".

Paragraph 2

In paragraph (15) of the Commission's commentary on article 18 the following statement is made:

> "Paragraph 1(d) has to be read in conjunction with article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations."

Under such a construction the provisions of paragraph 1(d) of article 18 could be rendered almost meaningless. For example, if such a rule had been in force when the Charter of the United Nations was being ratified, any State ratifying with a reservation would have become a Member of the United Nations with that reservation if at least one party had accepted that reservation. In this connexion consideration could be given to the relation of such a rule to the ratification of amendments to the Charter of the United Nations adopted under Article 108 thereof.

Sub-paragraph (a)

The phrase "any State to which it is open to become a party to the treaty" would include a State which, although having the right to become a party, never becomes a party. In such circumstances, acceptance of a reservation by a non-contracting State could not bring the treaty into force between that State and the reserving State. Perhaps the phrase "as soon as the treaty is in force" may have been intended to mean when the treaty is in force between the two States referred to as well as the normal connotation that the treaty has become a binding instrument with respect to any two or more States. In its present wording, however, the intended effect of the provision is not clear.

/...

Sub-paragraph (b)

These provision imply that a State may not object to a reservation on any ground other than that it is "incompatible with the object and purpose of the treaty". Such an implication could lead to endless disagreement and confusion. For example, the reserving State might insist that its reservation was compatible with the object and purpose of the treaty and the objecting State would insist that it was not so. The "incompatibility" criteria might well be employed in connexion with determinations whether a State may be considered a party to a treaty with a given reservation but it seems to be an unnecessarily limited basis for objecting to treaty relations with the reserving State. A State may feel that, because of the type of treaty and the circumstances, a given reservation by another State would render relations under the treaty between the two States inequitable. If each State were not free to decide which reservations it will accept and which reservations it will reject, on such bases as it considers appropriate in its national interest, it would have to accept all reservations except those "incompatible ... with the treaty". If the criteria for objecting to a reservation is limited to "incompatibility" the treaty rights expected by a State under a multilateral treaty it ratified with respect to other ratifying States could be changed considerably by reservations without that State's consent. It is doubted that the authors of the provision intend any such result. Such a result would be in serious conflict with the statement in paragraph (4) of the introduction to the Commission's commentary on articles 18, 19 and 20, quoting from the opinion of the International Court of Justice concerning the Genocide Convention, and reading "... no reservation can be effective against any State without its agreement thereto".

Paragraph 4

The phrase "the effect of the reservation" is not clear. It is assumed that the phrase, as well as the paragraph as a whole, is intended to refer to the bearing of the reservation upon the question whether or not the State involved shall be considered as a contracting party to the constituent instrument of the international organization and a member and not to relations between the reserving State and States which object to the reservation.

/...

If it is intended that the paragraph shall mean that the organization shall decide all legal aspects of the reservation and determine what legal relationships shall be established, it would be in conflict with the above-quoted phrase that "... no reservation can be effective against any State without its agreement thereto". When paragraph 4 is read in conjunction with article 21 it would be clear that the rights of the objecting State would be preserved but difficulties may arise and it would be well to avoid them by casting paragraph 4 in more precise terms.

Even if the intention of paragraph 4 were limited to admitting the reserving State to membership in the organization it could create difficulties and confusion. States which objected to the reservation may feel that they should in no manner be bound nor their interests affected by the vote of the reserving State in the making of decisions by the organization.

The example, given in paragraph (25) of the Commission's commentary to article 20, of the handling of the "alleged reservation" to the IMCO Convention appears to be taken as the basis for suggesting the rule of international law proposed in article 20, paragraph 4. The commentary in paragraph (25) concludes:

> "The Commission considers that in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable."

Four questions arise in connexion with the example given and the conclusion reached by the Commission, namely:

1. Was the "reservation" involved in the IMCO case an appropriate one on which to base a rule of international law?

2. In view of the essentially consultative character of the IMCO organization, can an example of a case involving its membership be considered applicable to other international organizations whose character may be considerably different, such as the Statute of the International Atomic Energy Agency, or the Constitution of the International Labour Organisation?

3. As the effect of a reservation is essentially a legal matter, doesn't the rule in paragraph 4 assign to an international organization juridical functions that should more properly be handled by the International Court of Justice?

4. Is it proper to assume that "integrity of the instrument" involves not only the integrity of the organizational structure but also the integrity of commitments by States that ratify without reservations and that the latter is not normally a matter for determination by a body constituted for other than juridical purposes?

Article 21

The acceptability of this article is dependent, at least in part, on the acceptability of the provisions of article 20 to which it refers.

On the assumption that a satisfactory text can be agreed upon for article 20 and articles 18 and 19 to which article 20 is closely related, the following comments are offered on article 21:

Paragraph 1(a)

Sub-paragraph (a) reflects a long recognized and widely accepted principle of international law. In this connexion an interesting question would exist where, in the case of a bilateral treaty, one of the parties in giving the approval required by the treaty does so with a condition or reservation that is not expressly accepted or rejected by the other party. The two parties proceed with the application of the treaty but one subsequently asserts that the condition or reservation is of no effect. Should such a condition or reservation be considered as having been accepted by implication? If the entire group of articles under section III is limited to multilateral treaties such a case would not need to be taken into account in articles 19 and 20. However, if section III is not limited to multilateral treaties, consideration should be given to the question of what, if anything, should be provided in articles 19 and 20 with respect to implications arising from acts taken by the parties other than a specific statement of acceptance or objection.

Paragraph 1(b)

The phrase "to claim" in the context of paragraph 1(b) is ambiguous. It is assumed that the phrase "to claim" is intended to permit any State to apply "the same modification ... in its relations with the reserving State". However,

without the Commission's commentary, the phrase may be understood as implying that the first State must notify the reserving State of an intention to invoke the reservation before the former could take advantage of the reservation in its relations with the reserving State. The Commission's commentary to article 21 states that "a reservation operates reciprocally between the reserving State and any other party, so that it modifies the application of the treaty for both of them in their mutual relations ..."

In view of the lack of clarity in the phrase "to claim" and the purpose of the provision as stated in the commentary, the article would be made clearer and more acceptable if the phrase "to apply" were substituted in place of "to claim".

Paragraph 2

In some instances States have objected to or refused to accept a reservation but have nevertheless considered themselves in treaty relations with the reserving State. Such a situation is unusual but the present wording of paragraph 2 not only makes no allowance for but appears to preclude such a situation. Perhaps such a situation could be more properly referred to as one in which the provisions to which the reservation applies are rendered inoperative between the reserving State and the State objecting to the reservations but nevertheless accepting treaty relations. This could be provided for by a third paragraph to article 21 reading somewhat as follows:

> "3. Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States."

Article 22

This article has considerable merit. It may have the effect of encouraging the withdrawal of reservations and thereby contribute to uniformity in treaty relations among the parties. Its principal merit is the clarification afforded by the provision that "Such withdrawal takes effect when notice of it has been received by the other States concerned". As indicated in the Commission's commentary on the article, a State should not be held responsible for a breach of a term of a treaty, to which the reservation relates, committed in ignorance of the withdrawal of the reservation.

Article 23

This article as a whole is clearly worded and its merit should be self-evident. As indicated in the Commission's commentary, the provisions reflect accepted present-day practices that are recognized as desirable.

Article 24

The provisions of this article are in accord with present-day requirements and practices. Provisional entry into force is required in various circumstances where the urgency of a situation makes it desirable to provide for giving effect to the treaty prior to completion of all the requirements for its definitive entry into force.

It may be questioned, however, whether such a provision in a convention on treaties is necessary.

Article 25

A question might well be raised whether the provisions of this article are appropriate for inclusion in the draft articles or whether it should be left to the United Nations. Under Article 102 of the Charter, Members of the United Nations have the obligation to register their treaties with the Secretariat and the Secretariat is responsible for publishing the treaties registered.

Paragraph 1 of article 25 merely reiterates the obligations imposed on Members of the United Nations and upon the United Nations Secretariat by Article 102 of the Charter. That paragraph would not impose any new obligations upon Members or any obligations upon non-members.

Paragraph 2 would not only impose a new obligation upon non-member States but also a new obligation upon the United Nations Secretariat. It is recognized that it would be highly desirable to have all treaties registered with the United Nations and published by it. However, although the present United Nations regulations on registration permit the "filing and recording" of treaties submitted by States not members of the United Nations, it is questionable whether the draft articles should seek to impose that function upon the Secretariat as an obligation without some recognition that the United Nations' consent is necessary. Perhaps before the texts of the draft articles are finally agreed upon arrangements could be made for a resolution by the General Assembly inviting all non-member States to register their treaties and providing for their publication.

More direct recognition of the United Nations' role in the adoption of the regulations on registration could be given by replacing the words "in force" in paragraph 3 by the words "adopted by the General Assembly of the United Nations".

Article 26

This article would serve as a useful guide on procedures for correcting errors in texts. There are a few minor changes in the wording that may be helpful, namely:

Paragraph 1

Although the various procedures outlined would seem to cover all methods that have been followed in the correction of errors, States may wish to follow some other procedure or may not wish to take any action because of the insignificance of the errors involved. In view of this, consideration might well be given to replacing the word "shall" in the phrase "shall by mutual agreement" by the word "may", making the matter of correcting errors and the procedure permissive rather than mandatory.

Paragraph 1(b)

The word "of" in the phrase "notes of similar instrument" should be replaced by the word "or".

Paragraph 4

Since Article 102 of the Charter of the United Nations and the regulations on registration do not provide for registration of a treaty until after it has entered into force, the communication to the Secretariat of corrections to texts should not be required before the treaty is registered. As the paragraph stands States may feel obliged to communicate the corrections to the Secretariat even though the treaty has not entered into force and has not been registered or may never enter into force and never be registered.

In view of these circumstances, consideration should be given to the revision of paragraph 4 along the following lines:

> "Notice of any correction made under the provisions of this article to the text of a treaty that has entered into force shall be communicated to the Secretariat of the United Nations."

It is assumed that a correction embodied in a text at the time the text is registered would require no special mention or separate communication.

Article 27

These provisions would serve as a useful guide in the correction of errors in multilateral treaties for which there is a depositary.

Paragraph 6, article 27, as in the case of paragraph 4 of article 26, may result in notifications of corrections being communicated to the Secretariat prior to registration of the treaty. In view of this, consideration might well be given to the revision of paragraph 6 of article 27 along the lines of the suggested revision of paragraph 4 of article 26 above.

Article 28

This article is declarative of well-accepted practice and its inclusion in the draft articles would serve as a useful guide.

Article 29

This article as a whole should serve as a useful guide with respect to the functions of a depositary. There are, however, several provisions of the article that are questionable.

The provisions of paragraph 3(a) requiring the preparation of any further texts in an additional language as may be required "under ... the rules in force in an international organization" may result in an unusual burden being placed upon the depositary if the organization involved should adopt a new rule that the text of a treaty should be prepared in many additional languages. Accordingly, rather than impose an obligation that might be vague in scope, it is suggested that the following phrase be added between the word "organization" and the semicolon: "at the time the depositary is designated".

The provisions of paragraph 3(b) may impose an unnecessary burden upon the depositary if they are construed as meaning that the depositary is required to transmit certified copies to all States to which a treaty "is open to become parties" regardless of the interest in the treaty on the part of such States. Such a provision may result in certified copies of a treaty being sent to States

that not only had no interest in the treaty but would become offended and protest the communication of the copies. In view of this it may be advisable to revise the provision to read:

> "(b) To prepare certified copies of the original text or texts and transmit such copies to all signatory, ratifying or acceding States, and any other States mentioned in paragraph 1 that request copies;"

The revised provision would not prevent a depositary from transmitting certified copies to any State or group of States but it may avoid unnecessarily burdening the depositary and possibly also embarrassment in some instances.

Paragraph 3(c) gives rise to two questions, namely:

(1) The relationship between these provisions and the provisions of paragraphs 4, 5 and 6 of article 29 is not clear. It may be assumed that paragraphs 4, 5 and 6 would be applied before the signature takes place, particularly if it is with a reservation, or before an instrument of ratification is considered as deposited. This relationship isn't clear, however, and serious differences and confusion might arise with respect to the precedence to be given the provisions involved. If, for example, an instrument contains a serious error, the submitting Government would expect the depositary to give it an opportunity to correct the error before the instrument is deposited. There may also be reservations which should be considered by the other States concerned before the deposit is considered as completed.

In view of the foregoing, it is suggested that sub-paragraph (c) of paragraph 3 be amended by revising the first part thereof to read:

> "(c) Subject to the provisions of paragraphs 4, 5 and 6 of this article, to receive in deposit ..."

(2) The phrase "and to execute a <u>procès-verbal</u> of any signature of the treaty or of the deposit of any instrument relating to the treaty" seems to require a formality that is unnecessary and perhaps in many cases would serve no useful purpose. For example, where a treaty remains open for signature and each signatory writes in the date of signature, the treaty itself is sufficient evidence of the action without the execution of any further formal document.

The execution of a procès-verbal of the deposit of instruments would also appear to be an unnecessary requirement. In many instances this requirement would be understood as requiring the execution of a document by both the depositary and the State submitting the instrument, imposing on each a requirement that they felt unnecessary. The United States has served, and continues to serve, as depositary for many important multilateral treaties with respect to which the formality of procès-verbaux in connexion with deposits has been dispensed with and no problems or complaints appear to have arisen from this practice.

The provisions of paragraph 3(d) would appear to be adequate and make the requirement of a procès-verbal unnecessary in all cases unless the State depositing felt otherwise. Such cases could be taken care of as they arise.

In view of the apparent lack of any real need for procès-verbaux in such cases it is recommended that the words "and to execute a procès-verbal of any instrument relating to the treaty" be deleted from paragraph 3(c).

Paragraph 3(d) reflects the procedures followed with respect to multilateral treaties in general and is a helpful guide and clarification.

The remaining provisions of article 29 appear to be declaratory of existing practices and procedures that are widely accepted and effective. Those provisions constitute useful guides on the matters they cover.

[Part II]

Transmitted by a note verbale of 11 February 1965 from the Permanent Representative to the United Nations

[Original: English]

The Government of the United States of America commends the International Law Commission and expresses appreciation for the Commission's efforts and major contributions in the development of the law of treaties.

The following comments are submitted by the United States Government on the group of draft articles (30-54) on the invalidity and termination of treaties submitted by the Commission in its report to the General Assembly. These comments are submitted with the understanding that they do not express the final views of the United States Government regarding the articles involved.

/...

Article 30

This article states a conclusion that is normally self-evident, namely, that a treaty concluded and brought into force shall be considered as being in force and in operation with regard to any State that has become a party to the treaty in accordance with its terms, unless the rules spelled out in later articles concerning nullity, termination, suspension, or withdrawal apply. Article 30 has merit in that it places, in the articles as a whole, a formal presumption which might otherwise be deviated from for reasons beyond those permitted by other articles. On the other hand, article 30, by stating what is readily assumed, seems to imply that every aspect of treaty law is covered by the convention, or series of conventions, which may be adopted on the law of treaties. Article 30 might well be omitted if the convention, or conventions, could be simplified to state only those aspects of the law of treaties which require statement.

Article 31

The provisions of article 31, when considered along with the commentary thereon, should prove to be self-enforcing in the course of time. Those provisions should encourage States to take account of the need for precision in meeting the requirements of their internal law. On the other hand, a State which invokes such a provision to withdraw, on the ground that the violation of its internal law was manifest, may very likely - as a political matter - find that in subsequent negotiations, even with different States, it will be required to give assurances that all necessary municipal requirements have been fulfilled.

Article 32

Paragraphs 1 and 2 of article 4 of the Commission's text on the law of treaties provides that Heads of State, Heads of Government, Foreign Ministers, Heads of a diplomatic mission and Heads of a permanent mission to an international organization are not required to furnish evidence of their authority to negotiate or sign a treaty on behalf of their State. Paragraph 3 of that article provides that any other representative shall be required to furnish written credentials of his authority to negotiate. In considering this provision of article 4, we have pointed out that the word "shall" in paragraph 3 could well be replaced by "may".

In many instances, the appointment of a representative to negotiate and draw up a text is preceded by an agreement at high levels on substance. Also, the surrounding circumstances may make clear that a given individual or mission is fully authorized. For these reasons, we do not think that article 4, paragraph 3, should use mandatory terminology.

Also, the reference in article 32 to article 4 is somewhat ambiguous in that it seems to ignore the fact that a representative may be furnished with some credentials as required under the existing wording of paragraphs 3-6 of article 4.

Accordingly, we would suggest the following revision of article 32:

> "1. If the representative of a State, who cannot be considered under the provisions of article 4 or in the light of the surrounding circumstances as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative may be considered by any of the parties to be without any legal effect, unless it is afterward confirmed, either expressly or impliedly, by his State."

Paragraph 2 of article 32 deals with the situation in which a State places restrictions upon the authority of its representative. The Commission quite properly provides that a treaty shall not become invalid by reason of failure of the representative to observe those restrictions "unless the restrictions upon his authority had been brought to the notice of the other contracting States". The only reasonable meaning of this exception to the rule is that effect shall be given to such notice only if it is received before his unauthorized consent to the treaty in the name of his State has been given. The words "prior to his expressing the consent" thus might well be added at the end of paragraph 2.

Article 33

Article 33, which deals with the relationship between fraudulent conduct and invalidity, could be a source of controversy and disagreement. It might very well create more problems than it would solve. One of the difficulties which the Commission faced in preparing these articles on invalidity and termination was the paucity of State practice in this area. The absence of State practice is reflected in article 33. A serious question arises as to when an injured State is required to assert the existence of the fraud or of any other disabling factor in order to

take advantage of it. Suppose, for example, a State becomes aware of a fraud with regard to a given treaty but waits two, or ten years before asserting it. Should that State have the benefit of this provision? It seems extremely doubtful that it should. If article 33 is retained it might be well to add a clause at the end of paragraph 1 reading somewhat as follows, "provided that the other contracting States are notified within _____ months after discovery of the fraud". We also believe it would be highly desirable to include in the article a requirement that the fraud be determined judicially.

Article 34

The point about limit of time is relevant also to article 34, which deals with error. Some limitation as to the time within which the error must be asserted after its discovery, or after ample time to discover the error, should be included in this provision. Also, as in the case of article 33, provision should be made for judicial determination.

Article 35

Paragraph 1 perhaps goes too far in providing that an expression of consent attained by means of coercion "shall be without any legal effect". It would seem that it would be better to provide that "such expression of consent may be treated by the State whose representatives were coerced as being without any legal effect". This revision would accomplish three things. First, it would prevent the State which applied the coercion from asserting that coercion as a basis for considering the treaty invalid; we do not think that the coercing State should have this right. Second, the State against which coercion was applied should not be required to take the view that the treaty is "without any legal effect"; the coerced State conceivably may wish to avail itself of the option of ignoring the coercion if its interest in maintaining the security of the treaty is dominant. Third, a revision along the lines suggested would tend to prevent third States from attempting to meddle in a situation where the parties immediately involved were satisfied to continue with the treaty.

/...

Article 36

Article 36 states that a treaty whose conclusion is procured by the threat or use of force in violation of the principles of the United Nations Charter shall be void. This article, if agreed upon, with certain safeguards, would constitute an important advance in the rule of law among nations. One can agree with the Commission that this rule should be restricted to the threat or use of physical force; it is this threat or use of force which is prohibited by Article 2, paragraph 4, of the Charter. But the Commission should deal in its commentary with the important question of the application of this provision in terms of time. As the Commission points out, the traditional doctrine prior to the League Covenant was that the validity of a treaty was not affected by the fact that it had been entered into under the threat or use of force. With the Covenant and the Pact of Paris, this traditional doctrine came under attack. With the Charter, this traditional doctrine was overturned. It was thus only with the coming into effect of the Charter that the concept of the illegitimacy of threats or uses of force in violation of the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, was accepted. It is accordingly doubtful whether invalidity due to an illegitimate threat or use of force should be retroactively applied. If it were, the validity of a large number of treaties, notably peace treaties, would be thrown into question. There is even a question whether such a provision should have effect from 1945 or, alternatively, from the conclusion of a convention on the law of treaties incorporating this rule. Retroactivity of the article would create too many legal uncertainties.

Article 37

The concept embodied in these provisions would, if properly applied, substantially further the rule of law in international relations. The provisions should be supported if it can be made certain that they will not conduce to abuse and create undesirable disruption in treaty relations.

The examples given in paragraph (3), points (a), (b) and (c), of the commentary on article 37 are readily acceptable. However, even the application of those examples, if applied retroactively, might possibly result in injustices to

one or more of the parties concerned and disrupt beneficial relations on the basis of clearly acceptable treaty provisions included among others that have long been recognized by the parties as obsolete and inapplicable but which, under the concept stated in article 37, would render the entire treaty void.

Without derogating from the merit of the concept embodied in article 37, it is suggested that the Commission reconsider the provisions of that article and all aspects of the manner in which it might be applied, particularly the question as to who would decide when the facts justify application of the rule.

Article 38

The rules spelled out in article 38 seem self-evident and axiomatic. It would appear that this article could well be omitted if the convention on the law of treaties were to be simplified. However, if it should be the consensus that an article of this character is desirable, its terms as written appear to be satisfactory.

Article 39

Article 39 has the distinct merit of overcoming the alleged presumption that a treaty may be denounced unilaterally where there is no provision for denunciation. However, the intention of the parties to permit denunciation or withdrawal should be a clear intention and this should be emphasized by including the word "clearly" before the word "appears".

Article 40

The provisions of paragraph 1 of article 40 are declaratory of existing principles of international law. The requirement that the agreement for termination be by all the parties emphasizes the cardinal principle that a State cannot be deprived of its legitimate treaty rights without its consent.

On the other hand, paragraph 2 embodies a new concept. It provides that the parties to a multilateral treaty can, by unanimous agreement among themselves, terminate the treaty only if at least two thirds of all the States which drew up the treaty consent to termination if that termination is to be effected before the expiration of a stated number of years. This provision would permit parties to a

/...

multilateral treaty to terminate it by agreement, without regard to any of the provisions in the treaty regarding termination, if - after the expiration of the given period of years - they were to find it not feasible to continue applying the treaty because of the failure of other States to join or for other reasons. There might be great difficulty in reaching agreement upon the number of years which would be practical with respect to all treaties. (Such a figure is to be inserted in paragraph 2.) Therefore, it is suggested that consideration be given to amending the final clause in the following manner: "however, after the expiry of _____ years, or such other period as the treaty may provide, the agreement only of the States parties to the treaty shall be necessary".

Article 41

Article 41 concerns the termination of an earlier treaty which is implied from entering into a subsequent treaty. The provision is sound in principle. Although its concept is self-evident, it would be helpful in resolving apparent questions in this area.

Article 42

Paragraph 1 of article 42 states that a material breach of a bilateral treaty by one party entitles the other party to invoke that breach as a ground for terminating the treaty or suspending its operation in whole or in part. This concept is widely supported but, apparently, seldom invoked. It should be crystallized as a rule of conventional law. To do so would go far toward eliminating much controversy in this area.

Paragraph 2 of article 42 likewise has merit in that it would discourage treaty violators but it requires some clarification. The paragraph seems to a certain extent to ignore the differing varieties of multilateral treaties. Paragraph 2 could well be applied to law-making treaties on such matters as disarmament, where observance by all parties is essential to the treaty's effectiveness. But we question whether a multilateral treaty such as the Vienna Convention on Consular Relations - which is essentially bilateral in its application - should be subjected to the provisions of paragraph 2 as it is now worded. Let us take an example. If part A refuses to accord to part B the rights set forth in the

/...

Consular Convention, should parties X, Y, and Z - in addition to party B (the wronged party) - have the right to treat the convention as suspended or no longer in force between themselves and party A? Another example: an international convention for the exchange of publications. Assume that a first party violates the convention in its relations with a second party. Should a third party have the right to suspend or terminate the convention in its relations with the first party? We think that these examples show that certain of the provisions of article 42 could have an undesirable effect.

Termination or suspension in the case of a multilateral treaty should follow the rule applicable to bilateral treaties. That is, an injured party should not be required to continue to accord rights illegally denied to it by the offending party. This could be accomplished by revising paragraph 2(a) to provide that a material breach of a multilateral treaty by one party entitles: "Any other party, whose rights or obligations are adversely affected by the breach, to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State". Similarly, we would suggest revising paragraph 2(b) to read: "The other parties whose rights or obligations are adversely affected by the breach, either ...", and so forth.

It is hoped that Governments and the Commission will review this matter with care.

Article 43

Article 43 concerns supervening impossibility of performance. Although this provision may be highly desirable as far as it goes, a question exists as to what rules should govern in a case in which certain provisions of the treaty have been executed, while others remain executory. For example, suppose that State A makes a cession of land to State B on the condition that State B will forever maintain and permit the use of a navigable channel in the river. Now if the river dries up or its course is seriously altered by a flood rendering the river permanently useless for the purposes of the agreed navigation, should State B continue to enjoy the benefits of the cession while State A is deprived of its rights under the treaty or does the cession simply become revoked? This question leads to the suggestion that article 43 might contain a new, a fourth, paragraph, somewhat along the following lines:

"4. The State invoking the impossibility of performance as a ground for terminating the treaty or suspending the operation of a treaty may be required to compensate the other State or States concerned for benefits received under executed provisions."

Article 44

The concept of rebus sic stantibus embodied in article 44 has long been of so controversial a character and recognized as being so liable to the abuse of subjective interpretation that the United States has reservations about its incorporation in the draft, at any rate in its present form. In the absence of accepted law, it seems highly questionable whether this concept is capable of codification. Moreover, we doubt whether its incorporation, at least in its present form, would be a progressive development of international law. The doctrine of rebus sic stantibus would have unquestionable utility if it were adequately qualified and circumscribed so as to guard against the abuses of subjective interpretation to which it lends itself. If it is applied with the agreement of the parties to the treaty, so as to give rise to a novation of the treaty, it would certainly be acceptable. If, failing that, an international court or arbitral body were entrusted with making a binding, third-party determination of the applicability of the doctrine to the particular treaty, that, too, would be acceptable. But, while there is opportunity to consider the question further, particularly in the light of comments of other Governments, the United States desires at this juncture, to place on record its opposition to article 44 as it is now drafted.

Article 45

Article 45 provides that a treaty becomes void and terminates when a new peremptory norm of general international law is established in conflict with the treaty. The Commission's commentary notes that this is a logical corollary of the jus cogens rule of article 37. But considerable further study is needed to decide whether this "logical corollary" is workable as well as to decide whether, as suggested in the comments on article 37, the jus cogens rule as presently embodied in the draft is workable. The determination as to just when a new rule of international law has become sufficiently established to be a peremptory rule is likely to be extremely difficult.

/...

Furthermore, it appears that under the provisions of article 37 peremptory norms developed after the conclusion of many early treaties may void the provisions of those treaties if, as appears to be the case, the provisions of that article apply retroactively. It appears that the article could not be accepted unless agreement is reached as to who is to define a new peremptory norm and determine how it is to be established.

Article 46

The provisions of article 46 would seem useful in clarifying, to some extent, the manner in which the articles to which it refers are to be applied. However, the expressions "33 to 35" and "42 to 45" may be somewhat misleading, even though their meaning can be ascertained by a study of the text of the articles to which they refer. It would seem that in order to clearly express the intention of the drafters, expressions such as "33 through 35" and "42 through 45" would be more appropriate.

It also is believed that, if the general concept of article 37 is to be retained, it will be found after some consideration of its implications that a second paragraph like that in article 45 should be added, and that article 37 should be among the articles referred to in article 46.

Article 47

Provisions along the lines of article 47 are essential to prevent abuses of the rights set forth in the articles to which it refers. It cannot prevent all abuses which may arise, but it does help to support the principle that a party is not permitted to benefit from its own inconsistencies.

There are two matters of drafting in connexion with article 47.

First, it would seem that the references involved would be clearer if the articles were referred to as "articles 32 through 35" and "articles 42 through 44".

Second, it would seem advisable to (a) either place article 47 ahead of the other articles to which it refers or (b) include in each of those articles a reference to article 47 in order to avoid those articles being considered out of context.

Article 48

The United Nations, as a party in interest, will recognize that article 48 of the draft has particular importance. The text concerns the very special case of treaties which are the constituent instruments of international organizations or which have been drawn up by international organizations. The text recognizes that an international organization must proceed in accordance with its established rules in reaching decisions and taking action. The United States emphatically agrees with this principle. But considerable study is apparently necessary to determine whether, and to what extent, a general convention on the law of treaties can easily include a provision such as article 48. The phrase "subject to the established rules of the organization" might, for example, be construed as meaning that the organization was completely free to ignore the provisions covered in section III if it chose to do so on the basis of some established rule of the organization.

Article 49

Article 49 constitutes a useful clarification. It should have the effect of removing any uncertainty or doubt concerning the authorization, or evidence of authorization, for taking the actions mentioned in the article.

Article 50

Paragraph 1 of article 50 provides that notice of termination of a treaty under a right expressly or impliedly provided for in that treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty, either directly or through the depositary. This provision is sound. It correctly states the procedures and principles normally applied. Paragraph 2 of article 50 states that notice to terminate, for example, may be revoked at any time before the date on which it takes effect unless the treaty otherwise provides. It should be pointed out that the reason for specifying a given period of time before a notice of termination becomes effective is to allow the other party or parties to adjust to the new situation created by the termination.

Accordingly, the State receiving the notice in the case of a bilateral treaty is entitled to proceed on the basis that the notice will stand and will prepare to make such readjustments as may be necessary. Perhaps the other party to the bilateral treaty would have given a notice of termination if the first party had not done so.

In the latter circumstances a party to a bilateral treaty might prevent the giving of a notice of termination by the other party by giving such notice itself and then withdrawing the notice with a view to prolonging the treaty beyond the period contemplated by the other party. Such a situation should not be encouraged.

The most reasonable rule would appear to be that, where notice of the termination would bring the treaty to an end with respect to all other parties, the withdrawal of the notice must be concurred in by at least a majority of the other parties to the treaty. For this reason, it is suggested that paragraph 2 of article 50 be revised to read: "Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect, except in a case in which the notice would have caused the treaty to terminate with respect to all parties." We would then add a new sentence to paragraph 2, namely: "Where the notice would cause the treaty to terminate with respect to all parties, the notice of withdrawal will not be effective if objected to by the other party in the case of a bilateral treaty, or if objected to by more than one-third of the other parties in the case of a multilateral treaty."

Article 51

The International Law Commission considers in its commentary that this is a key article. It points out that a number of the members of the Commission thought that some of the grounds under which treaties could be considered invalid or terminated could involve real danger for the security of treaties if allowed to be arbitrarily asserted in face of objection by other parties. It is regretted that the Commission did not find it possible to incorporate a rule subjecting the application of these articles to compulsory judicial settlement by the International Court of Justice. It would appear that the rule of law - particularly in an area such as the law of treaties - argues most strongly for compulsory reference to the Court. The Commission did not dispute "the value of recourse to the International

Court of Justice as a means of settling disputes arising under the present articles". As it is, it is not certain that the provisions of article 51 will supply the safeguards that may be required in connexion with some of the articles to which they apply. A requirement of compulsory arbitration or judicial settlement in the absence of settlement of differences by other means seems necessary. It is hoped that further consideration will be given to this matter.

Article 52

The provisions of article 52 would appear to be a useful clarification of the consequences resulting from the nullity of a treaty.

Article 53

The provisions of article 53, like those of article 52, would appear to be a useful clarification of the consequences of the termination of a treaty.

Article 54

There may be a question whether article 54 is intended to apply as broadly as it appears. For example, if one party to a multilateral treaty suspends the application of the treaty with respect to one other party, only the latter party should be relieved of the obligation to apply the treaty unless the nature of the treaty were such that the suspension affected the immediate interests of all parties. In view of this, it is recommended that consideration be given to the rewording of paragraph 1 (a) along the following lines:

"(a) Shall relieve the parties affected from the obligation to apply the treaty during the period of the suspension."

SECTION II

COMMENTS IN THE SIXTH COMMITTEE

/...

PART I

CONCLUSION, ENTRY INTO FORCE AND REGISTRATION OF TREATIES

SECTION I: GENERAL PROVISIONS

Article 1

Definitions

ARGENTINA

The Commission's handling of "treaties in simplified form" was especially interesting in view of their increasingly wide-spread use. It had given them a precise definition based, very properly by international standards, on their form rather than on the obligations which might be contracted under them. The cause of the difficulty now raised by treaties in simplified form was that most domestic constitutional rules had not yet been adapted to modern international requirements which demanded a rapid solution of problems. The opinion that treaties in simplified form should apply only to technical questions of secondary importance or be explanatory was no longer current; in fact, many very important exceptions might be cited, such as the Munich Agreement of 1938, the Geneva Agreements on Indo-China of 1954, the Indo-French Agreement on Settlements, the Roboré Agreements between Brazil and Bolivia on petroleum areas, and many other agreements concerning reciprocal military assistance, settlement of boundaries, movement of persons, and so on. Modern international life demanded practical, adaptable and flexible forms which would not hamper a State desiring to conclude international transactions. (Mr. Ruda, XVIIth sess., 744th mtg., para. 3)

BOLIVIA

... the Commission was to be congratulated on having proposed, in article 1, para. 1 (a) a single word to designate any international agreement in written form; the entire text had gained much in clarity thereby. (Mr. Añez, XVIIth sess., 740th mtg., para. 33)

BRAZIL

... the Brazilian delegation was not in favour of maintaining the words "and governed by international law" at the end of article 1, paragraph 1 (a), which defined the word "treaty". It had been pointed out that the purpose of those words was to exclude from the definition agreements regulated by private international law. Nevertheless, though regulated by the municipal law of the contracting parties, such instruments were geniune treaties and therefore governed by international law. Moreover, they were registered by the United Nations and published in the Treaty Series. The deletion of the words "and governed by international law" would make the definition clearer without affecting the substance. (Mr. Amado, XVIIth sess., 737th mtg., para. 16)

COLOMBIA

Some of the definitions in article 1 were open to the formal objection that they included the words they were intended to define. As for the definition of "treaty" in paragraph 1 (a), although his delegation had noted the interesting arguments put forward in the commentary and considered the limiting effect of paragraph 1 (b) defining a "treaty in simplified form", it still feared the consequences of using the word "treaty" as a generic term, in view of the clear distinction which had been maintained for many years in the domestic law of States between the words "treaty", "convention","exchange of notes", "agreed minute", and the like. The acts defined in paragraph 1 (d) - signature, ratification, accession, acceptance and approval - should be treated separately in closer accord with the provisions of articles 10-16.

His delegation was also concerned about the scope of the words "other subjects of international law" in the definition of the word "treaty" in article 1, para. 1 (a), especially since according to paragraph (8) of the commentary the Commission intended the words to cover "other international entities, such as insurgents which may in some circumstances enter into treaties". In the discussions in the Commission it had been argued that in theory insurgents did not possess jus contrahendi in international law but that, by virtue of custom, treaties concluded by some insurgents had been accepted as valid; and that if insurgents were recognized as subjects of international law, they would

acquire the capacity to enter into treaties. His delegation held that such an approach might lead to serious conflicts. As Mr. Amado had said, the capacity to conclude treaties was vested in every sovereign and independent State, because the jus contrahendi was an attribute of independence. If that fundamental principle were adopted, a theory which accepted insurgents as subjects of international law having the capacity to conclude treaties was manifestly deficient. Paragraph (2) of the commentary on draft article 3 referred to "an insurgent community to which a measure of recognition has been accorded"; recognition was itself a serious problem which would give rise to differences of view. In any event, as the draft articles from article 4 onwards dealt with the conclusion of treaties by States only there was no need to mention the capacity of "other subjects of international law".

Although his delegation agreed that the capacity of subjects other than States to conclude treaties should be clearly specified in the draft articles, it was not satisfied with the wording of articles 1 and 3. It shared the misgivings voiced by the secretary of the Commission concerning the use of the terms such as "subjects of international law" which, while proper in theory, might be considered unacceptable by States. The use of the term was not required to establish the Holy See's capacity to conclude treaties; as Mr. Bartos had said at the 669th meeting of the International Law Commission, the international juridical personality of the Holy See, whether considered as the Vatican State or as a spiritual Power, was generally acknowledged. Moreover, in recent practice, the Holy See had certainly been included in the list of States invited by the United Nations to participate in such important conventions as the Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations. (Mr. Bayona, XVIIth sess. 741st mtg., paras. 4-6)

See also comments on articles 8-9.

ECUADOR

The definition of a treaty in article 1 (a) of the Commission's draft confirmed the view that the rules of procedure applied only to the form of the treaty; if treaties were to be fully covered by international law, it was necessary to codify the substantive principles. On the other hand, while general

acceptance of the term "treaty" would be likely to prevent future mistakes or prejudiced interpretations, that was not the case with the definition of "treaty in simplified form" in contradistinction to "formal treaty". The final phrase in that definition ("or other instrument concluded by any similar procedure"), coming after the enumeration of the various methods of concluding treaties in simplified form, made the term less precise and might give rise to dangerous controversies. In the commentary on article 1, the Commission had observed that that type of treaty, far from being at all exceptional, was very common and that its use was steadily increasing. The problem assumed even more importance when it was considered that the entry into force of a treaty in simplified form was not subject to ratification, and that there might be many cases of nullity unless it was stated precisely which international agreements became effective without that formality. (Mr. Alcivar, XVIIth sess., 743rd mtg., para. 8)

NIGERIA

The use of the word "treaty" as a generic term covering all forms of international agreement was quite satisfactory. (Mr. Okany, XVIIth sess., 741st mtg., para. 37)

PANAMA

Some of the definitions in article 1 were circular. Moreover, in paragraph 1 (d) "signature" was mistakenly defined, like "ratification", "accession", "acceptance" and "approval", as an "act ... whereby a State establishes on the international plane its consent to be bound by a treaty". Notwithstanding the qualifying sentence which followed the definition, he disapproved of the inclusion of "signature" among the acts whereby a State expressed its consent to be bound: in contemporary international law ratification, not signature, expressed the consent of the State. In any event, signature as authentication would be the rule; consent by signature would be the rare exception. Several judicial decisions supported that view. "Acceptance", "approval" and "accession" were merely forms of ratification.

The Commission had not succeeded in distinguishing between "treaty in simplified form" and "formal treaty". However, it had wisely not adopted the proposition of Charles Rousseau and other text-writers that the existence or absence of ratification was the sole valid legal criterion by which formal treaties and treaties in simplified form could be distinguished. The Commission should prepare a revised version of article 1 establishing a distinction between the two forms of treaties. (Mr. Quintero, XVIIth sess., 741st mtg., paras. 20-21)

SYRIA

In part I, section I, article 1 (b) of the draft, the Commission defined the term "treaty in simplified form" as a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure. It was true that, for example, an exchange of notes was a treaty in simplified form, but a joint declaration did not altogether in itself constitute an agreement, but was rather an instrument which opened the way to the conclusion of future agreements. (Mr. Nachabe, XVIIth sess., 739th mtg., para. 17)

VENEZUELA

The use of the word "treaty" to mean any international agreement in written form overcame many terminological difficulties and was entirely acceptable. The Commission had endeavoured to assemble in article 1, paragraph 1 (b), all agreements which were not treaties in the strict sense; but he wondered whether "treaty in simplified form" was the best expression to describe them all. (Mr. Molina, XVIIth sess., 743rd mtg., para. 27)

Article 2

Scope of the present articles

CAMEROON

It [the delegation of Cameroon] endorsed the use of the term "treaty" in the draft articles to denote a written agreement, but had certain misgivings about the decision to confine study of the law of treaties to written agreements. It did

not seem advisable to disregard agreements in simplified form which, though summaries of written treaties, were nevertheless treaties in the full sense of the term, since a treaty was after all essentially a meeting of minds. (Mr. Njo-Lea, XVIIth sess., 740th mtg., para. 11)

Article 3

Capacity to conclude treaties

BELGIUM

Article 3, paragraph 3, and the commentaries on it showed that the Commission was properly aware of the important problem resulting from the exercise by international organizations of powers formerly belonging only to States. (Mr. Bal, XVIIth sess., 743rd mtg., para. 25)

BRAZIL

The general arrangement of the draft articles had been simplified by discarding the artificial and largely useless notion of a plurilateral treaty and by condensing article 3. As originally drafted, article 3 had invited copious controversy about the established limitations of the jus contrahendi and the repercussions of problems of constitutional law relating, for example, to the capacity of belligerents already recognized as such, and to specific unions of States such as the European Common Market. It was fortunate, therefore, that article 3 as now worded merely recognized the capacity of States to conclude treaties, which was an attribute inherent in their sovereignty. (Mr. Amado, XVIIth sess., 737th mtg., para. 12)

COLOMBIA

(See comments on article 1)

ECUADOR

With respect to article 3, his delegation thought that a provision should be drafted preventing a federal State which was a signatory to an international treaty from not observing, in one part of its territory, obligations which it might have contracted in the exercise of its sovereignty, on the pretext that those obligations were incompatible with the law in that particular part of the territory. Regardless of the form of political division adopted by a federal State and regardless of the degree of internal self-government enjoyed by the various entities constituting the federation, it was obvious that representation at the international level was exercised by the federal Government and that the State, as a geographic and political unit, was bound by its international commitments towards other signatories which had acted in good faith. Moreover, with respect to the capacity to conclude treaties, it would be desirable to define what entities, besides States, were regarded as subjects of international law. (Mr. Alcivar, XVIIth sess., 743rd mtg., para. 9)

VENEZUELA

Referring to article 3, he agreed with the Colombian representative in doubting the propriety of admitting that "an insurgent community to which a measure of recognition has been accorded" had capacity to conclude treaties. (Mr. Molina, XVIIth sess., 743rd mtg., para. 28)

UNITED ARAB REPUBLIC

He was.... satisfied with the present wording of article 3, paragraph 1, which made no reference to dependent States and thus refrained from sanctioning a situation which was becoming obsolete. (Mr. El-Erian, XVIIth sess., 744th mtg., para. 11)

SECTION II: CONCLUSION OF TREATIES BY STATES

Article 4

Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty

ITALY

..., a problem arose in connexion with a fundamental principle of the law of treaties - that of consent. A treaty between two States existed only in so far as those States had consented to be bound by its clauses. The question of consent had two main aspects: first, consent must exist, and that involved the question of the declaration of the State's contractual intention; second, that intention must be expressed at the international level. In principle, a State's intention could be validly expressed only if it existed in accordance with the legal rules governing its formation. There might be exceptions to that principle, since the requirements of certainty in legal relations and the very principle of good faith might result in a State's being regarded as bound by declarations made by its organs at the international level, even if those organs were not per se competent to declare the State's intention; but the principle lost none of its theoretical or practical importance. Moreover, it was generally recognized that the declaration of a State's contractual intention was governed by its constitution so that the conclusion of a treaty was not governed exclusively by the rules of international law; it was essential that a convention codifying the law of treaties should contain very specific provisions as to how far and with what exceptions compliance with a State's constitutional law was necessary to enable the representatives of that State to conclude a treaty in valid form. In the opinion of the Italian delegation, those provisions should appear in the section on authority to ratify, accede to, approve or accept a treaty, since such authority related not only to the manifestation of the intention of a State, but first and foremost to the actual declaration of that intention.

His delegation noted with concern that certain passages of the commentary on particular articles of the draft seemed to indicate an unfavourable attitude on the Commission's part towards the rule of international law which provided that a State's consent to be bound by the clauses of a treaty must be governed by the

/...

State's constitution. That observation related in particular to the commentary on articles 4, 12 and 14. Thus, in its commentary on article 12, the Commission differentiated between "parliamentary ratification of a treaty under municipal law" and "ratification on the international plane"; those terms might imply that, in international law, it was ratification on the international plane that counted. The Commission went on to say that "the international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes". That passage did not make it clear that constitutional law and international law both contributed to determining the conditions governing the conclusion of treaties. The distinction that should be made was that which existed between the procedures for the expression of the State's consent and those for the manifestation of that consent on the international plane, the former being subject to the rules of constitutional law and the latter to the rules of international law. The connexion between those two procedures then became obvious, and it followed that both must be observed for a treaty to be concluded in valid form. He would be grateful if the Commission would consider the question he had raised with the greatest care when it came to reconsider the draft articles on the law of treaties. (Mr. Sperduti, XVIIth sess., 743rd mtg., paras. 21-22)

VENEZUELA

Article 4 contained no rules governing the granting of full powers by States to their representatives; he supposed that the matter was one of domestic law. (Mr. Molina, XVIIth sess., 743rd mtg., para. 29)

Article 5

Negotiation and drawing up of a treaty

(no comments)

Article 6

Adoption of the text of a treaty

BRAZIL

On the choice of the two-thirds rule to determine the majority necessary for the adoption of the text of a treaty (article 6 of the draft articles), the Brazilian delegation agreed with the Commission's conclusions, but doubted whether the same rule ought to govern the preliminary vote on the voting procedure to be followed in adopting the provisions of the treaty. It realized that the Commission was anxious to avoid long procedural delays, but considered that for the adoption of the text of a treaty the two-thirds rule should be merely a suggestion which the participants in an international conference could either accept or reject. There was no doubt that the rule would invariably be observed, not only because that was the recent tendency but also because it was the rule which best fitted the international situation. If, however, it were compulsorily applied to procedural decisions on the choice of a final rule, it might appear as a constraint placed upon States in international negotiations which were primarily political and consequently should not be subjected to any complex or rigid rule which might make them unduly formal. Furthermore, in practice the absence of the rule did not appear to have raised any great difficulty in decision of the procedural question. (Mr. Amado, XVIIth sess., 737th mtg., para. 14)

MEXICO

In connexion with article 6, his delegation believed that more care should be given to study of the procedure for establishing the majority by which a treaty should be adopted at an international conference. The Commission's argument in favour of fixing rules in advance to avoid lengthy procedural debates carried some weight; but it was essential also to take into account the possibility of participation in such conferences by States which were not parties to the convention on the law of treaties and on which such rules would therefore not be binding. Accordingly it would be better for each conference to settle for itself not only the necessary majority but also the procedure for the adoption of the text of the final instrument. (Mr. Moreno, XVIIth sess., 739th mtg., para. 21)

Article 7

Authentication of the text

(no comments)

Article 8

Participation in a treaty

Article 9

The opening of a treaty to the participation of additional States

CAMEROON

His delegation agreed with those members of the Committee who at previous meetings had stressed the importance of draft articles 8 and 9, relating to participation in treaties. There should be no restrictions on the right to become a party to an existing treaty, for the international community was moving towards universality and it would be regrettable if treaties, the motive force of that trend, became its brakes. Moreover, no State could consider itself entitled on any ground to check the trend towards enlargement of the international community, particularly through multilateral treaties affecting the interests of all. (Mr. Njo-Lea, XVIIth sess., 740th mtg., para. 12)

COLOMBIA

Another controversial problem was the designation of the States which might participate in treaties. Articles 8, 9 and 13 were based on current practice and faithfully reflected the evolution of the law, especially with respect to the part played by international organizations in the conclusion of treaties. Because the second half of article 8, paragraph 1 was in accord with modern procedures, it should be retained. Nevertheless, in determining the participation of States in a treaty, it was essential to consider the purposes of the treaty, its subject matter, and the intention towards the treaty provisions shown by the State wishing

to participate. Such circumstances could be determined only by the contracting parties, or by the competent organs of international organizations in accordance with their constituent instruments. In that connexion it was uncertain whether the definition of "general multilateral treaty" in article 1, paragraph 1 (c) would be really useful in applying the rules governing the various categories of treaties. For example, it was not clear whether that definition included an agreement concerning a primary product such as sugar, in which all States had an interest as consumers or producers. (Mr. Bayona, XVIIth sess., 741st mtg., para. 7)

CYPRUS

With regard to articles 8 and 9, general multilateral treaties, because of their legislative character, should be open to universal participation, so as to ensure the universal application of their provisions. Since law-making treaties, like other treaties, were subject to the limitation that they were not binding on States not parties to them, no State should be excluded from participation. Of course that statement was subject to the existing rule that the problem of participation in general multilateral treaties was quite distinct from that of the recognition of States. The application of article 9, paragraph 1, to doubtful cases had the advantage of relieving the Secretary-General or any other depositary from having to take delicate and perhaps controversial political decisions. He had also been glad to see that the Commission had paid attention to the problem of the accession of new States to existing general multilateral conventions containing clauses which limited participation to certain categories of States. It was to be hoped that the Secretariat would soon be able to provide information relevant to the solution of that problem, either through the draft articles or by means of the procedures indicated in paragraph (10) of the commentary to article 9. (Mr. Jacovides, XVIIth sess., 741st mtg., para. 32)

CZECHOSLOVAKIA

Article 8

Participation in a treaty like the Convention on the Privileges and Immunities of the United Nations was obviously quite properly limited to Member States, but the case of such treaties as the Vienna Convention on Diplomatic

Relations, the objectives of which were universal, was quite different. The codification of the law of treaties offered a good opportunity to reconsider that unlawful practice of the United Nations. His delegation therefore noted with satisfaction that the Commission had recognized in its article 8, paragraph 1, the principle of the universality of general multilateral treaties. At the same time he drew attention to a danger that a denial of that principle might result from the words of the paragraph "unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization". He proposed, therefore, that that ambiguous and superfluous phrase should be deleted, and that article 8, paragraph 2 should be amended to enable a State to become a party to a treaty in which it had a legal interest. That question was highly important to newly-emerging States, as the representative of Ghana had already made clear. (Mr. Pechota, XVIIth sess., 739th mtg., para. 5)

HUNGARY

Article 9

His delegation unreservedly approved the principle acknowledged by the International Law Commission that general multilateral treaties, because of their special character, should be open to participation on as wide a basis as possible (article 9, commentary, para. (2)). If codification meant, in a general way, the transforming of customary into written rules, and if customary rules of international law were considered binding on all its subjects, it must be admitted that any measure tending to restrict participation in general multilateral treaties was adverse to the codification and progressive development of international law. The principle acknowledged by the Commission would make it possible to solve most of the differences of opinion which had arisen in the Commission on accession and reservations to general multilateral treaties. (Mr. Ustor, XVIIth sess., 736th mtg., para. 4)

INDONESIA

Article 8 was accompanied by a pertinent commentary stating that the Commission had been unanimous in thinking that general multilateral treaties, because of their special character, should be open to participation on as wide a

basis as possible. But article 8, as formulated, included the possibility of limiting participation. Participation should be open to all States without exception and, in her delegation's view, the limiting clauses in article 8 should be deleted. As to the problem of the accession of new States to general multilateral treaties, which was raised in paragraph (10) of the commentary on articles 8 and 9, her delegation agreed that it should be possible to solve that problem by obtaining the consent of the States concerned, without having to negotiate a fresh treaty amending or supplementing the earlier one. Pending the establishment of a suitable procedure it might be useful if a list could be drawn up, if necessary by the United Nations Secretariat, showing multilateral treaties universal in character but not open to all States. (Miss Laurens, XVIIth sess., 740th mtg., para. 20)

IRELAND

Article 9

... he would like to point out that, while appreciating the need for precision, his delegation did not think it desirable that time-limits such as those stipulated in articles 9 and 19 should be imposed in such important matters, since they placed an additional burden on Foreign Offices which were lightly staffed. (Mr. Morrissey, XVIIth sess., 743rd mtg., para. 13)

ISRAEL

With regard to paragraph (10) of the commentary on articles 8 and 9 of the draft articles on the law of treaties, the problem discussed did not appear to be directly linked with the codification and progressive development of the law of treaties. It was not a new problem, but its urgency had been felt for only a few years. However, since the draft articles sought to lay down general rules for the future, there could be no question of making them cover the problem of treaties concluded in the past, especially those which had been concluded under the auspices of the League of Nations and had been opened for signature to States Members of the League or to States expressly invited by it to sign. That problem should therefore be considered separately. The treaties of the League of Nations formed an important

/...

part of contemporary international law and it was not surprising that the new States wished to accede to them. There were two difficulties in that connexion: the Secretary-General, who was the depositary of those treaties pursuant to General Assembly resolution 24 (I), might consider that he was not authorized to accept instruments of accession from States Members of the United Nations which had not been Members of the League of Nations. Also to be considered was the position, with regard to those new accessions, of the States at present parties to those treaties. The International Law Commission had suggested that agreement should be reached on a list of multilateral treaties of a universal character which might be open to participation by all. The Israel delegation considered that an extremely practical and reasonable suggestion; that list could be prepared on the basis of the one appearing in the Secretariat working paper (A/C.6/L.498). His delegation also suggested that the General Assembly should authorize the Secretary-General to ask the parties to those conventions whether they saw any objection to the accession of States Members of the United Nations or of the specialized agencies, and should also authorize the Secretary-General to ask the parties to those conventions whether they saw any objection to the accession of States Members of the United Nations or of the specialized agencies, and should also authorize him to accept the instruments of accession of those States, without - following here the principle contained in General Assembly 598 (VI) - passing upon the legal effects of such documents. That would be a decision consistent with the intentions of the original parties to those conventions, which undoubtedly wanted them to be open to all members of the organized international community, which today meant all Members of the United Nations and the specialized agencies. His delegation believed that that measure would be fully in harmony with the agreements concluded in 1946 between the League of Nations and the United Nations and would not prejudice discussion of articles 8 and 9 of the draft articles on the law of treaties. It would also fall within the scope of the functions assigned to the General Assembly by the Charter with respect to the codification and progressive development of international law. (Mr. Rosenne, XVIIth sess., 743rd mtg. para. 40)

MEXICO

Article 9

His delegation ... had some doubts concerning article 9, paragraph 1 (a). By what authority would the provision for the subsequent consent of two-thirds of the States which drew up the treaty to the participation of additional States be applicable where States non-parties to the convention on the law of treaties had been represented at the international conference? It would be much more prudent to recommend that all treaties drawn up by an international conference should state the conditions for the participation of additional States.
(Mr. Moreno, XIIth sess., 739 mtg., para. 22)

MONGOLIA

... his Government had paid special attention to articles 8 and 9, on participation in treaties. Owing to the policy of discrimination practised by certain Western Powers, Mongolia had been prevented until recently from acceding to any general multilateral treaties; needless to say, that policy had hampered the development of friendly relations and co-operation among nations. It was therefore encouraging that the International Law Commission had held unanimously that general multilateral treaties, because of their special character, should in principle be open to participation on as wide a basis as possible. It was to be hoped that no provision contraty to the spirit of universality would be inserted in the article. (Mr. Khosbayar, XVIIth sess., 742nd mtg., para. 1)

POLAND

Attention should ... be paid to the question of the free will of the parties, the question of sovereign equality between them, and the problem of non-discrimination against any State, whether or not a Member of the United Nations, regarding participation in multilateral agreements or conventions. On the last point his delegation noted with satisfaction that the Commission had taken a firm stand in article 8, paragraph 1, of the draft articles, which provided that "in the case of a general multilateral treaty, every State may become a party to the treaty". The restrictions which existed in practice, or which were advocated by

some members of the Committee, were inconsistent with the spirit and with the other provisions of the draft articles, inter alia, article 1, paragraph 1 (c), and the accompanying commentary. The same applied mutatis mutandis, to article 8, paragraph 2, and article 9, paragraph 1. It was the considered view of his delegation that if the multilateral international treaty was to be the most fundamental juridical form of co-operation between States, it must be open for participation by as many States as possible. Any limitation of its scope was a disservice to the cause of peace and friendly relations among countries. (Mr. Wyzner, XVIIth sess., 740th mtg., para. 26)

ROMANIA

Article 8

He agreed with the Commission that its draft articles "contained elements of progressive development, as well as of the codification of the law" (A/5209, para. 22). However, they denied some States, though subjects of international law, access to multilateral treaties. The Commission had been unanimous in thinking that general multilateral treaties should in principle, because of their special character, be open to participation on as wide a basis as possible. If a State were not permitted to participate in a general multilateral treaty in which it was interested, it was in effect prevented from taking part in the development of contemporary international law. Universality of general international treaties was essential to the stability of the international legal order, the maintenance of peace and international security, and the development of co-operation between States. The contrary view was discriminatory and conflicted with the purposes of multilateral treaties. His delegation therefore urged that article 8 be redrafted to include specific recognition of the principle of universality of access to general multilateral treaties. (Mr. Ionascu, XVIIth sess., 742nd mtg., para. 25)

UNION OF SOVIET SOCIALIST REPUBLICS

Article 9

... the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law; and their participation in the work of codification was extremely desirable in order that the law of treaties might be placed upon the widest and most secure foundations. That sound approach to the problem was also evident in some of the draft articles; for instance, the Commission had been unanimous in the view, expressed in paragraph (2) of the commentary to article 9, that general multilateral treaties should be open to participation on as wide a basis as possible. (Mr. Movchan, XVIIth sess., 738th mtg., para. 5)

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Article 8

In her Government's opinion, that article did not represent either current practice or a well established rule of international law. On the contrary, the almost universal practice in multilateral treaties was to define the States which might accede; there was nothing contrary to international law in such a limitation, or in the United Nations consistent practice of restricting conventions concluded under its auspices to its Members and those of the specialized agencies. It was a fact of international life that there were entities purporting to be States which were by no means universally recognized as such; accordingly, if all multilateral conventions were thrown open to participation by "all States" without any definition or limitation of that term, a most unpleasant duty, calling for subjective decisions, would fall upon the Government or international organization acting as depositary of a convention. (Miss Gutteridge, XVIIth sess., 745 mtg., para. 21)

Article 9

In paragraph (10) of its commentary on article 9, the Commission referred to the problem of the accession of new States to general multilateral treaties, concluded in the past, whose participation clauses were limited to specific categories of States. The Commission had presumably had in mind particularly those

treaties concluded under the auspices of the League of Nations, which were limited to its Members. The problem deserved further consideration, and Ghana had made the very practical suggestion that the Secretariat should provide a list of such treaties. (Miss Gutteridge, XVIIth sess., 737th mtg., para. 6)

VENEZUELA

He agreed with what the Brazilian representative had said about the expression "a small group of States" in article 9 and elsewhere: its lack of precision might cause difficulty in practice. He approved of the distinction which the Commission made in paragraph (3) of its commentary on articles 8 and 9 between the problem of participation in general multilateral treaties and the problem of recognition of States. In legal theory the two problems were completely distinct, and in order to make the distinction perfectly clear, it would be desirable to embody it in an article, and not to relegate it to the commentaries. (Mr. Molina, XVIIth sess. 743rd mtg., para. 29)

YUGOSLAVIA

The commentary on articles 8 and 9 showed that opinion in the Commission differed on the opening of a general multilateral treaty to participation by additional States. The Yugoslav delegation believed that, in the modern world, general multilateral treaties should be open to participation on as wide a basis as possible, because it was in the interests of the international community as a whole and, in the long run, in the interests of the contracting parties themselves, that the rules of law laid down in the treaty should be universally applied, and because the exclusion of certain States would not only be at variance with the generally recognized principle of the sovereign equality of all nations, but would also constitute an act of discrimination incompatible with the purposes and principles of the United Nations Charter. In that matter in particular, the Commission should abandon traditional concepts of international law which had become outdated. (Mr. Milankovic, XVIIth sess., 743rd mtg., para. 15)

Article 10

Signature and initialling of the treaty

(no comments)

Article 11

Legal effects of a signature

ARGENTINA

His delegation had studied with particular attention the effects which article 11 attributed to the signature of treaties. In paragraph (4) of the commentary on that article the Commission had considered whether signature implied an obligation to be fulfilled in good faith to submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection. It had rightly concluded that that formulation appeared to go beyond any obligation recognized in State practice; and it had felt that the most that could be said was that the government of a signatory State might be under some kind of obligation to examine in good faith whether it should become a party to the treaty; however, the Commission had hesitated to include such a rule in the draft articles. Although customary law was silent on the subject, his delegation felt that the rule could have been included in the draft articles as part of the progressive development of international law, and that its inclusion would have provided an element of security in the relations between States. (Mr. Ruda, XVIIth sess., 744th mtg., para. 4)

Article 12

Ratification

ITALY

See comments on article 4

Article 13

Accession

ARGENTINA

In article 13 the Commission had rightly endorsed the position taken by the Secretary-General, who considered any instrument of accession expressed to be "subject to ratification" "simply as a notification of the Government's intention to become a party"; (article 13, commentary, para. (3)) and it had correctly decided not to deal with that practice specifically in the draft articles. (Mr. Ruda, XVIIth sess., 744th mtg., para. 5)

COLOMBIA

See comments on articles 8-9

ROMANIA

The Commission's decision not to give any currency to the doctrine that treaties were not open to accession until they were in force would encourage the expansion of international treaty relations. The Commission had also dealt correctly with the problem of accession subject to ratification (article 13, commentary, para. (3)). (Mr. Ionascu, XVIIth sess., 742nd mtg., para. 28)

SYRIA

His second comment related to terminology. With regard to article 13, on accession to treaties, he pointed out that the word "accession" ("accession") was sometimes used, especially in English, to indicate the adherence of a State to a multilateral treaty. He therefore proposed, in order to eliminate any ambiguity, that the word "accession" ("accession") should be used only to mean the admission of a State to a closed multilateral treaty, to which it could not become a party without fulfilling certain specific formalities, such as obtaining the unanimous consent of the parties or of a certain majority of them; and to use the word "adherence" ("adhésion") only for admission to an open multilateral treaty, to which a State could become a party without fulfilling such formalities. (Mr. Nachabe, XVIIth sess., 739th mtg., para. 18)

Article 14

Acceptance or approval

ITALY

See comments on article 4

Article 15

The procedure of ratification, accession, acceptance and approval

MEXICO

With regard to article 15, the Mexican delegation thought it might be advisable to follow the terms of article 6 of the Convention on Treaties[3/] drawn up by the Sixth International American Conference,[4/] and to provide that ratification must be unconditional. There were a number of valid arguments in favour of that course. (Mr. Moreno, XVIIth sess., 739th mtg., para. 23)

Article 16

Legal effects of ratification, accession, acceptance and approval

ARGENTINA

His delegation also approved of the Commission's decision to exclude, in connexion with article 16, the doctrine of the retroactive operation of ratification. (Mr. Ruda, XVIIth sess., 744th mtg., para. 5)

3/ Treaties and Conventions signed at the Sixth International Conference of American States, Panamerican Union, Law and Treaty Series No. 34, Washington, 1950, p. 21.

4/ Held at Havana, Cuba, 16 January-20 February 1928.

Article 17

The rights and obligations of States prior to the entry into force of the treaty

NEW ZEALAND

... his delegation had certain misgivings about article 17, paragraph 1. That article considerably amplified the generally recognized principle that a State which had gone so far as to sign a treaty subject to ratification should refrain from acts calculated to frustrate the treaty's objects; for the Commission had now extended that moral obligation to all States associated with the treaty-making process. The crux of the matter was, of course, the meaning of the somewhat nebulous expression "acts calculated to frustrate the objects of the treaty"; but it seemed prima facie inequitable to bind to the extent prescribed by article 17 a State participating in the whole treaty-making process with the strongest reservations. (Mr. Sharp, XVIIth sess., 742nd mtg., para. 5)

SECTION III: RESERVATIONS

Article 18

Formulation of reservations

Article 19

Acceptance of and objection to reservations

Article 20

The effect of reservations

Article 21

The application of reservations

Article 22

The withdrawal of reservations

ARGENTINA

It /the Argentine delegation/ much admired the manner in which the Commission had dealt with the difficult problems of the formulation, acceptance and validity of reservations to multilateral conventions, taking into consideration the changes resulting from the increase in the membership of the international community, the political, economic and social differences between the various States, and the various interests which each State felt obliged to protect by reservation. Considerable flexibility with regard to participation in general multilateral treaties should be allowed, in order to promote the formation of international contractual relations. He stressed the many points of agreement between the Commission's draft and the work of the fourth meeting of the Inter-American Council of Jurists, held at Santiago, Chile in 1959. When the Council had made a new formulation of the rules concerning reservations to multilateral treaties concluded among the American countries, for discussion at the Eleventh Inter-American Conference. The fundamental difference between the two drafts was that, according to the pan-American conception, where a treaty did not contain any provision relating to reservations, a reservation might be valid even if it were not compatible with the object of the treaty; in other words, if the reservation was accepted by another State, the treaty could enter into force between the reserving State and the accepting State.

His delegation thought it would be desirable to apply the criterion set out in article 20, paragraph 4 to treaties drawn up by an international organization or an international conference, and to provide that the instrument should indicate the fundamental articles which could not be subjected to reservations. Argentina, which since 1889 had signed a number of treaties with other South American countries regulating various aspects of its relations with them, was particularly interested in the subject of multilateral treaties concluded between "a small group of States", mentioned in articles 9 and 20. (Mr. Ruda, XVIIth sess., 744th mtg., paras. 5-6)

BRAZIL

Great progress had been made in the study of reservations. As early as 1951 two main schools of thought had emerged within the Commission: that of the States which favoured the doctrine of unanimity, and that of the devotees of the "flexible"

system. His own position, like that of many other jurists, had been much modified by the advisory opinion delivered by the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Obviously, in an era when a hundred States might be involved in the negotiations concerning a general multilateral treaty, the opportunity to formulate reservations might make it more widely acceptable, especially in view of their political, economic and social differences. He was therefore gratified that the Commission had endorsed the opinion on that point held by the Special Rapporteur, whose progressive views he shared.

Article 20

In his opinion, the expression "a small group of States" in article 20, paragraph 3, relating to the effect of reservations, which also appeared in other articles of the draft, was too vague. How many States would in fact constitute such a small group? Moreover, the concept "small group" might include other factors than the number of participants: for example, the nature of the relations between the States, or the region to which they belonged. So vague a formula could only lead to difficulties. (Mr. Amado, XVIIth sess., 737th mtg., paras. 13 and 15)

COLOMBIA

It was not necessary to go thoroughly into the history of that period of debate about reservations which had begun in 1951 in connexion with the Convention on Genocide (General Assembly resolution 260 (III)) - a period which some authors had labelled an era of genuine legal anarchy. The issue had been dealt with in the International Court of Justice, the International Law Commission, and the General Assembly; concern had also been aroused in the Latin American area, where rules juridically developed by the continent and generally accepted in the region had been projected outside the region so that they had been converted into universally applicable rules. In that way two great legal currents had been polarized at a given moment. One school of thought had supported the principle of unanimity as a prerequisite to the acceptance of reservations, and the other had defended the flexible procedure, which in substance had been nothing more than the procedure enshrined in the so-called pan-American rule.

/

The draft articles on reservations were almost entirely correct in their interpretation of existing requirements. At present there were two currents of legal thought, the first maintaining the principle of unanimity and the second the more flexible procedure of the pan-American rule. As the distinguished Colombian authority on international law, Mr. Caicedo Castilla, had said, in commenting on the outcome of the third session of the Inter-American Council of Jurists, the application of the pan-American rule by the American nations for the past twenty-five years had not given rise to any difficulties in practice; the rule respected the right of the State to submit reservations and its right to be free of international obligations unless it consented to be bound. It was also the most convenient rule, since it facilitated the conclusion of collective agreements and allowed every State to participate in general treaties without prejudice to its interests. It was, at the present time, the rule most favourable to universality.

At the fourth session of the Inter-American Council of Jurists at Santiago in 1959, the Colombian delegation had submitted draft rules governing the deposit in the Pan American Union of inter-American treaties and conventions and the effect of reservations thereto. Those draft rules and the draft resolution submitted by the Paramanian delegation had been the principal working documents and had furnished the basis for resolution X adopted by the session; that resolution had constituted a further ratification by the great majority of American States of the so-called pan-American rule.

Because several of the previous speakers had expressed a preference for rules on reservations which favoured the widest possible participation of States in treaties, the statement made at Santiago by the Colombian delegation when it submitted the aforementioned draft rules seemed worth repeating; namely, that it wished to stress that its principal aim was to lay down broad and flexible rules for reservation formulas, without running the grave risk involved in seeking unanimous acceptance of reservations; in that way ratification of conventions by the largest possible number of States would be achieved, and at the same time rules would be laid down to regulate the effects of reservations and of their acceptance and rejection in as clear and precise a form as possible.

It was against that background and without over-looking the differences between a regional presentation of the problem and the world consideration of it that his Government would approach the review of the articles on reservations included in the draft submitted by the International Law Commission. (Mr. Bayona, XVIIth sess., 741st mtg., paras. 8-12)

CZECHOSLOVAKIA

Article 20

On reservations to multilateral treaties the Commission had in general taken a stand corresponding to the development of that complex problem since the war. His delegation suggested, however, that the Commission might reconsider the provision in article 20, paragraph 2 (b), concerning the legal effects of an objection to a reservation. In the relations between the two contracting parties, the rejection of reservations could have different legal effects, the extent of which was as a rule determined by the State which raised the objection. The minimum effects would be that the objecting State could suspend the validity of that part of the treaty covered by the reservation in relations between itself and the reserving State, but at the same time remain in the treaty relation with the reserving State with respect to the remainder of the treaty. The maximum effects would be that the objecting State could consider the whole treaty ineffective in relation to a reserving State. In article 20, paragraph 2 (b) the Commission had indicated a presumption that objections would have the maximum effects; but his delegation felt that there should be a presumption that they would have the minimum effects. That principle would be more likely to broaden treaty relations among States, and would prevent the formation of an undesirable vacuum in the legal ties between States arising from important conventional rules of international law. (Mr. Pechota, XVIIth sess., 739th mtg., para. 6)

HUNGARY

On reservations he endorsed the view of a number of members of the Commission that, since today the number of the negotiating States might be not far short of one hundred States with very diverse cultural, economic and political conditions,

it was legitimate to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States might be a factor in promoting a more general acceptance of multilateral treaties (article 20, commentary, para. (12)). (Mr. Ustor, XVIIth sess., 736th mtg., para. 4)

INDONESIA

Articles 18-20

On the subject of reservations she was glad the Commission had recommended a flexible system; that appeared to be the soundest principle, especially for treaties open to more than a hundred States, and the same principle should be adopted for treaties concluded among "a small group of States".

However, article 18, paragraph 1 (d) according to which

> "A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless ... . In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty"

appeared to conflict with article 20, paragraph 2 (b), which stated that

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."

The latter provision seemed to imply that a State might make a reservation that was incompatible with the object and purpose of the treaty, and that it would be for the other States Parties to the treaty to settle the question of incompatibility by deciding whether or not to let the treaty enter into force between themselves and the reserving State. The result would be that certain States might not consider that reservation incompatible with the object and purpose of the treaty and might authorize its entry into force. She wondered whether it should be inferred that article 18, paragraph 1 (d) stated the guiding principles, while article 20, paragraph 2 (b), dealt with practical implementation. That question would require careful study in due course. (Miss Laurens, XVIIth sess., 740th mtg., paras. 21-22)

IRAN

The Commission had indeed attained the objectives described in paragraph 22 of the report: it had set forth clearly the principles of customary law governing the conclusion of treaties, and at the same time had introduced, very concisely, the factors which represented developments in that law. That was especially true of the thorny and complex question of reservations, which had been welded into a logical and harmonious whole, fully compatible with the present state of international relations.

His delegation fully endorsed the realistic statement in paragraph (12) of the commentary to articles 18, 19 and 20 that, in the present era of change and of challenge to traditional precepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement could be achieved and expressed in a multilateral treaty might be the one most suited to the immediate needs of the international community. That anxiety to avoid sterile dogmatism was praiseworthy and would, it was to be hoped, continue to prevail in the Commission. If it was true that the validity of a reservation depended on its compatibility with the object and purpose of the treaty, it was all the more true that, in a general sense, the validity and viability of any rule of law depended above all on the degree of its compatibility with the order of things that it was intended to govern. Life would not fall into step with the law; the law must catch up with life and its constant changes and transformations. (Mr. Mirfendereski, XVIIth sess., 738th mtg., paras. 11-12)

IRELAND

Article 19

See comments on article 9

MEXICO

Article 18

Taking the Havana Convention on Treaties as a precedent, his delegation considered that the right to formulate reservations was inherent in national

sovereignty, and could be exercised whenever reservations were not prohibited by the treaty itself or by the rules of an international organization. Accordingly it could not endorse article 18, paragraph 1 (c), which stated that when a treaty expressly authorized the formulation of a specialized category of reservations, all other reservations were by implication excluded. Nevertheless, the Commission was to be congratulated on its handling of the difficult problem of reservations to multilateral treaties; it had given due weight to the main objectives to be achieved - the integrity and effectiveness of treaties. (Mr. Moreno, XVIIth sess., 739th mtg., para. 24)

NEW ZEALAND

Section III, on reservations, raised many complex problems, as might be expected from a document designed to encourage universal acceptance while preserving the integrity of the main principles. The Special Rapporteur had pictured the nightmare situation in which States might make so many reservations to section III that the obligations of two States claiming participation in any treaty could scarcely be determined. Similar reasoning had hitherto led the New Zealand Government to prefer a code, rather than a convention, on reservations; but it appreciated the International Law Commission's reasons for adopting the conventional approach. (Mr. Sharp, XVIIth sess., 742nd mtg., para. 6)

POLAND

In the matter of reservations, the Polish delegation considered that the Commission had adopted in principle the right approach. (Mr. Wyzner, XVIIth sess., 740th mtg., para. 27)

ROMANIA

Article 20

The solution recommended by the Commission for the problem of reservations seemed to be just and in accord with the present requirements of States. However, his delegation shared the view of previous speakers that article 20 should establish

the presumption not of maximum but of minimum effects - suspension of the validity of only that part of the treaty covered by the reservation. (Mr. Ionascu, XVIIth sess., 742nd mtg., para. 27)

SYRIA

Article 20

... he observed that, although article 20, paragraph 2 (b) marked a certain advance in the practice followed in determining the effect of objections to reservations, by limiting that effect to the reserving and objecting States instead of extending it to all the parties to the treaty, the purpose of admitting the greatest possible number of States to general multilateral treaties would best be fulfilled by limiting the effect of the objection to the article or articles affected. He suggested that the sub-paragraph be replaced by the following two sub-paragraphs:

"(b) Where a State formulates a reservation to one or more articles of a multilateral treaty, the treaty shall remain in force as between that State and other States parties to the treaty which have not objected to the reservation.

"(c) The treaty shall also remain in force as between the reserving and the objecting State excepting the provisions of the article or articles to which the reservation was formulated, unless the omission of such article or articles would avoid the substance of the treaty, or the reservation formulated to them is incompatible with the object and purpose of the treaty."
(Mr. Nachabe, XVIIth sess., 739th mtg., para. 19)

UNITED ARAB REPUBLIC

The articles proposed by the Special Rapporteur on reservations to multilateral conventions had enabled the Commission to arrive at a solution which reconciled the principle of the integrity of treaties with concern for their maximum usefulness and for the broadest possible participation in them. (Mr. El-Erian, XVIIth sess., 744th mtg., para. 11)

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

She wished ... to commend the Commission for the thorough and scholarly way in which it had tackled questions on which views diverged widely; for example, in articles 18-22, dealing with the question of reservations. (Miss Gutteridge, XVIIth sess., 737th mtg., para. 5)

VENEZUELA

Articles 18-20

The principle stated in article 18, paragraph 1 (d), was sound and in line with the decisions of the International Court of Justice. Nevertheless, the question of who was to determine whether the reservation was incompatible with the object and purpose of the treaty was not answered. His delegation was happy to note that article 20, especially in its paragraph 2 (b), endeavoured to reconcile the unanimity system with the more flexible inter-American system. Paragraph 3 of that article, however, was based on the unanimity system, and the Commission could well have drafted it more in accordance with the inter-American system, which had proved its value. (Mr. Molina, XVIIth sess., 743rd mtg., para. 30)

YUGOSLAVIA

Another question on which there had been controversy in the Commission was that of reservations, or, more precisely, the problem which arose when the treaty was silent on the matter of reservations. In the case of general multilateral treaties, the Commission had finally decided in favour of a flexible system, as was stated in the commentary on articles 18 to 20. The Yugoslav delegation considered that the Commission should not adopt a restrictive attitude with regard to the idea of reservations and should bear in mind that the essential aim was to secure the widest possible participation in general multilateral treaties. (Mr. Milankovic, XVIIth sess., 743rd mtg., para. 16)

SECTION IV: ENTRY INTO FORCE AND REGISTRATION

Article 23

Entry into force of treaties

(no comments)

Article 24

Provisional entry into force

(no comments)

Article 25

The registration and publication of treaties

BOLIVIA

The omissions and obscurities related in the first place to article 25, on the registration and publication of treaties. In paragraph 2 of that article the Commission had been careful to avoid applying to States not members of the United Nations the sanction provided for in Article 102 of the Charter; and rightly so, for an organization's administrative procedures could not be imposed on States which were not members of that organization. For the same reason, the registration of a treaty with the United Nations Secretariat should be optional for such States, and not an obligation as it had been hitherto. However, a treaty might be concluded between a State Member of the United Nations and a non-member State; yet that situation was provided for neither in article 25 nor in any other draft article. (Mr. Añez, XVIIth sess., 740th mtg., para. 33)

ROMANIA

The articles on registration and the functions of depositaries were satisfactory. (Mr. Ionascu, XVIIth sess., 742nd mtg., para. 27)

SECTION V: CORRECTION OF ERRORS AND THE FUNCTIONS OF DEPOSITARIES

PANAMA

Although academically the juxtaposition of the mechanical and procedural function of correcting errors and the very important functions of depositaries was unfortunate, the arrangement was justified by the practical consideration that in certain cases the depositary played a part in the correction of errors. (Mr. Quintero, XVIIth sess., 741st mtg., para. 19)

Article 26

The correction of errors in the texts of treaties for which there is no depositary

(no comments)

Article 27

The correction of errors in the texts of treaties for which there is a depositary

BOLIVIA

... article 27 provided that, where an error was discovered in the text of a treaty, the depositary should bring the error to the attention of all the States concerned; but no provision was made for the case of an error which went unnoticed by the depositary and was pointed out by one or more of the States which had participated in the adoption of the treaty. (Mr. Añez, XVIIth sess., 740th mtg., para. 33)

Article 28

The depositary of multilateral treaties

(no comments)

Article 29

The functions of a depositary

CZECHOSLOVAKIA

With respect to the registration of treaties, his delegation fully endorsed the Commission's definition of the functions of a depositary in article 29, paragraph 1. With regard to paragraph 7 of that article, it proposed that the depositary should be given the additional duty of registering a multilateral treaty after its entry into force and of registering all subsequent legal acts, such as ratifications, accessions and withdrawals, relating to the legal status of the treaty. (Mr. Pechota, XVIIth sess., 739th mtg., para. 7)

ROMANIA

See comments on article 25

PART II

INVALIDITY AND TERMINATION OF TREATIES

EL SALVADOR

... for greater clarity, he would revise the Spanish heading of part II of the draft articles on the law of treaties to read: "Validez, suspensión y extinción de los tratados". The word "terminación", used in the existing text, implied the full performance of the terms of a treaty and should be replaced by "extinción" throughout. (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 2)

SECTION I: GENERAL PROVISION

Article 30

Presumption as to the validity, continuance in force and operation of a treaty

PAKISTAN

In his opinion the Commission was justified in stating the general rule in draft article 30 at the beginning of part II. (Mr. Saadi, XVIIIth sess., 791st mtg., para. 26)

SYRIA

In the French text of the draft articles, he would like the word "terminaison" to be replaced, wherever it occurred, by the word "fin" or "extinction". (Mr. Nachabe, XVIIIth sess., 786th mtg., para. 15)

UNITED STATES OF AMERICA

Draft article 30 had the merit of stating a formal presumption which might otherwise be disregarded for reason over and above those specified in other draft articles. However, by stating expressly what was normally assumed, it seemed to imply that every aspect of treaty law would be covered by whatever convention or conventions might be adopted on the subject. If the convention or conventions

could be simplified to state only those aspects of the law of treaties which required statement, article 30 might well be omitted. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 24)

URUGUAY

Article 30 was a key article which forecast the tenor of all the articles which followed. By prefacing the part of its draft on the invalidity and termination of treaties with that general provision, the International Law Commission had clearly wished to safeguard the universally valid principle of pacta sunt servanda. The principle had been confirmed, for example, in article 31, which upheld the validity of a treaty even when consent might appear vitiated by a conflict with internal law or when the competence of a State agent negotiating a treaty might not be absolutely clear. Article 39 provided a further safeguard by insisting that treaties which contained no provision for their termination were not subject to denunciation or withdrawal unless the intentions of the parties at the time of the conclusion of the treaty could be shown to have admitted the possibility of a denunciation. Similarly, article 42 strengthened the principle that treaties should be respected as binding and rejected the idea that a breach of a treaty was sufficient to render it null and void except under certain clearly defined conditions. Even article 44, which admitted the right of a State to invoke a fundamental change of circumstances as grounds for terminating a treaty, enumerated conditions which had the effect of reducing the doctrine of rebus sic stantibus to reasonable proportions within a legal framework designed to preserve the validity of the principle of pacta sunt servanda. Finally, articles 46 and 51 also provided guarantees against arbitrary action by one party seeking to terminate a treaty. In so far as all those articles were directed towards fostering respect for treaty obligations, Uruguay supported them. (Mr. Oribe, XVIIIth sess., 792nd mtg., para. 22)

VENEZUELA

In article 30, the Venezuelan delegation considered that the text of the Spanish version should be amended to make it clear that the "nullity, termination or suspension ... or ... withdrawal" referred to must be brought about by the

result of the application of the articles on the law of treaties, rather than by the application itself, as the mere application of the articles did not mean that a particular treaty was void - it was necessary to determine the result of their application before such a question could be settled. (Mr. Molina, XVIIIth sess., 790th mtg., para. 15)

SECTION II: INVALIDITY OF TREATIES

Article 31

Provisions of internal law regarding competence to enter into treaties

BOLIVIA

Among the most important articles in part II of the Commission's draft was article 31, under the terms of which a treaty signed by a representative possessing all the necessary powers for that purpose was of absolute validity. That article could be contrasted with article 15 of part I regarding formal treaties which required ratification by a legislative body and the existence of a document attesting ratification. In such a case, a representative who had signed a treaty of that type could not claim that the treaty was valid if constitutional requirements had not been respected. An example was the ratification by the United States Senate of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water. In many countries, any obligations contracted had to be validated by the legislature. In the case of simplified forms of treaties, however, the act of a State's plenipotentiary was sufficient to establish that State's consent. In present-day international relations, a large number of multilateral treaties were merely signed by a plenipotentiary. Likewise, a Minister for Foreign Affairs could commit his country to an agreement by an exchange of Notes which would constitute an agreement having binding force. The Bolivian delegation was therefore happy to note that, under article 31, consent expressed by the representative of a State was considered to be valid, it being clearly understood that there was a distinction between formal treaties and treaties of simplified form. (Mr. Iturralde, XVIIIth sess., 793rd mtg., para. 19)

BULGARIA

The Commission had ... tried to achieve a balance between ... two categories of contradictory requirements ... by providing in article 31, relating to provisions of internal law regarding competence to enter into treaties, that only "manifest" violations of those provisions could constitute a clause of nullity. It had therefore rejected both the theory which took into account only the will of the party expressing its consent ("Willenstheorie") and the theory which, regarding stability rather than authenticity, took into account only the interests of the party to which the expression of will was addressed ("Erklärungstheorie"), and had adopted an intermediate solution based on the idea of confidence ("Vertrauenstheorie"), the outward manifestation of will having no effect unless the principle of good faith was respected. His delegation approved that solution, but agreed with earlier comments on the need to specify exactly what should be understood by "manifest violation". (Mr. Anguelov, XVIIIth sess., 788th mtg., para. 13)

CYPRUS

As to the draft articles on the law of treaties, his delegation endorsed the principle laid down in article 31 that failure to comply with a provision of internal law regarding competence to enter into treaties did not invalidate the consent given in due form by the competent organ or representative of a State; however, it was a mistake to weaken that principle by admitting exceptions to it. The exception admitted under the draft article - that consent might be invalidated when the violation of internal law was manifest - presented difficulties both of principle and in practice. There seemed to be no basis in law for the contention that a "manifest" limitation imposed by internal law on a State representative's authority to give consent was effective in international law while a "non-manifest" limitation was not. In practice no clear-cut distinction could be made between "manifest" and "non-manifest" limitation. (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 17)

CZECHOSLOVAKIA

The Czechoslovak delegation, like many other delegations, considered that article 31, concerning constitutional limitations, was an acceptable compromise between the prevailing schools of thought. In order to solve the important problem of the relations between international law and internal law, it was necessary first of all to recognize that they were both mutually interrelated and autonomous, and that, consequently, international law was not entirely excluded from the constitutional process of the acceptance of treaty obligations, but could not, nevertheless, impose conditions which would be conducive to the replacement of the rules of internal law concerning the acceptance of treaties by other rules created in the sphere of international law. It was obvious that a State could not be forced, in the name of international law, to honour its obligations under a treaty if its representative in concluding the treaty had violated imperative rules of that State's constitution. A State was not relieved of its responsibility towards the other contracting parties, however, if those parties had acted in good faith and if the illegal act of its representative impaired their rights and interests. The conditions under which a State could legally repudiate its obligations should be agreed upon by the other contracting parties, who had the right to claim compensation for the damage caused. (Mr. Pechota, XVIIIth sess., 787th mtg., para. 23)

ECUADOR

With regard to the competence of the representative of a State to conclude treaties, the Commission had decided in favour of the internationalistic doctrine; and the application of the relevant article 31 should not present any difficulty in the case of treaties in good and due form, which must meet certain conditions before binding the States. Nevertheless, his delegation would rather the Commission had adopted precise rules of law defining and distinguishing accession, acceptance and approval, in order to prevent interpretations which might have unfortunate consequences. The competence of the representative of a contracting party was most likely to be challenged where the treaty was in simplified form and not subject to ratification, chiefly because, according to the draft code, that type of treaty

was defined solely by its form. Although it was almost impossible to define it according to its substance, a formula might perhaps be found which would more clearly indicate the position of that class of international agreements in international law. (Mr. Alcivar, XVIIIth sess., 789th mtg., para. 24)

EL SALVADOR

The question raised in draft article 31, concerning invalidation of consent expressed by the representative of a State to be bound by a treaty, warranted further consideration by the Committee. (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 3)

IRAN

Article 31 was acceptable, but the exact meaning of the word "manifest" should be made clear. (Mr. Hedayati, XVIIIth sess., 787th mtg., para. 32)

IRAQ

Article 31 regarding competence to enter into treaties gave preference to the "internationalist" theory over that known as the "constitutionalist" theory, except in the case of obvious violations of internal law. But international law did not regulate in detail the question of competence to express the consent of the State; many authors maintained that international law left it to the internal law of each State to determine the making of a treaty. The constitutionalist principle should therefore have been the foundation of article 31, while admitting certain exceptions in favour of the internationalist principle, exceptions which were justified by the necessity to respect the good faith of the other party, above all in multilateral treaties where it was difficult to have a detailed knowledge of the internal law of all the contracting parties. (Mr. Yasseen, XVIIIth sess., 788th mtg., para. 19)

ITALY

The Italian delegation noted with satisfaction that, in part II of its draft articles, the International Law Commission had considered it necessary to take a position on the weight to be given to international law and constitutional law,

respectively, in the formation of treaties. That very delicate matter was dealt with in article 31. Although he appreciated the Commission's efforts to reach a satisfactory solution of the question, he could not support the article as it stood.

The terminology used was not entirely accurate. It was incorrect to say that, unless the violation of internal law had been manifest, a State could not withdraw the consent expressed by its representative unless the other parties to the treaty so agreed. In the exception provided for, the State could not "withdraw" a consent which had never been given. A statement made by the representative of a State in violation of internal law could not be imputed to the State itself. It might have been difficult to draft a more rigorous wording, but the drafting problem arose undoubtedly from the fact that article 31 was not entirely logical.

It belatedly stated, in what seemed to be a contradictory manner, what should have been stated in a somewhat different form earlier in the draft, namely, in the part dealing with the conclusion of treaties, in articles 4, 11 and 12, for example. His delegation had drawn the Sixth Committee's attention to the matter at the seventeenth session (743rd meeting) when it had been considering the first draft articles.

He was raising the question again because he felt that article 31 was in contradiction with certain provisions of part I, section II of the draft. Article 4 established the authority of representatives of a State to negotiate, sign, ratify or accept a treaty in terms which left no doubt that that authority was exclusively within the scope of international law. In the case of treaties which were not subject to ratification, acceptance or approval, article 11 provided that signature established the consent of the signatory State to be bound by the treaty. But such signature was the signature provided for in article 4, where there was no reference to the internal law of the State. It was clear from article 11, as well as from article 12 on ratification, that where ratification was required, it established the consent of the State to be bound by the treaty. Consequently, none of the aforementioned articles, any more than the other articles which made up section II, required compliance with the constitutional laws of the State.

Moreover, it became clear that the only conditions to be met before a State could be considered to have given its consent to be bound by an international

/...

treaty through the intermediary of an organ competent to represent it were those provided in article 4. It followed that a treaty might be regarded as valid in so far as article 4 was concerned, with respect to the consent given by the representatives of the parties, but invalid in so far as article 31 was concerned, for reasons relating to that consent. Whereas part I of the draft articles gave the impression that it was not necessary, in principle, to act in compliance with constitutional laws for the treaty to be valid, part II stated that those laws should have been complied with in certain cases - cases where they had manifestly been violated.

If it was admitted that failure to comply with a provision of internal law relating to the authority to conclude treaties could affect the very existence of the consent given on behalf of a State by an organ of that State, certain conclusions must be drawn. First, the role of constitutional law in the matter should be defined in the part dealing with the authority of the organs of a State to commit that State to be bound by a treaty, and not, merely incidentally, in the section dealing with the invalidity of treaties. Secondly, the rules of constitutional law should be given their proper weight. In article 31 of the draft, they were given far less weight than in many international treaties, and, in particular, in the United Nations Charter, which provided in Article 110 that "The present Charter shall be ratified by the signatory States in accordance with their respective constitutional processes". (Mr. Sperduti, XVIIIth sess., 793rd mtg., paras. 5-10)

NETHERLANDS

... the problem dealt with in the International Law Commission's draft article 31 the refusal by one of the parties to a treaty to be bound by its representative's consent on the grounds that consent did not comply with some provision of its constitution or internal law - had increased in importance as national parliaments had become increasingly involved in the conclusion of international agreements, and the potential conflict between international law and national law must be resolved in any full set of articles on the law of treaties. The International Law Commission had decided that, as a general rule, international law should prevail in such a conflict, with the important exception that a State

/...

could withdraw its representative's consent to a treaty if the violation of its internal law involved in that consent was manifest. To judge from the text of the draft article, the Commission apparently viewed manifestness as an objective criterion - a presumptio juris et de jure that a State entering into a treaty must be deemed to be aware of any lack of constitutional authority, on the part of another State's representative, to enter into the treaty. However, paragraph (7) of the commentary on the article referred to a subjective criterion, as did the Special Rapporteur in his second report on the law of treaties. His delegation therefore considered that the exception in article 31 should be more clearly worded. Otherwise it might later be found that, while manifestness was a practicable criterion for violations of formal constitutional requirements - such as the consent of a State's parliament - it would not serve to distinguish between those international agreements which required parliamentary consent and those which did not. (Mr. Tammes, XVIIIth sess., 781st mtg., para. 1)

PANAMA

The Commission had discarded many obsolete principles and standards of classical international law. With respect to draft article 31, for example, he recalled that, while traditional international law had not reached universal conclusions regarding the conflict between internal law and international law governing the validity of treaties, international tribunals tended to grant primacy, in principle, to international law. That approach, if used only as a general guideline, was acceptable. However, if carried to the point of subordinating positive fundamental rules of internal law to the precepts of international law - which were not always positive or universal - it would weaken modern democratic trends in treaty-making and impair the rule of law. Undoubtedly that was why the Commission had agreed on the compromise wording of draft article 31. His delegation did not share the apprehension of some delegations that the difficulty of distinguishing in practice between a "manifest" and a "non-manifest" violation of internal law would introduce an element of instability into international relations. That apprehension arose from an unfortunate tendency to carry legal notions - which could not generally be taken as isolated and general propositions - to extreme conclusions. Moreover, present-day constitutions were not undecipherable or secret pronouncements.

/...

It should be noted, however, that draft article 31 dealt only with the question of the competence of the representatives of a State, and that many other complex conflicts between internal and international law might arise in treaty-making. For example, the Constitution of a Latin American State provided that only those jurisdictional limitations stipulated in public treaties concluded before its promulgation would be recognized. The object of that provision was to prevent any future Government of the State from making jurisdictional concessions such as those which a former Government had been compelled to make for the benefit of a great Power. If the Government of that State entered into such a treaty despite warnings in the Press and other organs of public organs, which must necessarily have informed the other party of the existence of the constitutional prohibition, that treaty would be invalid - even though the representatives of that State were entirely competent under internal law to negotiate, approve and ratify treaties. His delegation was not now proposing that the draft articles on the invalidity of treaties should be extended to cover the other aspects of internal law concerned with treaty-making, since they were so numerous and varied. It wished to stress, however, that the draft articles, even if they were embodied in a convention, should not be construed as a complete body of rules providing all the principal solutions to the fundamental problems of the law of treaties, particularly with respect to the causes of invalidity and termination. His delegation's position was in accord with the Commission's plan to give preference in its work of codification to those aspects of international law which could be most readily codified. The fact that the draft did not deal with certain topics or develop all their possibilities, did not mean that the Commission had necessarily discarded them as valid legal principles or disavowed the possibility of their subsequent codification. (Mr. Quintero, XVIIIth sess., 790th mtg., paras. 29-30)

PHILIPPINES

In the view of the Philippine delegation, article 31 deserved sympathetic consideration. The Philippines was one of a number of countries which had constitutional limitations regarding competence to enter into treaties. Although the exception contained in article 31 seemed to be desirable, the phrase "unless

the violation of its internal law was manifest" was far too vague, and should be worded more precisely. (Mr. Jimenez, XVIIIth sess., 790th mtg., para. 8)

ROMANIA

... draft article 31 raised two considerations which were difficult to reconcile. On the one hand, no sovereign State could be expected to abide by a treaty which violated its internal law, and no State had the practical capacity or the legal right to judge whether another State's representative was competent to consent to a treaty or not. On the other hand, States must be able to rely on actions - signature, ratification and the like - performed by the representatives of other States if the system of settling international problems by the conclusion of international agreements was to survive. As his delegation saw it, the only way to resolve the difficulty was to find objective criteria for the cases in which a State was legally justified in contesting its representative's action on its behalf. (Mr. Ionascu, XVIIIth sess., 783rd mtg., para. 31)

SPAIN

On the specific question dealt with by draft article 31, he considered that while legislative review of all the acts of the treaty-making authority in the form determined by the Constitution provided greater democratic safeguards, that review was more effective when the reasonable requirements of the treaty-making authority were taken into consideration. Political review of the acts of that authority by national parliaments, by the United Nations, and ultimately by national or world public opinion was absolutely essential if abuses of the treaty-making power were to be avoided, since in the final analysis power could only be limited by an opposing power.

Subsequent political review was not to be confused, however, with prior review under the law, which would paralyse the conduct of international relations by creating delay and uncertainty in negotiations. Whatever the theoretical solution adopted with respect to the international effects of constitutional norms concerning treaty-making (formal or extrinsic constitutionality), there was a growing tendency

in practice for the executive to avoid complying with constitutional requirements in treaty-making. In the United States of America, for example, where the Constitution gave the President power to make treaties with the advice and consent of two-thirds of the Senate, the requirement of senatorial consent could be evaded simply by calling the international obligation an "agreement" rather than a treaty. In Peru also, according to the representative of that country, there was no regulation specifying which agreements should be submitted for legislative approval and which were to be ratified by the President alone, and the practice of the Government on that point was apparently determined by the importance of the international agreement. Thus in draft article 31 the Commission could be said to have accepted in part, in a spirit of compromise, the contention that a foreign State entering into a treaty with Peru should know whether or not a given international obligation required legislative approval. Yet, it was still to be proved that the maxim of Ulpian, so often quoted, "qui cum alio contrahit vel est vel esse debet non ignarus conditionis ejus" was a rule of international law, for it was impossible for third States to be aware of all the complex questions raised by the formal or extrinsic constitutionality of a treaty, let alone those raised by its substantive or intrinsic constitutionality.

If a Government was prepared to enter into an agreement with another by which it was recognized, the other party, by questioning its competence to conclude treaties, would violate the principle of non-intervention. Moreover, many constitutions were silent with respect to acts which might establish, maintain or terminate international obligations. For example, while there was no constitutional provision to that effect, obligations entered into by senior military commanders in time of war bound a State under long-established international custom. Lastly, if all international acts which were unconstitutional were to be declared void, what would be the effect on all the de facto Governments, which were unconstitutional by definition? The principle of effectiveness would always play a part in international law. Therefore, his delegation was of the opinion that the Commission should not have weakened the principle that the unconstitutionality of a treaty in internal law did not affect its international validity and should not have introduced a notion so subjective as "manifest violation". Furthermore, it was not clear whether the violation referred to in draft article 31 was simply

/...

a violation of the letter of the constitution or a violation of constitutional practice, which might be very difficult for foreigners to ascertain. (Mr. de Luna, XVIIIth sess., 792nd mtg., paras. 5-7)

THAILAND

Article 31 raised the difficult and controversial problem of the relationship between international law and internal law. The International Law Commission had opted for a compromise solution in favour of the supremacy of international law, but with one exception, namely, that the validity of consent was affected only if a violation of internal law was manifest. His delegation felt that, so long as different legal systems prevailed in the world, it would be idealistic to believe that all countries could have in common a legal principle as progressive as that embodied in article 31. Furthermore, his delegation believed that the scope of the word "manifest" was not sufficiently clearly defined and that the application of the article might give rise to controversies. (Mr. Watanakun, XVIIIth sess., 791st mtg., para. 3)

UNITED ARAB REPUBLIC

The question of constitutional limitations affecting the exercise of treaty-making power, dealt with by the International Law Commission in draft article 31, was a question on which there was a profound division of opinion and on which international jurisprudence was neither extensive nor very conclusive. The question involved two principles: that of the stability of treaties and international transactions, and that of respect for constitutional limitations. While appreciating the efforts which the International Law Commission had made to reconcile those two principles, the delegation of the United Arab Republic regretted that article 31 did not sanction the principle of incorporating constitutional limitations in international law, but merely recognized the validity of that principle in exceptional cases. On the other hand, however, the delegation of the United Arab Republic would have preferred a provision on the lines of article 21 of the draft convention prepared by the Harvard Law School, which was worded as follows: "A State is not bound by a treaty made on its

/...

behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty". (Mr. El-Erian, XVIIIth sess., 791st mtg., para. 14)

UNITED STATES OF AMERICA

The provisions of draft article 31, on internal law regarding competence to enter into treaties, were sensible, and it was to be hoped that they would become self-enforcing in the course of time. The article should encourage States to recognize the need for precision in meeting the requirements of their internal law. A State which invoked them to justify the withdrawal of its consent to be bound by a treaty, alleging manifest violation of its internal law, might find that in subsequent negotiations, even with different States, it would be required to give assurances that the requirements of its internal law had been fully satisfied. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 25)

URUGUAY

Article 31 of the International Law Commission's draft was of particular interest to the Uruguayan delegation, as Uruguay had very clear-cut rules in its Constitution regarding competence to enter into treaties. Prima facie, the provisions of article 31 appeared to be reasonable and adequate. A distinction might perhaps have been drawn between the violation of procedural or formal rules and the violation of rules regarding the competence of a State's representative, but the Uruguayan delegation considered that the International Law Commission's proposed rules were the best solution to the problem yet put forward. In any case, it should not be lost from sight that countries which felt that they had a case for declaring a treaty invalid under article 31 also had the possibility of invoking article 34 (Error) or article 44 (Fundamental change of circumstances) in order to free themselves from their obligations under the treaty objected to. (Mr. Oribe, XVIIIth sess., 792nd mtg., para. 27). See also comments on article 30.

/...

YUGOSLAVIA

The Commission's draft article 31 on the law of treaties raised again a question which had been discussed at the seventeenth session in relation to draft article 4: the relationship between international and internal law. In matters concerning the validity of treaties it was essential to avoid all ambiguity, and it seemed to him unwise to introduce, as the Commission had done, a distinction between manifest and non-manifest violation of a State's internal law. Today no State could justifiably plead ignorance of another State's constitutional law; furthermore a State entering into a treaty must be assumed to do so in accordance with its own constitutional law. An international agreement could have no legal force unless it was concluded in accordance with both international law and the internal laws of the signatories. That was the view which the International Law Commission had taken in 1951, and it seemed equally valid today; indeed, it was reflected in draft article 32. That principle was implicit throughout the draft articles, and there seemed no reason to depart from it in article 31 which, as it stated, would enable one State Party to a treaty to enforce against another an agreement concluded in violation of the latter's internal law. (Mr. Blagojevic, XVIIIth sess., 782nd mtg., para. 12)

Article 32

Lack of authority to bind the State

INDIA

The Indian delegation was not very happy with the phraseology of draft article 32, paragraph 2. It felt that it referred to restrictions which were secret since the instrument of full powers issued to a State's representative normally specified, for the information of the other contracting States, any non-secret restrictions on those powers. (Mr. More, XVIIIth sess., 783rd mtg., para. 3)

PAKISTAN

In draft article 32, paragraph 1 the word "shall" should be replaced by the word "may", for the appointment of a representative to negotiate and draw up a treaty was generally preceded by a high-level decision, so that mandatory terminology should be avoided. (Mr. Saadi, XVIIIth sess., 791st mtg., para. 27)

SPAIN

... He would merely add one further example. In the Spanish text of draft article 32 the term "facultad", which in legal terminology meant the power to act vested in a person as a consequence of a legal situation, was incorrectly used instead of the term "poder" or "apoderamiento", which was the authority granted by one person to another to represent him in a legal transaction. The correct term "competencia" had been employed in the Spanish version of draft article 31. The Spanish translators had apparently used the English text as a basis for their work; it would be wiser to translate from the French version because of the similarities between the French and Spanish languages and the common background of the Napoleonic Code. (Mr. de Luna, XVIIIth sess., 792nd mtg., para. 2)

UNITED STATES OF AMERICA

When draft article 4, paragraph 3, had first been discussed, his delegation had objected to the use of mandatory language, pointing out that circumstances might make it clear that a given individual or mission was fully authorized to negotiate, draw up or authenticate a treaty. Consistently with that position, his delegation now suggested that draft article 32, paragraph 1, should be amended to read as follows:

> "1. If the representative of a State, who cannot be considered under the provisions of article 4 or in the light of the attending circumstances as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes, without authority, an act purporting to express its consent, the act of such representative may be considered by the parties to be without any legal effect, unless it is afterward confirmed, either expressly or impliedly, by his State."

The only tenable meaning of paragraph 2 of that article could be made clearer by adding the words "prior to his expressing the consent" at the end of the paragraph. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 26)

YUGOSLAVIA

See comments on article 31.

Article 33

Fraud

BRAZIL

With respect to articles 33 and 34, dealing with vitiation of consent, he wished to stress how difficult it was in international law to give a generally satisfactory definition of fraud, the search for the intention of which called for great psychological subtlety. In practice, however, it appeared that there was no recorded instance of a State claiming to denounce a treaty on the ground that it had been induced to enter into it by the fraud of the other party. Similarly, the notion of error, which was so important in matters of contracts, lost much of its force in contemporary international law, particularly as treaties were now frequently formulated at international conferences in which a large number of countries took part. Giving approval to provisions which would raise more difficulties in practice than they would solve should therefore be avoided. (Mr. Amado, XVIIIth sess., 793rd mtg., para. 16)

BULGARIA

With regard to the imperatives of equity, the Commission had introduced some quite remarkable innovations into the draft articles. Thus, fraud and error had been treated separately, which was not always admitted by the theory of international law on that subject. (Mr. Anguelov, XVIIIth sess., 788th mtg., para. 9)

COLOMBIA

The rule on fraud laid down in draft article 33 was a logical corollary of the principle that relations among States must be based on good faith. However, in view of the diversity of meanings attributed in internal law to fraud as a ground for the invalidation of consent, his delegation considered that for purposes

of international law the term "fraud" should be given a precise and uniform definition in order to avoid any misinterpretation. (Mr. Uribe, XVIIIth sess., 783rd mtg., para. 10)

ECUADOR

It /the delegation of Ecuador/ considered the wording of article 33 generally acceptable, agreed with the representative of El Salvador that fraud did not necessarily consist in fraudulent conduct but could be constituted by a single fraudulent act, and that the scope of article 33 should be extended accordingly. His delegation did not believe that that failure of consent should be omitted from an instrument codifying the law of treaties merely because it had never been invoked. A codifying instrument should provide for all situations, and it was impossible to allow an exception based on an obsolete legal tradition which had shcwn its weaknesses in two world wars. (Mr. Alcivar, XVIIIth sess., 789th mtg., para. 25)

EL SALVADOR

Draft article 33 did not specify whether, in addition to the fraudulent conduct of another contracting State, that of a third party might be invoked as invalidating the consent of a State to be bound by a treaty. Moreover for greater precision, the expression "fraudulent conduct" should be replaced by "fraudulent act". (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 3)

FRANCE

It had been pointed out that the difference in meaning between certain French and English terms, for example between "dol" and "fraud", might give rise to scme difficulties. The difficulty lay, not in matters of language, but in the notions of the law and it would be one of the merits of the International Law Commission, not that it had coined new terms, but that in certain cases it had given traditional legal terms a meaning better adapted to the needs of modern international law.

...

In their observations, some delegations had implied that the Commission had done more than define existing international law in introducing into the law of treaties rules taken directly from private law, such as those on fraud (article 33). His delegation, for its part, took the view that whenever the Commission had stated a principle it had done so in the belief that that principle existed, if only in latent form as in the case of fraud, and that in doing so it had acted in accordance with article 15 of its Statute. (Mr. Monod, XVIIIth sess., 787th mtg., paras. 2 and 7)

IRAQ

Articles 33 and 34 dealing respectively with fraud and error were logically necessary in a body of rules relating to the validity of treaties. Questions of the vitiation of consent must of course be included among the causes of nullity and the fact that fraud was very rare and error not frequent was no reason for failing to declare that they vitiated consent. He agreed with the representative of El Salvador (782nd meeting) that fraud did not necessarily constitute fraudulent conduct but might arise from one fraudulent act only. (Mr. Yasseen, XVIIIth sess., 788th mtg., para. 20)

PAKISTAN

There should be a time-limit on the right to invoke fraud and error conferred by draft articles 33 and 34. Unless a time-limit were set, the question of determining when the injured State was required to assert the existence of those defects of consent would certainly give rise to difficulties. (Mr. Saadi, XVIIIth sess., 791st mtg., para. 28)

PERU

The Commission stated in its report that international law should free itself, conceptually speaking, from the tutelage of civil law. Nevertheless, it had retained the concepts of fraud and error, which in his view were not applicable to international law. (Mr. Ulloa, XVIIIth sess., 789th mtg., para. 17)

/...

SYRIA

... he approved the Commission's decision to draw up separate articles on fraud and error in order to demonstrate clearly the difference in effects between the two defects of consent. (Mr. Nachabe, XVIIIth sess., 786th mtg., para. 16)

THAILAND

See comments on article 34.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Some of [the proposed new rules] were based on private law analogies which differed widely in different legal systems and which did not, perhaps, justify the establishment of comparable rules in public international law. She wondered, for example, whether draft article 33 was really necessary since, as the Commission itself had pointed out, there did not appear to be any recorded instance of a State claiming to annul or denounce a treaty on the ground that it had been induced to enter into the treaty by the fraud of another party. (Miss Gutteridge, XVIIIth sess., 786th mtg., para. 4)

UNITED STATES OF AMERICA

In draft articles 33 and 34, dealing with fraud and error, respectively as grounds for invalidating consent to be bound by a treaty, it was important to set a time-limit on the exercise of the remedies. In drafting article 33, the Commission had obviously been hampered by the absence of State practice; in a simplified convention, the article might well be omitted. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 27)

VENEZUELA

In article 33, the Commission had been wise not to attempt to define the word "fraud", in view of the difficulty of establishing a satisfactory definition. (Mr. Molina, XVIIIth sess., 790th mtg., para. 16)

Article 34

Error

BRAZIL

See comments on article 33.

BULGARIA

See comments on article 33.

ECUADOR

The practical scope of the provisions of paragraph 1 of article 34 relating to error was difficult to determine precisely. (Mr. Alcivar, XVIIIth sess., 789th mtg., para. 25)

EL SALVADOR

The Commission was to be commended upon its expert drafting of article 34, dealing with the invocation of error as invalidating consent to be bound by a treaty. However, it was necessary to determine not only whether there had been an error on the part of a contracting State, but also whether that error related to a state of facts involving a third State. For example, if two States entered into a commercial agreement on the assumption that a third State did not produce a given commodity and later found that that third State did in fact produce that commodity, the question arose whether that discovery of error should be accepted as justification for invalidating consent to be bound by the agreement. (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 4)

IRAN

Article 34 dealt with errors of fact, but not errors of law. (Mr. Hedayati, XVIIIth sess., 787th mtg., para. 32)

IRAQ

See comments on article 33.

PAKISTAN

See comments on article 33.

PERU

See comments on article 33.

SYRIA

See comments on article 33.

THAILAND

The International Law Commission had sought to lay down certain principles of international law taking as a foundation sources of private law and establishing an analogy between international law and private law, as could be seen from articles 33 and 34 regarding fraud and error, respectively. The Commission itself had admitted that it had encountered some difficulty in formulating article 33 and that in any event it was not always appropriate to transplant notions of private law into international law without certain modifications. Despite that statement, his delegation felt that the influence of English private law was predominant in draft articles 33 and 34. Moreover, several delegations had wondered, in the absence of State practice in the matter, what was the precise scope of the terms of article 33 and in what circumstances an injured State was required to assert fraud as invalidating its consent. The International Law Commission had concluded that the question must be left to practice and to international tribunals, which was a possible solution. In draft article 34, paragraph 1, however, the Commission had laid down the principle that a State might invoke an error as invalidating its consent, but at the same time it had provided an exception in paragraph 2 which, because its scope was too wide, would render paragraph 1 ineffective. His delegation believed, therefore, that if article 34 was to be formulated by

/...

transplanting notions of private law into international law, the provisions relating to exceptions must be drafted with the greatest care. In that connexion, his delegation wished to point out that the map in the case concerning the Temple of Preah Vihear, which was mentioned in paragraph (4) of the commentary on article 34, 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. The map in question could not therefore be considered a "treaty", the meaning of which was defined in part I of the draft articles on the law of treaties. (Mr. Watanakun, XVIIIth sess., 791st mtg., para. 4)

UNITED STATES OF AMERICA

See comments on article 33.

Article 35

Personal coercion of representatives of States

COLOMBIA

The distinction drawn between personal coercion of representatives of States, on the one hand, and coercion of the State itself in violation of the principles of the Charter of the United Nations, on the other, marked a step forward in the preservation of freedom of contract, which could be endangered not only by acts of violence against diplomatic representatives but also, and more seriously, by indirect means of coercion incompatible with the sovereign equality of States. (Mr. Uribe, XVIIIth sess., 783rd mtg., para. 10)

CZECHOSLOVAKIA

The Czechoslovak delegation had studied with the greatest attention articles 35, 36 and 37 of the draft. It noted with satisfaction that the International Law Commission had chosen to support justice and international legality by declaring void all treaties concluded by the threat or use of force or by the coercion of the individual representatives of a State. The tragic events which had followed the imposition on Czechoslovakia of the Munich Agreement - a prelude to the Second

/...

World War and to the unspeakable sufferings endured by the nations of the world as a result of that war - were still fresh in the minds of the Czechoslovak people. (Mr. Pechota, XVIIIth sess., 787th mtg., para. 24)

ECUADOR

His delegation believed that the provisions of article 35 should be extended to cover members of the families of representatives of States. (Mr. Alcivar, XVIIIth sess., 789th mtg., para. 25)

IRAQ

See comments on article 36.

PAKISTAN

... The word "shall" should be replaced by the word "may" also in draft article 35, paragraph 1. (Mr. Saadi, XVIIIth sess., 791st mtg., para. 27)

SPAIN

His delegation supported the principles stated in draft articles 35 and 36. ... His delegation was opposed to the United States oral amendment to draft article 35 made at the 784th meeting. Consent to a treaty was invalid if it had been secured by coercion of the individual representatives of the State concerned. Yet, under the proposed amendment unless the injured State invoked the coercion as the ground for considering the treaty invalid, the treaty would be deemed to be valid. On that matter he shared the view expressed by the Czechoslovak representative at the 787th meeting. (Mr. de Luna, XVIIIth sess., 792nd mtg., para. 8)

THAILAND

See comments on article 36.

UNITED STATES OF AMERICA

In draft article 35, paragraph 1, he suggested that the words "shall be without any legal effect" should be replaced by the words: "may be treated by the State whose representatives were coerced as being without any legal effect". As amended, that provision would, firstly, prevent the State which had applied the coercion from invoking that coercion as grounds for considering the treaty invalid. Secondly, it would leave the injured State the option of ignoring the coercion if it saw fit to keep the treaty in force. Lastly, it would prevent third States from interfering if the parties directly involved were satisfied to maintain the treaty.
(Mr. Plimpton, XVIIIth sess., 784th mtg., para. 28)

VENEZUELA

In article 35, the Venezuelan delegation considered that it would be much better to include in the article itself a provision that the term "individual representatives of a State" included also the families of such representatives, rather than to insert that clarification in the commentary on the article.
(Mr. Molina, XVIIIth sess., 790th mtg., para. 17)

YUGOSLAVIA

See comments on article 36.

Article 36

Coercion of a State by the threat or use of force

ALGERIA

With regard to the nullity of a treaty concluded as a result of threats or force in violation of the principles of the Charter, the Algerian delegation had difficulty in understanding why certain delegations desired to limit that idea to physical force. Economic pressure could sometimes be more effective in reducing the power of self-determination of a country, above all in the case of a country with single-crop farming or the economy of which depended on the export of one

/...

product only. Recognition that economic pressure was a cause of nullity of treaties was by no means a threat to their stability but would increase the confidence in international law of the newly independent States. (Mr. Khelladi, XVIIIth sess., 789th mtg., para. 30)

BOLIVIA

Draft article 36 stated a juridical principle. But while the principle that it laid down was accepted in theory, it was not accepted in the practice of international law. On the other hand, it was generally accepted in internal law, and the Commission had been well advised to incorporate it into international law. Draft article 36 was applicable not only to treaties which might be concluded in the future but, according to the commentary, to all treaties without exception, since a treaty procured by the threat or use of force in violation of the principles of the Charter should be regarded as void ab initio. The Commission had not enumerated all possible forms of coercion, since it had felt that the scope of the Charter was sufficiently broad. That fact should be stressed, because it showed that draft article 36 laid down an already accepted principle while taking into consideration present world conditions. (Mr. Iturralde, XVIIIth sess., 793rd mtg., para. 20)

BRAZIL

The provisions of article 36, under which any treaty whose conclusion had been procured by the threat or use of force was void, likewise represented an important step forward. The Commission, referring to the Covenant of the League of Nations, to the clear-cut prohibition in Article 2, paragraph 4 of the Charter of the United Nations and to the practice of the United Nations itself, had concluded, in paragraph (1) of its commentary on article 36, that the invalidity of a treaty procured by the illegal threat or use of force was a principle which was lex lata in present-day international law. (Mr. Amado, XVIIIth sess., 793rd mtg., para. 15)

BULGARIA

In that connexion it was necessary to insist upon the importance of article 36 of the draft, which provided that any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations should be void. The Commission had considered that principle lex lata in international law. But international treaties might be considered void on the ground of the old saying ex injuria non oritur jus. His delegation unreservedly supported that notion, which marked a considerable step forward in the development of international law, and greatly hoped that the work would continue along those lines. In particular leonine treaties, which ran counter to the principle of the sovereign equality of States and the widespread phenomenon of the liberation of countries and peoples, must disappear. It was the duty of the International Law Commission to study that question in order to remedy situations of flagrant political and economic inequality. (Mr. Anguelov, XVIIIth sess., 788th mtg., para. 10)

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

The International Law Commission, in preparing the draft articles, had based itself on the fundamental principles of existing international law. The provisions of article 36, for instance, were irrefutable. The principle of the nullity of leonine treaties was of very great contemporary importance, for efforts must be exerted to eradicate colonialism in all its forms, and one of the most important objectives of the international law of the day was to protect the new States from unequal treaties. The colonialist Powers were now resorting to more subtle forms of coercion - for instance, under the guise of economic assistance.
(Mr. Stelmashok, XVIIIth sess., 791st mtg., para. 10)

CHINA

With regard to article 36, he noted that prior to the Covenant of the League of Nations and as a corollary to the recognition of war as an instrument of national policy, coercion had not constituted grounds for invalidating a treaty. China, on which unequal treaties had been imposed by the threat or use of force for a century

/...

before the Second World War, was keenly aware of the importance of article 36 and warmly welcomed its inclusion in the draft elaborated by the Commission. However, difficulties were likely to arise in applying it unless the Commission solved the question of determining the presence of the threat or use of force at the time of the conclusion of a treaty and worked out safeguards to ensure that coercion was not used as a pretext for violating a treaty. (Mr. Cha, XVIIIth sess., 792nd mtg., para. 12)

COLOMBIA

See comments on article 35.

CYPRUS

His delegation particularly welcomed draft articles 36 and 37. The Covenant of the League of Nations, the General Treaty for the Renunciation of War as an Instrument of National Policy (known as the Briand-Kellogg Pact); the Charter of the Nürnberg Tribunal; the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East and, most recently, Article 2, paragraph 4, of the Charter of the United Nations made it lex lata in modern international law that a treaty procured by the illegal threat or use of force was void ab initio. If the State forced into such a treaty wished to revalidate that treaty after regaining a position of legal equality with the offending State, it would have to conclude a new treaty. (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 18)

CZECHOSLOVAKIA

See comments on article 35.

ECUADOR

Article 36, which mentioned the United Nations Charter, deserved special attention, since all contemporary specialists in the law of treaties stated that prior to the Covenant of the League of Nations a treaty had never been invalidated because its conclusion had been brought about by the threat or use of force. The

theory recognizing the use of force was essentially European, since European countries had frequently had to resort to arms to solve problems which had not been solved by law. The Covenant of the League of Nations had for the first time declared war illegal, while allowing Member States to resort to it in certain circumstances. Unfortunately aggression or the use of force without the formalities of war had not been contemplated in the Covenant of the League of Nations. The Commission's commentary also referred to the Briand-Kellogg Pact, which condemned recourse to war and had served as the foundation for the judgement of the war criminals at Nürnberg. The unhappy experience of the League of Nations had been borne in mind by those who had drafted Article 2, paragraph 4, of the United Nations Charter, prohibiting the threat or use of force. His delegation could never sufficiently emphasize that that prohibition was absolute except in case of self-defence, and that, although in the latter case a State was relieved of liability, the use of force nevertheless remained a violation. Moreover, force could not be used collectively by the United Nations except in certain well-defined circumstances. His reason for repeating all those points was that a considerable number of eminent jurists gave a limited interpretation to Article 2, paragraph 4, of the Charter. Fortunately, the majority of the international law experts maintained that the Charter was indivisible. The delegation of Ecuador was of the opinion that the International Law Commission should take account of the observation made at the 788th meeting by the representative of Iraq who had requested that article 36 should be extended to cover economic and political pressure. He recalled that resort to force had been prohibited in American public law long before the Covenant of the League of Nations and consequently long before the Charter of the United Nations. Wars of conquest and the doctrine of the fait accompli had been proscribed by American law ever since the First International Conference of American States, held at Washington, D.C., from 2 October 1889 to 19 April 1890.
(Mr. Alcivar, XVIIIth sess., 789th mtg., para. 25)

GHANA

As for the draft articles concerning the invalidation of treaties by fraud, error or coercion, his delegation welcomed the Commission's decision to revise the traditional doctrine under which only coercion against the person of a representative

/...

of a State should be taken into consideration. In that respect the Commission had upheld the highest principles, particularly those enunciated in Article 2 of the United Nations Charter. However, his delegation had noted the absence of any provision relating to the economic pressure that might be put on a State to compel it to sign a treaty. (Mr. Dadzie, XVIIIth sess., 791st mtg., para. 35)

GUATEMALA

He ... approved the principle, stated in draft article 36, that any treaty the conclusion of which was procured by the threat or use of force was void, for that principle was lex lata in the international law of today. (Mr. Herrera, XVIIIth sess., 785th mtg., para. 4)

HUNGARY

He could not share the view of some delegations that article 36 applied only to cases involving the threat or use of force. He agreed with the Indonesian representative that all types of duress must be taken into account, and therefore supported the suggestion of the Iraqi and Yugoslav representatives that the article should be redrafted to prevent an unduly narrow interpretation. (Mr. Ustor, XVIIIth sess., 789th mtg., para. 10)

INDONESIA

Her delegation supported the Commission's unanimous conclusion that any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations should be void. However, the Commission did not seem to have anticipated the case in which force was threatened or used by a third country, which did not appear to be directly concerned, instead of by one of the contracting parties. The Commission had considered that the precise scope of the acts covered by the expression "threat or use of force in violation of the principles of the Charter" should be left to be determined in practice by interpretation of the relevant provisions of the Charter. In her delegation's view, that expression covered all forms of coercion employed to induce a State to act against its own interests; it undoubtedly applied to a threat to

/...

strangle the economy of a country, as some members of the Commission had said. The fact that the expression "armed force" was used in the seventh preambular paragraph of the Charter and not in Article 2, paragraph 4, seemed to demonstrate clearly that that interpretation was correct, all the more so since justice was mentioned before "respect for the obligations arising from treaties and other sources of international law" in the third preambular paragraph and before "international law" in Article 1, paragraph 1. (Miss Laurens, XVIIIth sess., 785th mtg., para. 8)

IRAQ

The Iraqi delegation approved the principle adopted by the International Law Commission on the subject of coercion (articles 35 and 36) but noted an omission. Although the Commission had clearly explained the position of positive international law with regard to the coercion of the person of the representatives of the State, it did not take fully into account the tendency of contemporary international law with respect to coercion exercised against a State. Under the influence of the United Nations Charter threat or the use of force had been condemned as an instrument of national policy. It was therefore generally recognized that recourse to threats or force to impose a treaty constituted a cause of nullity and that was already lex lata. It was not sufficient when codifying the law of treaties merely to express that reality. The technicalities of a treaty, which was an agreement of wills, in the opinion of his delegation called for the free expression of such wills. If the coercion exercised against the person of the representative of the State could be carried out by any act or threat why could the coercion exercised against the State itself be carried out only by threat or the use of force? Coercion was not necessarily a manifestation of physical force. If a restricted interpretation of the expression "threat or use of force" was adopted, many forms of real coercion would not come under article 36 and treaties which had been imposed by force would remain valid, for example treaties imposed by political or economic pressure. An article the purpose of which was to put treaties on a healthier basis and to guarantee the freedom of the parties, must therefore declare as cause of nullity every and any form of coercion, whether a threat or the use of force or any other unlawful pressure, economic or political, likely to compel the consent of a State. Pressures which might pass unperceived were more to be feared

/...

nowadays than threats or the use of physical force which could be easily denounced. Further, by clearly defining the rules relating to the vitiation of consent and coercion the risks of unequal treaties were reduced. Thus without fraud, without error, and without coercion there would scarcely be any unequal treaties except between States having unequal international juridical status; and here again vitiation of consent or coercion might often be noted. The Iraqi delegation therefore hoped that the International Law Commission would review article 36 bearing in mind the requirements of contemporary international life. (Mr. Yasseen, XVIIIth sess., 788th mtg., para. 21)

MOROCCO

Commenting on article 36 of the International Law Commission's draft, he noted that it represented an important step towards the establishment of the rule of law among nations. The Commission should give further study, however, to the question whether it should be applied as from 1945 or from the date on which an international convention on the law of treaties would have been concluded. The Commission should also consider forms of pressure other than physical threat or use of force. Economic pressure, for example, often influenced the attitude of a country which was aware of the unfavourable position in which it was placed by entering into a treaty, but felt compelled by circumstances to sign it. Such was the case, for example, of a State whose economy depended upon another powerful State which controlled either its national production or the international market for its products. The struggle of certain States against domestic trusts and cartels should be carried over to the international level. (Mr. Benjelloun, XVIIIth sess., 792nd mtg., para. 16)

NIGERIA

The Nigerian delegation was particularly grateful to the International Law Commission for article 36, which was of special importance to a young, emergent nation like Nigeria, whose hope of survival depended on the increasing recognition of the desirability of finding peaceful solutions for international problems.

A question which, in the view of the Nigerian delegation, should be recognized and examined by the International Law Commission was that of treaties signed by

dependent States just before receiving their independence. The signing of such treaties was often a condition of the granting of independence, so that it was clear to the Nigerian delegation that they were signed under a form of duress, and were therefore void. It was the wish of the Nigerian delegation that that fact should be recognized in the law of treaties, so that the position of States which were victims of such treaties would be safeguarded by international law. (Mrs. Moore, XVIIIth sess., 790th mtg., paras. 2-3)

PANAMA

The Commission's successful revision in draft article 36 of traditional doctrine concerning the use of force was to be commended. (Mr. Quintero, XVIIIth sess., 790th mtg., para. 31)

PHILIPPINES

The Philippine delegation considered that article 36 represented an important step forward, and its adoption might finally eliminate the old idea that coercion vitiated consent only when employed against an agent of a State, and not against the State as such. Moreover, its reference to the United Nations Charter gave it the stamp of universality. The Philippine delegation considered, however, that the Commission should not have confined the notion of coercion to the threat or use of force only; although abuses might be possible if the definition were extended, yet if it were not extended so as to take account of newer forms of coercion there would be no protection against measures such as "economic strangulation", to which many countries - especially the developing countries - were particularly vulnerable, and to which it was easy to give a semblance of legality which made them all the more dangerous. The Philippine delegation shared the anxiety of other members of the Committee that an excessively wide definition of coercion might be used as a pretext for avoiding treaty obligations, but it felt that such abuse of the article could be avoided by the insertion of detailed provisions to prevent such abuse and to permit easy ascertainment of the facts desired. An example of such detailed provisions was to be found in article 44, where possible abuse of the principle of rebus sic stantibus was prevented by the limitations contained in paragraphs 2, 3 and 4. (Mr. Jimenez, XVIIIth sess., 790th mtg., para. 9)

/...

POLAND

Article 36 might have a wider application, as the representative of Iraq had suggested. It marked, however, an important advance from the state of affairs which had still existed a short time before. It was true that the principle of invalidity of treaties the conclusion of which had been procured by the threat or use of force in violation of the principles of the United Nations Charter was already being recognized; but the small States and former colonial States had been in no position to invoke it. By declaring such a treaty void de jure from the outset, article 36 was providing such States with an objective norm of international law. (Mr. Wyzner, XVIIIth sess., 788th mtg., para. 35)

ROMANIA

His delegation concurred in the text of draft article 36 and with the Commission's commentary on that text. It considered that any international treaty concluded in violation of the general principles of present-day international law was ipso facto void and without effect for all the parties. For the same reason, his delegation concurred in the provisions of draft article 37. (Mr. Ionascu, XVIIIth sess., 783rd mtg., para. 32)

SPAIN

His delegation supported the principles stated in draft articles 35 and 36. It agreed with the Iraqi and Hungarian representatives that both the threat of starvation through economic warfare and the threat of destruction by atomic warfare were prohibited by draft article 36, but did not consider it necessary to make the draft article more explicit. It would be best to wait for that provision to be interpreted in practice, in the spirit of the United Nations Charter to the principles of which the said article referred. (Mr. de Luna, XVIIIth sess., 792nd mtg., para. 8)

SYRIA

The draft articles as a whole showed that the Commission had rightly taken into account the development and progressive evolution of international law. Thus

/...

it had gone beyond traditional doctrine in recognizing as void treaties the conclusion of which had been procured by the threat or use of force against a State in violation of the principles of the Charter of the United Nations. (Mr. Nachabe, XVIIIth sess., 786th mtg., para. 13)

THAILAND

His delegation welcomed the progressive nature of draft articles 35 and 36 on coercion. It was evident that the principles relating to the threat or use of force contained in the Charter were imperative norms of the law of nations and that any treaty the conclusion of which had been procured in violation of those principles was void. It was more than necessary to consider the principle laid down in article 36 as a rule of international law, since small nations had suffered greatly in the past from the threat or use of force. (Mr. Watanakun, XVIIIth sess., 791st mtg., para. 5)

UNION OF SOVIET SOCIALIST REPUBLICS

In several provisions of the draft, the Commission had provided that treaties which conflicted with the rules of present-day international law should be void. Thus, draft article 36 stipulated that any treaty the conclusion of which had been procured by the threat or use of force should be void and draft article 37 stated that a treaty was void if it conflicted with a peremptory norm of general international law. To secure respect for treaties, leonine treaties such as existed between some new States and former colonial Powers must be prohibited. The granting of independence had often been accompanied by reservations. Such a situation was contrary to the principle of equality of peoples and States which had been proclaimed in 1945 by the United Nations Charter and endangered good relations among States. (Mr. Morozov, XVIIIth sess., 787th mtg., para. 15)

UNITED ARAB REPUBLIC

The delegation of the United Arab Republic endorsed the International Law Commission's extension of the notion of coercion in article 36 of its draft, and it thought, like the representative of Iraq, that a sound theory regarding vitiation of consent could greatly contribute to the solution of the problem of unequal treaties. (Mr. El-Erian, XVIIIth sess., 791st mtg., para. 15)

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

She accepted the Commission's opinion, recorded in paragraph (1) of its commentary on article 36, that the invalidity of a treaty procured by the illegal threat or use of force was a principle which was lex lata in the international law of today. However, she also shared the Commission's view, recorded in paragraph (3) of the commentary, that the notion of coercion should be confined to "a threat or use of force in violation of the principles of the Charter", for to widen that notion in the manner suggested by some members of the Committee might lessen the effectiveness of the article and give rise to pretexts for the evasion of treaty obligations. (Miss Gutteridge, XVIIIth sess., 786th mtg., para. 8)

UNITED STATES OF AMERICA

The adoption of draft article 36 would, if agreed upon, constitute an important advance in the rule of law among nations. The provision should be restricted to cases of the threat or use of physical force, which was the subject of article 2, paragraph 4, of the Charter. However, the idea that it was illegal to threaten or use physical force in violation of territorial integrity or political independence, or in any other manner inconsistent with the purposes of the United Nations, had been accepted only upon the entry into force of the Charter. If article 36 was applied retroactively, the validity of many treaties, notably peace treaties, would be thrown into question. The Commission should therefore consider whether the proposed rule should have effect from 1945 or, alternatively, from the date of conclusion of a convention on the law of treaties embodying that rule. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 29)

/...

URUGUAY

Article 36 was of fundamental significance in international law, because it was the first clear statement in international law that treaties secured by force were invalid. In the past, it had been considered that a victor was perfectly justified in imposing an unjust, one-sided treaty on a vanquished country, and even the Covenant of the League of Nations had provided for the use of force in certain cases. Violence had been outlawed by the Pact of Paris (the Briand-Kellogg Pact) of 1928, and the idea of voidance as a sanction against treaties obtained by force had been introduced in 1932 by Mr. Stimson, the United States Secretary of State, in a Note to China and Japan, in which he had stated that the United States would not recognize any treaties concluded in violation of the terms of the Pact of Paris; those were the only measures which had been taken on the subject of the invalidity of treaties obtained by force up to the present. In inter-American law, there was no principle that such treaties were void, although article 17 of the Charter of the Organization of American States provided that "No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized" and article 18 of the same Charter outlawed the use of force in international relations. So far, however, the Organization of American States had not adopted any principles as forceful as those of article 36 of the International Law Commission's draft, and the Commission was to be praised for having formulated articles of such fundamental value as articles 36 and 37. (Mr. Oribe, XVIIIth sess., 792nd mtg., para. 26)

VENEZUELA

The Venezuelan delegation fully supported the inclusion among the draft articles of article 36, which condemned the threat or use of force, but felt that there were grounds for a fuller definition of what was meant by "force", so as to avoid the possibility of any restrictive interpretations of the term which might prejudice the article's true intention of condemning coercion in all its forms. (Mr. Molina, XVIIIth sess., 790th mtg., para. 18)

YUGOSLAVIA

The Commission had recognized, in its commentary on draft articles 35 and 36, that the invalidity of a treaty procured by the illegal threat or use of force was a principle which was lex lata in present-day international law. However, the narrowness of the definition given for coercion in draft article 36 showed that the language of Article 2, paragraph 4, of the Charter needed elaboration in order to cover all the varied, often indirect or concealed, forms in which pressure could now be brought to bear on a State. (Mr. Blagojevic, XVIIIth sess., 782nd mtg., para. 15)

Article 37

Treaties conflicting with a peremptory norm of general international law (jus cogens)

ALGERIA

With regard to the priority to be given to the rules of jus cogens the Algerian delegation fully approved the constructive approach of the International Law Commission. It was difficult to pick out an exact criterion that would permit of the definition of the rules having that character, but the United Nations had already developed a number of imperative norms of morality and public policy in international affairs, a body of rules which the States in their practice would continue to define and develop. It was on the basis of those norms that the Organization of African Unity would for example seek to have annulled the agreements existing between the racists and colonialist States in South Africa. (Mr. Khelladi, XVIIIth sess., 789th mtg., para. 30)

BRAZIL

The Commission's courageous determination was particularly evident in the provisions of article 37 regarding treaties conflicting with a peremptory norm of general international law. Whatever doctrinal divergencies there might be on the subject of the existence of rules of jus cogens in international law, the evolution of international society since the Second World War showed that it was essential to

/...

recognize the peremptory nature of certain rules the soundness of which was generally accepted. As the representative of Iraq had so rightly said at the 788th meeting, the notion of jus cogens raised the question of the hierarchy of the sources of international law. In internal law, that question was solved in accordance with a formal criterion, but in international law, where the weight of a rule was not determined by whether it had been established by treaty or by custom, a positive criterion had to be found. He thought, therefore, like the representative of Iraq, that it was logical that the appearance of a new peremptory norm should have the effect of rendering void all pre-existing norms which were incompatible with it. States could not derogate from such peremptory norms by the conclusion of treaties amongst themselves without harming international law and order. The Chairman of the International Law Commission had thus been right, in introducing the Commission's report at the 780th meeting to quote, as examples of rules of international public order, the prohibition of the threat or use of force contained in Article 2, paragraph 4, of the United Nations Charter. It was also worth noting that the International Law Commission had very wisely limited itself to merely stating the principle, leaving it to State practice and to the jurisprudence of international tribunals to develop the content of the rule. (Mr. Amado, XVIIIth sess., 793rd mtg., para. 14)

BULGARIA

... contrary to the classic principle of almost complete freedom to contact, the Commission had reached the conclusion that international law recognized rules having the character of jus cogens, from which individual States were not competent to derogate and derogation from which caused nullity of treaties. The debate in the Sixth Committee on the principles governing friendly relations between States would help to give certainty to the content of the rules of jus cogens and provide a more satisfactory foundation for article 37. (Mr. Anguelov, XVIIIth sess., 788th mtg., para. 9)

CYPRUS

Article 37 rightly recognized that there were now certain rules of law from which States were not competent to derogate by treaty, and consequently that a

/...

treaty was void if any clause in it conflicted with those rules. That principle corresponded to the rule of municipal law that an agreement to commit a crime or one otherwise contrary to public policy was null and void and could not be construed as conferring any rights on the parties. The International Law Commission, by recognizing that principle of jus cogens, had made a very constructive contribution to the progressive development of international law, and had prudently left the full content of article 37 to be worked out by State practice and in the jurisprudence of international tribunals. The article meant that a treaty which contained a provision contemplating, directly or by implication, the threat or use of force against the political independence or territorial integrity of a State would have no validity. The same applied to a treaty containing a provision purporting to confer upon one or more States the right to intervene in the internal affairs of another State. The judgement of the International Court of Justice in the Corfu Channel case had clearly demonstrated that such intervention was legally inadmissible, as being inconsistent with the basic principles of the independence and sovereign equality of States. (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 18)

CZECHOSLOVAKIA

International agreements must necessarily be in conformity with the main objectives and principles of the international community. The International Law Commission had therefore acted in harmony with the legal convictions of the nations in declaring in article 37 that a treaty was void if it conflicted with a peremptory norm of general international law (jus cogens). That provision, like that of article 45, was of impressive significance, and represented a remarkable step forward in the development of the law of treaties. In paragraph (1) of its commentary on article 37, the International Law Commission had taken the position that "today there are certain rules and principles from which States are not competent to derogate by a treaty arrangement", and had thus confirmed a rule largely supported by State practice and international law and also stressed by many authorities in international law, such as Professor Charles Cheney Hyde. (Mr. Pechota, XVIIIth sess., 787th mtg., para. 25)

ECUADOR

The delegation of Ecuador approved the initiative of the International Law Commission in including in article 37 a violation of the jus cogens as a cause for voiding a treaty. (Mr. Alcivar, XVIIIth sess., 789th mtg., para. 26)

FRANCE

Codification, in fact, did not consist in anticipating everything, but merely in formulating general rules and leaving the rest to time, experience and the interpretation of the courts. Some of the draft articles, such as article 37, were genuine key articles in that respect. (Mr. Monod, XVIIIth sess., 787th mtg., para. 5)

GHANA

... it [the delegation of Ghana] approved of the Commission's attitude towards the concept of jus cogens. Nowadays there were certain principles - especially those enshrined in the United Nations Charter - which States might not set aside by "contracting out". (Mr. Dadzie, XVIIIth sess., 791st mtg., para. 35)

GUATEMALA

... He was particularly glad the Commission had recognized the existence of certain peremptory norms and rules of international law (jus cogens), derogation from which by agreement among the parties was not permitted. (Mr. Herrera, XVIIIth sess., 785th mtg., para. 4)

HUNGARY

He welcomed the principle enunciated in article 37 that States could not derogate from certain rules by treaty. Similarly, article 45 recognized that international law was not static but dynamic and ever-changing. With regard to articles 37 and 45, he found it impressive that, although the members of the Commission disagreed on the origin of the peremptory rules of international law, they had nevertheless agreed to recognize their existence, and their ideological differences had not prevented them from reaching a solution that met the needs of

practice. In connexion with those articles, the representative of Austria had expressed some philosophical ideas that had a certain value from the point of view of natural law but must necessarily be rejected by positivists and even more necessarily by Marxists. One should, on the contrary, welcome the abolition of certain principles of natural law and the increasing adaptation of international law to the realities of international life. (Mr. Ustor, XVIIIth sess., 789th mtg., para. 11)

INDONESIA

Article 37 showed, once again, that it was one thing to state a principle or rule of international law in general terms and quite another to give a detailed account of its exact scope. However, her delegation shared the Commission's hope that the precise criteria by which to identify norms having the character of jus cogens would be worked out in State practice and in the jurisprudence of international tribunals. (Miss Laurens, XVIIIth sess., 785th mtg., para. 9)

IRAQ

Article 37 of the draft concerning treaties conflicting with a peremptory norm of general international law (jus cogens) was a fundamental matter. It emphasized an obvious truth but the International Law Commission could not fail to include it in a chapter on the invalidity of treaties. The notion of jus cogens, by no means new, raised the question of the hierarchy of the rules of international law. In internal law that question was solved according to a formal rule, but that did not apply in international law where the fact that a rule was conventional or customary did not determine its value. It was necessary, therefore, to adopt a material standard which would show the substance of the rule, its necessity and its importance. There was here great need of prudence, but the notion of jus cogens was indisputable and it was difficult to admit that the rules of jus cogens could coexist with other rules that contradicted them. Consequently, the birth of a new imperative would have the effect of nullifying all pre-existing incompatible rules. In that respect article 45 was quite justified. It should be noted that the notion of jus cogens derived from positive law and not from natural law; it was not a

/...

matter of immutable and permanent norms but of a rule that had a particular value at a particular moment. Article 37 emphasized that positive and relative character by foreseeing the possibility of modifying a peremptory norm by a new norm of the same character. (Mr. Yasseen, XVIIIth sess., 788th mtg., para. 22)

ITALY

The Italian delegation endorsed the Commission's recognition, in draft articles 37 and 45, of the existence of the rules of jus cogens. In so doing, the Commission had successfully met the requirements of the progressive development of international law. That category of rules had been challenged in the past only because a contractual idea of international law still prevailed. As a result of the evolution of international law since the establishment of the United Nations and the emergence of a genuine general international law, it could not continue to prevail. The International Law Commission had quite rightly attributed to the rules of jus cogens the importance they deserved in modern treaty law. (Mr. Sperduti, XVIIIth sess., 793rd mtg., para. 11)

MOROCCO

With regard to articles 37 and 45, he pointed out that the United Nations Charter had established several peremptory norms of general international law and, under Article 103, had rendered them binding upon Member States. (Mr. Benjelloun, XVIIIth sess., 792nd mtg., para. 17)

NETHERLANDS

The question of jus cogens, dealt with in draft article 37, was not one of classical international law. In an era when the use of force in international relations had been almost unrestricted and when international law had barely begun to recognize human rights, international public order had been the vaguest of concepts. The Agreement concerning the Sudeten German Territory, signed at Munich on 29 September 1938, was one of the few examples of treaties which had come to be regarded as contrary to international public order. The Commission had taken an important step by recognizing the existence of peremptory norms of general

/...

international law. The Charter of the United Nations embodied several incontrovertible norms of public international law, such as the prohibition of the use of force in international relations and the obligation to respect fundamental human rights, and Article 103 made those norms peremptory so far as the Member States were concerned. Thus the Charter, as a quasi-universal law-making instrument, had made the idea of jus cogens very much a reality of international law. (Mr. Tammes, XVIIIth sess., 781st mtg., para. 2)

PANAMA

His delegation... agreed whole-heartedly with draft article 37 incorporating the rule of public order into international law: it would be absurd for the principle of freedom of contract to retain its absolute sway in international law, when in both public and private internal law it was being constantly restricted through the application of the principles of social justice. (Mr. Quintero, XVIIIth sess., 790th mtg., para. 31)

PHILIPPINES

The Philippine delegation welcomed the Commission's decision, reflected in articles 37 and 45, to recognize the existence of peremptory norms of international law (jus cogens), and considered that the two articles represented a breakthrough in the progressive development of international law. The Philippine delegation was glad to note that the Commission had recognized, in paragraph (3) of the commentary on article 37, that human rights and the principle of self-determination were to be considered as essentials of jus cogens, violation of which by a treaty could lead to its being declared void. (Mr. Jimenez, XVIIIth sess., 790th mtg., para. 10)

POLAND

Article 37 embodied the notion of jus cogens, which was not new, for W.E. Hall had already formulated it in his Treaties on International Law, the first edition of which had been published as early as 1880. In reply to those who had pointed out the absence of any generally recognized criterion by which to identify the fundamental principles of international law, it was enough to recall, as the

representative of Czechoslovakia had done at the 787th meeting, a proposal made in the Sixth Committee that a declaration should be drafted on the fundamental principles of international law, spelling out the broad rules of international co-operation. (Mr. Wyzner, XVIIIth sess., 788th mtg., para. 36)

ROMANIA

See comments on article 36.

SPAIN

As for draft article 37, he agreed with the Iraqi and Hungarian representatives that the text did not represent a triumph of one idea over others but rather a victory of technical co-operation among jurists with widely differing legal backgrounds. In his view, the Commission had been wise not to attempt to identify the rules which had the character of jus cogens. Such rules were readily recognized in practice, as the recent approval by the General Assembly of a resolution (resolution 1881 (XVIII)) condemning certain violations of human rights with only one dissenting vote had shown. Moreover, new rules of jus cogens arising in the future might nullify existing peremptory norms of international law. (Mr. de Luna, XVIIIth sess., 792nd mtg., para. 9)

SYRIA

The draft articles as a whole showed that the Commission had rightly taken into account the development and progressive evolution of international law. Thus... it had recognized the existence of peremptory norms of general international law and the nullity of any treaty which conflicted even with a new norm if the peremptory character of that norm was established.

.....

He... approved the Commission's decision not to attempt to draw up a list of the rules of jus cogens. The rule laid down in article 37 was all the stronger for being stated in general terms, and indeed more readily adaptable to new peremptory norms of general international law. (Mr. Nachabe, XVIIIth sess., 786th mtg., paras. 13 and 16)

/...

THAILAND

Article 37 provided that a treaty was void if it conflicted with a peremptory norm of general international law (jus cogens); his delegation had studied with great interest the insertion of that principle in the law of treaties. In conjunction with article 45, it should be considered as a new rule recognizing in positive international law the existence of superior norms in the hierarchy of international discipline. (Mr. Watanakun, XVIIIth sess., 791st mtg., para. 6)

TURKEY

The Commission had drawn heavily on private law and on recent developments in treaty-making, which had led it far beyond the traditional doctrines of international law. Draft articles 37 and 45, for example, seemed to represent innovation rather than codification; as previous speakers had pointed out, they were open to varied interpretations and might be difficult to apply. (Mr. Miras, XVIIIth sess., 790th mtg., para. 35)

UKRAINIAN SOVIET SOCIALIST REPUBLIC

The draft articles were based on the central idea that the only valid treaties were those which conformed to the fundamental principles of international law; they closely reflected the view expressed by Sir Gerald Fitzmaurice, in his third report on the law of treaties, that:

> "It is essential to the validity of a treaty that it should be in conformity with and not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of jus cogens."

That requirement was adequately expressed in draft article 37. It should prove an adequate criterion with which to identify treaties incompatible with the principles of the Charter and with the Declaration on the granting of independence to colonial countries and peoples. (General Assembly resolution 1514 (XV))

.....

The world would never be free from the danger of another war until all forms of unjust relations between States had been eliminated. Unjust treaties conflicted with the affirmation by the United Nations, in the Preamble to the Charter, of

faith in the equal rights of nations large and small, and with the purpose, defined in Article 1, paragraph 2, of developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Article 103 provided that, in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the former should prevail. Draft article 37 seemed to her delegation completely in accordance with that principle. Unjust treaties designed as instruments of colonial oppression and exploitation also conflicted with the Declaration on the granting of independence to colonial countries and peoples and with General Assembly resolutions 523 (VI), 626 (VII), 1314 (XIII) and 1515 (XV). (Mrs. Zgurskaya, XVIIIth sess., 784th mtg., paras. 8 and 13)

UNION OF SOVIET SOCIALIST REPUBLICS

See comments on article 36.

UNITED ARAB REPUBLIC

The International Law Commission had been right to recognize the existence of rules having the character of jus cogens in article 37 of its draft. As the representative of the Netherlands had said at the 781st meeting, the United Nations Charter contained several incontestable norms of international public law, and Article 103 of the Charter made those norms obligatory, at any rate for Member States. As a quasi-universal set of norms, the Charter had thus helped considerably to make the idea of jus cogens an international reality. As long ago as 1927, in the case of the S.S. Lotus, Judge J.B. Moore had stated in his dissenting opinion that piracy was in its jurisdictional aspects sui generis and that a pirate was treated as an outlaw, as the enemy of all mankind - hostis humani generis. The origin of the notion of jus cogens went back to the prohibition of certain actions in international law, and the recognition of that notion by the International Law Commission marked the transition from classifical international law to the modern law of the United Nations. (Mr. El-Erian, XVIIIth sess., 791st mtg., para. 16)

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

.....

Other new rules related to concepts which at the present time had no very precise meaning in international law and which for that reason might lead to difficulties when an attempt was made to apply them. That was true, for example, of article 37 and the articles logically related to it. As the Commission itself had recognized in paragraph (2) of the commentary on article 37, there was not as yet any generally recognized criterion by which to identify a general rule of international law as having the character of jus cogens. (Miss Gutteridge, XVIIIth sess., 786th mtg., para. 4)

UNITED STATES OF AMERICA

Draft article 37 would... do much to advance the rule of international law and should be supported. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 30)

URUGUAY

In article 37, the principle of jus cogens had been established for the first time in a legal text as a basis for deciding the nullity of a treaty. It was of the greatest significance that the International Law Commission, representing jurists from many different legal systems with very different backgrounds, had agreed to include so vital a principle in a multilateral convention on the law of treaties. To date, Article 103 of the United Nations Charter constituted the most far-reaching legal text applicable to the question. That Article established the rule that there was a hierarchy of norms in international law and that the norms laid down by the Charter should in all cases prevail. Similar provisions were embodied in the constitutions of federal States: they stipulated that the federal Government should prevail over the States in the event of conflict between their respective laws. Article 37 of the Commission's draft, however, represented a substantial advance over Article 103 of the Charter in that it not only recognized the existence of peremptory norms of general international law, but also provided a penalty for derogation from such norms, namely, the nullity of a treaty.

Article 37 of the International Law Commission's report went further than Article 103 of the Charter in clarifying the conditions governing the moral acceptability of treaties, but it also raised problems. Did article 37 represent the codification of an accepted principle of international law or the progressive development of a new principle? The International Law Commission appeared to regard article 37 as the codification of an existing principle, but that principle had never been clearly stated in international law before, and if the International Law Commission was to put forward a convincing case for regarding it as a generally accepted principle, it should cite some previous cases in which the principle of jus cogens had been reflected in United Nations solutions of international problems.

Another problem raised by article 37 was that of the date on which it should become effective, and whether it should be retroactive or not. There were three possible solutions: that it should affect only future treaties signed after a certain date to be agreed upon in advance; that it should take effect as soon as article 37 was adopted as part of an international convention on the law of treaties; or that, in view of its great importance and fundamental nature, it should be applicable not only to treaties signed after its adoption, but also to those signed at any time in the past. It was obvious that either of the last two solutions would give rise to great difficulties, but the Uruguayan delegation's intention in raising the question was to bring it to the attention of the International Law Commission, so that the Commission could consider what should be done. (Mr. Oribe, XVIIIth sess., 792nd mtg., paras. 23-25)

VENEZUELA

See comments on article 44.

YUGOSLAVIA

The Commission now regarded international law, not as something vague and fluid, but as a tangible asset created by the international community, primarily through the efforts of the United Nations. In draft articles 37 and 45, the Commission extended a welcome recognition to the existence of peremptory norms of international law (jus cogens).

Those two articles reflected two important postulates concerning international law: firstly, that it included a set of peremptory norms from which no derogation could be permitted, and secondly that those norms were constantly developing and changing, in number, scope and substance, with the times. The Commission's recognition of those two postulates was an important step in the progressive development of international law. (Mr. Blagojevic, XVIIIth sess., 782nd mtg., paras. 13-14)

SECTION III: TERMINATION OF TREATIES

Article 38

Termination of treaties through the operation of their own provisions

UNITED STATES OF AMERICA

The rules laid down in draft article 38, ... appeared self-evident and might well be omitted from a simplified convention. If the majority wished to maintain the article, however, his delegation would have no objection to the present wording, since it overcame any alleged presumption that a treaty might be denounced unilaterally where there was no provision for denunciation. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 31)

Article 39

Treaties containing no provisions regarding their termination

ALGERIA

See comments on article 44.

COLOMBIA

As to draft article 39, the principle of pacta sunt servanda had been universally recognized as the foundation of international order, and anything that might affect it would reflect directly on confidence in international relations.

The Colombian view was that a right of denunciation or withdrawal was valid only if it was explicit and that, in the absence of a clause embodying that right, the treaty should be presumed to be of indefinite duration. It would be a mistake to adopt a less categorical rule which would allow the unilateral revision of a treaty. To seek the intention of the parties in documents other than the treaty itself was to place treaty-making on an insecure basis. As now worded, the draft article would revive many issues which had already been settled and might impart a quality of impermanency to the decisions made in many future disputes. According to the Declaration of London of 1871 as to the non-alteration of Treaties without consent of Contracting Parties, denunciation or withdrawal was valid only if it was provided for in the treaty or consented to by all the other parties. That precept had been recognized by many writers and adopted as a rule of conduct by many Governments. (Mr. Uribe, XVIIIth sess., 783rd mtg., para. 11)

CYPRUS

Draft article 39 (Treaties containing no provisions regarding their termination), read in conjunction with paragraph (5) of the commentary, made it clear that denunciation or withdrawal was permissible when it appeared from the character of the treaty and from the circumstances of its conclusion or the statements - or subsequent conduct - of the parties that the latter intended to admit the possibility of denunciation or withdrawal. Moreover, his delegation was inclined to share the view expressed by some members of the Commission that in certain types of treaty, such as treaties of alliance, the presumption as to the intentions of the parties was that a right of renunciation or withdrawal after reasonable notice should be implied unless there were indications of a contrary intention. (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 19)

INDIA

Draft article 39, concerning treaties containing no provisions regarding their termination, might give rise to difficulties of interpretation and application. As the Commission pointed out in paragraph (3) of the commentary, the proposal to insert denunciation clauses in the conventions drawn up at the first United Nations Conference on the Law of the Sea had proved highly controversial; the difficulties

/

and doubts felt at that time did not appear to have been entirely disposed of even now, particularly in view of the comment in paragraph (5) that the term "statements of the parties" referred not only to statements forming part of the "travaux préparatoires" of the treaty, but also to subsequent statements. (Mr. More, XVIIIth sess., 783rd mtg., para. 4)

PANAMA

On the question of the implied right of denunciation, his delegation agreed with those authorities who held that under certain conditions a treaty might be denounced unilaterally although it did not include an express denunciation clause. Whether a treaty was open to unilateral denunciation was a question of fact which should be determined by reference to all the circumstances of the case. His delegation, however, did not accept the position stated in draft article 39 that the intention of the parties was the sole factor determining that question. All the circumstances should be taken into account, especially in the case of treaties of military alliance. (Mr. Quintero, XVIIIth sess., 790th mtg., para. 33)

UNITED STATES OF AMERICA

Draft article 39 wisely specified the cases in which a party to a treaty containing no provision for denunciation could denounce or withdraw from it unilaterally. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 32)

URUGUAY

See comments on article 30.

Article 40

Termination or suspension of the operation of treaties by agreement

CYPRUS

Draft article 40 provided that a treaty might be terminated by agreement of all the parties; paragraph (2) of the commentary made it clear that in some cases the parties might think it sufficient to express their consent through the diplomatic channel. (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 20)

EL SALVADOR

In draft article 40, the words "Tratado que termina" in the heading of the Spanish text should be replaced by "Tratado que se extingue". (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 5)

INDIA

In draft article 40, concerning the termination or suspension of the operation of treaties by agreement, his delegation considered that paragraph 2 conferred an unnecessary privilege on States which drew up treaties but did not become parties to them; it urged the Commission to amend the article so as to make the consent of the parties the only prerequisite for the termination of a multilateral treaty. (Mr. More, XVIIIth sess., 783rd mtg., para. 5)

POLAND

Article 40, paragraph 2, revealed a rather unusual concept. The generally accepted practice was that States not bound by the obligations arising out of a treaty could not usually at the same time acquire rights under it. The provision contemplated by the Commission would de facto put States which wilfully evaded their responsibilities under a treaty, and did not become parties to it, in a more privileged position than States parties. If a provision of that type was considered necessary for some transitional period, that period should be limited to one or two years at most. (Mr. Wyzner, XVIIIth sess., 788th mtg., para. 37)

SOMALIA

His delegation wished to comment briefly on draft article 40, paragraph 2. By requiring the consent of not less than two-thirds of all the States which had drawn up the treaty, that paragraph might thwart the wishes of all the signatories of a treaty if they later desired to terminate it. There were two possible situations. Firstly, if the States which had drawn up the treaty had ceased to be parties to it, the treaty could not be terminated, even if it had become politically objectionable, until the number of years fixed in the paragraph had expired. Secondly, if the same conditions obtained but the period fixed had expired, States

with no further interest whatsoever in the treaty might retain a say in whether or not it should remain in force. Furthermore, if consent had not been given but all the States formerly parties to the treaty had withdrawn from it pursuant to its own terms, the treaty would remain in force but only on paper. In paragraph (4) of the commentary, the Commission had taken into account the interests of the other States entitled to become parties under the terms of the treaty. It would seem that, even if a particular multilateral treaty had been terminated, it should be possible to re-establish that treaty, in its original form or in modified form, if as many States as had drawn it up, or a smaller number of States, found it in their interest to do so. In his delegation's opinion, draft article 40 would be technically sounder if paragraph 2 was deleted. (Mr. Darman, XVIIIth sess., 786th mtg., para. 1)

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The provisions of article 40, paragraph 2, were likely to complicate the process of terminating a treaty, particularly in cases in which there had been changes affecting the international personality of the original contracting parties and intricate problems of State succession might therefore be involved. (Miss Gutteridge, XVIIIth sess., 786th mtg., para. 7)

UNITED STATES OF AMERICA

Draft article 40, paragraph 1, stated an established principle of international law concerning the termination of treaties by agreement. Paragraph 2 of that draft article, on the other hand, broke new ground. It would permit the parties to a multilateral treaty to terminate it by agreement, without regard to any of the provisions in the treaty regarding termination, if after the expiry of a specified number of years they did not find it feasible to continue applying it. It might prove difficult to agree upon the appropriate number of years, and he therefore suggested that the final clause in paragraph 2 should be amended to read: "however, after the expiry of... years, or such other period as the treaty may provide, the agreement only of the States parties to the treaty shall be necessary". (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 32)

/...

Article 41

Termination implied from entering into a subsequent treaty

EL SALVADOR

In draft article 41, the subject of paragraph 2 - suspension of an earlier treaty - might be more appropriately dealt with in a separate article. (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 5)

INDIA

In draft article 41, paragraph 1, sub-paragraphs (a) and (b) seemed to some extent redundant; his delegation hoped that, when the Commission reconsidered at its sixteenth session whether to keep article 41 in part II or move it to part III, it would also reconsider the wording of the two sub-paragraphs. (Mr. More, XVIIIth sess., 783rd mtg., para. 6)

UNITED STATES OF AMERICA

Draft article 41 would be superfluous if treaties were drafted with care and attention, and might well be omitted from a simplified convention. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 33)

Article 42

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

GHANA

Although the suggested provisions of article 42 (termination or suspension of a treaty as a consequence of its breach) gave rise to no difficulty in the case of bilateral treaties, an injured State party to a multilateral treaty might be unable to persuade all the other parties to terminate it. The injured State would then theoretically remain a party to the treaty and could do no more than suspend its

application. His delegation saw a need for some provision enabling such a State to terminate the treaty, for example after a period of notice during which the treaty would merely be suspended. (Mr. Dadzie, XVIIIth sess., 791st mtg., para. 36)

GUATEMALA

... he approved in principle the content of article 42, to the effect that a material breach of a bilateral treaty by one party entitled the other to invoke the breach as a ground for terminating the treaty. (Mr. Herrera, XVIIIth sess., 785th mtg., para. 4)

PANAMA

Draft article 42, while adopting the principle of the termination of a treaty as a consequence of its breach, unfortunately placed the defaulting State in a more favoured position than that which it enjoyed in traditional doctrine. Most publicists recognized that the breach of a treaty by one party gave the other party the right to abrogate it or to suspend its operation. His delegation agreed with the position of the many acknowledged authorities who allowed no limitation of that right. (Mr. Quintero, XVIIIth sess., 790th mtg., para. 31)

UNITED STATES OF AMERICA

The principle laid down in draft article 42, paragraph 1, was sound and should be crystallized as a rule of conventional law. Paragraph 2, however, appeared to some extent to disregard the varied nature of multilateral treaties. It could be applied to a law-making treaty on such a subject as disarmament, whose observance by all parties was essential to its effectiveness, but his delegation doubted that the paragraph should apply equally to a multilateral treaty like the Vienna Convention on Consular Relations, 1963, which was essentially bilateral in application. For example, if one State refused to accord to a second State its right under the aforementioned Convention, a third State should not have the right to treat the Convention as suspended or no longer in force between itself and the first State. It was to be hoped that the Commission and Governments would give the

question careful study. The termination or suspension of multilateral treaties should be governed by the rule applicable to bilateral treaties: an injured party should not be required to continue to accord rights illegally denied to it by the offending party. Accordingly, sub-paragraph 2 (a) should be amended to read:

> "(a) Any other party, whose rights or obligations are adversely affected by the breach, to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;"

and the opening words of sub-paragraph 2 (b) should be amended to read:

> "(b) The other parties whose rights or obligations are adversely affected by the breach, either:". (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 34)

URUGUAY

See comments on article 30.

Article 43

Supervening impossibility of performance

PAKISTAN

Draft article 43 did not provide for cases in which certain provisions of the treaty had been executed while others remained executory. The suggestion made by the United States representative at the 784th meeting would help to remedy that omission. Provision should also be made for cases in which a party to a treaty itself deliberately created circumstances which made or seemed to make it impossible for the party to fulfil its obligations under the treaty. In such a case the party should be compelled to restore the status quo and to execute the treaty. In private law a party might not take advantage of his own wrong to evade his contractual obligations. The representative of Pakistan therefore proposed the addition of a fifth paragraph reading as follows:

"5. A party to a treaty may not plead impossibility of performance if the impleaded impossibility is based upon a change of circumstances deliberately brought about by that party. Such a party should be under an obligation to restore the status quo and to carry out its obligations under the treaty." (Mr. Saadi, XVIIIth sess., 791st mtg., para. 29)

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

... there was a very close connexion between articles 43 and 44, and she believed that they might well be considered together. (Miss Gutteridge, XVIIIth sess., 786th mtg., para. 8)

UNITED STATES OF AMERICA

Draft article 43 might be desirable as far as it went, but it failed to provide for cases in which certain provisions of the treaty had been executed, while others remained executory. For example, a State might conclude a bilateral treaty ceding land to another State on condition that the latter would for ever maintain and permit the use of a navigable channel in the river running through that land. If, in the course of nature, the river became permanently impassable, the question arose whether the second State should continue to enjoy the benefits of the cession of land while the first State was deprived of its rights under the treaty. He therefore suggested the addition of a fourth paragraph reading as follows:

"4. The State invoking the impossibility of performance as a ground for terminating the treaty or suspending the operation of a treaty may be required to compensate the other State or States concerned for benefits the invoking State received under executed provisions that were the bases for its performance of the provisions that remained executory while the treaty continued to be operative." (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 35)

VENEZUELA

In the case of article 43, concerning the termination or suspension of a treaty because of the permanent disappearance or destruction of its subject-matter, the Venezuelan delegation felt that some allowance should be made in the text for possible cases in which one of the parties to a treaty of the type dealt with in article 43 obtained, by the performance of the treaty, permanent benefits which were not enjoyed by the other party or parties. (Mr. Molina, XVIIIth sess., 790th mtg., para. 20)

/...

Article 44

Fundamental change of circumstances

ALGERIA

The Algerian delegation desired in particular to congratulate the International Law Commission on its efforts to define as objectively as possible the notion of the fundamental change of circumstances. Nevertheless, it would suggest the advisability of including in article 39 the possibility of a revision of a treaty as a third possible solution, which would be frequently more practical in the case of certain treaties no longer valid under prevailing conditions. (Mr. Khelladi, XVIIIth sess., 789th mtg., para. 31)

BOLIVIA

Draft article 44 sanctioned the doctrine of rebus sic stantibus, but did not allow it a very broad scope. In fact, that doctrine did not apply only to a change of circumstances existing at the time when the treaty had been entered into; it also applied to imposed treaties which for the very reason that they had been imposed caused a change of circumstances in the sense that they created situations jeopardizing friendly relations among States. Some representatives had said that the doctrine of pacta sunt servanda was diametrically opposed to the doctrine of rebus sic stantibus, but that was not so, since the doctrine of pacta sunt servanda obviously could not apply to treaties which did not meet the conditions of draft article 36. A treaty which had been concluded in the absence of threats or vice of consent should be respected. The doctrine of rebus sic stantibus gave practical expression to the idea of justice. Accordingly, it had its place in the law of treaties, where it became a principle of positive law. He recalled that it was the Latin American States which had demanded that the word "justice" should be inserted in Article 2, paragraph 3 of the Charter and in the Preamble. He shared the opinion of the Brazilian representative, who had declared categorically that unjust treaties should be proscribed in international relations. The doctrine of pacta sunt servanda then would no longer have to distinguish between equal and unequal treaties. (Mr. Iturralde, XVIIIth sess., 793rd mtg., para. 21)

BULGARIA

...the Commission, while admitting in article 44, entitled "Fundamental change of circumstances", the doctrine of rebus sic stantibus, had taken care to limit its application. (Mr. Anguelov, XVIIIth sess., 788th mtg., para. 12)

CAMEROON

He had been surprised to note that in article 44, paragraph 2 had not been made applicable to treaties fixing a boundary. While many African States appeared to agree with the status quo of their present boundaries, his delegation nevertheless felt that it would be an exaggeration to exclude altogether treaties fixing boundaries from the rule of rebus sic stantibus. That would moreover, be contrary to the principle of self-determination laid down in the Charter, especially if the States which had had their territorial boundaries forced on them without the slightest heed for geographical or ethnic considerations were borne in mind. (Mr. N'Nang, XVIIIth sess., 791st mtg., para. 41)

CHINA

With regard to article 44, it should be noted that every treaty had been presumed to contain a tacit rebus sic stantibus clause and many countries had invoked it before the Second World War. In an opinion respecting the termination of the International Load Line Convention given in 1941, the then Acting Attorney-General of the United States had stated that it was a well-established principle of international law, rebus sic stantibus, that a treaty ceased to be binding upon a State adversely affected by an essential change of circumstances and that State had the unquestioned right to suspend the Convention. Australia, France, India, New Zealand, South Africa and the United Kingdom, as Members of the League of Nations, had accepted the compulsory jurisdiction of the Permanent Court of International Justice by subscribing to the Optional Clause. However, after the beginning of the Second World War, they had notified the Secretary-General of the League that their adherence to that Clause could not be regarded as binding with respect to events of the war. Indeed, a rigid rule of pacta sunt servanda could impede progress and lead to situations inconsistent with the principles of equity.

/...

Some recognition had been given to the fact that in Article 19 of the Covenant, and although there was no specific article on the subject in the United Nations Charter, Article 14 touched upon the problem by implication. Nevertheless, the application of a rebus sic stantibus clause presented some danger in the absence of an impartial authority to rule on all the issues involved. Obviously, it should not be left to the subjective judgement of a State to decide whether a change of circumstances justified its release from treaty obligations. The Commission should therefore study the matter further with a view to developing safeguards against such abuse of the principle. (Mr. Cha, XVIIIth sess., 792nd mtg., para. 13)

COLOMBIA

... The same criticism applied to draft article 44 on fundamental change of circumstances. The doctrine of rebus sic stantibus had not been accepted in positive international law; it was not even unanimously accepted in academic circles. In a rapidly changing world, paragraph 1 of the draft article would merely add another element of instability, even though the expression rebus sic stantibus did not appear in the text. In practice States had shown themselves averse to the doctrine of rebus sic stantibus, which had been invoked more often for political motives than on firm legal grounds. (Mr. Uribe, XVIIIth sess., 783rd mtg., para. 12)

CYPRUS

Draft article 44 reflected a new approach to the doctrine of rebus sic stantibus, and his delegation recognized that the application of the principle of fundamental change of circumstances, if properly delimited and regulated, would provide the law of treaties with an essential safety-valve. If the only legal way of terminate or modify a treaty was for the parties to conclude a further agreement, and if one of the parties adamantly opposed any such agreement, an undue burden would be imposed upon the dissatisfied party, which might feel obliged to seek relief outside the law. (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 21)

CZECHOSLOVAKIA

The principle stated in article 44, whereby a fundamental change in circumstances could be invoked as ground for terminating a treaty, was sound and reflected the realities of international life. The sweeping changes which had taken place in the international community in the past few decades undoubtedly affected treaty relations between States. The application of the principle of rebus sic stantibus should, however, be an exceptional measure playing the part of a safety-valve in situations where the preservation of a treaty relation would be contrary to the realities of international life. The principle of rebus sic stantibus was a useful one, but its field of application in international treaty relations was rather limited. It was, however, important enough for the rule based on it to be included in the set of articles concerning the invalidity of treaties. (Mr. Pechota, XVIIIth sess., 787th mtg., para. 28)

ECUADOR

The doctrine of rebus sic stantibus dealt with in article 44 was at last going to become a part of the positive law of treaties. The delegation of Ecuador did not think that the principle of pacta sunt servanda would be affected by including vitiation of consent, the jus cogens or the principle of rebus sic stantibus as causes of nullity. There was no reason why a treaty which contained flagrant injustices should be considered sacred because of the mere fact that it was a treaty. (Mr. Alcivar, XVIIIth sess., 789th mtg., para. 26)

FRANCE

It had disturbed some representatives that the Commission had devoted a separate article - article 44 - to the effects of a fundamental change of circumstances. The rebus sic stantibus clause had hitherto been chiefly a subject of academic controversy. The fact was, however, that the situations which had given rise to that clause were by no means theoretical but wholly real. By taking up the question, the Commission had lived up to its responsibilities and had set a problem which sooner or later must be solved. (Mr. Monod, XVIIIth sess., 787th mtg., para. 6)

/...

GHANA

By the provisions relating to fundamental change of circumstances (article 44), the Commission had avoided abuse of the doctrine of rebus sic stantibus, and appeared to have clearly defined the circumstances in which it might properly be invoked. To the newly independent States, many of which had inherited treaties signed on their behalf by former colonial Powers, the provisions of article 44 offered a remedy additional to the existing right of abrogation. In order to safeguard the security of treaties it was clearly necessary to ensure that the change of circumstances was genuine and fundamental. That was obviously true, for example, of certain treaties under which until recently concessions had been granted at a purely nominal rent for goldfields which currently yielded millions of pounds sterling. (Mr. Dadzie, XVIIIth sess., 791st mtg., para. 37)

HUNGARY

The Commission had been right in concluding, in paragraph (6) of its commentary on article 44, that "the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties". The Commission had, moreover, proceeded with wisdom in excluding from the application of the rule treaties fixing boundaries. (Mr. Ustor, XVIIIth sess., 789th mtg., para. 12)

IRAN

... it should be made clear in article 44 that the breaking off of diplomatic relations between two States did not affect treaties already concluded between them. (Mr. Hedayati, XVIIIth sess., 787th mtg., para. 32)

IRAQ

With regard to article 44 which dealt with the question of a fundamental change of circumstances, it had to be recognized that the doctrine of rebus sic stantibus, to which it referred, existed in positive international law. The almost total absence of case-law in the matter was not a sufficient ground for denying its existence. It was frequently stated that the parties against whom that principle was formulated claimed in general that the change was not real or that it was

/...

sufficient to justify a revision of the treaty or its termination. Nevertheless, although it did exist, the doctrine of rebus sic stantibus, like many customary principles, lacked precision and the Commission had attempted to set aside that disadvantage. It was a principle which tended to adapt law to facts; indeed, treaties did not always have a contractual character but were frequently legislative and created in many cases objective and general situations which it was necessary to adapt to the realities of life. (Mr. Yasseen, XVIIIth sess., 788th mtg., para. 23)

ITALY

... the International Law Commission had dealt with some delicate and highly controversial questions such as the doctrine of rebus sic stantibus. With reference to that doctrine, he noted that paragraph 3 of article 51, which simply referred to Article 33 of the United Nations Charter, betrayed the Commission's hesitation. In the opinion of the delegation of Italy, a reference to Article 33 of the United Nations Charter was not enough in article 51 of the Commission's draft, particularly when it was a question of disputes arising from the allegation by a State of a fundamental change of circumstances. Such disputes would be of a legal nature. However, neither Article 33 of the United Nations Charter, nor even Article 36, paragraph 3 of which dealt with legal disputes, provided for compulsory international jurisdiction. The parties to such a dispute would thus find themselves in a deadlock. In other words, in view of the fact that draft article 44 did not consider fundamental change of circumstances as bringing about ipso facto the termination of a treaty and did not consider, either, that such change gave a State the right to denounce a treaty unilaterally, it seemed that in order to evade the provisions of article 44 it would be sufficient to raise objections under the terms of paragraph 2 of article 51, while at the same time refusing to agree to a decision by an international judge on the merits of the case. International law should make the application of such an intrinsically vague notion as that of a fundamental change of circumstances subject to the appropriate procedures, just as, under internal law, the duty of giving a judgement on the termination of a contract for fundamental change of circumstances was entrusted to a competent judge. It would be unwise to adopt the basic rules stated in article 44 unless there was a

/...

clause providing for compulsory jurisdiction. The application of the fundamental principle of good faith might perhaps offer a compromise solution. A clause based on that principle might provide that if objections were raised, under the terms of article 51, against a request for termination of a treaty under article 44, and if those objections were not accepted, the party which opposed the giving of a verdict by an impartial authority on the conditions of application of article 44 should thereby be considered as having abandoned any attempt to prove the grounds which it alleged. (Mr. Sperduti, XVIIIth sess., 793rd mtg., para. 12)

JAMAICA

On part II of the draft articles, concerning invalidity and termination of treaties, he would express only a preliminary view concerning draft article 44. In that article the International Law Commission had adopted a wise attitude towards fundamental change of circumstances. In its present form, however, the article might be interpreted as reserving solely to the original parties the right of terminating or withdrawing from a treaty. A fundamental change of circumstances could in special instances be a direct consequence of State succession. Newly independent States sometimes inherited treaties, the termination of which would normally have been justified at the outset in terms of the principle enunciated by draft article 44. Fundamental change of circumstances might, therefore, also be dealt with under the succession of States. The Chairman of the Sub-Committee on the Succession of States and Governments indicated in paragraph 10 of his report (see A/5509, annex II) that the Sub-Committee held that succession in respect of treaties should be dealt with in the context of succession of States rather than in that of the law of treaties. That might be a convenient arrangement. Nevertheless, he suggested that a saving clause should be introduced into draft article 44, so that the question of fundamental chance of circumstances might be considered further in connexion with the succession of States. Jamaica, for its part, was committed to a policy of unswerving respect for its treaty obligations, but realized that many of the difficulties in international relations arose from insistence on the terms of out-of-date treaties. (Mr. Francis, XVIIIth sess., 791st mtg., para. 22)

MOROCCO

In article 44, the International Law Commission, concerned with the possible danger of a rigid enforcement of the rebus sic stantibus principle to the security of treaties, had prudently specified that it was applicable solely in certain carefully defined circumstances. Although neither the International Court of Justice nor any other tribunal had issued a decisive decision in the matter, that was not sufficient to deny its existence. Nevertheless, the Commission should give further study to the question, taking into account the conditions laid down by the United States representative at the 784th meeting together with the comments of other speakers. The Moroccan delegation greatly appreciated the Commission's efforts and was confident that it would succeed in codifying the principle embodied in article 44. (Mr. Benjelloun, XVIIIth sess., 792nd mtg., para. 18)

NETHERLANDS

The so-called clausula rebus sic stantibus was an old, much-discussed problem; yet there was no relevant international practice, and no decisive finding of the International Court of Justice, or of any other international tribunal, recognizing the principle as a general rule of international law. That probably was because, while the doctrine of rebus sic stantibus was somewhat lacking in clarity, existing international law already contained a number of positive rules and principles which helped States out of what they considered excessively rigid obligations. The Commission pointed the way to a solution by excluding from the scope of the doctrine certain situations which could be solved by other principles. In his delegation's view, there were three distinct types of situations.

In the first type of situation, the parties concluding the treaty had jointly envisaged a particular type of change of circumstances, and had not agreed to recognize such changed circumstances as grounds for terminating the treaty. In such a case, the mutual consent between the parties clearly ruled out any appeal to the doctrine of rebus sic stantibus, and the situation was similar to that provided for in sub-paragraph 3 (b) of the Commission's draft article 44. It was obviously reasonable that international law should not lay down any rule which

/...

would frustrate the agreed intention of the parties in a situation for which they had made express provision. However, it might also be desirable to exclude, as grounds for termination of a treaty on account of fundamental change, all changes which the parties could be proved to have foreseen, but for which they had not deemed it necessary to make any explicit provision.

In the second type of situation the parties, in negotiating the treaty, had shown no interest in the legal consequences of changes which they knew to be possible in the future. In such a case there was no consensus among the parties on the effect of any changes, and any appeal to the doctrine of rebus sic stantibus would seriously prejudice the expectations of a party that wished to hold fast to the terms of the treaty.

In the third type of situation, the circumstances had changed in a manner which none of the parties to the treaty could have foreseen. International law already provided two principles for the settlement of such cases: firstly, supervening impossibility of performance (draft article 43) and secondly, necessity in which, in view of all the interests involved, performance - though physically possible - could not be required. (Mr. Tammes, XVIIIth sess., 781st mtg., paras. 3-6)

PANAMA

The Commission's conclusion that the doctrine of rebus sic stantibus should be included in the existing law of treaties was very laudable. His delegation agreed with the Commission's statement in paragraph (6) of its commentary on article 44 that "despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law was so considerable that it seemed to indicate a recognition of a need for this safety-valve in the law of treaties". It was particularly significant that many writers and States which had been somewhat apprehensive about the application of the doctrine to all treaties had accepted it unconditionally for "perpetual" treaties. While the Commission had concluded that the principle should apply to treaties for a fixed term as well as to "perpetual" treaties, it had accorded special importance to the time factor. His delegation shared the opinion expressed by the Commission in paragraph (6) of the commentary on draft article 44; it disagreed only with that

sentence which stated that: "if the other party were obdurate in opposing any change, ... the dissatisfied State might ultimately be driven to take action outside the law". In his delegation's view, it would not be the State which invoked the doctrine in order to escape the persistent application of obsolete, unequal and inequitable treaties, but rather the other party which insisted on the maintenance of a relation inconsistent with a fundamental change of circumstances, that would be acting outside the law. His delegation's position on that point must not be construed as opposition to faithful and strict compliance with treaty obligations. But it felt that certain obsolete and unequal treaties concluded in the distant past as "perpetual" agreements could not survive in a new and radically different era of law and international relations. And while the doctrine of rebus sic stantibus was not the only means available for terminating such agreements, it was an additional remedy which should be retained in the law of treaties. (Mr. Quintero, XVIIIth sess., 790th mtg., para. 32)

PHILIPPINES

The Philippine delegation favoured the inclusion of draft article 44 in the final set of articles on the law of treaties, and did not share the fear that such an article would affect the security of treaties, as it contained adequate safeguards against its abuse. (Mr. Jimenez, XVIIIth sess., 790th mtg., para. 11)

ROMANIA

Some rules had the effect of strengthening the rule of law in international relations, which was based inter alia on the principle of pacta sunt servanda. Draft article 44, however, seemed unlikely to have that effect and, if adopted, might become a serious source of misunderstanding. In any case it was unnecessary, for experience showed that, wherever a party to a treaty had successfully invoked the principle of rebus sic stantibus, that party had been freed of its obligations under the treaty in question by the application of the general principles of international law. (Mr. Ionascu, XVIIIth sess., 783rd mtg., para. 33)

SPAIN

As for the doctrine of rebus sic stantibus, there had never been any precedent which had dealt with the validity of the doctrine itself. In all the cases in which the doctrine appeared to be rejected it was, in fact, the possibility of the unilateral denunciation of a treaty on the alleged grounds of a change of circumstances which was rejected. Since it was clear that no person could be a judge in his own case, other States had opposed such unilateral denunciations without giving any consideration to the validity of the claim that there had been a fundamental change of circumstances. The principle of pacta sunt servanda was based on good faith; therefore it could not be cited to uphold the validity of leonine conventions. (Mr. de Luna, XVIIIth sess., 792nd mtg., para. 10)

SYRIA

As to article 44, on fundamental change of circumstances, his delegation fully appreciated the prudent efforts made by the Commission to lay down for the doctrine of rebus sic stantibus limits indispensable for the security of treaties. (Mr. Nachabe, XVIIIth sess., 786th mtg., para. 16)

THAILAND

Draft article 44 was a confirmation of the existence of the controversial doctrine of rebus sic stantibus, and the International Law Commission had been well advised to introduce that principle into the law of treaties. (Mr. Watanakum, XVIIIth sess., 791th mtg., para. 7)

UNITED ARAB REPUBLIC

In draft article 44, it was not so much the principle of fundamental change of circumstances which had led to controversy as the basis of that principle; i.e., the doctrine of rebus sic stantibus. He was glad that the International Law Commission had recognized and formulated that principle as an objective rule of international law. (Mr. El-Erian, XVIIIth sess., 791st mtg., para. 17)

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

See comments on article 43

UNITED STATES OF AMERICA

His delegation opposed the adoption of draft article 44, at any rate in its present form. In the absence of accepted law, his delegation did not believe that the much-debated principle of rebus sic stantibus was capable of codification. It would have unquestionable value if it was adequately qualified and circumscribed so as to guard against the abuse of subjective interpretation. It would be acceptable if it was applied with the agreement of the parties to a treaty, so as to give rise to a novation of the treaty. Failing that, it would be acceptable if an international court or arbitral body was entrusted with making a binding, impartial determination of its applicability to a particular treaty.
(Mr. Plimpton, XVIIIth sess., 784th mtg., para. 36)

URUGUAY

... the Uruguayan delegation supported in principle article 44 of the Commission's draft and felt that the Commission had performed a brilliant task in reducing the principle of rebus sic stantibus to manageable proportions, so that it could be used within the scope of the present set of articles on the law of treaties. (Mr. Oribe, XVIIIth sess., 792nd mtg., para. 28)

See also comments on article 30

VENEZUELA

The Venezuelan delegation considered the recognition by the Commission of the principles of jus cogens and rebus sic stantibus to be a milestone in international law, and the only doubts which it harboured concerned the restriction of the principle of rebus sic stantibus contained in paragraph 3 (a) of article 44.
(Mr. Molina, XVIIIth sess., 790th mtg., para. 19)

YUGOSLAVIA

Draft articles 39, 43, 44 and others, by recognizing the important principle of rebus sic stantibus, set the law of treaties in tune with the realities of international life. (Mr. Blagojevic, XVIIIth sess., 782nd mtg., para. 16)

Article 45

Emergence of a new peremptory norm of general international law

CYPRUS

As the Commission explained in paragraph (1) of the commentary, draft article 45 was a logical corollary of article 37: a new peremptory norm of general international law (jus cogens), whether established by a multilateral treaty or by a new customary rule, was an overriding rule of public order depriving of validity any treaty in conflict with it. (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 22)

CZECHOSLOVAKIA

See comments on article 37

EL SALVADOR

The Spanish text of draft article 45, paragraph 1, should begin with the words: "1. Un tratado se extingue cuando ...". However, he had been gratified to note that the concepts of relative and absolute nullity of a treaty had both been taken into account in the commentary on the article. (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 6)

HUNGARY

See comments on article 37

ITALY

See comments on article 37

MOROCCO

See comments on article 37

PHILIPPINES

See comments on article 37

SYRIA

See comments on article 37

THAILAND

See comments on article 37

TURKEY

See comments on article 37

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

As the United States representative had pointed out with reference to article 45 (784th meeting), it was likely to be extremely difficult to determine just when a new rule of law had become sufficiently established to be a peremptory rule; and it therefore seemed justifiable to doubt whether the provisions of paragraph 1 of that article would be workable in practice. Article 45, paragraph 2, also presented difficulties of application, for most provisions of treaties were so closely interrelated that few provisions would be clearly separable from the remainder of the treaty with regard to their application. In her view, Article 103 of the Charter of the United Nations provided a more flexible and constructive solution in the event of a conflict between certain provisions of a treaty and a peremptory norm of international law. (Miss Gutteridge, XVIIIth sess., 786th mtg., para. 5)

UNITED STATES OF AMERICA

His delegation felt that draft article 45 would require considerable further study. It was a difficult matter to determine when a new rule of international law had become sufficiently established to be regarded as a peremptory norm. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 37)

YUGOSLAVIA

See comments on article 37

SECTION IV: PARTICULAR RULES RELATING TO THE APPLICATION OF SECTIONS II AND III

Article 46

Separability of treaty provisions for the purposes of the operation of the present articles

BULGARIA

The Commission, in its overriding concern to guarantee the stability of treaties, had in preparing the draft articles tried above all to find solutions which would not endanger established relations. Thus the "classical" circumstances vitiating consent did not, according to the draft, affect any clauses but those to which they applied. But although the principle pacta sunt servanda had been taken fully into account, the Commission was quite rightly subjecting the severability of clauses in treaties to the double condition set forth in article 46, paragraph 2 of the draft. (Mr. Anguelov, XVIIIth sess., 788th mtg., para. 11)

CYPRUS

Draft article 46, paragraph 1, made it clear that the separability of treaty provisions for the purposes of the operation of the draft articles did not apply to treaties covered by draft article 36 (Coercion of a State by the threat or use of force) or by draft article 37 (Treaties conflicting with jus cogens). (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 23)

SYRIA

The Commission had .... embodied in its draft articles the principle of separability of treaty provisions. Subject to the rule laid down in article 46, it had decided in favour of that principle in the case of fraud (article 33), error (article 34), personal coercion of representatives of States (article 35),

/...

material breach of a bilateral treaty (article 42), supervening impossibility of performance (article 43), fundamental change of circumstances (article 44) and establishment of a new rule of jus cogens (article 45). There was no reason why the parties to a treaty should be deprived of the benefit of provisions to which no one objected, and in the case of general multilateral treaties it was in the interest of all parties to enable as many States as possible to participate. At the seventeenth session (739th meeting) his delegation had proposed in the Committee that the principle of the separability of the provisions of treaties should be applied to article 20, dealing with the effect of reservations.
(Mr. Nachabe, XVIIth sess., 786th mtg., para. 14)

URUGUAY

See comments on article 30

Article 47

Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty

EL SALVADOR

The word "Pérdida" used in the heading of the Spanish text of draft article 47 had no specific legal meaning and should be replaced. In paragraph (5) of the commentary on that article, the Commission noted that the governing consideration for the application of the principle stated in the 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 as the ground of termination. That consideration would require careful study if it was not to give rise to serious errors. (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 7)

UNITED STATES OF AMERICA

... the provisions of draft article 47 were essential in order to prevent abuses of certain rights laid down in other articles, and helped to establish the

principle that a party to a treaty was not permitted to benefit from its own inconsistencies. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 37)

Article 48

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

UNITED STATES OF AMERICA

Draft article 48 stated an important rule, but considerable study would be needed to determine whether, and to what extent, that rule was appropriate for inclusion in a general convention on the law of treaties. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 37)

VENEZUELA

In article 48 on treaties that were constituent instruments of international organizations, it was clear from the commentary that the term "within an international organization" was rather vague. It was therefore desirable that the term should be explained more fully. (Mr. Molina, XVIIIth sess., 790th mtg., para. 21)

SECTION V: PROCEDURE

Article 49

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

CYPRUS

Draft article 49 extended the provisions of draft article 4 to evidence of authority to denounce, terminate or withdraw from a treaty or to suspend its operation. His delegation fully agreed with the Commission that the same rules should apply to evidence of authority to perform acts with regard to the nullity of a treaty. (Mr. Jacovides, XVIIIth sess., 783rd mtg., para. 24)

UNITED STATES OF AMERICA

Draft article 49 served a useful purpose of clarification. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 37)

Article 50

Procedure under a right provided for in the treaty

POLAND

Commenting on article 50, paragraph 2, he pointed out that a State which withdrew from a treaty was taking a serious decision which called for a consideration, particularly if the treaty had political, economic or legal importance, Moreover, withdrawal, particularly from a bilateral treaty, could be a means of political or economic pressure. Article 50, paragraph 2, which provided that notice to terminate a treaty might be revoked at any time before the date on which it took effect, did not take into account the need for other parties to adapt themselves to the situation created by the withdrawal of one State, the termination of the treaty, or conversely its continuation. For the sake of international co-operation, which was based on treaty-type obligations, the right to revoke a notice should be limited by linking it to the clear consent of the other party. (Mr. Wyzner, XVIIIth sess., 788th mtg., para. 38)

UNITED STATES OF AMERICA

Draft article 50, paragraph 1, correctly stated the principles and procedures normally applied to the giving of notice. With regard to paragraph 2, however, the reason for specifying a period of notice was to allow the parties time to adjust to the new situation created by termination of the treaty. His delegation consequently suggested that paragraph 2 should be amended to read as follows:

> "2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect, except in a case in which the notice would have caused the treaty to terminate with respect to all parties. Where the notice would cause the treaty to terminate with respect to all parties, the notice of withdrawal will not be effective if objected to by the other party in the case of a bilateral treaty, or if objected to by one-third of the other parties in the case of a multilateral treaty."

(Mr. Plimpton, XVIIIth sess., 784th mtg., para. 38)

Article 51

Procedure in other cases

BULGARIA

The Sixth Committee should study not only the substantive provisions of the draft articles, but also those relating to the procedure to be followed in various cases where the validity or termination of a treaty was in issue. Article 51, which the Chairman of the International Law Commission had himself described at the 780th meeting as a key provision, prescribed a procedure for preventing a State from invoking a cause of nullity or termination of a treaty in order to evade its obligations unilaterally. It should be noted that the Commission had not specified the authorities which would be competent to decide the matter, and had very reasonably confined itself to a reference to Article 33 of the Charter. (Mr. Anguelov, XVIIIth sess., 788th mtg., para. 14)

COLOMBIA

The Commission had based its draft articles on the principle that release from treaty obligations was no automatic process. The procedure to be followed was set out in great detail in draft article 51; it would eliminate some risks to the security of treaties. However, the effect of paragraph 3 of that article would be to re-open closed issues and encourage revisionist ideas on the part of many Governments. (Mr. Uribe, XVIIIth sess., 783rd mtg., para. 13)

IRAQ

Article 51 was of capital importance for it reconciled the principle that no person could be judge and party in his own case with the fact that no general compulsory court was provided, and omission which was explained by the relatively undeveloped condition of the international system in comparison with the internal system. The international rules lacked precision and many of them were disputed. For that reason States were reluctant in general to commit themselves in advance to have recourse to a court when they did not know exactly what rules would be applied to them. It would be dangerous to make the development of international

rules and their codification depend on the acceptance of a compulsory jurisdiction. That would be harmful at the time of codification and indirectly to the expansion of compulsory jurisdiction in the international sphere. Article 51 took into account the realities of international life by referring with regard to the solution of international disputes to the means indicated in Article 33 of the Charter. (Mr. Yasseen, XVIIIth sess., 788th mtg., para. 24)

ITALY

See comments on article 44

PAKISTAN

His delegation noted, in paragraph (1) of the commentary on draft article 51, that many members of the Commission had thought that some of the grounds upon which treaties might be considered invalid or terminated under part II, sections II and III, of the law of treaties, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real danger for the security of treaties. To guard against that danger, it would be best to subject the application of the articles of those sections to the compulsory jurisdiction of the International Court of Justice. (Mr. Saadi, XVIIIth sess., 791st mtg., para. 30)

UNITED ARAB REPUBLIC

... in article 51 of its draft, the International Law Commission had adopted a very carefully defined attitude regarding the procedure for exercising a power of termination, withdrawal from or suspension of a treaty. While prescribing procedural measures as safeguards against the arbitrary exerise of the right of termination, the Commission had wisely refrained from adopting any rigid formulae, and instead had taken as its basis the carefully worked out approach of the Charter of the United Nations to the pacific settlement of international disputes. (Mr. El-Erian, XVIIIth sess., 791st mtg., para. 18)

UNITED STATES OF AMERICA

The Commission itself acknowledged that draft article 51 was a key article. Some of the grounds under which treaties might be considered invalid or terminated

could imperil the security of treaties if a party was free to invoke them arbitrarily over the objections of other parties. His delegation regretted that, while the Commission had specifically stated in its commentary that it did not dispute the value of recourse to the International Court of Justice as a means of settling disputes arising under the draft articles, it had not found it possible to adopt a rule making such recourse compulsory. The United States was not convinced that the provisions of article 51 would provide all the safeguards which might be required; it hoped that the matter would receive further consideration. (Mr. Plimpton, XVIIIth sess., 784th mtg., para. 39)

URUGUAY

See comments on article 30

VENEZUELA

As far as the procedure envisaged in article 51 was concerned, the Venezuelan delegation considered that, in not prescribing the compulsory jurisdiction of the International Court of Justice, the Commission had wisely recognized the practice at present followed in international disputes. (Mr. Molina, XVIIIth sess., 790th mtg., para. 22)

SECTION VI: LEGAL CONSEQUENCES OF THE NULLITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 52

Legal consequences of the nullity of a treaty

EL SALVADOR

It was clear from article 52 that the International Law Commission had accepted the theory of the putative treaty, a theory which he had consistently upheld. The article provided that the nullity of a treaty should not as such affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked. Accordingly, the effects of the treaty would be maintained provided that the party could prove good faith, but a party

which invoked its own error would not be bound to execute the terms of the treaty. However, the article made no provision for the case where - for example under a bilateral treaty - the fact that one party, having invoked its own error, was no longer bound to execute the terms of the treaty might prevent the other party from executing it as well. Provision should be made to enable the other party to continue to execute the treaty. Moreover, the treaty might have produced benefits for the parties, and the question arose whether the other party might demand that the "erring" State should continue to implement those terms of the treaty which produced such benefits notwithstanding the fact that the nullity of the treaty had been invoked. Surely a party in good faith should not have to prove its good faith; the burden of proving otherwise should rest with the other parties to the treaty. Furthermore, since draft article 52 dealt with the effects of a treaty, it should be placed in part III of the draft articles. (Mr. Gallardo, XVIIIth sess., 782nd mtg., para. 8)

Article 53

Legal consequences of the termination of a treaty

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

As to article 53, paragraph 2, the Commission's commentary threw no light on the kinds of situation envisaged, and the application of that rule seemed likely to give rise to a number of difficulties; in particular, in a case in which the treaty's provisions had already been executed, it might be extremely difficult if not impossible to restore the status quo ante. (Miss Gutteridge, XVIIIth sess., 786th mtg., para. 6)

Article 54

Legal consequences of the suspension of the operation of a treaty

(no comments)