REPORT
OF THE
INTERNATIONAL LAW COMMISSION

on the work of its fifteenth session
6 May—12 July 1963

GENERAL ASSEMBLY
OFFICIAL RECORDS : EIGHTEENTH SESSION
SUPPLEMENT No. 9 (A/5509)

UNITED NATIONS

(47 p.)

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with its Statute annexed thereto, as subsequently amended, held its fifteenth session at the European Office of the United Nations, Geneva, from 6 May to 12 July 1963. The work of the Commission during the session is described in this report. Chapter II of the report contains twenty-five articles on the invalidity and termination of treaties. Chapter III concerns the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. Chapter IV relates to progress of work on other subjects under study by the Commission. Chapter V deals with a number of administrative and other questions.

A. Membership and attendance

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy)
Mr. Gilberto AMADO (Brazil)
Mr. Milan BARTOŠ (Yugoslavia)
Mr. Herbert W. BRIGGS (United States of America)
Mr. Marcel CADIEUX (Canada)
Mr. Erik CASTRÉN (Finland)
Mr. Abdullah EL-ERIAN (United Arab Republic)
Mr. Taslim O. ELIAS (Nigeria)
Mr. André GROS (France)
Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay)
Mr. Victor KANGA (Cameroon)
Mr. Manfred LACHS (Poland)
Mr. LIU Chieh (China)
Mr. Antonio DE LUNA (Spain)
Mr. Luis PADILLA NERVO (Mexico)
Mr. Radhabinod PAL (India)
Mr. Angel M. PAREDES (Ecuador)
Mr. OBED PESSOU (Dahomey)
Mr. Shabtai ROSENNE (Israel)
Mr. Abdul Hakim TABIBI (Afghanistan)
Mr. Senjin TSURUOKA (Japan)
Mr. Grigory I. TUNKIN (Union of Soviet Socialist Republics)
Mr. Alfred VERDROSS (Austria)
Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland)
Mr. Mustafa Kamil YASSEEN (Iraq)

3. All the members, with the exception of Mr. Victor Kanga, attended the session of the Commission.

B. Officers

4. At its 673rd meeting, held on 6 May 1963, the Commission elected the following officers:

Chairman: Mr. Eduardo Jiménez de Aréchaga
First Vice-Chairman: Mr. Milan Bartoš
Second Vice-Chairman: Mr. Senjin Tsuruoka
Rapporteur: Sir Humphrey Waldock

5. At its 677th meeting, held on 10 May 1963, the Commission appointed a drafting Committee under the chairmanship of the first Vice-Chairman of the Commission. The composition of the Committee was as follows: Mr. Milan Bartoš, Chairman, Mr. Roberto Ago, Mr. Herbert W. Briggs, Mr. Abdullah El-Erian, Mr. André Gros, Mr. Luis Padilla Nervo, Mr. Shabtai Rosenne, Mr. Grigory Tunkin, Sir Humphrey Waldock. The drafting Committee held twelve meetings during the session.

6. The Legal Counsel, Mr. Constantin Stavropoulos, was present at the 710th meeting, held on 28 June 1963. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

C. Agenda

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

1. Law of treaties.
2. Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)).
3. State responsibility: report of the Sub-Committee.
4. Succession of States and Governments: report of the Sub-Committee.
5. Special missions.
6. Relations between States and inter-governmental organizations.
7. Co-operation with other bodies.
8. Date and place of the sixteenth session.
9. Other business.

8. In the course of the session, the Commission held forty-nine meetings. It considered all the items of its agenda.

Chapter II

LAW OF TREATIES

A. Introduction

Summary of the Commission's proceedings

9. At its fourteenth session the Commission provisionally adopted part I of its draft articles on the law of treaties, consisting of twenty-nine articles on the conclusion, entry into force and registration of treaties. At the same time the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit this draft, through the Secretary-General, to Governments for their observations. The Commission further decided to continue its study of the law of treaties at its next session, to give the topic priority and to take up at that session the questions of the validity and duration of treaties.

10. Both the "validity" and the "duration" of treaties have been the subject of reports by previous Special Rapporteurs. "Validity" was dealt with by Sir Hersch Lauterpacht in articles 10-16 of his first report on the law of treaties[1] and in his revision of article 16 in his second report[2], and by Sir Gerald Fitzmaurice in his third report.[3] "Duration" was not covered by Sir Hersch Lauterpacht in either of his two reports, but was dealt with at length in Sir Gerald Fitzmaurice's second report.[4] Owing to the pressure of other work, none of these reports had been examined by the Commission; but the Commission has naturally given them full consideration.

11. At the present session of the Commission, the Special Rapporteur submitted a report (A/CN.4/156 and Add.1-3) on the essential validity, duration and termination of treaties. The Commission also had before it a memorandum prepared by the Secretariat containing the provisions of the resolutions of the General Assembly concerning the law of treaties (A/CN.4/154). It considered the report of the Special Rapporteur at its 673rd-685th, 687th-711th, 714th, 716th-718th and 720th meetings and adopted a provisional draft of articles upon the topics mentioned, which is reproduced in the present chapter together with commentaries upon the articles. In studying these topics the Commission came to the conclusion that it was more convenient to formulate the articles upon the "essential validity" of treaties in terms of the various grounds upon which treaties may be affected with invalidity and the articles on "duration and termination" in terms of the various grounds upon which the termination of a treaty may be brought about. Accordingly, the Commission decided to change the title of this part of its work on the law of treaties to the "Invalidity and Termination of Treaties"; this is, therefore, the title given to the draft articles reproduced in the present chapter.

12. As stated in paragraph 18 of its report for 1962,[5] the Commission's plan is to prepare a draft of a further group of articles at its session in 1964 covering the application and effects of treaties. After all its three drafts on the law of treaties have been completed, the Commission will consider whether they should be amalgamated to form a single draft convention or whether the codification of the law of treaties should take the form of a series of related conventions. In accordance with its decision at its previous session, the Commission has provisionally prepared the present draft in the form of a second self-contained group of articles closely related to the articles in part I which have already been transmitted to Governments for their observations. The present draft has therefore been designated "The Law of Treaties—Part II." At the same time the Commission decided, without thereby prejudging in any way its decision concerning the form in which its work on the law of treaties should ultimately be presented, that it would be more convenient not to number the present group of articles in a new series, but to number them consecutively after the last article of the previous draft. Accordingly, the first article of the present group is numbered 30.

13. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit its draft concerning the invalidity and termination of treaties, through the Secretary-General, to Governments for their observations.

The scope of the present group of draft articles

14. The present group of draft articles covers the broad topics of the invalidity and termination of treaties, while the topic of the suspension of the operation of treaties has been dealt with in close association with that of termination. The draft articles do not, however, contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic raises problems both of the termination of treaties and of the suspension of their operation. The Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties. Another question not dealt with in these draft articles is the effect of the extinction of the international personality of a State upon the termination of treaties. The Commission, as further explained in paragraph 3 of its commentary to article 43, did not think that any useful provisions could be formulated on this question without taking into account the problem of the succession of States to treaty rights and obligations. Having regard to its decision to undertake a separate study of the topic of succession of

[1] *Yearbook of the International Law Commission, 1953*, vol. II, pp. 137-159.
[2] *Yearbook of the International Law Commission, 1954*, vol. II, pp. 133-139.
[3] *Yearbook of the International Law Commission, 1958*, vol. II, pp. 20-46.
[4] *Yearbook of the International Law Commission, 1957*, vol. II, pp. 16-70.
[5] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr.1).

States and Governments and to deal with succession in the matter of treaties in connexion with that topic, the Commission excluded for the time being the question of the extinction of the international personality of a State altogether from the draft articles regarding the termination of treaties. It decided to review this question at a later session when its work on the succession of States was further advanced.

15. In discussing the invalidity of treaties, the Commission considered the case of a treaty the provisions of which conflict with those of a prior treaty; and in discussing the termination of treaties it considered the analogous case of the implied termination of a treaty by reason of entering into another treaty the provisions of which are incompatible with those of the earlier treaty. Some members of the Commission considered that in both instances these cases raised questions of the interpretation and of the priority of the application of treaties, rather than of validity or termination. Other members expressed doubts as to whether these cases could be considered as exclusively questions of interpretation and application. The Commission decided to leave both these cases aside for examination at its next session when it would have before it a further report from its Special Rapporteur dealing with the application of treaties, and to determine their ultimate place in the draft articles on the law of treaties in the light of that examination.

16. The draft articles have provisionally been arranged in six sections covering: (i) a general provision, (ii) invalidity of treaties, (iii) termination of treaties, (iv) particular rules relating to the application of sections (ii) and (iii), (v) procedure, and (vi) legal consequences of the nullity, termination or suspension of the operation of a treaty. The definitions contained in article 1 of part I are applicable also to part II and it was not found necessary to add any further definitions for the purposes of this part. The articles formulated by the Commission in this part, as in part I, contain elements of progressive development as well as of codification of the law.

17. The text of draft articles 30-54 and the commentaries as adopted by the Commission on the proposal of the Special Rapporteur are reproduced below:

B. Draft articles on the law of treaties

Part II

INVALIDITY AND TERMINATION OF TREATIES

SECTION I: GENERAL PROVISION

Article 30

Presumption as to the validity, continuance in force and operation of a treaty

Every treaty concluded and brought into force in accordance with the provisions of part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the application of the present articles.

Commentary

The substantive provisions of the present part of the draft articles on the law of treaties relate exclusively to cases where for one reason or another the treaty is to be considered vitiated by nullity or terminated or its operation suspended. The Commission accordingly thought it desirable to underline in a general provision at the beginning of this part that any treaty concluded and brought into force in accordance with the provisions of the previous part is to be considered as being in force and in operation, unless its nullity or termination or the suspension of its operation results from the provisions of the present part.

SECTION II: INVALIDITY OF TREATIES

Article 31

Provisions of internal law regarding competence to enter into treaties

When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding competence to enter into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree.

Commentary

(1) Constitutional limitations affecting the exercise of the treaty-making power take various forms.[6] Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the State unless "approved" or confirmed in some manner by a legislative organ; others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties. Legally, a distinction can be drawn under internal law between those types of provision which place constitutional limits upon the power of a Government to enter into treaties and those which merely limit the power of a Government to enforce a treaty within the State's internal law without some form of endorsement of the treaty by the legislature. The former can be said to affect the actual power of the executive to conclude a treaty, the latter merely the power to implement a treaty when concluded. The question which arises under this article is how far any of these constitutional limitations may affect the validity under international law of a consent to a treaty given by a State agent ostensibly authorized to declare that consent; and on this question opinion has been divided.

(2) One group of writers[7] maintains that international law leaves it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty shall be formed and expressed; and that constitutional laws governing the

[6] See *United Nations Legislative Series, Laws and Practices concerning the Conclusion of Treaties* (ST/LEG/SER.B/3).

[7] E.g., P. Chailley, *La nature juridique des traités internationaux selon le droit contemporain*, pp. 175 and 215; S. B. Crandall, *Treaties, their Making and Enforcement*, pp. 13-14; C. De Visscher, *Bibliotheca Visseriana*, vol. 2 (1924), p. 98.

formation and expression of a State's consent to a treaty have always to be taken into account in considering whether an international act of signature, ratification, acceptance, approval or accession is effective to bind the State. On this view, internal laws limiting the power of State organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the State in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty. If this view were to be accepted, it would follow that other States would not be entitled to rely on the authority to commit the State ostensibly possessed by a Head of State, Prime Minister, Foreign Minister, etc., under article 4; they would have to satisfy themselves in each case that the provisions of the State's constitution are not infringed or take the risk of subsequently finding the treaty void. The weakening of the security of treaties which this doctrine entails is claimed by those who advocate it to be outweighed by the need to give the support of international law to democratic principles in treaty-making.

(3) In 1951 the Commission itself adopted an article based upon this view.[8] Some members, however, were strongly critical of the thesis that constitutional limitations are incorporated into international law, while the Assistant Secretary-General for Legal Affairs expressed misgivings as to the difficulties with which it might confront depositaries. During the discussion at that session it was said that the Commission's decision had been based more on a belief that States would not accept any other rule than on legal principles.

(4) A second group of writers,[9] while basing themselves on the incorporation of constitutional limitations into international law, recognize that some qualification of that doctrine is essential if it is not to undermine the security of treaties. According to this group, good faith requires that only notorious constitutional limitations with which other States can reasonably be expected to acquaint themselves should be taken into account. On this view, a State contesting the validity of a treaty on constitutional grounds can only invoke those provisions of the constitution which are notorious or could easily have been ascertained by inquiry. Some writers in this group further maintain that a State which invokes the provisions of its constitution to annul its signature, ratification, etc., of a treaty, is liable to compensate the other party which "relied in good faith and without any fault of its own on the ostensible authority of the regular constitutional organs of the State".[10]

(5) A compromise solution based upon the initial hypothesis of the invalidity in international law of an unconstitutional signature, ratification, etc., of a treaty presents certain difficulties. If a limitation laid down in the internal law of a State is to be regarded as effective in international law to curtail the authority of a Head of State or other State agent to declare the State's consent to a treaty, it is not clear upon what principle a "notorious" limitation is effective for that purpose but "non-notorious" one is not. Under the State's internal law both kinds of limitation are legally effective to curtail the agent's authority to enter into the treaty. Similarly, if the internal limitation is effective in international law to deprive the State agent of any authority to commit the State, it does not seem that the State can be held internationally responsible in damages in respect of its agent's unauthorized signature, ratification, etc., of the treaty. If the initial signature, ratification, etc., of the treaty is not imputable to the State by reason of the lack of authority, all subsequent acts of the State agents with respect to the same treaty would also logically seem not to be imputable to the State.

(6) The practical difficulties are even more formidable, because in many cases it is quite impossible to make a clear-cut distinction between notorious and non-notorious limitations. Admittedly, there now exist collections of the texts of State constitutions and the United Nations has issued a volume of "Laws and Practices concerning the Conclusion of Treaties" based on information supplied by a considerable number of States. Unfortunately, however, neither the texts of constitutions nor the information made available by the United Nations are by any means sufficient to enable foreign States to appreciate with any degree of certainty whether or not a particular treaty falls within a constitutional provision. Some provisions are capable of subjective interpretation, such as a requirement that "political" treaties or treaties of "special importance" should be submitted to the legislature; some laws do not make it clear on their face whether the limitation refers to the power to conclude the treaty or to its effectiveness within domestic law. But even when the provisions are apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive. In the majority of cases where the constitution itself contains apparently strict and precise limitations, it has nevertheless been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in internal law; and this use of the treaty-making power is reconciled with the letter of the law either by a process of interpretation or by the development of political understandings. Furthermore, the constitutional practice in regard to treaties in simplified form tends to be somewhat flexible, and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judgement of the executive, whose decision may afterwards be challenged in the legislature or in the courts. Accordingly, while it is certainly true that in a number of cases it will be possible to say that a particular provision is notorious and that a given treaty falls within it, in many cases neither a foreign State nor the national Government itself will be able to judge in advance with any certainty whether, if contested, a given treaty would be held under national law to fall within an internal limitation, or whether an international tribunal would hold the internal provision to be one that is "notorious" and "clear" for the purposes of international law.

[8] Article 2: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." (*Yearbook of the International Law Commission, 1951*, vol. II, p. 73).

[9] E.g., McNair, *Law of Treaties* (1961), chapter III; Paul De Visscher, *De la conclusion des traités internationaux* (1943), p. 275; P. Guggenheim, *Recueil des cours de l'Académie de droit international*, vol. 74 (1949), p. 236; Sir Hersch Lauterpacht, *First Report on the Law of Treaties, Yearbook of the International Law Commission, 1953*, vol. II, pp. 141-146.

[10] Sir Hersch Lauterpacht, *Yearbook of the International Law Commission, 1953*, vol. II, p. 143; see also Lord McNair, op. cit., p. 77; *Research in International Law, Harvard Law School*, part III, Law of Treaties, art. 21.

(7) A third group of writers[11] considers that international law leaves to each State the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. According to this view, international law determines the procedures and conditions under which States express their consent to treaties on the international plane; and it also regulates the conditions under which the various categories of State organs and agents will be recognized as competent to carry out such procedures on behalf of their State. In consequence, if an agent, competent under international law to commit the State, expresses the consent of the State to a treaty through one of the established procedures, the State is held bound by the treaty in international law. Under this view, failure to comply with internal requirements may entail the invalidity of the treaty as domestic law, and may also render the agent liable to legal consequences under domestic law; but it does not affect the validity of the treaty in international law so long as the agent acted within the scope of his authority under international law. Some of these writers[12] modify the stringency of the rule in cases where the other State is actually aware of the failure to comply with internal law or where the lack of constitutional authority is so manifest that the other State must be deemed to have been aware of it. This compromise solution, which takes as its starting point the supremacy of the international rules concerning the conclusion of treaties, does not present the same logical difficulties as the compromise put forward by the other group. As the basic principle, according to the third group, is that a State is entitled to assume the regularity of what is done within the authority possessed by an agent under international law, it is logical enough that the State should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.

(8) The decisions of international tribunals and State practice, if they are not conclusive, appear to support a solution based upon the position taken by the third group. The international jurisprudence is admittedly not very extensive. The *Cleveland* award[13] (1888) and the *George Pinson* case[14] (1928), although not involving actual decisions on the point, contain observations favouring the relevance of constitutional provisions to the international validity of treaties. On the other hand, the *Franco-Swiss Custom* case[15] (1912) and the *Rio Martin* case[16] (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the *Metzger* case[17] contains an observation in the same sense. Furthermore, pronouncements in the *Eastern Greenland*[18] and *Free Zones*[19] cases, while not directly in point, seem to indicate that the International Court will not readily go behind the ostensible authority under international law of a State agent—a Foreign Minister and an Agent in international proceedings in the cases mentioned—to commit his State.

(9) As to State practice, a substantial number of diplomatic incidents has been closely examined in a recent work.[20] These incidents certainly contain examples of claims that treaties were invalid on constitutional grounds, but in none of them was that claim admitted by the other party to the dispute. Moreover, in three instances—the admission of Luxembourg to the League, the Politis incident and the membership of Argentina—the League of Nations seems to have acted upon the principle that a consent given on the international plane by an ostensibly competent State agent is not invalidated by the subsequent disclosure that the agent lacked constitutional authority to commit his State. Again, in one case a depositary, the United States Government, seems to have assumed that an ostensibly regular notice of adherence to an agreement could not be withdrawn on a plea of lack of constitutional authority except with the consent of the other parties.[21] Nor is it the practice of State agents, when concluding treaties, to cross-examine each other as to their constitutional authority to affix their signatures to a treaty or to deposit an instrument of ratification, acceptance, etc. It is true that in the *Eastern Greenland* case Denmark conceded the relevance in principle of Norway's constitutional provisions in appreciating the effect of the Ihlen declaration, while contesting their relevance in the particular circumstances of the case. It is also true that at the seventeenth session of the General Assembly one delegate in the Sixth Committee expressed concern that certain passages in the Commission's report seemed to imply a view unfavourable to the relevance of constitutional provisions in determining the question of a State's consent in international law. But the weight of State practice seems to be very much the other way.

(10) The view that a failure to comply with constitutional provisions should not normally be regarded as vitiating a consent given in due form by an organ or agent ostensibly competent to give it appears to derive support from two further considerations. The first is that international law has devised a number of treaty-making procedures — ratification, acceptance and approval—specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the State should become a party to it, and also of enabling them to take account of any domestic constitutional requirements. When a treaty has been made subject to ratification, acceptance or approval, the negotiating States would seem to have done all that can reasonably be demanded of them in the way of giving effect to democratic principles of treaty-making. It would scarcely be reasonable to expect each Government subsequently to follow the internal handling of the treaty by each of the other Governments, while any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. The same considerations apply in cases of accession where

[11] E.g., Anzilotti, *Cours de droit international* (*translation Gidel*), vol. I (1929), pp. 366-367; Sir Gerald Fitzmaurice, *British Yearbook of International Law*, vol. 15 (1934), pp. 129-137; Blix, *Treaty-Making Power* (1960), chapter 24; and see UNESCO, *Survey of the Ways in which States interpret their International Obligations* (P. Guggenheim), pp.7-8.

[12] J. Basdevant, for example, while holding that States must in general be able to rely on the ostensible authority of a State agent and to disregard constitutional limitations upon his authority, considered that this should not be so in the case of a *"Violation manifeste de la constitution d'un Etat"; Recueil des cours de l'Académie de droit international*, vol. XV (1926), p. 581; see also UNESCO, *Survey of the Ways in which States interpret their International Obligations*, p. 8.

[13] Moore, *International Arbitrations*, vol. 2, p. 1946.

[14] *United Nations Reports of International Arbitral Awards*, vol. V, p. 327.

[15] *Ibid.*, vol. XI, p. 411.

[16] *Ibid.*, vol. II, p. 724.

[17] *Foreign Relations of the United States* (1901), p. 262.

[18] *P.C.I.J.*, Series A/B, No. 53, pp. 56-71 and p. 91.

[19] *P.C.I.J.*, Series A/B, No. 46, p. 170.

[20] H. Blix, op. cit., chapter 20.

[21] H. Blix, op. cit., p. 267.

the Government has the fullest opportunity to study the treaty and give effect to constitutional requirements before taking any action on the international plane to declare the State's accession to the treaty. Again, in the case of a treaty binding upon signature it is the Government which authorizes the use of this procedure; the Government is aware of the object of the treaty before the negotiations begin and, with modern methods of communication, it normally has knowledge of the exact contents of the treaty before its representative proceeds to the act of signature; moreover, if necessary, its representative can be instructed to sign "*ad referendum*." Admittedly, in the case of treaties binding upon signature, and more especially those in simplified form, there may be a slightly greater risk of a constitutional provision being overlooked; but even in these cases the Government had the necessary means of controlling the acts of its representative and of giving effect to any constitutional requirements. In other words, in every case any failure to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the Government of the State concerned.

(11) The second consideration is that the majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Furthermore, in most of these cases the other party to the dispute has contested the view that non-compliance with constitutional provisions could afterwards be made a ground for invalidating a treaty which had been concluded by representatives ostensibly possessing the authority of the State to conclude it. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. In such cases the difficulty seems often to show itself not from the matter being raised in the legislative body whose consent was by-passed, but rather in the courts when the validity of the treaty as internal law is challenged on constitutional grounds.[22] Confronted with a decision in the courts impugning the constitutional validity of a treaty, a Government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere.

(12) Some members of the Commission were of the opinion that international law had to take account of internal law to the extent of recognizing that internal law determines the organ or organs competent in the State to exercise the treaty-making power. On this view, any treaty concluded by an organ or representative not competent to do so under internal law by reason of any failure to comply with its provisions would be invalidated by reason of the defective character of the consent resulting from the application of the internal law. The majority of the Commission, however, considered that under such a rule the complexity and uncertain application of provisions of internal law regarding the conclusion of treaties would create too large a risk to the security of treaties. In the light of this consideration and of the jurisprudence of international tribunals and the evidence of State practice, they considered that the basic principle of the present article had to be that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a State organ or agent competent under international law to give that consent. Some members, indeed, took the view that it was undesirable to weaken this basic principle in any way by admitting any exceptions to it and would have preferred to see the State held bound by the consent of its organ or representative in every case where it appeared to have been given in due form. Other members forming part of the majority, while endorsing whole-heartedly the view that non-observance of internal law regarding competence to enter into treaties does not, in principle, affect a consent regularly given under the rules of international law, considered that it would be admissible to allow an exception in cases where the violation of the internal law regarding competence to enter into treaties was absolutely manifest. They had in mind cases, such as have occurred in the past, where a Head of State enters into a treaty on his own responsibility in contravention of an unequivocal provision of the constitution. They did not feel that to allow this exception would compromise the basic principle, since the other State could not legitimately claim to have relied upon a consent given in such circumstances. This view is incorporated in article 31.

(13) The article therefore provides that, when the consent of a State to be bound has been expressed by an organ or representative furnished with the necessary authority to do so under international law, the efficacy of that consent to bind the State cannot normally be impeached merely on the ground of a non-observance of internal law. Only in the case of a violation of the law which is "manifest" may the invalidity of the consent be claimed. Article 4, to which reference is made in the text of the paragraph, is an article which sets out the conditions under which certain State organs or agents are not required to furnish any evidence of their authority to negotiate or conclude treaties and the conditions under which they are required to do so. From this article it follows that an organ or agent is to be considered as possessing authority under international law either when no evidence of authority is required under article 4 or when specific evidence of authority has been produced.

(14) The second sentence of the article merely draws the logical consequence from the rule laid down in the first sentence. This is that, except in the case of a manifest violation, a consent regularly given under the provisions of international law but in breach of a provision of internal law may only be withdrawn with the agreement of the other party or parties.

Article 32

Lack of authority to bind the State

1. If the representative of a State, who cannot be considered under the provisions of article 4 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 shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

[22] E.g., *Prosecution for Misdemeanours* (Germany) case, (*International Law Reports, 1955*, pp. 560-561); *Belgian State* v. *Leroy* (*ibid.*, pp. 614-616). National courts have sometimes appeared to assume that a treaty, constitutionally invalid as domestic law, will also be automatically invalid on the international plane. More often, however, they have either treated the international aspects of the matter as outside their province or have recognized that to hold the treaty constitutionally invalid may leave the State in default in its international obligations.

2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States.

Commentary

(1) Article 32 covers cases where a representative may purport by his act to bind the State but in fact lacks authority to do so. This may happen in two ways. First, a representative who cannot be considered as possessing authority under international law to bind the State in accordance with the provisions of article 4 and lacks any specific authority from his Government may, through error or excess of zeal, purport to enter into a treaty on its behalf. Secondly, while possessing the necessary authority under international law, a representative may be subject to express instructions from his Government which limit his authority in the particular instance. Neither type of case is common but both types have occasionally occurred in practice.[23]

(2) Where a treaty is not to become binding without subsequent ratification, acceptance or approval, any excess of authority committed by a representative in establishing the text of the treaty will automatically be dealt with at the subsequent stage of ratification, acceptance or approval. The State in question will then have the clear choice either of repudiating the text established by its representative or of ratifying, accepting or approving the treaty; and if it does the latter, it will necessarily be held to have endorsed the unauthorized act of its representative and, by doing so, to have cured the original defect of authority. Accordingly, the present article is confined to cases in which the defect of authority relates to the execution of an act by which a representative purports finally to establish his State's consent to be bound. In other words, it is confined to cases where there is an unauthorized signing of a treaty which is to become binding upon signature, or where a representative, authorized to exchange or deposit a binding instrument under certain conditions or subject to certain reservations, exceeds his authority by failing to comply with the conditions or to specify the reservations, when exchanging or depositing the instrument.

(3) Paragraph 1 of the article deals with cases where the representative lacks any authority to enter into the treaty. In 1908, for example, the United States Minister to Romania signed two conventions without having any authority to do so.[24] With regard to one of these conventions, his Government had given him no authority at all, while he had obtained full powers for the other by leading his Government to understand that he was to sign a quite different treaty. Again, in 1951 a convention concerning the naming of cheeses concluded at Stresa was signed by a delegate on behalf both of Norway and Sweden, whereas it appears that he had authority to do so only from the former country. In both these instances the treaty was, in fact, subject to ratification, but they serve to illustrate the kind of cases that may arise. A further case, in which the same question may arise, and one more likely to occur in practice, is where an agent has authority to enter into a particular treaty, but goes beyond his full powers by accepting unauthorized extensions or modifications of it. An instance of such a case was Persia's attempt, in discussions in the Council of the League, to disavow the Treaty of Erzerum of 1847 on the ground that the Persian representative had gone beyond his authority in accepting a certain explanatory note when exchanging ratifications.[25]

(4) Where there is no authority to enter into a treaty, it seems clear, on principle, that the State must be entitled to disavow the act of its representative, and paragraph 1 so provides. On the other hand, it seems equally clear that, notwithstanding the representative's original lack of authority, the State may afterwards endorse his act and thereby establish its consent to be bound by the treaty. It will also be held to have done so by implication if it invokes the provisions of the treaty or otherwise acts in such a way as to appear to treat the act of its representative as effective.

(5) Paragraph 2 of the article deals with the other type of case where the representative has authority to enter into the treaty but his authority is curtailed by specific instructions. The Commission considers that in order to safeguard the security of international transactions, the rule must be that specific instructions given by a State to its representative are only effective to limit his authority vis-à-vis other States, if they are made known to the other States in some appropriate manner before the State in question enters into the treaty. That this is the rule acted on by States is suggested by the rarity of cases in which a State has sought to disavow the act of its representative by reference to secret limitations upon his authority. Thus in the incident in 1923 of the Hungarian representative's signature of a resolution of the Council of the League, the Hungarian Government sought to disavow his act by interpreting the scope of his full powers, rather than by contending that he had specific instructions limiting their exercise. Furthermore, the Council of the League seems clearly to have held the view that a State may not disavow the act of an agent done within the scope of the authority apparently conferred upon him by his full powers. Paragraph 2 accordingly provides that specific instructions are not to affect a consent to a treaty signified by a representative unless they had been brought to the notice of the other contracting State or States.

Article 33

Fraud

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

2. Under the conditions specified in article 46, the State in question may invoke the fraud as invalidating its consent only with respect to the particular clauses of the treaty to which the fraud relates.

Commentary

(1) There does not appear to be any recorded instance of a State claiming to annul or denounce a treaty

[23] See generally H. Blix, op. cit., pp. 5-12 and 76-82.

[24] Hackworth's *Digest of International Law*, vol. IV, p. 467. Cf. also the well-known historical incident of the British Government's disavowal of an agreement between a British political agent in the Persian Gulf and a Persian minister which the British Government afterwards said had been concluded without any authority whatever; Adamyiat, *Bahrein Islands*, p. 106.

[25] For further cases, see H. Blix, op. cit., pp. 77-81.

on the ground that it had been induced to enter into the treaty by the fraud of the other party. The only instance mentioned by writers as one where the matter was discussed at all is the Webster-Ashburton Treaty of 1842 relating to the north-eastern boundary between the United States and Canada.[26] That, however, was a case of non-disclosure of a material map by the United States in circumstances in which it was difficult to say that there was any legal duty to disclose it, and Great Britain did not assert that the non-disclosure amounted to fraud.

(2) Clearly, cases in which Governments resort to deliberate fraud in order to procure the conclusion of a treaty are likely to be rare, while any fraudulent misrepresentation of a material fact inducing an essential error would in any event fall under the provisions of the next article dealing with error. Some members of the Commission therefore felt that it was not really necessary to have a separate article dealing specifically with fraud and they would have preferred to amalgamate fraud and error in a single article. On balance, however, the Commission considered that it was advisable to keep fraud and error distinct in separate articles. Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely nullify the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties.

(3) The Commission encountered some difficulty in formulating the article. Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. Thus, it is doubtful whether the French term "dol" corresponds exactly with the English term "fraud"; and in any event it is not always appropriate to transplant private law concepts into international law without certain modifications. Moreover, the absence of any precedents means that there is no guidance to be found either in State practice or in the jurisprudence of international tribunals as to the scope to be given to the concept of fraud in international law. In these circumstances, some members of the Commission thought it desirable that an attempt should be made to define with precision the conditions necessary to establish fraud in the law of treaties. The view which prevailed, however, was that it would be better to formulate the general concept of fraud applicable in the law of treaties in as clear terms as possible and to leave its precise scope to be worked out in practice and in the decisions of international tribunals.

(4) The article, as drafted, uses the English word "fraud" and the French word *"dol"* as the nearest terms available in those languages for identifying the principle with which the article is concerned; and the same applies to the word "dolo" in the Spanish text of the article. In using these terms the Commission does not intend to convey that all the detailed connotations given to these terms in internal law are necessarily applicable in international law. It is the broad principle comprised in each of these terms, rather than the detailed applications of the principle in internal law, that is covered by the present article. The term used in each of the three texts is accordingly intended to have the same meaning and scope in international law. Accordingly, in indicating the matters which will operate to nullify consent under this article, the Commission has sought to find a non-technical expression of as nearly equivalent meaning as possible: fraudulent conduct, ***conduite frauduleuse*** and ***conducta fraudulenta***. This expression is designed to include any false statements, misrepresentations or other deceitful proceedings by which a State is induced to give a consent to a treaty which it would not otherwise have given.

(5) The effect of fraud, it seems to be generally agreed, is not to render the treaty *ipso-facto* void but to entitle the injured party, if it wishes, to invoke the fraud as invalidating its consent; the article accordingly so provides.

(6) Paragraph 2 makes applicable to cases of fraud the principle of the separability of treaty provisions, the general scope of which principle is defined in article 46. The Commission considered that where the fraud related to particular clauses only of the treaty, it should be at the option of the injured party to invoke the fraud as invalidating its consent to the whole treaty or to the particular clauses to which the fraud related. On the other hand, even in cases of fraud the severance of the treaty could only be admitted under the conditions specified in article 46, because it would be undesirable to set up continuing treaty relations on the basis of a truncated treaty the provisions of which might apply in a very uneven manner as between the parties.

Article 34

Error

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

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

3. Under the conditions specified in article 46, an error which relates only to particular clauses of a treaty may be invoked as a ground for invalidating the consent of the State in question with respect to those clauses alone.

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

Commentary

(1) In municipal law, error occupies a comparatively large place as a factor which may nullify the reality of consent to a contract. Some types of error found in municipal law, however, can hardly be imagined as operating in the field of treaties, e.g., error *in persona*. Similarly, some types of treaty, more especially law-making treaties, appear to afford little scope for error *in substantia* to affect the formation of consent, even if that may not be altogether impossible. Moreover, treaty-making processes are such as to reduce to a minimum the risk of errors on material points of substance. In consequence, the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent.

(2) Almost all the recorded instances concern geographical errors, and most of them concern errors in

[26] See Moore, *Digest of International Law*, vol. 5, p. 719.

maps.[27] In some instances, the difficulty was disposed of by a further treaty; in others the error was treated more as affecting the application of the treaty than its validity and the point was settled by arbitration. These instances confirm the possible relevance of errors either in regard to the validity of treaties or their application, but they do not provide clear guidance as to the principles governing the effect of error on the essential validity of treaties.

(3) The effect of error was, however, discussed in the *Eastern Greenland* case before the Permanent Court of International Justice, and again in the *Temple* case before the present Court. In the former case[28] Norway contended that, when asked by the Danish Ambassador to say that Norway would not object to the Danish Government extending its political and economic interests over the whole of Greenland, Norway's Foreign Minister had not realized that this covered the extension of the Danish monopoly régime to the whole of Greenland, and that accordingly his acquiescence in the Danish request had been vitiated by error The Court contented itself with saying that the Foreign Minister's reply had been definitive and unconditional and appears not to have considered that there was any relevant error in the case. Judge Anzilotti, while also considering that there was no error, went on to say: "But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty . . ."[29]

(4) In the first stage of the *Temple* case[30] the Court was confronted with a plea that, when making a declaration under the optional clause in 1950, Thailand had had a mistaken view of the status of its earlier declaration of 1940 and had for that reason used language which had been shown in the *Israel* v. *Bulgaria* case to be inadequate to affect her acceptance of the optional clause in 1950. As to this plea the Court said: "Any error of this kind would evidently have been an error of law, but in any event the Court does not consider that the issue in the present case is really one of error. Furthermore, the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given. The Court cannot, however, see in the present case any factor which could, as it were *ex post* and retroactively, impair the reality of the consent Thailand admits and affirms she fully intended to give." A plea of error was also raised in the second stage of the case on the merits; and the error, which was geographical, arose in somewhat special circumstances. There was no error in the conclusion of the original treaty, in which the parties were agreed that the boundary in a particular area should be the line of a certain watershed; the error concerned what the Court held to be a subsequent, implied, agreement to vary the terms of the treaty. Thailand had accepted a map prepared *bona fide* for the purpose of delimiting the boundary in the area in question, but showing a line which did not follow the watershed. Rejecting Thailand's plea that her acceptance of the map was vitiated by error, the Court said: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."[31]

(5) The *Eastern Greenland* and *Temple* cases throw light on the conditions under which error will *not* nullify the reality of the consent rather than on those under which it will do so. The only further guidance which can perhaps be obtained from the Courts' decisions is in the *Mavrommatis Concessions* case[32] which, however, concerned a concession, not a treaty. There the Court held that an error in regard to a matter not constituting a *condition* of the agreement would not suffice to invalidate the consent, and it seems to be generally agreed that, to vitiate consent to a treaty, an error must relate to a matter considered by the parties to form an essential basis of their consent to the treaty.

(6) The Commission recognized that some systems of law distinguish between mutual and unilateral error; but it did not consider that it would be appropriate to make this distinction in international law. Accordingly, the present article applies no less to an error made by only one party than to a mutual error made by both or all the parties.

(7) Paragraph 1 formulates the general rule that an error respecting the substance of a treaty may be invoked as vitiating consent where the error related to a fact or state of facts assumed to exist at the time that the treaty was entered into and forming an essential basis of the consent to the treaty. The Commission did not intend the requirement that the error must have related to a "fact or state of facts" to exclude any possibility that an error of law should in some circumstances serve to nullify consent. Quite apart from the fact that errors as to rights may be mixed questions of law and fact, the line between law and fact is not always an easy one to draw and cases are conceivable in which an error of law might be held to affect consent. For example, it may be doubtful how far an error made as to a regional or local custom is to be considered as one of law or of fact for the purposes of the present article, having regard to the pronouncements of the Court as to the proof of a regional or local custom.[33] Again, it would seem clear on principle that an error as to internal law would for the purposes of international law be considered one of fact.

(8) Under paragraph 1, error only affects consent if it was a fundamental error in the sense of an error as to a matter which formed an essential basis of the consent given to the treaty. Furthermore, even such an error does not make the treaty automatically void, but gives a right to the party whose consent to the treaty was induced by the error to invoke the error as invalidating its consent. On the other hand, if the party concerned does invoke the error as invalidating its consent, the effect will be to make the treaty void *ab initio*.

(9) Paragraph 2 excepts from the rule cases where the mistaken party in some degree brought the error upon itself. The terms in which the exception is formulated are those used by the Court in the sentence from its judgment on the merits in the *Temple* case which has already been quoted in paragraph 4 above.

[27] See Harvard Law School: *Research in International Law*, III, Law of Treaties, pp. 1127-1128; Hyde, *A.J.I.L.* (1933), p. 311; and Kiss, *Répertoire français de droit international public*, vol. I, pp. 55-56.

[28] *P.C.I.J.*, Series A/B, No. 53, pp. 71 and 91.

[29] *Ibid.*, p. 92.

[30] *I.C.J. Reports, 1961*, p. 30.

[31] *I.C.J. Reports, 1962*, p. 26; see also the individual opinion of Sir Gerald Fitzmaurice (*ibid.*, p. 57).

[32] *P.C.I.J.*, Series A, No. 11.

[33] E.g., in the *Asylum*, *Right of Passage* and *U.S. Nationals in Morocco* cases.

(10) Paragraph 3 applies to cases of error the principle of the separability of treaty provisions. The Commission considered that it was undesirable that the whole treaty should be brought to the ground in cases where the error related to particular clauses only and where these clauses were separable from the rest of the treaty under the conditions specified in article 46. If acceptance of the clauses in question had not been an essential condition of the consent of the parties to the treaty as a whole, it appeared to be legitimate and desirable to allow severance of the treaty with respect to those clauses.

(11) Paragraph 4, in order to prevent any misunderstanding, takes up a point which was the subject of articles 26 and 27, namely, errors not as to the substance of a treaty but as to the wording of its text. The present paragraph merely underlines that such an error does not affect the validity of the consent and that it falls under the provisions of articles 26 and 27 relating to the correction of errors in the texts of treaties.

Article 35

Personal coercion of representatives of States

1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

2. Under the conditions specified in article 46, the State whose representative has been coerced may invoke the coercion as invalidating its consent only with respect to the particular clauses of the treaty to which the coercion relates.

Commentary

(1) There appears to be general agreement that acts of coercion or threats applied to individuals with respect to their own persons or in their personal capacity in order to procure the signature, ratification, acceptance or approval of a treaty will necessarily justify the State in invoking the nullity of the treaty.[34] History provides a number of instances of the alleged employment of coercion against not only negotiators but members of legislatures in order to procure the signature or ratification of a treaty. Amongst those instances the Harvard Research Draft lists:[35] the surrounding of the Diet of Poland in 1773 to coerce its members into accepting the treaty of partition; the coercion of the Emperor of Korea and his ministers in 1905 to obtain their acceptance of a treaty of protection; the surrounding of the national assembly of Haiti by United States forces in 1915 to coerce its members into ratifying a convention. It is true that in some instances it may not be possible to distinguish completely between coercion of a Head of State or Minister as a means of coercing the State itself and coercion of them in their personal capacities. For example something like third-degree methods of pressure were employed in 1939 for the purpose of extracting the signatures of President Hacha and the Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, as well as the gravest threats against their State. Nevertheless, the two forms of coercion, although they may sometimes be combined, are, from a legal point of view, somewhat different; the Commission has accordingly placed them in separate articles.

[34] McNair, op. cit., pp. 207-209.
[35] *Ibid.*, pp. 1155-1159.

(2) The present article deals with the coercion of the individual representatives "in their personal capacities". This phrase is intended to cover any form of constraint of or threat against a representative affecting him as an individual and not as an organ of his State. It would therefore include not only a threat to his person, but a threat to ruin his career by exposing a private indiscretion, as would also a threat to injure a member of the representative's family with a view to coercing the representative.

(3) The Commission gave consideration to the question whether coercion of a representative, as distinct from coercion of the State, should render the treaty *ipso facto* void or whether it should merely entitle it to invoke the coercion of its representative as invalidating its consent to the treaty. It concluded that the use of coercion against the representative of a State for the purpose of procuring the conclusion of a treaty would be a matter of such gravity that the article should provide for the absolute nullity of a consent to a treaty so obtained.

(4) On the other hand, if the coercion has been employed against a representative for the purpose of extracting his assent to particular clauses only of a treaty and these clauses are separable from the rest of the treaty under the conditions specified in article 46, it seems logical that the injured party should have the right, if it wishes, to treat the coercion as invalidating its consent to those clauses alone. Otherwise, the injured party might be obliged to waive the coercion of its representative with respect to part of the treaty in order not to lose the benefit of the remainder of the treaty.

Article 36

Coercion of a State by the threat or use of force

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 shall be void.

Commentary

(1) The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which advocated that the validity of such treaties ought no longer to be recognized. The endorsement of the criminality of aggressive war in the Charters of the Allied military tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2, paragraph 4, of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this opinion. The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today.

(2) Some authorities, it is true, while not disputing the moral value of the principle, have hesitated to accept it as a legal rule. The arguments are that to recognize the principle as a legal rule may open the door to the evasion of treaties by encouraging unfounded assertions of coercion and that the rule will be ineffective because the same threat or compulsion that procured the con-

clusion of the treaty will also procure its execution, whether the law regards it as valid or invalid. Important though it may be not to overlook the existence of these difficulties, they do not appear to the Commission to be of such a kind as to call for the omission from the present articles of a principle of invalidity springing from the most fundamental provisions of the Charter, the relevance of which in the law of treaties as in other branches of international law cannot today be regarded as open to question.

(3) If the notion of coercion is confined, as the Commission thinks it must be, to a threat or use of force in violation of the principles of the Charter, the possibilities of a plausible abuse of this ground of invalidity do not appear to be any greater than in cases of fraud or error or than in cases of a claim to terminate a treaty on the ground of an alleged breach or of a fundamental change in the circumstances. Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter," and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

(4) Again, even if sometimes a State should initially be successful in achieving its objects by a threat or use of force, it cannot be assumed in the circumstances of today that a rule nullifying a treaty procured by such unlawful means would not prove meaningful and effective. The existence, universal character and effective functioning of the United Nations in themselves provide the necessary framework for the operation of the rule formulated in the present article.

(5) The Commission considered that the rule should be stated in as simple and categorical terms as possible. The article therefore provides that: "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 shall be void." The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are today of universal application. It was therefore considered to be both legitimate and appropriate to frame the article in terms of the principles of the Charter. At the same time, the phrase "violation of the principles of the Charter" was chosen rather than "violation of the Charter", in order that the article should not appear to be confined in its application to Members of the United Nations.

(6) The Commission further considered that a treaty procured by a threat or use of force in violation of the principles of the Charter must be characterized as void, rather than as voidable. The prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State. Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded as a law void *ab initio*. This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State. If, therefore, the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations.

Article 37

Treaties conflicting with a peremptory norm of general international law (jus cogens)

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

Commentary

(1) The opinion of writers has been divided upon the question whether international law recognizes the existence within its legal order of rules having the character of *jus cogens*, that is, rules from which the law does not permit any derogation. Some writers, considering that the operation even of the most general rules of international law still falls short of being universal, deny that any rule can properly be regarded as a *jus cogens* from which individual States are not competent to derogate by agreement between themselves.[36] But whatever imperfections international law may still have, the view that in the last analysis there is no rule from which States cannot at their own free will contract out has become increasingly difficult to sustain. The law of the Charter concerning the prohibition of the use of force in reality presupposes the existence in international law of rules having the character of *jus cogens*.[37] This being so, the Commission concluded that in codifying the law of treaties it must take the position that today there are certain rules and principles from which States are not competent to derogate by a treaty arrangement.

(2) The formulation of the rule, however, is not free from difficulty, since there is not as yet any generally recognized criterion by which to identify a general rule of international law as having the character of *jus cogens*. Moreover, it is undeniable that the majority of the general rules of international law do not have that character and that States may contract out of them by treaty. The general law of diplomatic intercourse, for example, requires that certain treatment be accorded to diplomatic representatives and forbids the doing of certain acts with respect to diplomats; but these rules of general international law do not preclude individual States from agreeing between themselves to modify the treatment to be accorded reciprocally to each other's representatives. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law.

(3) The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals. Some members of the Commission felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested included: (*a*) a treaty contemplating an unlawful use of force con-

[36] See for example G. Schwarzenberger, *International Law* (3rd edition), vol. I, pp. 426-427.

[37] See McNair, op. cit., pp. 213-214.

trary to the principles of the Charter; (*b*) a treaty contemplating the performance of any other act criminal under international law; and (*c*) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights or the principle of self-determination were mentioned as other possible examples. The Commission, however, decided against including any examples of rules of *jus cogens* in the article for two reasons. First, the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.

(4) Accordingly, the article simply provides that a treaty is void "if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". This provision makes it plain that nullity attaches to a treaty under the article only if the rule with which it conflicts is a peremptory norm of general international law from which no derogation is permitted, even by agreement between particular States. On the other hand, it would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As any modification of a rule of *jus cogens* would today most probably be effected by the conclusion of a general multilateral treaty, the Commission thought it desirable to make it plain by the wording of the article that a general multilateral treaty establishing a new rule of *jus cogens* would fall outside the scope of the article. In order to safeguard this point, the article defines rules of *jus cogens* as peremptory norms of general international law from which no derogation is permitted "and which can be modified only by a subsequent norm of general international law having the same character".

(5) The Commission considered the question whether the nullity resulting from the application of the article should in all cases attach to the whole treaty or whether severance of the offending provisions from the rest of the treaty might be admissible under the conditions laid down in article 46. Some members were of the opinion that it was undesirable to prescribe that the whole treaty should be brought to the ground in cases where only one part—and that a small part—of the treaty was in conflict with a rule of *jus cogens*. Other members, however, took the view that rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid. In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction. This was the view which prevailed in the Commission and the article does not, therefore, admit any severance of the offending clauses from the rest of the treaty in cases falling under its provisions.

Article 38

Termination of treaties through the operation of their own provisions

1. A treaty terminates through the operation of one of its provisions:

(*a*) On such date or on the expiry of such period as may be fixed in the treaty;

(*b*) On the taking effect of a resolutory condition laid down in the treaty;

(*c*) On the occurrence of any other event specified in the treaty as bringing it to an end.

2. When a party has denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

3. (*a*) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation or withdrawal takes effect.

(*b*) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Commentary

(1) The majority of modern treaties contain clauses fixing their duration or the date of their termination or a condition or event which is to bring about their termination, or providing for a right to denounce or withdraw from the treaty. In these cases the termination of the treaty is brought about by the provisions of the treaty itself and how and when this is to happen is essentially a question of interpreting and applying the treaty. The present article sets out the basic rules governing the termination of a treaty through the application of its own provisions.

(2) The treaty clauses are very varied.[38] Many treaties provide that they are to remain in force for a specified period of years or until a particular date or event; others provide for the termination of the treaty through the operation of a resolutory condition. Specific periods fixed by individual treaties may be of very different lengths, periods between one and twelve years being usual but longer periods up to twenty, fifty and even ninety-nine years being sometimes found. More common in modern practice are treaties which fix a comparatively short initial period for their duration, such as five or ten years, but at the same time provide for their continuance in force after the expiry of the period subject to a right of denunciation or withdrawal. These provisions normally take the form either of an indefinite continuance in force of the treaty subject to a right of denunciation on six or twelve months notice or of a renewal of the treaty for successive periods of years, subject to a right of denunciation or withdrawal on giving notice to that effect six months before the expiry of each period. Some treaties fix no period for their duration and simply provide for a right to denounce or withdraw from the treaty, either with or without a

[38] See *Handbook of Final Clauses* (ST/LEG.6), pp. 54-73.

period of notice. Occasionally, a treaty which fixes a single specific period, such as five or ten years, for its duration allows a right of denunciation or withdrawal even during the currency of the period.

(3) Paragraph 1 sets out the rules governing the time at which a treaty comes to an end by the operation of the various types of terminating provision found in treaties. Some members felt that these rules were self-evident and did not really need to be stated; but the Commission considered that, although they follow directly from the application of the provisions in question, the rules are the governing rules and therefore should have a place in a codifying convention. Some members suggested that the "occurrence of any other event", in sub-paragraph (*c*), was already covered by the "resolutory condition". As, however, a clause providing for a terminating "event" is not always expressed in the form of a term or of a condition, it was thought preferable to include sub-paragraph (*c*) so as to ensure that no case could be said not to have been covered.

(4) Paragraphs 2 and 3 deal with cases where the treaty comes to an end through the operation of a clause providing for a right to denounce or withdraw from it. If this is only a particular example of termination through the operation of a resolutory condition, it has a special importance for two reasons. First, it is a condition which brings the treaty to an end at the will of the individual party; secondly, it is extremely common in multilateral treaties. Clearly, denunciation of a bilateral treaty brings the treaty itself to an end and paragraph 2 so provides. The denunciation of a multilateral treaty, on the other hand, by a single party or the withdrawal of a single party from the treaty does not normally put an end to the treaty; the effect is merely that the treaty ceases to apply to the party in question. Paragraph 3 (*a*) states this general rule.

(5) In some cases, a multilateral treaty which is subject to denunciation or withdrawal does provide for the termination of the treaty itself, if denunciations or withdrawals should reduce the number of parties below a certain figure. For example, the Convention on the Political Rights of Women[39] provides that it "shall cease to be in force as from the date when the denunciation which reduces the number of parties to less than six becomes effective". In some cases the minimum number of surviving parties required by the treaty to keep it alive is even smaller, e.g., five in the case of the Customs Convention on the Temporary Importation of Commercial Road Vehicles[40] and three in the case of the Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation.[41] In other, perhaps less frequent, cases a larger number is required to maintain the treaty in force. Clearly, provisions of this kind establish what is really a resolutory condition and, as paragraph 3 (*b*) states, the treaty terminates when the number of parties falls below the specified minimum.

(6) A further point arises as to whether a multilateral treaty, the entry into force of which was made dependent upon its ratification, acceptance, etc., by a given minimum number of States, automatically ceases to be in force, should the parties afterwards fall below that number as a result of denunciations or withdrawals. The better opinion,[42] it is believed, is that this is not a necessary effect of a drop in the number of the parties below that fixed for the treaty's entry into force. The treaty provisions in question relate exclusively to the conditions for the entry into force of the treaty and, if the negotiating States had intended the minimum number of parties fixed for that purpose to be a continuing condition of the validity of the treaty, it would have been both easy and natural for them so to provide. In some cases, it is true, a treaty which fixes a low minimum number of parties for entry into force prescribes the same number for the cessation of the treaty. But there is no general practice to that effect, and the fact that this has not been a regular practice in cases where a larger minimum number, such as ten or twenty, has been fixed for entry into force seems significant. At any rate, when the number for entry into force is of that order of magnitude, it does not seem desirable that the application of the treaty should be dependent on the number of parties not falling below that number. The remaining parties, if unwilling to continue to operate the treaty with the reduced number, may themselves either join together to terminate it or separately exercise their own right of denunciation or withdrawal. Paragraph 3 (*b*) therefore also provides that a treaty is not terminated "by reason only of the fact" that the number of its parties falls below that prescribed for its original entry into force.

Article 39

Treaties containing no provisions regarding their termination

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case, a party may denounce or withdraw from the treaty upon giving to the other parties or to the depositary not less than twelve months notice to that effect.

Commentary

(1) Article 39 covers the termination of treaties which neither contain any provision regarding their duration or termination nor mention any right for the parties to denounce or withdraw from it. Such treaties are not uncommon, recent examples being the Charter of the United Nations, the four Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations. The question is whether they are to be regarded as terminable only by common agreement or whether individual parties are under any conditions to be considered as having an implied right to withdraw from the treaty upon giving reasonable notice to that effect.

(2) In principle, the answer to the question must depend on the intention of the parties in each case, and the very character of some treaties excludes the possibility that the contracting States could have intended them to be open to unilateral denunciation or withdrawal at the will of an individual party. Treaties of peace and treaties fixing a territorial boundary are examples of such treaties. Many treaties, however, are not of a kind with regard to which it can be said that to allow a unilateral right of denunciation or withdrawal would be inconsistent with the character of the treaty; for the

[39] *United Nations Treaty Series*, vol. 193, p. 135, art. 8.
[40] *Handbook of Final Clauses* (ST/LEG.6), p. 58.
[41] *Ibid.*, pp. 72-73.
[42] Cf. E. Giraud, "Modification et terminaison des traités collectifs", *Annuaire de l'Institut de droit international*, vol. 49, tome I, 1961, p. 62.

normal practice today in the case of most categories of treaties is either to fix a comparatively short period for their duration or to provide for the possibility of termination or withdrawal. No doubt, one possible point of view would be that, since the parties in many cases do provide expressly for a unilateral right of denunciation or withdrawal, their silence on the point in other cases must be interpreted as excluding such a right. Some authorities,[43] basing themselves on the Declaration of London of 1871 and certain State practice, take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. The Declaration of London and the State practice in question, however, relate to peace treaties or other treaties designed to establish enduring territorial settlements, in other words, to treaties where an intention to admit a right of unilateral denunciation or withdrawal is excluded by the character of the treaty. In many other types of treaty the widespread character of the practice making the treaty subject to denunciation or withdrawal suggests that it would be unsafe to draw the conclusion from the mere silence of the parties on the point that they necessarily intended to exclude any possibility of denunciation or withdrawal. For this reason a number of other authorities[44] take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties, and more especially in commercial treaties and in treaties of alliance.

(3) The difficulty of the problem is well illustrated by the discussions which took place at the Geneva Conference on the Law of the Sea concerning the insertion of denunciation clauses in the four conventions drawn up at that Conference.[45] None of the Conventions contains a denunciation clause. They provide only that after five years from the date of their entry into force any party may at any time request the revision of the Convention, and that it will be for the General Assembly to decide upon the steps, if any, to be taken in respect of the request. The Drafting Committee, in putting forward this revision clause, observed that its inclusion "made unnecessary any clause on denunciation". Proposals had previously been made for the inclusion of a denunciation clause and these were renewed in the plenary meeting, notwithstanding the view of the Drafting Committee. Some delegates thought it wholly inconsistent with the nature of the codifying conventions to allow denunciation; some thought that a right of denunciation existed anyhow under customary law; others considered it desirable to provide expressly for denunciation in order to take account of possible changes of circumstances. The proposal to include the clause in the "codifying" conventions was rejected by 32 votes to 12, with 23 abstentions. A similar proposal was also made with reference to the Fishing and Conservation Convention, which formulated entirely new law. Here, opponents of the clause argued that a right of denunciation would be out of place in a Convention which created new law and was the result of negotiation. Advocates of the clause, on the other hand, regarded the very fact that the Convention created new law as justifying and indeed requiring the inclusion of a right of denunciation. Again, the proposal was rejected, by 25 votes to 6, with no less than 35 abstentions. As already mentioned, no clause of denunciation or withdrawal was inserted in these conventions and at the subsequent Vienna Conferences on Diplomatic and Consular Intercourse the omission of the clause from the conventions on those subjects was accepted without discussion. However, any temptation to generalize from these Conferences as to the intentions of the parties in regard to the denunciation of "law-making" treaties is discouraged by the fact that other conventions, such as the Genocide Convention and the Geneva Conventions of 1949 on prisoners of war, sick and wounded, etc. expressly provide for a right of denunciation.

(4) The contention was put forward in the Commission that, in order to safeguard the security of treaties, the absence of any provision in the treaty should be interpreted in every case as excluding any right of unilateral denunciation or withdrawal without the agreement of the other party. Some members, on the other hand, considered that in certain types of treaty, such as treaties of alliance, the presumption as to the intentions of the parties was the other way round, with the result that a right of denunciation or withdrawal after reasonable notice should be implied in the treaty unless there were indications of a contrary intention. Certain other members took the view that, while the omission of any provision for it in the treaty did not exclude the possibility of implying a right of denunciation or withdrawal, the existence of such a right was not to be implied from the character of the treaty alone. According to these members, the intention of the parties was essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case. This view prevailed in the Commission and is embodied in article 39.

(5) The article states that a treaty not making any provision for its termination or for denunciation or withdrawal is not subject to denunciation or withdrawal unless "it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of denunciation or withdrawal". Under this rule, the character of the treaty is only one of the elements to be taken into account and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case, including the statements of the parties, that the parties intended to allow the possibility of unilateral denunciation or withdrawal. The statement of one party would not, of course, be sufficient to establish that intention, unless it appeared to meet with the express or tacit assent of the other parties. The term "statements of the parties", it should be added, was not meant by the Commission to refer only to statements forming part of the *travaux préparatoires* of the treaty, but was meant also to cover subsequent statements showing the understanding of the parties as to the possibility of denouncing or withdrawing from the treaty; in other words, it was meant to cover interpretation of the treaty by reference to "subsequent conduct" as well as by reference to the *travaux préparatoires*.

(6) The period of notice is twelve months. An alternative would be simply to say "reasonable" notice; but as the purpose of the article is to clarify the position

[43] See article 34 of the *Harvard Research Draft*, pp. 1173-1183; C. Rousseau, *Principes généraux du droit international public*, pp. 526-548.

[44] See Hall, *International Law*, 8th Edition, p. 405; Oppenheim, *International Law*, 8th Edition, vol. 1, p. 938; McNair, *Law of Treaties*, 1961, pp. 501-505; Sir Gerald Fitzmaurice, Second Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1957, vol. II, p. 22.

[45] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, pp. 19, 56 and 58.

where the parties have failed to deal with the question of the termination of the treaty, the Commission preferred to propose a specific period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where the treaty is of the renewable type and is open to denunciation by a notice given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually twelve months, though admittedly in some cases no period of notice is required. In formulating a general rule, the Commission considered it to be desirable to lay down a longer rather than a shorter period in order to give adequate protection to the interests of the other parties to the treaty.

Article 40

Termination or suspension of the operation of treaties by agreement

1. A treaty may be terminated at any time by agreement of all the parties. Such agreement may be embodied:

(*a*) In an instrument drawn up in whatever form the parties shall decide;

(*b*) In communications made by the parties to the depositary or to each other.

2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all the parties, the consent of not less than two thirds of all the States which drew up the treaty; however, after the expiry of . . . years the agreement only of the States parties to the treaty shall be necessary.

3. The foregoing paragraphs also apply to the suspension of the operation of treaties.

Commentary

(1) The termination of a treaty or the suspension of its operation by agreement is necessarily a process which involves the conclusion of a new "treaty" in some form or another. From the point of view of international law, as stated in article 1 of the Commission's draft articles, the agreement may be any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. It is true that the view has sometimes been put forward that an agreement terminating a prior treaty must be cast in the same form as the treaty which is to be terminated or at least be a treaty form of "equal weight". However, it reflects the constitutional practice of particular States,[46] not a general rule of international law. It is always for the States concerned themselves to select the appropriate instrument or procedure for bringing a treaty to an end, and, in doing so, they will no doubt take into account their own constitutional requirements. So far as international law is concerned, all that is required is that the parties to the prior treaty should have entered into an agreement to terminate it, whether they conclude that agreement by a formal instrument or instruments or by a "treaty in simplified form".

(2) Paragraph 1 of article 40 therefore provides that a treaty may be terminated at any time by agreement of all the parties, and that the agreement may be embodied in an instrument drawn up in whatever form the parties shall decide. The paragraph further underlines that the agreement may be embodied in communications made by the parties to the depositary or to each other. In some cases, no doubt, the parties will think it desirable to use a formal instrument. In other cases, they may think it sufficient to express their consents through the diplomatic channel or, in the case of multilateral treaties, by communications made through the depositary. As to the latter procedure, in modern practice communications through the depositary are a normal means of obtaining the consents of the interested States in matters touching the operation of the "final clauses" of the treaty; it would seem to be a convenient procedure to use for effecting the termination of a treaty by an agreement in simplified form.

(3) Paragraph 1, as already noted, provides that the consent of all the parties to a treaty is necessary for its termination by agreement. Each party to a treaty has a vested right in the treaty itself of which it cannot be deprived by a subsequent treaty to which it is not a party or to which it has not given its assent. The application of this rule to multilateral treaties tends to result in somewhat complicated situations, because it is very possible that some parties to the earlier treaty may fail to become parties to the terminating agreement. In that event, the problem may arise whether the earlier treaty is to be regarded as terminated *inter se* the parties to the later treaty but still in force in other respects. Further reference to this matter is made in the commentary to the next article. Here it suffices to say that, whatever the complications, it is a strongly entrenched rule of international law that the consent of every party is, in principle, necessary to the termination of any treaty bilateral or multilateral; it is this rule which is safeguarded in the opening sentence of paragraph 1 of the present article.

(4) Paragraph 2 deals with the question whether in the case of a multilateral treaty the consent of all the parties is necessarily sufficient for its termination or whether account might also be taken of the interests of the other States still entitled to become parties under the terms of the treaty. Some members of the Commission were inclined to the opinion that, if a State had not shown enough interest in a treaty to take the necessary steps to become a party before the time arrived when its termination was under discussion, there was no case for making the termination of the treaty conditional upon its consent. However, it was pointed out that quite a number of multilateral conventions, especially those of a technical character, require only two or a very small number of ratifications or acceptances to bring them into force; and that it did not seem right that the first two or three States to deposit instruments of ratification or acceptance should have it in their power to terminate the treaty without regard to the wishes of the other States which drew up the treaty. It was also recalled that in drafting article 9 concerning the opening of a treaty to additional States the Commission had thought it necessary that all the States which had drawn up the treaty should have a voice in the matter for a certain period of time. The Commission decided that it ought to follow the same approach in the present article; paragraph 2 accordingly provides that until the expiry of . . . years the consent of the States which drew up the treaty should be required in addition to that of the actual parties. As in the case of article 9, the Commission preferred to await the comments of Governments on the question before suggesting the length of the period during which this provision should apply.

[46] See an observation of the United States representative at the 49th meeting of the Social Committee of the Economic and Social Council (E/AC.7/SR.49, p. 8), to which Sir Gerald Fitzmaurice drew attention.

(5) Paragraph 3 provides that the rules laid down in the article apply equally to the suspension of the operation of a treaty.

Article 41

Termination implied from entering into a subsequent treaty

1. A treaty shall be considered as having been impliedly terminated in whole or in part if all the parties to it, either with or without the addition of other States, enter into a further treaty relating to the same subject-matter and either:

(*a*) The parties in question have indicated their intention that the matter should thereafter be governed by the later treaty; or

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

2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty.

Commentary

(1) The previous article concerns cases where the parties to a treaty enter into a later agreement for the express purpose of terminating the treaty. The present article deals with cases where the parties, without expressly terminating or modifying the first treaty, enter into another treaty which is so far incompatible with the earlier one that they must be considered to have intended to abrogate it. Where the parties to the two treaties are identical, there can be no doubt that, in concluding the second treaty, they are competent to abrogate the earlier one; for that is the very core of the rule contained in the previous article. Even where the parties to the two treaties are not identical, the position is clearly the same if the parties to the later treaty include all the parties to the earlier one; for what the parties to the earlier treaty are competent to do together, they are competent to do in conjunction with other States. The sole question therefore is whether and under what conditions the conclusion of the further incompatible treaty must be held by implication to have terminated the earlier one.

(2) This question is essentially one of the construction of the two treaties in order to determine the extent of their incompatibility and the intentions of the parties with respect to the maintenance in force of the earlier one. Some members of the Commission felt that for this reason the question ought not to be dealt with in the present report as one of termination, but should be left over for consideration at the next session at which the Special Rapporteur would be submitting draft articles on the application of treaties. However, it was pointed out that, even if it were true that a preliminary question of interpretation was involved in these cases, there was still a need to determine the conditions under which the interpretation should be held to lead to the conclusion that the treaty had been terminated. The Commission decided provisionally, and subject to reconsideration at its next session, to retain article 41 in its present place among the articles dealing with "termination" of treaties.

(3) Paragraph 1 therefore seeks to formulate the conditions under which the parties to a treaty are to be understood as having intended to terminate it by concluding a later treaty conflicting with it. The wording of the two clauses in paragraph 1 is based upon the language used by Judge Anzilotti in his separate opinion in the *Electricity Company of Sofia* case,[47] where he said:

> "There was no express abrogation. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions."

That case, it is true, concerned a possible conflict between unilateral declarations under the optional clause and a treaty, and the Court itself did not accept Judge Anzilotti's view that there was any incompatibility between the two instruments. Nevertheless, the two tests put forward by Judge Anzilotti for determining whether a tacit abrogation had taken place appeared to the Commission to contain the essence of the matter.

(4) Paragraph 2 merely provides that the earlier treaty shall not be considered to have been terminated where it appears from the circumstances that a later treaty was intended only to suspend the operation of the earlier one. Judge Anzilotti, it is true, in the above-mentioned opinion considered that the declarations under the optional clause, although in his view incompatible with the earlier treaty, had not abrogated it because of the fact that the treaty was of indefinite duration, whereas the declarations were for limited terms. But it could not be said to be a general principle that a later treaty for a fixed term does not abrogate an earlier treaty expressed to have a longer or indefinite duration. It would depend entirely upon the intention of the States in concluding the second treaty, and it is probable that in most cases their intention would have been to cancel rather than suspend the earlier treaty.

(5) The Commission considered whether it should add a further paragraph dealing with the question of the termination of a treaty as between certain of its parties only in cases where those parties alone enter into a later treaty which conflicts with their obligations under the earlier one. In such cases, parties to the earlier treaty, as stressed in paragraph 3 of the commentary to the previous article, cannot be deprived of their rights under it without their agreement, so that in law the later treaty, even if concluded between a majority of the parties to the earlier treaty, cannot be said to have terminated the earlier one altogether. There is, however, a question whether the earlier treaty terminates *inter se* the parties who enter into the later treaty. This question is so closely connected with the problem of the application of treaties that, for the reasons given in the Introduction to the present articles, the Commission decided to defer the examination of this question until its next session when it will take up the problem of the application of treaties.

Article 42

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

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

[47] *P.C.I.J.*, Series A/B, No. 77, p. 92.

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

(*a*) Any other party 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;

(*b*) The other parties by common agreement either:

(i) To apply to the defaulting State the suspension provided for in subparagraph (*a*) above; or

(ii) To terminate the treaty or to suspend its operation in whole or in part.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(*a*) The unfounded repudiation of the treaty; or

(*b*) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in paragraphs 1 and 2 above, is subject to the conditions specified in article 46.

5. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

Commentary

(1) The great majority of writers[48] recognize that the violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. A violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take non-forcible reprisals and these reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of the right to abrogate the treaty and the conditions under which it may be exercised. Some writers,[49] in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. These writers tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach.[50] Other writers are more impressed with the risk that a State may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing.[51] These writers tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.[52]

(2) State practice, although not lacking,[53] does not give great assistance in determining the true extent of this right or the proper conditions for its exercise. In many cases, the denouncing State has decided for quite other reasons to put an end to the treaty and, having alleged the violation primarily to provide a pretext for its action, has not been prepared to enter into a serious discussion of the legal principles involved. The other party has usually contested the denunciation primarily on the basis of the facts; and, if it has sometimes used language appearing to deny that unilateral denunciation is ever justified, this has usually appeared rather to be a protest against the one-sided and arbitrary pronouncements of the denouncing State than a rejection of the right to denounce when serious violations are established. Thus, States which have on one occasion seemed to assert that denunciation of a treaty is always illegitimate in the absence of agreement have, on other occasions, themselves claimed the right to denounce a treaty on the basis of alleged breaches by the other party.

(3) Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty and they have not found it necessary to examine the conditions for the application of the principle at all closely.[54]

(4) International jurisprudence has contributed comparatively little on this subject. In the case of the *Diversion of Water from the River Meuse*,[55] Belgium contended that, by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against it. Belgium did not claim to denounce the treaty, but it did assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision, although it pleaded its claim rather as an application of the principle *inadimplenti non est adimplendum*. The Court, having found that Holland had not violated the treaty, did not pronounce upon the Belgian contention. In a dissenting opinion, however, Judge Anzilotti expressed the view[56] that the principle underlying the Belgian contention is "so just, so equitable, so universally recognized that it must be applied in international relations also". The only other case that seems to be of much significance is the *Tacna Arica Arbitration*.[57] There Peru contended that by preventing the performance of article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from her obligations under that article. The Arbitrator,[58] after examining the evidence, rejected the Peruvian contention, saying:

"It is manifest that if abuses of administration

[48] See Harvard Law School, *Research in International Law, III, Law of treaties*, pp. 1081-1083; McNair, op. cit., p. 553. C. Rousseau seems to have doubted whether customary law recognizes a right to denounce a treaty on the ground of the other party's non-performance, because claims to do so have usually been objected to; but for the reasons given in paragraph 2 this can hardly be regarded as sufficient evidence of the non-existence of any such customary rights.

[49] E.g., Hall, op. cit., p. 408; S. B. Crandall, *Treaties, their Making and Enforcement*, p. 456; A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1929-I), vol. 26, p. 535.

[50] See Oppenheim, op. cit., p. 947.

[51] E.g., McNair, op. cit., p. 571; C. C. Hyde, *International Law*, vol. 2, p. 1543; E. Giraud, op. cit., p. 28.

[52] See Harvard Law School, *Research in International Law, III, Law of Treaties* (Article 27), pp. 1077 and 1091-1092.

[53] Hackworth, *Digest of International Law*, vol. 5, pp. 342-348; Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1083-1090; McNair, op. cit., pp. 553-569; A. C. Kiss, *Répertoire français de droit international*, vol. 5, pp. 102-121; *Fontes Juris Gentium*, Series B, section 1, tomus I, part I (2), pp. 791-2.

[54] E.g., *Ware* v. *Hylton* (1796), 3 Dallas 261; *Charlton* v. *Kelly*, 229 U.S. 447; *Lepeschkin* v. *Gosweiler et Cie., Journal du droit international* (1924), vol. 51, p. 1136; *In re Tatarko, Annual Digest and Reports of Public International Law Cases*, 1949, No. 110, p. 314.

[55] *P.C.I.J.*, Series A/B, No. 70.

[56] *Ibid.*, p. 50; cf. Judge Hudson, pp. 76-77.

[57] *Reports of International Arbitral Awards*, vol. II, pp. 929 and 943-944.

[58] President Coolidge.

could have the effect of terminating such an agreement, *it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement*, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown."

This pronouncement seems to assume that only a "fundamental" breach of article 3 by Chile could have justified Peru in claiming to be released from its provisions.

(5) The Commission was agreed that a breach of a treaty, however serious, did not *ipso facto* put an end to a treaty, and also that it was not open to a State simply to allege a violation of the treaty and pronounce the treaty at an end. On the other hand, it considered that within certain limits and subject to certain safeguards the right of a party to invoke the breach of a treaty as a ground for terminating it or suspending its operation should be recognized. Some members considered that, in view of the risk of abuse, it would be dangerous for the Commission to endorse such a right, unless its exercise were to be made subject to control by compulsory reference to the International Court of Justice. Other members, while agreeing on the importance of providing proper safeguards against arbitrary denunciation of a treaty on the ground of an alleged breach, pointed out that the question of providing safeguards against arbitrary action was a general one which affected several articles and was taken up in article 51; at the same time, they drew attention to the difficulties standing in the way of any proposal to include a clause of compulsory jurisdiction in a general convention. The Commission decided to formulate in the present article the substantive conditions under which a treaty may be terminated or its operation suspended in consequence of a breach, and to deal with the question of the procedural safeguards in article 51. Some members, in agreeing to this decision, stressed that in their opinion the present article would only be acceptable, if the necessary procedural safeguards were provided in article 51.

(6) Paragraph 1 therefore provides that a "material" breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. The formula "invoke as a ground" is intended to underline that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated. If the other party contests the breach or its character as a "material" breach there will be a "difference" between the parties with regard to which the normal obligations incumbent upon the parties under the Charter and under general international law to seek a solution of the question by pacific means will apply. The Commission considered that the action open to the other party in the case of a material breach is either the termination or the suspension of the operation of the treaty in whole or in part. The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil obligations which the other party fails to fulfil. This right would, of course, be without prejudice to the injured party's right to present an international claim on the basis of the other party's responsibility with respect to the breach.

(7) Paragraph 2 covers the case of a material breach of a multilateral treaty and here the Commission considered that it was necessary to visualize two possible situations: (*a*) an individual party affected by the breach might react alone; or (*b*) the other parties to the treaty might join together in reacting to the breach. When an individual party reacts, the Commission considered that its position was similar to that in the case of a bilateral treaty, but that its right should be limited to suspending the operation of the treaty in whole or in part as between itself and the defaulting State. In the case of a multilateral treaty the interests of the other parties had to be considered, while a right of suspension provided adequate protection to the State directly affected by the breach. Moreover, the limitation of the right of the individual party to a right of suspension seemed particularly necessary having regard to the nature of the obligations contained in general multilateral treaties of a law-making character. Indeed, the question was raised as to whether even suspension would be admissible in the case of law-making treaties. It was pointed out, however, that it might be inequitable to allow a defaulting State to continue to enforce the treaty against the injured party, whilst itself violating its obligations towards that State under the treaty. Moreover, it had to be borne in mind that even such treaties as the Genocide Convention and the Geneva Conventions on the treatment of prisoners of war, sick, and wounded allowed an express right of denunciation. When the other parties to a multilateral treaty react jointly to a breach by one party, they obviously have the right to do jointly what each one may do severally, and may therefore jointly suspend the operation of the treaty with regard to the defaulting State. Equally, if a breach by one State frustrates or undermines the operation of the treaty as between all the parties, the others are entitled jointly to terminate or suspend the operation of the treaty in whole or in part.

(8) Paragraph 3 defines the kind of breach which may give rise to a right to terminate or suspend the treaty. Some authorities have in the past seemed to assume that any breach of any provision would suffice to justify the denunciation of the treaty. The Commission, however, was agreed that the right to terminate or suspend must be limited to cases where the breach was of a serious character. It preferred the term "material" to "fundamental" to express the kind of breach which is required. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character. Subparagraph (*a*) of the definition simply records that the repudiation of a treaty, which does not of itself terminate a treaty, is an act which the other party is entitled to regard as a "material" breach. The main definition is in sub-paragraph (*b*) under which a breach is "material" if the provision violated is one "essential to the effective execution of any of the objects or purposes of the treaty".

(9) Paragraph 4 subjects the provisions in the article concerning the partial termination of a treaty or partial suspension of its operation to the conditions governing the separability of treaty provisions specified in article 46. The Commission considered that this was necessary because even in the case of breach it would be wrong to hold the defaulting State afterwards to a truncated treaty the operation of which was grossly inequitable between the parties.

(10) Paragraph 5 merely reserves the rights of the parties under specific provisions of the treaty or of a related instrument which are applicable in the event of a breach.

Article 43

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty.

2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.

3. Under the conditions specified in article 46, if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only.

Commentary

(1) The present article concerns the termination of a treaty or the suspension of its operation in consequence of the fact that the total disappearance or destruction of its subject-matter has rendered its performance permanently or temporarily impossible. The next article concerns the termination of a treaty in consequence of a fundamental change in the circumstances existing at the time when it was entered into. Cases of supervening impossibility of performance are *ex hypothesi* cases where there has been a fundamental change in the circumstances existing at the time when the treaty was entered into. Some members of the Commission felt that it was not easy to draw a clear distinction between the types of cases dealt with in the two articles and were in favour of amalgamating them. The Commission, however, considered that juridically "impossibility of performance" and a "fundamental change of circumstances" are distinct grounds for regarding a treaty as having been terminated, and should be kept separate. Although it was true that there might be borderline cases in which the two articles tended to overlap, the criteria to be employed in applying the articles were not the same, and to combine them might lead to misunderstanding. "Impossibility of performance" was therefore kept distinct in the present article as a specific and separate ground for invoking the termination of a treaty.

(2) Paragraph 1 provides that the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty may be invoked as putting an end to the treaty. This may happen either through the disappearance or destruction of the physical subject-matter of the treaty or of a legal situation which was the *raison d'être* of the rights and obligations contained in the treaty. Practice furnishes few examples of impossibility relating to the physical subject-matter of the treaty; but the type of case envisaged by the article is the submergence of an island, the drying up of a river, the destruction of a railway, hydro-electric installation, etc. by an earthquake or other disaster. As to impossibility resulting from the disappearance of the legal subject-matter of the treaty rights and obligations, an example is treaty provisions connected with the operation of capitulations which necessarily fall to the ground with the disappearance of the capitulations themselves. The dissolution of a customs union might similarly render further performance of treaties relating to its operation impossible.

(3) Most authorities cite the total extinction of the international personality of one of the parties to a bilateral treaty as an instance of impossibility of performance. After discussion, however, the Commission decided against including the point in the present article, at any rate at the present stage of its work. It considered that it would be very misleading to formulate a provision concerning the extinction of the international personality of a party without at the same time dealing with, or at least reserving, the question of the succession of States to treaty rights and obligations. But the question of succession is a complex one which is already under separate study in the Commission and it was thought to be inadvisable to prejudge in any way the outcome of that study by attempting to formulate in the present article the conditions under which the extinction of the personality of one of the parties would bring about the termination of a treaty. If, on the other hand, the question of State succession were merely to be reserved by some such phrase as "subject to the rules governing State succession in the matter of treaties", a provision stating that the "extinction of a party could be invoked as terminating the treaty" would serve little purpose. For the time being, therefore, extinction of the international personality of a party was omitted from the article, and it was noted that the point should be reconsidered when the Commission's work on State succession was further advanced.

(4) Impossibility of performance, as a ground for the termination of the treaty under this article, is something which comes about through events which occur outside the treaty; and the treaty is sometimes referred to as terminating by operation of law independently of any action of the parties. The Commission recognized that in cases under this article, unlike cases of breach, the ground of termination, when established, might be considered to have automatic effects on the validity of the treaty. But in drawing up the article it felt bound to cast the rule in the form not of a provision automatically terminating the treaty but of one entitling the parties to invoke the impossibility of performance as a ground for terminating the treaty. The difficulty is that disputes may arise as to whether a total disappearance or destruction of the subject-matter of the treaty has in fact occurred, and in the absence of compulsory jurisdiction it would be inadvisable to adopt, without any qualification, a rule bringing about the automatic abrogation of the treaty by operation of law. Otherwise, there would be a risk of arbitrary assertions of a supposed impossibility of performance as a mere pretext for repudiating a treaty. For this reason, the Commission considered it necessary to formulate the article in terms of a right to invoke the impossibility of performance as a ground for terminating the treaty and to make this right subject to the procedural requirements of article 51.

(5) Paragraph 2 provides that if it is not clear that the impossibility is to be permanent, it may be invoked only as a ground for suspending the operation of the treaty. These cases might simply be treated as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance. But where there is a continuing impossibility of performance of continuing obligations it seems better to recognize that the treaty may be suspended.

(6) Paragraph 3 applies the principle of the separability of treaty provisions to cases of impossibility of performance. Where the impossibility is only partial, the Commission considered that the separation of those parts of the treaty which had been rendered impossible of performance from the remainder of the treaty would

be entirely appropriate and desirable, if the conditions for the separability of treaty provisions set out in article 46 existed in the case.

Article 44

Fundamental change of circumstances

1. 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.

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(*a*) The existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(*b*) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 above does not apply:

(*a*) To a treaty fixing a boundary; or

(*b*) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

4. Under the conditions specified in article 46, if the change of circumstances referred to in paragraph 2 above relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only.

Commentary

(1) Almost all modern writers,[59] however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*. Just as many systems of municipal law recognize that, quite apart from any actual *impossibility* of performance, contracts may become inapplicable through a fundamental change of circumstances, so also, it is held, international law recognizes that treaties may cease to be binding upon the parties for the same reason. Most writers, however, at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are perhaps more serious than in the case of any other ground either of invalidity or of termination. The circumstances of international life are always changing and it is all too easy to find some basis for alleging that the changes have rendered the treaty inapplicable.

(2) The evidence of the recognition of the principle as a rule of customary law is considerable, even if it be true that the Court has not yet committed itself on the point. In the *Free Zones* case,[60] having held that the facts did not in any event justify the application of the doctrine, the Permanent Court expressly reserved its position. It observed that it became unnecessary for it to consider "any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the methods by which effect can be given to the theory, if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816". On the other hand, it can equally be said that the Court has never on any occasion[61] rejected the principle and that in the passage just quoted it even seems to have assumed that the doctrine is to some extent admitted in international law.

(3) Municipal courts, on the other hand, have not infrequently recognized the relevance of the principle in international law, though for one reason or another they have always ended by rejecting the application of it in the particular circumstances of the case before them.[62] These cases contain the propositions that the principle is limited to changes in circumstances the continuance of which, having regard to the evident intention of the parties at the time, was regarded as a tacit condition of the agreement,[63] that the treaty is not dissolved automatically by law upon the occurrence of the change but only if the doctrine is invoked by one of the parties;[64] and that the doctrine must be invoked within a reasonable time after the change in the circumstances was first perceived.[65] Moreover, in *Bremen* v. *Prussia*[66] the German Reichsgericht, while not disputing the general relevance of the doctrine, considered it altogether inapplicable to a case where one party was seeking to release itself not from the whole treaty but only from certain restrictive clauses which had formed an essential part of an agreement for an exchange of territory.

(4) The principle of *rebus sic stantibus* has not infrequently been invoked in State practice either *eo nomine* or in the form of a reference to a general principle claimed to justify the termination or modification of treaty obligations by reason of changed circumstances. Detailed examination of this State practice is not possible in the present Report.[67] Broadly speaking, it shows a wide acceptance of the view that a fundamental

[59] E.g., Oppenheim, op. cit., vol. I, pp. 938-944; McNair, op cit., pp. 681-691; F. I. Kozhevnikov, *International Law* (Academy of Sciences of the USSR), p. 281; C. Rousseau, *Principes généraux du droit international public*, tome I, pp. 580-615; Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1096-1126; Chesney Hill, *The Doctrine of* Rebus Sic Stantibus. University of Missouri Studies (1934).

[60] *P.C.I.J.*, Series A/B, No. 46, pp. 156-158.

[61] E.g., in the *Nationality Decrees* Opinion (P.C.I.J., Series B, No. 4, p. 29), where it merely observed that it would be impossible to pronounce upon the point raised by France regarding the "principle known as the *clausula rebus sic stantibus*" without recourse to the principles of international law concerning the duration of treaties.

[62] E.g., *Hooper* v. *United States*, Hudson, *Cases on International Law*, Second Edition, p. 930; *Lucerne* v. *Aargau* (1888), *Arrêts du Tribunal fédéral suisse*, vol. 8, p. 57; *In re Lepeschkin*, *Annual Digest of Public International Law Cases*, 1923-1924, Case No. 189; *Bremen* v. *Prussia*, *Ibid.*, 1925-1926, Case No. 266; *Rothschild and Sons* v. *Egyptian Government*, *Ibid.*, 1925-1926, Case No. 14; *Canton of Thurgau* v. *Canton of St. Gallen*, *Ibid.*, 1927-1928, Case No. 289; *Bertaco* v. *Bancel*, *Ibid.*, 1935-1937, Case No, 201; *Stransky* v. *Zivnostenska Bank*, *International Law Reports*, 1955, pp. 424-427.

[63] *Lucerne* v. *Aargau*; *Canton of Thurgau* v. *Canton of St. Gallen*; *Hooper* v. *United States*.

[64] *In re Lepeschkin*; *Stransky* v. *Zivnostenska Bank*.

[65] *Canton of Thurgau* v. *Canton of St. Gallen*.

[66] *Annual Digest of Public International Law Cases*, 1925-1926, Case No. 266.

[67] See the accounts of the State practice in Chesney Hill, op. cit., pp. 27-74; C. Kiss, op. cit., pp. 381-393; C. Rousseau, op. cit., pp. 594-615; Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1113-1124; H. W. Briggs, *A.J.I.L.* 1942, pp. 89-96, and 1949, pp. 762-769.

change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground. The most significant indications as to the attitude of States regarding the principle are perhaps to be found in statements submitted to the Court in the cases where the doctrine has been invoked. In the *Nationality Decrees* case the French Government contended that "perpetual" treaties are always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over Morocco had for that reason had the effect of extinguishing certain Anglo-French treaties.[68] The British Government, while contesting the French Government's view of the facts, observed that the most forceful argument advanced by France was that of *rebus sic stantibus*.[69] In the case concerning *The Denunciation of the Sino-Belgian Treaty of 1865*, China invoked, in general terms, changes of circumstances as a justification of her denunciation of a sixty-year-old treaty, and supported her contention with a reference to Article 19 of the Covenant of the League of Nations.[70] This Article, however, provided that the Assembly of the League should "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable", and the Belgian Government replied that neither Article 19 nor the doctrine of *rebus sic stantibus* contemplated the unilateral denunciation of treaties. It further maintained that there could be no question of China's denouncing the treaty because of a change of circumstances unless she had at least tried to obtain its revision through Article 19; that where both parties were subject to the Court's jurisdiction, the natural course for China, in case of dispute, was to obtain a ruling from the Court; and that if she did not, she could not denounce the treaty without Belgium's consent.[71] In the *Free Zones* case[72] the French Government, the Government invoking the *rebus sic stantibus* principle, itself emphasized that it does not allow unilateral denunciation of a treaty claimed to be out of date. It argued that the doctrine would cause a treaty to lapse only *"lorsque le changement de circonstances aura été reconnu par un acte faisant droit entre les deux Etats intéressés"*; and it further said: *"cet acte faisant droit entre les deux Etats intéressés peut être soit un accord, lequel accord sera une reconnaissance du changement des circonstances et de son effet sur le traité, soit une sentence du juge international compétent s'il y en a un"*.[73] Switzerland, emphasizing the differences of opinion amongst writers in regard to the principle, disputed the existence in international law of any such right to the termination of a treaty because of changed circumstances enforceable through the decision of a competent tribunal. But she rested her case primarily on three contentions: (*a*) the circumstances alleged to have changed were not circumstances on the basis of whose continuance the parties could be said to have entered into the treaty; (*b*) in any event, the doctrine does not apply to treaties creating territorial rights; and (*c*) France had delayed unreasonably long after the alleged changes of circumstances had manifested themselves.[74] France does not appear to have disputed that the doctrine is inapplicable to territorial rights; instead, she drew a distinction between territorial rights and "personal" rights created on the occasion of a territorial settlement.[75] The Court upheld the Swiss Government's contentions on points (*a*) and (*c*), but did not pronounce on the application of the *rebus sic stantibus* principle to treaties creating territorial rights.

(5) The principle has also sometimes been invoked in debates in political organs of the United Nations, either expressly or by implication. In 1947, for example, when Egypt referred the question of the continued validity of the Anglo-Egyptian Treaty to the Security Council, the United Kingdom delegates interpreted the Egyptian case as being one based on the *rebus sic stantibus* principle. The existence of the principle was not disputed, though emphasis was placed on the conditions restricting its application. The Secretary-General also, in a study of the validity of the minorities treaties concluded during the League of Nations era, while fully accepting the existence of the principle in international law, emphasized the exceptional and limited character of its application.[76]

(6) Some members of the Commission expressed doubts as to how far the principle could be regarded as an already accepted rule of international law; and many members emphasized the dangers which the principle involved for the security of treaties unless the conditions for its application were closely defined and adequate safeguards were provided against its arbitrary application. The Commission, however, concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty might remain in force for a long time and its stipulations come to place an undue burden on one of the parties. Then, if the other party were obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties might impose a serious strain on the regulations between the States concerned; and the dissatisfied State might ultimately be driven to take action outside the law. The number of such cases was likely to be comparatively small. As pointed out in the commentary to article 38, the majority of modern treaties were expressed to be of short duration, or were entered into for recurrent terms of years with a right to break the treaty at the end of each term, or were expressly or implicitly terminable upon notice. In all these cases either the treaty expires automatically or each party, having the power to terminate the treaty, had the power also to apply pressure upon the other party to revise its provisions. Nevertheless, there remained a residue of cases in which, failing any agreement, one party might be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It was in these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law was so considerable that it seemed to indicate a recognition of a need for this safety-valve in the law of treaties.

(7) In the past the principle has almost always been presented in the guise of a tacit condition implied in every "perpetual" treaty that would dissolve it in the

[68] *P.C.I.J.*, Series C, No. 2, pp. 187-188.
[69] *Ibid.*, pp. 208-209.
[70] *Ibid.*, No. 16, I., p. 52.
[71] *Ibid.*, pp. 22-23; the case was ultimately settled by the conclusion of a new treaty.
[72] *Ibid.*, Series A/B, No. 46.
[73] *Ibid.*, Series C, No. 58, pp. 578-579, 109-146, and 405-415; see also Series C, No. 17, I, pp. 89, 250, 256, and 283-284.
[74] *Ibid.*, Series C, No. 58, pp. 463-476.
[75] *Ibid.*, pp. 136-143.
[76] E/CN.4/367, p. 37.

event of a fundamental change of circumstances. The Commission noted, however, that the tendency today was to regard the implied term as only a fiction by which it was attempted to reconcile the principle of the dissolution of treaties in consequence of a fundamental change of circumstances with the rule *pacta sunt servanda*.[77] In most cases the parties gave no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner. Furthermore, the Commission considered the fiction to be an undesirable one since it increased the risk of subjective interpretations and abuse. For this reason, the Commission was agreed that the theory of an implied term must be rejected and the doctrine formulated as an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty. It further decided that, in order to emphasize the objective character of the rule, it would be better not to use the term "*rebus sic stantibus*" either in the text of the article or even in the title, and so avoid the doctrinal implication of that term.

(8) The Commission also recognized that many authorities have in the past limited the application of the principle to so-called perpetual treaties, that is, to treaties not making any provision for their termination. The reasoning by which this limitation of the principle was supported by these authorities did not, however, appear to the Commission to be convincing. When a treaty had been given a duration of ten, twenty, fifty or ninety-nine years, it could not be excluded that a fundamental change of circumstances might occur which radically affected the basis of the treaty. The cataclysmic events of the present century showed how fundamentally circumstances may change within a period of only ten or twenty years. If the doctrine were regarded as an objective rule of law founded upon the equity and justice of the matter, there did not seem to be any reason to draw a distinction between "perpetual" and "long term" treaties. Moreover, practice does not altogether support the view that the principle was confined to "perpetual" treaties.[78] Some treaties of limited duration actually contained what were equivalent to *rebus sic stantibus* provisions.[79] The principle had also been invoked sometimes in regard to limited treaties as, for instance, in the resolution of the French Chamber of Deputies of 14 December 1932 expressly invoking the principle of *rebus sic stantibus* with reference to the Franco-American war debts agreement of 1926.[80] The Commission accordingly decided that the rule should be framed in the present article as one of general application, though for obvious reasons it would seldom or never have relevance for treaties of limited duration or which are terminable upon notice.

(9) Paragraph 1 has as its object to emphasize that it is not any change in the circumstances existing when the treaty was entered into that may be invoked as a ground for terminating a treaty, but only one which fulfils the conditions laid down in paragraph 2. Many members of the Commission regarded the rule contained in this article, even when strictly defined, as representing a danger to the security of treaties. These members considered it essential to underline the exceptional character of the application of the rule, and some of them were in favour of using an even stronger formula. Certain other members, while recognizing the need to define the conditions for the application of the article with precision, regarded it rather as expressing a principle of general application which has an important role to play in bringing about a modification of out-of-date treaty situations in a rapidly changing world.

(10) Paragraph 2 defines the changes of circumstances which may be invoked as a ground for the termination of a treaty or for withdrawing from a multilateral treaty. The change must relate to a fact or situation which existed at the time when the treaty was entered into and must be a "fundamental" one in the sense that: (*a*) "the existence of the fact or situation constituted an essential basis of the consent of the parties to the treaty", and (*b*) "the effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty". The Commission gave the closest consideration to the formulation of these conditions. It attached great importance in expressing them in objective terms, while at the same time making it clear that the change must be one affecting the essential basis of the consent of the parties to the treaty. Certain members felt that general changes of circumstances quite outside the treaty might bring the article into operation. But the Commission decided that such general changes could only be invoked as a ground for terminating the treaty if their effect was to alter a fact or situation constituting an essential basis of the parties' consent to the treaty.

(11) Certain members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty. They represented that, if this were not the case, the security of treaties might be gravely prejudiced by recognition of the principle in the present article. Other members, while not dissenting from the view that mere changes of policy on the part of a government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that a change of policy could never in any circumstances be invoked as a ground for terminating a treaty. They instanced a treaty of alliance as a possible case where a radical change of political alignment by the government of a country might make it unacceptable, from the point of view of both parties, to continue with the treaty. The Commission, considering that the definition of a "fundamental change of circumstances" in paragraph 2 should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change of policy, decided that it was unnecessary to go further into the matter in formulating the article.

(12) Paragraph 3 excepts from the operation of the article two cases which gave rise to some discussion. The first concerns treaties fixing a boundary, which both States concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most writers. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go

[77] C. Rousseau, op. cit., p. 584; Sir John Fischer Williams, *A.J.I.L.*, 1928, pp. 93-94; C. De Visscher, *Théories et réalités en droit international public*, p. 391; J. Basdevant, "Règles générales du droit de la paix", *Recueil des Cours 1936*, vol. IV, pp. 653-654; Sir Gerald Fitzmaurice, Second report, *Yearbook of the International Law Commission, 1957*, vol. II, para. 149.

[78] C. Rousseau, op. cit., p. 586.

[79] E.g., art. 21 of the Treaty on Limitation of Naval Armament, signed at Washington, 6 February 1922 (Hudson, *International Legislation*, vol. II, p. 820); art. 26 of the Treaty for the Limitation of Naval Armament, signed at London, 25 March 1936 (*ibid.*, vol. VII, p. 280); and Convention regarding the régime of the Straits, signed at Montreux, 20 July 1936 (*L.N.T.S.*, vol. 173, p. 229).

[80] For the text of the resolution, see C. Kiss, op. cit., pp. 384-385.

too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties fixing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter, was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties fixing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed.

(13) The second exception—in sub-paragraph 3(*b*)—is cases where the parties have foreseen the change of circumstances and have made provision for it in the treaty itself. In the discussion of this article some members of the Commission expressed the view that the principle contained in this article is one which, under general international law, the parties may not exclude altogether by a provision in the treaty. According to these members, the parties may make express provision for a change which they contemplate may happen, but are not entitled simply to negative the application of the present article to the treaty. Other members doubted whether the freedom of States to make their own agreement on this point could or should be limited in this way. The Commission, without taking any position on this question, excepted from the article "changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself".

(14) Paragraph 4 makes the principle of the separability of treaty provisions applicable to this article. Where the change of circumstances relates to particular clauses only of the treaty, it seemed to the Commission appropriate, for the same reasons as in the case of supervening impossibility of performance, to allow the severance of those clauses from the rest of the treaty under the conditions laid down in article 46.

(15) In the discussion of this article, as in the discussion of article 42, many members of the Commission stressed the importance which they attached to the provision of adequate procedural safeguards against arbitrary action as an essential basis for the acceptance of the article.

Article 45

Emergence of a new peremptory norm of general international law

1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in article 37 is established and the treaty conflicts with that norm.

2. Under the conditions specified in article 46, if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void.

Commentary

(1) The rule formulated in this article is the logical corollary of the rule in artice 37 under which a treaty is void if it conflicts with a "peremptory norm of general international law from which no derogation is permitted". Article 37, as explained in the commentary to it, is based upon the hypothesis that in international law today there are a certain number of fundamental rules of international public order from which no State may derogate even by agreement with another State. Manifestly, if a new rule of that character—a new rule of *jus cogens*—is established either by general multilateral treaty or by the development of a new customary rule, its effect must be to render void not only future but existing treaties. This follows from the fact that it is an overriding rule of public order depriving any act or situation which is in conflict with it of legality. An example would be former treaties regulating the slave trade, the performance of which later ceased to be compatible with international law owing to the general recognition of the total illegality of all forms of slavery.

(2) The Commission discussed whether to include this rule in article 37, but decided that it should be placed among the articles concerning the termination of treaties. Although the rule operates to deprive the treaty of validity, its effect is not to render it void *ab initio*, but only from the date when the new rule of *jus cogens* is established; in other words it does not nullify the treaty, it forbids its further performance. It is for this reason that paragraph 1 provides that the treaty "becomes void when a new peremptory norm . . .".

(3) Paragraph 2 provides that, subject to the conditions for the separability of treaty provisions laid down in article 46, if only certain clauses of the treaty are in conflict with the new rule of *jus cogens*, they alone are to become void. Although the Commission did not think that the principle of separability was appropriate when a treaty was rendered void *ab initio* under article 37 by an existing rule of *jus cogens*, it felt that different considerations applied in the case of a treaty which had been entirely valid when concluded but was now found in some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions could properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid.

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

1. Except as provided in the treaty itself or in articles 33 to 35 and 42 to 45, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

2. The provisions of articles 33 to 35 and 42 to 45 regarding the partial nullity, termination or suspension of the operation of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

(*a*) The clauses in question are clearly severable from the remainder of the treaty with regard to their application; and

(*b*) It does not appear either from the treaty or from statements made during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treaty as a whole.

Commentary

(1) A number of the articles in sections II and III provide explicitly for the possibility of limiting a claim to invoke the nullity of a treaty or a ground of termina-

tion to particular clauses only of the treaty. In each case reference is made to the conditions for the separability of treaty provisions specified in the present article. As the proposals of the Commission concerning the right to claim the partial nullity or termination of a treaty are to some extent *de lege ferenda,* the Commission considers it desirable to make certain general observations on the question before commenting upon the article.

(2) The separability of treaty provisions was until comparatively recently considered almost exclusively in connexion with the right to terminate a treaty on the ground of a breach of the other party. Certain modern authorities,[81] however, have advocated recognition of the principle of separability in cases of invalidity and in determining the effect of war upon treaties. They have urged that in some cases one provision of a treaty may be struck out or suspended without necessarily disturbing the balance of the rights and obligations established by the other provisions of the treaty and without destroying one of the considerations which induced the parties to accept the treaty as a whole. These authorities cite in support of their contentions certain pronouncements of the Permanent Court of International Justice in regard to the interpretation of self-contained parts of treaties.[82]

(3) The question of the separability of treaty provisions for the purposes of interpretation raises quite different issues from the application of the principle of separability to the nullity or termination of treaties. However, if the jurisprudence of the two Courts does not throw much light on these latter questions, it is clear that certain judges in separate opinions in the *Norwegian Loans* and *Interhandel* cases accepted the applicability of the principle of separating treaty provisions in the case of the alleged nullity of a unilateral Declaration under the Optional Clause, by reason of a reservation the validity of which was contested.

(4) The authorities being by no means conclusive, the Commission decided that it should examine *de novo* the appropriateness and utility of recognizing the principle of separability of treaty provisions in the context of the nullity and termination of treaties. The Commission further decided that in order to determine the appropriateness of applying the principle in these contexts it was essential to examine each article in turn, since different considerations might well apply in the various articles. The Commission concluded that, for reasons which have already been given in the commentary to each article, the application of the principle would be appropriate and serve a useful purpose in regard to articles 33 (fraud), 34 (error), 35 (personal coercion), 42 (breach), 43 (impossibility of performance), 44 (change of circumstances) and 45 (supervening rule of *jus cogens*). But it also concluded that this would only be acceptable if the conditions under which the principle might legitimately be invoked in any given case were defined with some strictness. The sole purpose of the present article is to define those conditions.

(5) Paragraph 1 of the article makes it clear that the general rule is that the nullity or termination of a treaty or the suspension of its operation relates to the treaty as a whole. This rule is subject, first, to any provisions in the treaty allowing the separation of its provisions and, secondly, to the special provisions contained in the above-mentioned articles. Treaties, more especially multilateral treaties, which admit the acceptance of part only of the treaty or which allow partial withdrawal from the treaty or suspension of the operation of only one part are not uncommon; and their provisions, so far as they are applicable, necessarily prevail.

(6) Paragraph 2 sets out the basic conditions to which the application of the principle of separability is subject in each of the articles where it is allowed, and they are two-fold. First, the clauses to be dealt with separately must be clearly severable from the rest of the treaty with regard to their operation. In other words, the severance of the treaty must not interfere with the operation of the remaining provisions. Secondly, it must not appear from the treaty or from the statements during the negotiations that acceptance of the severed clauses was an essential condition of the consent of the parties to the treaty as a whole. In other words, acceptance of the severed clauses must not have been so linked to acceptance of the other parts that, if the severed parts disappear, the basis of the consent of the parties to the treaty as a whole also disappears.

Article 47

Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty

A right to allege the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under articles 32 to 35 and 42 and 44 shall no longer be exercisable if, after becoming aware of the facts giving rise to such right, the State concerned shall have:

(*a*) Waived the right; or

(*b*) So conducted itself as to be debarred from denying that it has elected in the case of articles 32 to 35 to consider itself bound by the treaty, or in the case of articles 42 and 44 to consider the treaty as unaffected by the material breach, or by the fundamental change of circumstances, which has occurred.

Commentary

(1) The foundation of the principle that a party is not permitted to benefit from its own inconsistencies is essentially good faith and fair dealing (*allegans contraria non audiendus est*). The relevance of this principle in international law is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases.[83]

(2) The principle is one of general application which is not confined to the law of treaties.[84] Nevertheless, it does have a particular importance in this branch of international law. As already mentioned in previous commentaries, the grounds upon which treaties may be invalidated under section II or terminated under section III involve certain risks of abusive claims to allege the nullity or termination of treaties. Another risk is that a State, after becoming aware of an essential error in the conclusion of the treaty, an excess of authority

[81] See Harvard Law School, *Research in International Law, III, Law of Treaties,* art. 30, pp. 1134-1139; McNair, *Law of Treaties (1961)*, chapter 28.

[82] E.g., the *Free Zones Case,* Series A/B, No. 46, p. 140; the *Wimbledon Case,* Series A, No. 1, p. 24.

[83] *The Arbitral Award made by the King of Spain, I.C.J. Reports, 1960,* pp. 213-214; *The Temple of Preah Vihear, I.C.J. Reports, 1962,* pp. 23-32.

[84] See generally D. W. Bowett, *British Yearbook of International Law, 1957,* pp. 176-202; Bin Cheng, *General Principles of Law,* pp. 141-149; Judges Alfaro and Fitzmaurice in *The Temple of Preah Vihear, I.C.J. Reports, 1962,* pp. 39-51, 62-65.

committed by its representative or a breach by the other party etc., may continue with the treaty as if nothing had happened and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. Indeed, it may seek in this way to resuscitate an alleged ground of invalidity or of termination long after the event upon the basis of arbitrary or controversial assertions of fact. The principle now under consideration does place a limit upon the cases in which such claims can be asserted with any appearance of legitimacy. Such indeed was the role played by the principle in the *Temple* case and in the case of the *Arbitral Award of the King of Spain*. Accordingly, while recognizing the general character of the principle, the Commission considered that its particular importance in the sphere of the invalidity and termination of treaties called for its mention in this part of the law of treaties.

(3) "Waiver", although not identical with the general principle of law discussed in the preceding paragraphs of this commentary, is connected with it; indeed some cases of the application of that general principle can equally be viewed as cases of implied waiver. The Commission, therefore, considered it appropriate to include "waiver" in the present article together with the general principle of law.

(4) The article accordingly provides that the right to invoke the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under certain articles shall no longer be exercisable if the State concerned shall have either: (*a*) waived its right or (*b*) shall have so conducted itself that it is debarred from asserting the right by reason of the principle that it may not take up a legal position which is in contradiction with its own previous representations or conduct. The essence of the matter is that the State in question so conducts itself as to appear to have elected, in cases of nullity under articles 32-35, to consider itself bound by the treaty, or in cases of termination under articles 42 and 44, to consider the treaty unaffected by the breach or change of circumstances.

(5) The Commission noted that the application of the principle in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith. This being so, the principle would not operate if the State in question had not been aware of the facts giving rise to the right or had not been in a position freely to exercise its right to invoke the nullity of the treaty as the ground of termination. The Commission further noted that in municipal systems of law this general principle has its own particular manifestations reflecting technical features of the particular system. It felt that these technical features of the principle in municipal law might not necessarily be appropriate for the application of the principle in international law. For this reason, it preferred to avoid the use of such municipal law terms as "*préclusion*" or "estoppel" and to speak simply of the State being "debarred" from denying that it has elected to consider itself as bound by the treaty or to consider the treaty in force.

(6) The Commission did not think it appropriate that the principle should be admitted in cases of "coercion" or "*jus cogens*" or in cases of "impossibility of performance" or of "supervening *jus cogens*"; and, clearly, it would not be applicable to termination under a right conferred by the treaty or to termination by agreement. Consequently, the operation of the principle was confined to articles 32-35 and 42 and 44.

Article 48

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

Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provisions of part II, section III, shall be subject to the established rules of the organization concerned.

Commentary

(1) The application of the law of treaties to the constituent instruments of international organizations and to treaties drawn up within an organization inevitably has to take account also of the law governing each organization. Thus, in formulating the rules governing the conclusion of treaties in part I, the Commission found it necessary in certain contexts to draw a distinction between these and other kinds of multilateral treaties and also in a few instances to distinguish treaties drawn up under the auspices of an international organization and treaties drawn up at a conference convened by the States concerned. In the present part the Commission did not think it necessary to make any particular provision for these special categories of treaties with regard to the articles contained in section II which deal with the grounds of the invalidity of treaties. The principles embodied in that section appeared by their very nature not to require modification for the purposes of being applied to the constituent treaties of organization or to treaties drawn up within or under the auspices of international organizations.

(2) On the other hand, it appeared to the Commission that certain of the articles in section III concerning the termination or suspension of the operation of treaties and withdrawal from multilateral treaties might encroach upon the internal law of international organizations to a certain extent, more especially in relation to withdrawal from the organization, and termination and suspension of membership. Accordingly, the present article provides that the application of the provisions of section III to constituent instruments and to treaties drawn up "within" an organization shall be subject to the "established rules" of the organization concerned. The term "established rules of the organization" is intended here, as in article 18, paragraph 1 (*a*), to embrace not only the provisions of the constituent instrument or instruments of the organization but the customary rules developed in its practice.

(3) The phrase treaty "drawn up within an international organization", which also appears in certain articles of part I, covers treaties, such as the international labour conventions, the texts of which are drawn up and adopted by an organ of the organization concerned, but not treaties drawn up "under the auspices" of an organization in a diplomatic conference convened by the organization. The latter category of treaties, in the opinion of the Commission, is as fully subject to all the provisions of the present part as are general multilateral treaties drawn up in conferences convened by the States concerned. Admittedly, there are a few treaties, like the Genocide Convention and the Convention on the Political Rights of Women, which were drawn up "within" an organization but the application of which is not particularly affected by the law of the organization. As, however, the present article does not exclude these treaties from the application of the provisions of section

III, but only makes the application of those provisions subject to the law of the organization concerned, it was not considered necessary to qualify the phrase "drawn up within an organization" for the purposes of the present article.

SECTION V: PROCEDURE

Article 49

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

The rules contained in article 4 relating to evidence of authority to conclude a treaty also apply, *mutatis mutandis,* to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation.

Commentary

Article 4 sets out the rules governing the cases in which organs or representatives of States may be required to furnish evidence of their authority to conclude a treaty. Competence under international law to invoke or establish the nullity of a treaty or to invoke a ground terminating, withdrawing from or suspending the operation of a treaty or to effect these acts is of the same nature as competence to conclude treaties, and it is normally exercised by corresponding State organs or representatives. Similarly, when an organ or representative of a State purports to exercise that competence, the other parties to the treaty are concerned to know that it or he possesses the necessary authority to do so. Accordingly, it seems both logical and necessary that the rules concerning the furnishing of evidence of authority contained in article 4 should also apply, *mutatis mutandis,* to organs or representatives purporting to perform acts on behalf of their States with regard to the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty; and the present article so provides.

Article 50

Procedure under a right provided for in the treaty

1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect.

Commentary

(1) This article concerns the procedure for exercising a power of termination, withdrawal or suspension conferred which is expressed or implied in the treaty. The procedural act required is a notification and this is usually given in writing. If difficulties are to be avoided, it is essential that the notice should not only emanate from an authority competent for the purpose under the previous article, but should also be the subject of an official communication to the other interested States. It goes without saying that the notification should conform to any conditions laid down in the treaty itself; e.g. the condition frequently found in treaties for recurrent periods of years that notice must be given not less than six months before the end of one of the periods.

(2) Paragraph 1 accordingly provides that a notice of termination etc. should be formally communicated to all the other parties either directly or through the depositary. It sometimes happens that in moments of tension the termination of a treaty or a threat of its termination may be made the subject of a public utterance not addressed to the State concerned. But it is clearly essential that such statements, at whatever level they are made, should not be regarded as a substitute for the formal act which diplomatic propriety and legal regularity require.

(3) Paragraph 2 deals with a small point of substance in that it provides that a notice of termination etc. may be revoked at any time before the date on which it takes effect. Thus, if a treaty is subject to termination by giving six months notice, a notice given under the treaty may be revoked at any time before the expiry of the six months period makes it effective. A query was raised in the Commission as to a possible need to protect the interests of the other parties to the treaty, should they have changed their position by taking preparatory measures in anticipation of the State's ceasing to be a party. The Commission, however, considered that the right to revoke the notice was really implicit in the provision that it was not to become effective until after the expiry of a certain period. The other parties would be aware that the notice was not to become effective until after the expiry of the period specified and would, no doubt, take that fact into account in any preparations which they might make.

Article 51

Procedure in other cases

1. A party alleging the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty, shall be bound to notify the other party or parties of its claim. The notification must:

(*a*) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(*b*) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

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

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

5. Subject to article 47, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking 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 a violation of the treaty.

Commentary

(1) As already mentioned in previous commentaries, many members of the Commission regarded the present

article as in some ways a key article for the application of the provisions of part II, sections II and III, of the law of treaties. They thought that some of the grounds upon which treaties may be considered invalid or terminated under those sections, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real danger for the security of treaties. These dangers were, they felt, particularly serious in regard to claims to denounce or withdraw from a treaty by reason of an alleged breach by the other party or by reason of a fundamental change of circumstances. In order to minimize these dangers the Commission has sought to define as precisely and as objectively as possible the conditions under which the various grounds may be invoked. But whenever a party to a treaty invokes one of these grounds, the question whether or not its claim is justified will nearly always turn upon facts the determination or appreciation of which may be controversial. Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity or termination of a treaty may be arbitrarily asserted on the basis of the provisions of sections II and III as a mere pretext for getting rid of an inconvenient obligation.

(2) States in the course of disputes have not infrequently used language in which they appeared to maintain that the nullity or termination of a treaty could not be established except by consent of both parties. This presentation of the matter, however, subordinates the application of the principles governing the invalidity and termination of treaties to the will of the objecting State no less than the arbitrary assertion of the nullity or termination of a treaty subordinates their application to the will of the claimant State. The problem is, of course, the familiar one of the settlement of differences between States. In the case of treaties there is the special consideration that the parties by negotiating and concluding the treaty have brought themselves into a relationship in which there are particular obligations of good faith. Some members of the Commission were strongly in favour of recommending that the application of the present articles should be made subject to compulsory judicial settlement by the International Court of Justice, if the parties did not agree upon another means of settlement. Other members, however, pointed out that the Geneva Conventions on the Law of the Sea and the two Vienna Conventions respectively on Diplomatic and on Consular Relations did not provide for compulsory jurisdiction. While not disputing the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles, these members expressed the view that in the present state of international practice it would not be realistic for the Commission to put forward this solution of the procedural problem.

(3) After giving prolonged consideration to the question, the Commission concluded that its appropriate course was, first, to provide a procedure requiring a party which invoked the nullity of a treaty or a ground for terminating it to notify the other parties and give them a proper opportunity to state their views, and then, in the event of an objection being raised by the other party, to provide that the solution of the question should be sought through the means indicated in Article 33 of the Charter. In other words, the Commission considered that in dealing with this problem it should take as its basis the general obligation of States under international law to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" which is enshrined in Article 2, paragraph 3 of the Charter and the means for the fulfilment of which are indicated in Article 33 of the Charter.

(4) Paragraph 1 accordingly provides that a party "alleging" the nullity of the treaty or a ground for terminating it or suspending its operation shall put in motion a regular procedure under which it must first notify the other parties of its claim. In doing so it must indicate the measure which it proposes to take with respect to the treaty and the grounds upon which the claim is based, and must give the other parties a reasonable period within which to reply. Except in cases of special urgency, the period must not be less than three months. The second stage of the procedure depends on whether or not objection is raised by any party. If there is none or there is no reply before the expiry of the period, the party may take the measure proposed. If, on the other hand, objection is raised, the parties are required to seek a solution of the question through the means indicated in Article 33 of the Charter. The Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution of the question at issue between the parties. If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each government to appreciate the situation and to act as good faith demands. There would also remain the right of every State, whether or not a Member of the United Nations, under certain conditions, to refer the dispute to the competent organ of the United Nations.

(5) Even if, for the reasons previously mentioned in this commentary, the Commission felt obliged not to go beyond Article 33 of the Charter in providing for procedural checks upon arbitrary action, it considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity and termination of treaties would be a valuable step forward. The express subordination of the substantive rights arising under the provisions of Sections II and III to the procedure prescribed in the present article and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity or termination of a treaty.

(6) Paragraph 4 merely provides that nothing in the article is to affect the position of the parties under any other provisions for the settlement of disputes in force between the parties, whether contained in the treaty itself or in any other instrument.

(7) Paragraph 5 reserves the right of any party to invoke the nullity or termination of a treaty by way of answer to a demand for its performance or to a complaint in regard to its violation, even although it may not previously have initiated the procedure laid down in the article for invoking the nullity or termination of the treaty. In cases of error, impossibility of performance or change of circumstances, for example, a State might well not have invoked the ground in question before being confronted with a complaint—perhaps even before a tribunal. Subject to the provisions of article 47 concerning the effect of inaction in debarring a State from invoking a ground of nullity or termination, it would seem right that a mere failure to have made a prior notification should not prevent a party from raising the question of the nullity or termination of a treaty in answer to a demand for performance.

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

1. (*a*) The nullity of a treaty shall 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.

(*b*) The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed.

2. If the nullity results from fraud or coercion imputable to one party, that party may not invoke the provisions of paragraph 1 above.

3. The same principles shall apply with regard to the legal consequences of the nullity of a State's consent to a multilateral treaty.

Commentary

(1) This article deals only with the legal effects of the nullity of a treaty. It does not deal with any questions of responsibility or of redress arising from acts which are the cause of the nullity of a treaty. Fraud or coercion, for example, clearly raise questions of responsibility and redress as well as of nullity. But those questions fall outside the scope of the present part, which is concerned only with the nullity of the treaty.

(2) The Commission found that this article posed a problem of some delicacy. The nullity of the treaty in cases falling under section II is a nullity *ab initio*, and yet, for reasons which are entirely justifiable in law, it may not have been invoked until after the treaty has been applied for some time. The problem is to determine the legal position of the parties on the basis that the treaty is a nullity but the parties have acted upon it as if it were not. The Commission considered that in cases where neither party was to be regarded as a wrong-doer with respect to the cause of nullity their legal positions should be determined on the basis of the principle of good faith, taking account of the nullity of the treaty.

(3) Paragraph 1 accordingly provides that the nullity of the treaty is not, as such, to affect the legality of acts performed by either party in good faith in reliance on the void instrument before its nullity is invoked. This means that the nullity of the treaty does not, as such, convert acts done in reliance on a right conferred by the treaty into wrongful acts for which the party in question has international responsibility. It does not mean that the acts are to be regarded as validated for the future and creative of continuing rights. On the contrary, sub-paragraph (*b*) expressly provides that the parties may be required to "establish as far as possible the position that would have existed if the acts had not been performed". In other words, the nullity of the treaty is for all other purposes to have its full legal consequences.

(4) Paragraph 2 for obvious reasons excepts from the rule in paragraph 1 a party whose fraud or coercion has been the cause of the nullity.

(5) Paragraph 3 merely applies the previous paragraphs also to the nullity of the consent of an individual State to a multilateral treaty.

Article 53

Legal consequences of the termination of a treaty

1. Subject to paragraph 2 below and unless the treaty otherwise provides, the lawful termination of a treaty:

(*a*) Shall release the parties from any further application of the treaty;

(*b*) Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. If a treaty terminates on account of its having become void under article 45, a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

3. Unless the treaty otherwise provides, when a particular State lawfully denounces or withdraws from a multilateral treaty:

(*a*) That State shall be released from any further application of the treaty;

(*b*) The remaining parties shall be released from any further application of the treaty in their relations with the State which has denounced or withdrawn from it;

(*c*) The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

4. The fact that a State has been released from the further application of a treaty under paragraph 1 or 3 above shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subjected under any other rule of international law.

Commentary

(1) Article 53, like the previous article, does not deal with any question of responsibility or redress that may arise from acts which are the cause of the termination of a treaty, such as breaches of the treaty by one of the parties; it is limited to the legal consequences of a treaty's termination.

(2) Except in the case mentioned in paragraph 2 of the article, the formulation of the legal consequences of termination did not appear to the Commission to pose any particular problem. Paragraph 1 states that the termination releases the parties from any further application of the treaty, but does not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty. It is true that different opinions are sometimes expressed as to the exact legal basis, after a treaty has terminated, of situations resulting from executed provisions of the treaty. However, the Commission did not think it necessary to enter into this theoretical point for the purpose of formulating the provisions of the article, which appeared to it to follow logically from the legal act of the termination of the treaty.

(3) The particuar case of a termination resulting from the emergence of a new rule of *jus cogens* which is contemplated in article 45 did, on the other hand, appear to the Commission to be a little more complicated. The hypothesis is that a treaty or part of it becomes void and

terminates by reason of its conflict with a new over-riding rule of *jus cogens*, after having been valid and applied during some, perhaps quite long, period of time. Clearly, the invalidity which subsequently attaches to the treaty is not a nullity *ab initio*, but is one that dates from the emergence of the new rule of *jus cogens*. Accordingly, equity requires that, in principle, the rules laid down in paragraph 1 concerning the legal consequences of termination should apply. However, the rule of *jus cogens* being an over-riding rule of international law, it seemed to the Commission that any situation resulting from the previous application of the treaty could only retain its validity after the emergence of the rule of *jus cogens* to the extent that it was not in conflict with that rule. Paragraph 2 accordingly so provides.

(4) Paragraph 3 merely adopts the provisions of paragraph 1 to the case of the withdrawal of an individual State from a multilateral treaty. It also takes account of the fact that some multilateral treaties do contain express provisions regarding the legal consequences of withdrawal from the treaty. Article XIX of the Convention on the Liability of Operators of Nuclear Ships,[85] for example, expressly provides that even after the termination of the Convention liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the Convention. Again some treaties, for example, the European Convention on Human Rights and Fundamental Freedoms,[86] expressly provide that the denunciation of the treaty shall not release the State from its obligations with respect to acts done during the currency of the Convention.

(5) Paragraph 4 provides—*ex abundanti cautela*—that release from the further application of the provisions of a treaty does not in any way impair the duty of the parties to fulfil obligations embodied in the treaty to which they are also subjected under general international law or under another treaty. The point, although self-evident, was considered worth emphasizing in this article, seeing that a number of major Conventions embodying rules of general international law, and even rules of *jus cogens*, contain denunciation clauses. A few Conventions, such as the Geneva Conventions of 1949 for the humanising of warfare, expressly lay down that denunciation does not impair the obligations of the parties under general international law. But the majority of treaties provide for their own denunciation without prescribing that the denouncing State will remain bound by its obligations under general international law with respect to the matters dealt with in the treaty.[87]

[85] Signed at Brussels on 25 May 1962.

[86] Article 65, *United Nations Treaty Series*, vol. 213, p. 252.

Article 54

Legal consequences of the suspension of the operation of a treaty

1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:

(a) Shall relieve the parties from the obligation to apply the treaty during the period of the suspension;

(b) Shall not otherwise affect the legal relations between the parties established by the treaty;

(c) In particular, shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

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

Commentary

(1) This article, like the two previous articles, does not touch the question of responsibility, but concerns only the direct legal consequences of the suspension of the operation of the treaty.

(2) Paragraph 1 adapts to the case of suspension the rules laid down in article 53, paragraph 1, for the case of termination. The parties are relieved from the obligation to apply the treaty during the period of the suspension. But the relations established between them by the treaty are not otherwise affected by the suspension, while the legality of acts previously done under the treaty and of situations resulting from the application of the treaty are not affected.

(3) The very purpose of suspending the operation of the treaty rather than terminating it is to keep the treaty relationship in being. The parties are therefore bound in good faith to refrain from acts calculated to frustrate the treaty altogether and to render its resumption impossible.

[87] E.g., the Genocide Convention, *United Nations Treaty Series*, vol. 78, p. 277.

Chapter III

QUESTION OF EXTENDED PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER THE AUSPICES OF THE LEAGUE OF NATIONS

18. On the recommendation of the Sixth Committee, the General Assembly, at its 1171st meeting, held on 20 November 1962, adopted the following resolution[88]:

"*The General Assembly,*

"*Taking note* of paragraph 10 of the commentary to articles 8 and 9 of the draft articles on the law of treaties contained in the report of the International Law Commission covering the work of its fourteenth session,

"*Desiring* to give further consideration to this question,

"1. *Requests* the International Law Commission to study further the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, giving due consideration to the views expressed during the discussions at the seventeenth session of the General Assembly, and to include the results of the study in the report of the Commission covering the work of its fifteenth session;

"2. *Decides* to place on the provisional agenda of its eighteenth session an item entitled 'Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations'."

19. In addition to the records of the discussions in the Sixth Committee, the Commission had before it a note by the Secretariat which contained a summary of those discussions (A/CN.4/159 and Add.1) and a report entitled "Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)", submitted by the Special Rapporteur on the Law of Treaties (A/CN.4/162). The Commission examined the question at its 712th and 713th meetings.

20. As indicated by the terms of the resolution, the further study requested of the Commission relates to a question raised in paragraph 10 of the commentary to articles 8 and 9 of the Commission's draft articles on the law of treaties. In that paragraph, the Commission drew attention 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". It pointed out that certain technical difficulties stand in the way of finding a speedy and satisfactory solution to this problem through the medium of the draft articles on the law of treaties which are now in course of preparation. Suggesting that consideration should therefore be given to having recourse to other more expeditious procedures, it observed:

"It seems to be established that the opening of a treaty to accession by additional States, while it requires the consent of the States entitled to a voice in the matter, does not necessitate the negotiation of a fresh treaty amending or supplementing the earlier one. One possibility would be for administrative action to be taken through the depositaries of the individual treaties to obtain the necessary consents of the States concerned in each treaty; indeed, it is known that action of this kind has been taken in some cases. Another expedient that might be considered is whether action to obtain the necessary consents might be taken in the form of a resolution of the General Assembly by which each Member State agreed that a specified list of multilateral treaties of a universal character should be opened to accession by new States. It is true that there might be a few non-Member States whose consent might also be necessary, but it should not be impossible to devise a means of obtaining the assent of these States to the terms of the resolution."[89]

21. During the discussion of the Commission's report, members of the Sixth Committee had asked for particulars of the treaties in question. The Secretariat had accordingly submitted a working paper[90] setting out the multilateral agreements concluded under the auspices of the League of Nations in respect of which the Secretary-General acts as depository and which are not open to new States. Part A of this list gave twenty-six agreements which have entered into force, while part B gave five agreements which have not yet done so. As over a quarter of a century has now elapsed without the treaties mentioned in part B receiving the necessary support to bring them into force, the Commission decided to confine its present study to the treaties mentioned in part A.

22. The Commission interprets the request addressed to it by the General Assembly as relating only to the technical aspects of the question of extended participation in League of Nations treaties. In the present study, therefore, it will examine this question generally with reference to the twenty-six treaties given in part A of the Secretariat's list, without considering how far any particular treaty may or may not still retain its usefulness. However, in the course of the discussion it was stressed that quite a number of the treaties given in part A may have been overtaken by modern treaties concluded during the period of the United Nations, while some others may have lost much of their interest for States with the lapse of time. It was also pointed out that no re-examination of the treaties appears to have been undertaken with a view to ascertaining whether, quite apart from their participation clauses, they may require any changes of substance in order to adapt them to contemporary conditions. The Commission accordingly decided to bring this aspect of the matter to the attention of the General

[88] Resolution 1766 (XVII).

[89] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr. 1).

[90] *Ibid., Seventeenth Session, Annexes,* agenda item 76, document A/C.6/L.498.

Assembly, and to suggest that in due course a process of review should be initiated.

23. Five of the twenty-six treaties have rigid participation clauses, being confined to the States which were represented at or invited to the conference which drew up the treaty.[91] These treaties, in short, appear to have been designed to be closed treaties. The remaining twenty-one treaties were clearly intended to be open-ended, the participation clause being so worded as to allow the participation of any State not represented at the conference to which a copy of the treaty might be communicated for that purpose by the Council of the League. It is only the fact of the dissolution of the League and its Council and the absence of any organ of the United Nations exercising the powers previously exercised by the Council under the treaties which has had the effect of turning them into closed treaties.

24. The arrangements made between the League of Nations and the United Nations for the transfer of certain functions, activities and assets of the League to the United Nations covered, *inter alia,* functions and powers belonging to the League of Nations under international agreements. At its final session the League Assembly passed a resolution whereby it recommended that the Members of the League should facilitate in every way the assumption without interruption by the United Nations of functions and powers entrusted to the League under international agreements of a technical and non-political character, which the United Nations was willing to maintain.[92] The General Assembly, for its part, in section I of resolution 24 (I) of 12 February 1946, reserved "the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed". However, having placed on record that by this resolution those Members of the United Nations which were parties to the instruments in question were assenting to the action contemplated and would use their good offices to secure the co-operation of the other parties to those instruments so far as was necessary, the General Assembly declared its willingness in principle to assume the exercise of certain functions and powers previously entrusted to the League; in the light of this declaration it adopted three decisions, A, B and C, which are contained in resolution 24 (I).[93]

25. Decision A recalled that under certain treaties the League had, for the general convenience of the parties, undertaken to act as a custodian of the original signed texts and to "perform certain functions, pertaining to a secretariat, which do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties". Having then set out some of the main functions of a depositary, the General Assembly declared the willingness of the United Nations to "accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations".[94] It may here be remarked that, purely secretarial though the functions of the Secretariat of the League may have been as depositary of the treaties, it was invested with these functions by the parties to each treaty, not by the League of Nations, for the appointment of the League Secretariat as depositary was effected by a provision of the "final clauses" of each treaty. The transfer of the depositary functions from the Secretariat of the League to that of the United Nations was therefore a modification of the final clauses of the treaties in question. The League Assembly, it is true, had directed its Secretary-General to transfer to the Secretariat of the United Nations for safe custody and performance of the functions previously performed by the League Secretariat all the texts of the League treaties. But although the General Assembly, as already mentioned, emphasized the assent given to this transfer by those Members of the United Nations which were also parties to the particular treaties, it did not seek to obtain the agreement of all the parties to the various treaties. It simply assumed the functions of the depositary of these treaties by resolution 24 (I) and charged the Secretariat with the task of carrying them out. No objection was raised by any party and the Secretary-General has acted as the depositary for all these treaties ever since the passing of the resolution.[95]

26. On the other hand, decision A contained in resolution 24 (I) underlined the purely secretarial character of the depositary functions transferred to the Secretariat, pointing out that they did not affect "the operation of the instruments" or relate to the "substantive rights and obligations of the parties". Accordingly, in the case of closed treaties, including those where the closure has resulted solely from the disappearance of the Council of the League, the Secretary-General has not considered it within his powers under the terms of the resolution to accept signatures, ratifications or accessions from States not covered by the participation clause.

27. Decision B of the resolution dealt with instruments of a "technical and non-political character" containing provisions "relating to the substance of the instruments" whose due execution was dependent on the continued exercise of functions and powers which those instruments conferred upon organs of the League. The General Assembly expressed its willingness "to take the necessary measures to ensure the continued exercise of these functions and powers" and referred the matter to the Economic and Social Council for examination. Decision C dealt with functions and powers entrusted to the League by instruments having a political character. With regard to these instruments the General Assembly decided that it would either itself examine, or would submit to the appropriate organ of the United Nations, any request from the parties to an instrument that the United Nations should assume the exercise of the functions or powers entrusted to the League.

28. In pursuance of decisions B and C, the General Assembly between 1946 and 1953 approved seven protocols which amended earlier multilateral treaties and transferred the functions or powers formerly exercised by the League to organs of the United Nations. These protocols dealt with various treaties relating to: (1) opium and dangerous drugs (United Nations Treaty Series, vol. 12, p. 179); (2) economic statistics (United

[91] In one case, the Convention Regarding the Measurement of Vessels Employed in Inland Navigation, the treaty was also open to States having a common frontier with one of the States invited to the Conference.

[92] League of Nations, *Official Journal, Special Supplement No. 194,* p. 57 (Resolution of 18 April 1946).

[93] See "Resolutions of the General Assembly concerning the Law of Treaties" (A/CN.4/154), pp. 15-17.

[94] See "Resolutions of the General Assembly concerning the Law of Treaties" (A/CN.4/154), p. 16.

[95] See *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7), pp. 65-68.

Nations Treaty Series, vol. 20, p. 229); (3) circulation of obscene publications (United Nations Treaty Series, vol. 30, p. 3); (4) the white slave traffic (United Nations Treaty Series, vol. 30, p. 23); (5) circulation of and traffic in obscene publications (United Nations Treaty Series, vol. 46, p. 169); (6) traffic in women and children (United Nations Treaty Series, vol. 53, p. 13); and (7) slavery (United Nations Treaty Series, vol. 182, p. 51). In all of these protocols, in addition to making any necessary amendments of substance, the opportunity was taken of replacing the participation clause of the earlier treaties with a clause opening them to accession by any Member of the United Nations and by any non-Member State to which the Economic and Social Council decides officially to communicate a copy of the amended treaty. It is for this reason that the League of Nations treaties covered by the protocols are not included in part A of the Secretariat's list of multilateral agreements which are not open to new States.

29. When the problem of extending the right to participate in closed League of Nations treaties was taken up in the Sixth Committee, certain delegations—Australia, Ghana and Israel[96]—joined together in introducing a draft resolution designed to achieve this objective. This draft resolution in its final form, after recalling the previously quoted passage from the Commission's report for 1962 and resolution 24 (I), proposed that the General Assembly should: (1) request the Secretary-General to ask the parties to the conventions listed in an annex to the resolution (i.e., the conventions listed in part A of the Secretariat's working paper) to state, within a period of twelve months from the date of the inquiry, whether they objected to the opening of those of the conventions to which they were parties for acceptance by any State Member of the United Nations or member of any specialized agency; (2) authorize the Secretary-General, if the majority of the parties to a convention had not within the period referred to in paragraph 1 objected to opening that convention to acceptance, to receive in deposit instruments of acceptance thereto which are submitted by any State Member of the United Nations or member of any specialized agency; (3) recommend that all States parties to the conventions listed in the annex of the resolution should recognize the legal effect of instruments of acceptance deposited in accordance with paragraph 2, and communicate to the Secretary-General as depositary their consent to participation in the conventions of States so depositing instruments of acceptance; (4) request the Secretary-General to inform Members of communications received by him under the resolution.

30. The sponsors of the draft resolution explained that the scheme proposed in their draft contemplated three stages: first, an inquiry to the parties whether they objected to opening a convention; second, an authorization to the Secretary-General to receive new instruments of acceptance; and third, a recommendation that the legal effect of new instruments deposited should be recognized. The first two stages were, they considered, purely administrative in character and did not effect legal relationships. The third stage, that of recognition of the legal effect of newly deposited instruments, would be only a recommendation and each State would be left to determine the method of such recognition in the light of the requirements of its own internal law.

31. During the debate in the Sixth Committee certain reservations were expressed as to the procedure proposed in the joint resolution. Some representatives felt that what was really involved in the first stage was the agreement of the parties to change a rule on participation which had been laid down in the conventions, and that for reasons of international and constitutional law consent to such a change could not be given informally, or tacitly by a mere failure to object. Some representatives stated that the course which was legally preferable in order to avoid uncertainty and constitutional difficulties was to prepare a protocol of amendment of the conventions, as had already been done in other cases by the General Assembly.[97] The sponsors of the three-power draft and some other delegations, however, expressed the view that a requirement of express consent might mean a delay of some years in the participation of new States, and that such a requirement was unnecessary.

32. Some representatives considered that the fact that some new States might have become bound by the League treaties through succession to parties made it difficult to determine the list of the present-day parties to the treaties, as would need to be done under the draft resolution. Another representative thought that inviting new States to accede to the conventions ignored the possibility that they might have become parties by succession and that such an invitation might prejudge the work of the International Law Commission on State succession. The sponsors, on the other hand, took the view that the question of opening the treaties for new accessions is quite distinct from the succession of States, and could not prejudge the Commission's work on the latter question.

33. A number of representatives also expressed the view that, if participation in the treaties was to be opened to additional States, it should not be restricted to States Members of the United Nations or of a specialized agency, as was at present provided in the draft resolution.

34. Certain other points were made with respect to the draft resolution. One representative observed that its provision for a simple majority as sufficient to open the treaties to additional States appeared to be inconsistent with the requirement of a two-thirds majority in article 9, paragraph 1 (*a*), of the draft articles on the law of treaties provisionally adopted by the Commission in 1962. Another representative thought that it should have been made clear that it would not be permissible for acceding States to formulate reservations since he doubted whether the recent practice concerning reservations could be applied to the older treaties.

35. The Commission, as requested, has given due consideration to the views expressed during the discussions of this question at the seventeenth session of the General Assembly. It does not, however, understand its task to be to comment in detail upon these views, but to study the technical aspects of the question generally and to report.

36. The first point to be examined is the relation between the present question and that of the succession of States to League of Nations treaties, since it has a definite bearing also on the technical aspects of opening these treaties to participation by additional States. Thus, the joint draft resolution would require the Secretary-General to "ask the parties to the conventions listed in the annex" to state within a period of twelve months whether they objected to the "opening of those conventions to which they are parties" etc.; and his authority to receive

[96] *Official Records of the General Assembly, Seventeenth Session, Annexes,* agenda item 76, document A/C.6/L.504/Rev.2.

[97] See protocols mentioned in paragraph 28 above.

instruments of acceptance in deposit from additional States would only arise if a "majority of the parties to a convention" had raised no objection to the opening of the convention. In other words, the identification of the parties to the treaties would be necessary both for the purposes of the inquiry and for determining when the authority of the Secretary-General to receive instruments from additional States came into force. Similarly, if the procedure of an amending protocol were to be used, it would be necessary for a stated number or proportion of the parties to each League treaty to become parties to the amending protocol in order to bring the latter into force. Again, therefore, there would be a need to identify the parties to the League treaties.

37. The present practice of the Secretary-General, as appears from the Secretariat memorandum on the succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150), is to inquire from each new State whether it recognizes that it is bound by United Nations treaties, and by League treaties amended by United Nations protocols, when any of these treaties had been made applicable to its territory by its predecessor State.[98] In consequence of these inquiries a number of new States have signified their attitudes towards certain of the League treaties. But that practice has not previously extended to the League treaties now under consideration. According to the information contained in the Secretariat memorandum, the position with regard to these treaties is that Pakistan has of its own accord made communications to the Secretary-General stating that it considers itself a party to three of the treaties, while Laos has done the same with regard to one treaty. These communications have been notified to the Governments concerned.

38. The precise legal position of a new State whose territory was formerly under the sovereignty of a State party or signatory to a League treaty is a question which involves an examination of such principles of international law as may govern the succession of States to treaty rights or obligations. Clearly, if a certain view is taken of these principles, participation in the League treaties may be open to a considerable number of the new States without any special action being taken through the United Nations to open the treaties to them. But a number of points of some difficulty may have to be decided before it can be seen how far the problem is capable of being solved through principles of succession. In many of the League treaties, for example, a substantial proportion of the signatories have not proceeded to ratification and the point arises as to what may be the position of a new State whose predecessor in the territory was a signatory but not a party to the treaty. The Commission has only recently begun its study of this branch of international law and nothing in the preceding observations is to be understood as in any way prejudging its views on any aspects of the question of succession to treaties. The Commission is here concerned only to point out that, owing to some of the difficulties, the principles governing the succession of States to treaty rights or obligations can scarcely be expected to provide either a speedy or a complete solution of the problem now under consideration.

Protocol of amendment

39. This procedure, if it has the merit of avoiding any possible constitutional difficulty, also has certain disadvantages. In the first place, the procedure adopted in the seven protocols mentioned in paragraph 28 above is somewhat complicated. A protocol is drawn up under which the parties to the protocol undertake that as between themselves they will apply the amendments to the League treaty which are set out in an annex to the protocol. The protocol is open to signature or acceptance only by the States parties to the League treaty and is expressed to come into force when any two such States have become parties to the protocol. On the other hand, the amendments to the League treaty contained in the annex to the protocol do not come into force until a majority of the parties to the League treaty have become parties to the protocol. Amongst the amendments are provisions making the League treaty, as amended by the protocol, open to accession by any Member of the United Nations and by any non-Member State to which a designated organ of the United Nations shall decide officially to communicate a copy of the amended treaty. Thus, under the procedure of the United Nations protocols there are different dates for the entry into force of the protocol itself and of the amendments to the League treaty. Moreover, the parties to the original treaty become parties to the amended treaty by subscribing to the protocol, whilst other States do so by acceding to the amended treaty.

40. In the second place, the protocol operates only *inter se* the parties to it. This is unavoidable, since under the existing law, unless the treaty expressly so provides, a limited number of the parties, even if they constitute a majority, cannot amend the treaty so as to effect its application to the remaining parties without the latter's consent. But it means that a protocol of amendment provides an incomplete solution to the problem of extending participation in League of Nations treaties to additional States, for accession to the amended treaty will not establish any treaty relations between the acceding State and parties to the original treaty which have failed to subscribe to the protocol. There is also a possibility that there may be some delay before the number of signatures or acceptances necessary to bring the required amending provision into force are obtained. Consequently, even if the use of a simplified form of protocol were to be found possible, this procedure would still have certain drawbacks.

The three-power draft resolution

41. When the Commission suggested that consideration might be given to the possibility of solving the present problem by administrative action taken through the depositary of the treaties, it had in mind that today international agreements are concluded in a great variety of forms, and that in multilateral treaties communications through the depositary are a normal means of obtaining the views of the interested States in matters touching the operation of the final clauses. From the point of view of international law, the only essential requirement for the opening of a treaty to participation by additional States is, it is believed, the consent of the parties and, for a certain period of time, of the States which drew up the treaty. Constitutional or political considerations may affect the decision of the interested States as to the particular form in which that consent should be expressed in any given case. But in principle the agreement of the interested States may be expressed in any form which they themselves may determine.

42. The three-power draft resolution, evidently starting from this standpoint, seeks to obtain the necessary consents by means of inquiries addressed to the parties

[98] See paragraphs 10-13 of memorandum.

to the various treaties by the Secretary-General in his capacity as depositary of the treaties. These inquiries would be in a negative form asking the parties to each treaty whether they have any objection to its being opened for acceptance by any State Member of the United Nations or of any specialized agency. In order to obviate delay, the resolution contemplates that the parties should be invited to reply within twelve months and that a failure to reply within that period should be treated as equivalent to an absence of objection for the purpose only of determining whether the Secretary-General should be authorized to receive in deposit instruments of acceptance from Members of the United Nations or of a specialized agency. The authority of the Secretary-General to receive instruments in deposit is to arise at the end of the twelve months' period if a majority of the parties have not up to then made any objection. But such "tacit consent" of the majority would not, it appears, suffice to give legal effect to the instruments of acceptance deposited with the Secretary-General even vis-à-vis those parties whose consent is thus presumed. For paragraph 3 of the draft resolution recommends all the parties also to recognize the legal effect of the instruments and to communicate to the Secretary-General their consent to the participation of the States concerned in the treaties.

43. The various points made in the Sixth Committee with regard to the three-power draft resolution have been noted in paragraphs 30-34 above, and the question of the bearing of State succession upon the identification of the parties to the League treaties has already been discussed in paragraphs 36-37. It is for the Sixth Committee finally to appraise the legal merits or demerits of that draft resolution as a means of solving the present problem. The Commission will therefore limit itself to certain observations of a general nature with a view to assisting the Sixth Committee in arriving at its decision as to the best procedure to adopt in all the circumstances of the case.

44. The procedure proposed in the three-power draft resolution, though it offers the prospect of somewhat speedier action than might be obtainable through an amending protocol, does not avoid some of the latter's other defects. Its entry into effect is made dependent on the tacit consent of a "majority of the parties", thereby appearing to require an exhaustive determination of the States ranking as parties in order to ascertain the date when the procedure begins to become effective. In this connexion, it may be noted that the later United Nations protocols seek to minimize the difficulty arising from the need to identify the parties to League treaties by making the entry into force of the amendments dependent upon the acceptances of a specified number, rather than of a majority of the parties.

45. At the same, it may be pointed out that the requirement of a simple majority laid down in the draft resolution, as in the United Nations protocols, is not in conflict with the rule formulated in article 9, paragraph 1 (*a*), of the Commission's draft articles, which contemplates a two-thirds majority for the opening of multilateral treaties to additional participation. That rule was proposed by the Commission *de lege ferenda* and under it the consent of a two-thirds majority would operate with binding effect for all the parties. But under the three-power draft resolution and the United Nations protocols the consent of a simple majority of the parties modifies the treaty only with effect *inter se* the parties which give their consent.

46. Finally, it is necessary to examine the point made in the Sixth Committee as to possible constitutional objections to the procedure of tacit consent. Under the draft resolution, as its sponsors pointed out, tacit consent would operate only to establish the authority of the Secretary-General to receive instruments in deposit and it would be open to each party to follow whatever procedure it wished for the purpose of "recognizing" the legal force and effect of the instruments deposited with the Secretary-General. If this feature of the resolution may diminish the force of the constitutional objections, it also involves a certain risk of delaying the completion of the procedure and of obtaining only incomplete results. The Legal Counsel, at the 748th meeting of the Sixth Committee, put the matter on somewhat broader grounds.[99] "A number of the protocols", he said, "made more extensive amendments than merely opening the old treaties to new parties, and hence a formal procedure for consent was suitable; but where the only object is to widen the possibilities for accession the Committee may find that no such formality is necessary".

47. A participation clause, as already pointed out, is one of the "final clauses" of a treaty and is, in principle, on the same footing as a clause appointing a depositary. It differs, it is true, from a depositary clause in that it affects the scope of the operation of the treaty and therefore the substantive obligations of the parties. But it is a final clause and it is one which furnishes the basis upon which the constitutional processes of ratification, acceptance and approval by individual States take place. In the present instance the relation between the participation clauses of the League treaties and the constitutional processes of the individual parties may, it is thought, be significant. In twenty-one out of the twenty-six treaties, as already mentioned, the participation clauses were so formulated as to make the treaty open to participation by any Member of the League and any additional States to which the Council of the League should communicate a copy of the treaty for that purpose. Thus, not only did the negotiating representatives intend, when they drew up the treaty, to authorize the Council of the League to admit any further State to participation in the treaty, but each party when it gave its definitive consent to the treaty expressly conferred that authority upon the Council. In short, in the case of these twenty-one treaties, any State organ which ratified, consented to or approved the treaty in order to enable the State to become a party by so doing gave its express consent to the admission to the treaty not only of any Member of the League but of any further State at the decision of an external organ, the Council of the League. This being so, any possible constitutional objection to the use of a less formal procedure for modifying the participation clause would seem to be of much less force in the case of these treaties. Further, the very fact that the remaining five treaties were originally designed as closed treaties suggests that they may not be of great interest to new States today, and it may be found, on examination, that the problem in fact concerns only the twenty-one treaties and, perhaps, only a very limited number of these treaties.

48. The special form of the participation clauses of the twenty-one treaties further suggests that it may be worth examining the possibility of dealing with the problem on the basis that what is involved is a simple adaptation of the participation clauses to the change-over from the League to the United Nations. The case may not be identical with that of the transfer of the depositary functions from the League to the United Nations, in

[99] A/C.6/L.506.

that the participation clauses touch the scope of the operation of the treaties. But consideration should, it is thought, be given to the possibility of devising some procedure analogous to that used in the case of the depositary functions.

Alternative solution

49. The special form of the participation clauses of the twenty-one treaties suggested to the Commission that it might be worth examining the possibility of dealing with the problem along the lines adopted in 1946 with regard to the transfer of the depositary functions of the League Secretariat to the Secretariat of the United Nations. The case might not be identical in that the participation clauses touch the scope of the operation of the treaty and that the functions of the Council of the League under those clauses were not purely administrative. But the Commission felt that in essence what was involved was an adaptation of the participation clauses of the League treaties to the change-over from the League to the United Nations. On this basis the General Assembly, by virtue of all the arrangements made in 1946 for the transfer of powers and functions from the League to the United Nations, would be entitled to designate an organ of the United Nations to act in the place of the Council of the League, and to authorize the organ so designated to exercise the powers of the Council of the League in regard to participation in the treaties in question. If this course were to be adopted, it would seem appropriate that the resolution of the General Assembly designating an organ of the United Nations to fulfil the League Council's functions under the treaties should: (*a*) recall the recommendation of the League Assembly that members of the League should facilitate in every way the assumption by the United Nations of functions and powers entrusted to the League under international agreements of a technical and non-political character; (*b*) recite that by the resolution those Members of the United Nations which are parties to the League treaties in question give their assent to the assumption by the designated organ of the functions hitherto exercised by the League Council under the treaties in question; and (*c*) request the Secretary-General, as depositary of the treaties, to communicate the terms of the resolution to any party to the treaties not a Member of the United Nations.

Conclusions

50. The conclusions resulting from the Commission's study of the question referred to it by the General Assembly may, therefore, be summarized as follows:[100]

[100] For the various views expressed by the members of the Commission during the discussion, see A/CN.4/SR.712 and 713.

(*a*) The method of an amending protocol and the method of the three-power draft resolution both have their advantages and disadvantages. But both methods take account of the applicable rule of international law that the modification of the participation clauses requires the assent of the parties to the treaties, and the Commission does not feel called upon to express a preference between them from the point of view of the constitutional issues under internal law. At the same time, it has pointed out that the special form of the participation clauses of the treaties under consideration appears to diminish the force of the possible constitutional difficulties which were referred to in the Sixth Committee.

(*b*) While the topic of State succession has a certain relevance in the present connexion and is a complicating element in the procedures of amending protocol and three-power draft resolution, the adoption of these procedures need not prejudge the work of the Commission on this topic or preclude the use of either of those procedures, if so desired.

(*c*) However, in the light of the arrangements which were made on the occasion of the dissolution of the League of Nations and the assumption by the United Nations of some of its functions and powers in relation to treaties concluded under the auspices of the League, the General Assembly appears to be entitled, if it so desires, to designate an organ of the United Nations to assume and fulfil the powers which, under the participation clauses of the treaties in question, were formerly exercisable by the Council of the League. This would provide, as an alternative to the other two methods, a simplified and expeditious procedure for achieving the object of extending the participation in general multilateral treaties concluded under the auspices of the League. It would, indeed, be administrative action such as was envisaged by the Commission in 1962, and would avoid some of the difficulties attendant upon the use of the other methods.

(*d*) Even a superficial survey of the twenty-six treaties listed in the Secretariat memorandum indicates that today a number of them may hold no interest for States. The Commission suggests that this aspect of the matter should be further examined by the competent authorities. Subject to the outcome of this examination, the Commission reiterates its opinion that the extension of participation in treaties concluded under the auspices of the League is desirable.

(*e*) The Commission also suggests that the General Assembly should take the necessary steps to initiate an examination of the general multilateral treaties in question with a view to determining what action may be necessary to adapt them to contemporary conditions.

Chapter IV

PROGRESS OF WORK ON OTHER QUESTIONS UNDER STUDY BY THE COMMISSION

A. State responsibility: report of the Sub-Committee

51. The Commission considered this question at its 686th meeting. Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, introducing the Sub-Committee's report (A/CN.4/152),[101] drew special attention to the conclusions set out and the programme of work proposed in the report.

52. All the members of the Commission who took part in the discussion expressed agreement with the general conclusions of the report, viz.: (1) that, in an attempt to codify the topic of State responsibility, priority should be given to the definitions of the general rules governing the international responsibility of the State, and (2) that in defining these general rules the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the persons or property of aliens, should not be overlooked and that careful attention should be paid to the possible repercussions which developments in international law may have had on responsibility.

53. Some members of the Commission felt that the emphasis should be placed in particular on the study of State responsibility in the maintenance of peace, in the light of the changes which have occurred in recent times in international law. Other members considered that none of the fields of responsibility should be neglected and that the precedents existing in all the fields in which the principle of State responsibility had been applied should be studied.

54. The members of the Commission also approved the programme of work proposed by the Sub-Committee, without prejudice to their position on the substance of the questions set out in that programme. Thus, during the discussion, doubts or reservations were expressed with regard to the solution to be given to certain problems arising in connexion with some of the questions listed. In this connexion, it was pointed out that these questions were intended solely to serve as an *aide-mémoire* for the Special Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of States, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect. The Sub-Committee's suggestion that the study of the responsibility of other subjects of international law, such as international organizations, should be left aside also met with the general approval of the members of the Commission.

55. After having unanimously approved the report of the Sub-Committee on State Responsibility, the Commission appointed Mr. Ago as Special Rapporteur for the topic of State responsibility. The Secretariat will prepare certain working papers on this question.

[101] See annex I to the present report.

B. Succession of States and Governments: report of the Sub-Committee

56. The report of the Sub-Committee on the Succession of States and Governments (A/CN.4/160)[102] was discussed by the Commission at its 702nd meeting. Mr. Manfred Lachs, Chairman of the Sub-Committee, introduced the report and explained the Sub-Committee's conclusions and recommendations. All the members of the Commission who took part in the discussion fully approved the delimitation of the topic and the approach thereto, the proposed objectives, and the plan of work drawn up.

57. The Commission considered that the priority given to the study of the question of State succession was fully justified. The succession of Governments will, for the time being, be considered only to the extent necessary to supplement the study on State succession. During the discussion, several members of the Commission stressed the special importance which the problems of State succession had at the present time for the new States and for the international community, in view of the modern phenomenon of decolonization; in consequence they emphasized that, in the codification of the topic, special attention should be given to the problems of concern to the new States.

58. The Commission approved the Sub-Committee's recommendations concerning the relationship between the topic of State succession and other topics on the Commission's agenda. Succession in the matter of treaties will therefore be considered in connexion with the succession of States rather than in the context of the law of treaties. Furthermore, the Commission considered it essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, State responsibility, and the succession of States, in order to avoid any overlapping in the codification of these three topics.

59. The objectives proposed by the Sub-Committee—viz., a survey and evaluation of the present state of the law and practice in the matter of State succession and the preparation of draft articles on the topic in the light of new developments in international law—were approved by all the Commission's members. Some considered that the existing general rules and practice should be adapted to present-day situations and aspirations, and that in consequence the codification of State succession would necessarily include, to a large extent, provisions belonging rather to the progressive development of international law. Other members of the Commission, while recognizing that account would have to be taken of the new spirit and of the new aspects which were becoming manifest in international relations, shared the view that first there should be thorough research into past practice before one could undertake the creation of such elements of new law as were necessary.

[102] See annex II to the present report.

60. The broad outline, the order of priority of the headings and the detailed division of the topic were agreed to by the Commission, it being understood that its approval was without prejudice to the position of each member with regard to the substance of the questions included in the programme. The programme lays down guiding principles to be followed by the Special Rapporteur, who, however, will not be obliged to conform to them in his study in every detail.

61. The Commission, after having unanimously approved the Sub-Committee's report, appointed Mr. Lachs as Special Rapporteur on the topic of the succession of States and Governments. The Commission adopted a suggestion by the Sub-Committee that Governments should be reminded of the note circulated by the Secretary-General asking them to furnish him with the text of all treaties, laws, decrees, regulations, diplomatic correspondence, etc., relating to the process of succession and affecting States which have attained independence since the Second World War.[103] At the same time, the Commission suggested that the deadline for the communication of comments by Governments should be prolonged to 1 January 1964. The Secretariat will circulate the texts of the comments submitted by Governments in response to the said circular note and will prepare an analysis of these comments and a memorandum on the practice followed, in regard to the succession of States, by the specialized agencies and other international bodies.

C. Special missions

62. The Commission discussed this topic at its 711th and 712th meetings. It had before it a memorandum prepared by the Secretariat (A/CN.4/155). During the discussion it was agreed to resume consideration of the topic of special missions in conformity with resolution 1687 (XVI) adopted by the General Assembly on 18 December 1961. As the rules regarding permanent missions had been codified by the Vienna Convention on Diplomatic Relations, 1961, the Commission expressed the belief that it should now draw up the rules applicable to special missions to supplement the codification of the law relating to diplomatic relations among States.

63. With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.[104] At that session the Commission had also decided[105] not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.

64. With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject.

65. Lastly, at its 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.

D. Relations between States and inter-governmental organizations

66. In accordance with the Commission's request at its fourteenth session, the Special Rapporteur, Mr. El-Erian, submitted at the present session a first report (A/CN.4/161 and Add.1), consisting of a preliminary study on the scope of and approach to the topic of "Relations between States and inter-governmental organizations". He submitted also a working paper (A/CN.4/L.103) on the scope and order of future work on the subject. At its 717th and 718th meetings, the Commission had a first general discussion of this report and asked the Special Rapporteur to continue his work and prepare a second report containing a set of draft articles, with a view to further consideration of the question at a later stage.

[103] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr.1), para. 73.

[104] *Yearbook of the International Law Commission, 1960*, vol. I, 565th meeting, para. 26.

[105] *Ibid.*, para. 25.

Chapter V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Co-operation with other bodies

67. The Commission considered the item concerning co-operation with other bodies at the 715th meeting.

68. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, and the Asian-African Legal Consultative Committee by Mr. H. W. Tambiah; they both addressed the Commission.

69. The Commission, after considering the invitation addressed to it by the Secretary of the Asian-African Legal Consultative Committee, decided to ask its Chairman, Mr. Eduardo Jiménez de Aréchaga, to attend the Committee's next session in the capacity of observer, or, if he was unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission at that session. The next session of the Asian-African Legal Consultative Committee will open at Cairo on 15 February 1964, and will last for two weeks.

70. The Commission expressed the hope that the relevant regulations of the United Nations would be so adapted as to ensure a better exchange of documentation between the Commission and the bodies with which it co-operates. The Commission further recommended that the Secretariat should make whatever arrangements were needed for the purpose.

B. Programme of work, date and place of the next session

71. The Commission adopted the following programme of work for 1964: (1) Law of treaties (application, interpretation and effects of treaties); (2) Special missions (first report with draft articles); (3) Relations between States and inter-governmental organizations (first report on general directives (A/CN.4/161 and Add.1) and another report with draft articles); (4) State responsibility (preliminary report, if ready); (5) Succession of States and Governments (preliminary report on the aspect of treaties, if ready).

72. Since it will not be possible to deal with all items at the regular session, which should be mainly devoted to the law of treaties, and, if there is a possibility, to a first discussion of the preliminary reports on State responsibility and succession of States and Governments, it was decided that a three-week winter session of the Commission should take place at Geneva from 6 to 24 January 1964.

73. In this winter session, the Commission should consider the draft articles to be submitted by the Special Rapporteur on special missions and consider the first report and general directives to the Special Rapporteur on the subject of relations between States and inter-governmental organizations.

74. It was suggested that measures should be taken now to arrange also for a winter session in January 1965, in order to continue the consideration of the two topics which complete the codification of diplomatic law without thereby detracting from the time required for the work of the Commission on the law of treaties.

75. In accordance with the decision taken by the Commission during its fourteenth session,[106] it was decided that the regular session of the Commission would be held at Geneva from 4 May to 10 July 1964.

C. Production and distribution of documents, summary records and translations

76. The Commission expressed its satisfaction at the very considerable improvement in the facilities put at its disposal for the production of documents, summary records and translations—a matter which had been the subject of some criticism at the previous session.[107]

77. There had still been some delay, however, in the translation of documents into Spanish, and the Commission expressed the hope that further improvements would be made in that respect.

78. The Commission also expressed the hope that its preparatory documents would be sent to members by air mail, to allow them sufficient time to study the documents before the opening of the session.

D. Delay in the publication of the Yearbook

79. The Commission has noted with concern that publication of the volumes of the Yearbook of the International Law Commission is being subjected to an increasing delay. The Commission expresses the hope that steps will be taken to ensure that in future the Yearbook will be published as soon as possible after the termination of each annual session.

E. Representation at the eighteenth session of the General Assembly

80. The Commission decided that it would be represented at the eighteenth session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Eduardo Jiménez de Aréchaga.

[106] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr.1), para. 83.

[107] *Ibid.*, paras. 84 and 85.

ANNEXES

Annex I

Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility

(Approved by the Sub-Committee)

1. The Sub-Committee on State Responsibility, set up by the International Law Commission at its 637th meeting on 7 May 1962 and consisting of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen, held its second meeting at Geneva from 7 to 16 January 1963. The terms of the reference of the Sub-Committee, as laid down by the Commission at its 668th meeting on 26 June 1962,[a] were as follows:

"(1) The Sub-Committee will meet at Geneva between the Commission's current session and its next session from 7 to 16 January 1963;

"(2) Its work will be devoted primarily to the general aspects of State responsibility;

"(3) The members of the Sub-Committee will prepare for it specific memoranda relating to the main aspects of the subject, these memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they may be reproduced and circulated before the meeting of the Sub-Committee in January 1963;

"(4) The Chairman of the Sub-Committee will prepare a report on the results of its work to be submitted to the Commission at its next session."

2. The Sub-Committee held seven meetings ending on 16 January 1963. All its members were present with the exception of Mr. Lachs, who was absent because of illness. The Sub-Committee had before it memoranda prepared by the following members:

Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1)
Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1, A/CN.4/WP.7)
Mr. Gros (A/CN.4/SC.1/WP.3)
Mr. Tsuruoka (A/CN.4/SC.1/WP.4)
Mr. Yasseen (A/CN.4/SC.1/WP.5)
Mr. Ago (A/CN.4/SC.1/WP.6)

3. The Sub-Committee held a general discussion of the questions to be studied in connexion with the work relating to the international responsibility of States, and with the directives to be given by the Commission to the Rapporteur on that topic.

4. Some members of the Sub-Committee expressed the view that it would be desirable to begin the study of the very vast subject of the international responsibility of the State by considering a well-defined sector such as that of responsibility for injuries to the person or property of aliens. Other members, on the other hand, argued that it was desirable to carry out a general study of the subject, taking care not to confuse the definition of the rules relating to responsibility with that of the rules of international law—and in particular those relating to the treatment of aliens—the breach of which can give rise to responsibility. Some of the members in this second group stressed in particular that, in the study of the topic of responsibility, new developments of international law in other fields, notably that of the maintenance of peace, ought also to be taken into account.

5. In the end, the Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of the State. It was agreed, firstly that there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.

6. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago. After this debate, it decided unanimously to recommend to the Commission the following indications on the main points to be considered as to the general aspects of the international responsibility of the State; these indications may serve as a guide to the work of a future special rapporteur to be appointed by the Commission.

Preliminary point: Definition of the concept of the international responsibility of the State.[b]

First point: Origin of international responsibility

(1) *International wrongful act:* the breach by a State of a legal obligation imposed upon it by a rule of international law, whatever its origin and in whatever sphere.

(2) *Determination of the component parts of the international wrongful act:*

(*a*) *Objective element:* act or omission objectively conflicting with an international legal obligation of the State.[c] Problem of the abuse of right. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

(*b*) *Subjective element:* imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Imputation of the wrongful act and of responsibility. Problem of indirect responsibility.

Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a State organ. System of law applicable for determining the status of organ. Legislative, administrative and judicial organs. Organs acting *ultra vires.*

State responsibility in respect of acts of private persons. Question of the real origin of international responsibility in such cases.

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu.* Problems of the degree of fault.[d]

(3) *The various kinds of violations of international obligations.* Questions relating to the practical scope of the distinctions which can be made.

[a] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr.1), para. 72.

[b] The Sub-Committee suggested that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.

[c] The question of possible responsibility based on "risk", in cases where a State's conduct does not constitute a breach of an international obligation, may be studied in this connexion.

[d] It would be desirable to consider whether or not the study should include the very important questions which may arise in connexion with the proof of the events giving rise to responsibility.

International wrongful acts arising from conduct alone and those arising from events. The causal relationship between conduct and event. Practical consequences of the distinction.

International wrongful acts and omissions. Possible consequences of the distinction, particularly with regard to *restitutio in integrum*.

Simple and complex, non-recurring and continuous international wrongful acts. Importance of these distinctions for the determination of the *tempus commissi delicti* and for the question of the exhaustion of local remedies.

Problems of participation in the international wrongful act.

(4) *Circumstances in which an act is not wrongful*

Consent of the injured party. Problem of presumed consent;

Legitimate sanction against the author of an international wrongful act;

Self-defence;

State of necessity.

Second point: The forms of international responsibility

(1) *The duty to make reparation,* and the right to apply sanctions to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions. Possible basis for such a distinction.

(2) *Reparation.* Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction.* Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.

7. In accordance with the Sub-Committee's decision, the summary records giving an account of the discussion on substance, and the memoranda by its members mentioned in paragraph 2 above, are attached to this report.[e]

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[e] These summary records and memoranda will appear in the *Yearbook of the International Law Commission, 1963.*

Annex II

Report by Mr. Manfred Lachs, Chairman of the Sub-Committee on the Succession of States and Governments

(Approved by the Sub-Committee)

1. The International Law Commission, at its 637th meeting on 7 May 1962, set up the Sub-Committee on the Succession of States and Governments, composed of the following ten members: Mr. Lachs (Chairman) Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Commission, at its 668th meeting on 26 June 1962, took the following decisions with regard to the work of the Sub-Committee:[a]

"(1) The Sub-Committee will meet at Geneva on 17 January 1963, immediately after the session of the Sub-Committee on State Responsibility, for as long as necessary but not beyond 25 January 1963;

"(2) The Commission took note of the Secretary's statement in the Sub-Committee regarding the following three studies to be undertaken by the Secretariat:

"(*a*) A memorandum on the problem of succession in relation to membership of the United Nations,

(*b*) A paper on the succession of States under general multilateral treaties of which the Secretary-General is the depositary,

(*c*) A digest of the decisions of international tribunals in the matter of State succession;

"(3) The members of the Sub-Committee will submit individual memoranda dealing essentially with the scope of and approach to the subject, the reports to be submitted to the Secretariat not later than 1 December 1962 to permit reproduction and circulation before the January 1963 meeting of the Sub-Committee;

"(4) Its chairman will submit to the Sub-Committee, at its next meeting or, if possible, a few days in advance, a working paper containing a summary of the views expressed in the individual reports;

"(5) The Chairman of the Sub-Committee will prepare a report on the results achieved for submission to the next session of the Commission."

2. In accordance with these decisions, the Sub-Committee met at the European Office of the United Nations on 17 January 1963. As the Chairman of the Sub-Committee, Mr. Lachs, was prevented by illness from being present, the Sub-Committee unanimously elected Mr. Erik Castrén as Acting Chairman. The Sub-Committee held nine meetings, and ended its session on 25 January 1963. It was decided that the Sub-Committee would meet again, with the participation of the Chairman, Mr. Lachs, at the beginning of the fifteenth session of the International Law Commission in order to approve its final report. The Sub-Committee approved its final report at its 10th meeting held on 6 June 1963, during the fifteenth session of the International Law Commission, with the participation of the Chairman, Mr. Lachs, and all its members.

3. The Sub-Committee had before it memoranda submitted by the following members:

Mr. Elias (TLC(XIV)/SC.2/WP.1 and A/CN.4/SC.2/WP.6)
Mr. Tabibi (A/CN.4/SC.2/WP.2)
Mr. Rosenne (A/CN.4/SC.2/WP.3)
Mr. Castrén (A/CN.4/SC.2/WP.4)
Mr. Bartoš (A/CN.4/SC.2/WP.5).

The Chairman, Mr. Lachs, also submitted a working paper (A/CN.4/SC.2/WP.7) which summarized the views expressed in the foregoing memoranda. The Sub-Committee decided to take Mr. Lachs' working paper as the main basis of its discussion.

4. The Sub-Committee also had before it the three following studies prepared by the Secretariat:

The succession of States in relation to membership in the United Nations (A/CN.4/149);

The succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150 and Corr.1).

Digest of decisions of international tribunals relating to State succession (A/CN.4/151).

5. The Sub-Committee discussed the scope of the topic of succession of States and Governments, the approach to be taken to it and the directives which might be given by the Commission to the Special Rapporteur on that subject. Its conclusions and recommendations were as follows:

I. The Scope of the subject and the approach to it

A. Special attention to problems in respect of new States

6. There is a need to pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II. The problems concerning new States should therefore be given special attention and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter.

7. Some members wished to indicate that special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources; others thought such an indication superfluous, in view of the fact that these principles are already contained in the United Nations Charter and the resolutions of the General Assembly.

B. Objectives

8. The objectives are a survey and evaluation of the present state of the law and practice on succession, and the preparation of draft articles on the topic having regard also to new developments in international law in this field. The presentation should be precise, and must cover the essential elements which are necessary to resolve present difficulties.

C. Questions of priority

9. The Sub-Committee recommends that the Special Rapporteur who should be appointed at the fifteenth session of the International Law Commission, should initially concentrate on the topic of State succession, and should study succession of Governments in so far as necessary to complement the study of State succession. Within the field thus delimited, the Sub-Committee's opinion is that priority should be given to the problems of succession in relation to treaties.

[a] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr.1), para. 72.

D. Relationship to other subjects on the agenda of the International Law Commission

(a) *Law of treaties*

10. The Sub-Committee is of the opinion 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.

(b) *Responsibility of States, and relations between States and inter-governmental organizations*

11. The fact that these subjects are also on the agenda of the International Law Commission calls for special attention in order to avoid overlapping.

(c) *Co-ordination of the work of the four Special Rapporteurs*

12. It is recommended that the four Special Rapporteurs (on succession of States and Governments, on the law of treaties, on responsibility of States and on relations between States and inter-governmental organizations) should keep in close touch and co-ordinate their work.

E. Broad outline

13. In a broad outline the following headings are suggested:

(i) Succession in respect of treaties

(ii) Succession in respect of rights and duties resulting from other sources than treaties

(iii) Succession in respect of membership of international organizations.

14. The Sub-Committee was divided on the question whether the foregoing outline should include a point on adjudicative procedures for the settlement of disputes. On the one hand, it was argued that the settlement of disputes was in itself a branch of international law, which was extraneous to the branch relating to succession of States and Governments to which the Commission had been asked to give priority. On the other hand, other members, stressing that the outline was only a list of points to be examined by the Special Rapporteur, expressed the view that the Special Rapporteur should be asked to consider whether some particular system for the settlement of disputes should be an integral part of the régime of succession.

F. Detailed division of the subject

15. The Sub-Committee was of the opinion that in a detailed study of the subject the following aspects, among others, will have to be considered:

(a) *The origin of succession:*

Disappearance of a State;
Birth of a new State;
Territorial changes of States.

(b) *Ratione materiae:*

Treaties;
Territorial rights;
Nationality;
Public property;
Concessionary rights;
Public debts;
Certain other questions of public law;
Property, rights, interests and other relations under private law;
Torts.

(c) *Ratione personae:*

Rights and obligations:
(i) Between the new State and the predecessor State;
(ii) Between the new State and third States;
(iii) Of the new State with respect to individuals (including legal persons).

(d) *Territorial effects:*

Within the territory of the new State;
Extra-territorial.

II. Studies by the Secretariat

16. The Sub-Committee decided to request the Secretariat to prepare, if possible by the sixteenth session of the Commission in 1964:

(*a*) An analytical restatement of the material furnished by Governments in accordance with requests already made by the Secretariat;

(*b*) A working paper covering the practice of specialized agencies and other international organizations in the field of succession;

(*c*) A revised version of the Digest of the Decisions of International Tribunals relating to State Succession (A/CN.4/151), incorporating summaries of the relevant decisions of certain tribunals other than those already included.

17. The Sub-Committee noted the statement by the Director of the Codification Division that the Secretariat would submit at the earliest opportunity the publication described under paragraph 16 (*a*) above, that it would publish the information requested under 16 (*b*) as soon as it could be gathered, and that the request under 16 (*c*) would be given earnest consideration, in the light of the availability of the decisions in question.

III. Annexes to the report

18. The Sub-Committee decided that the summary records giving an account of the discussion on substance, and the memoranda and working papers by its members mentioned in paragraph 3 above, should be attached to its report.[b]

[b] These annexes will appear in the *Yearbook of the International Law Commission, 1963.*

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